NOTTINGHAM
LAW SCHOOL

A Comparative Analysis of Section 54 of the Modern Slavery Act 2015: The Case For Legislative Reforms of Directors’ Duties

Usman Mahmud Malik

A thesis submitted in partial fulfilment of the requirements of Nottingham Trent University for the degree of Doctor of Philosophy

January 2024

Copyright Statement

The copyright in this work is held by the author. You may copy up to 5% of this work for private study, or personal, non-commercial research. Any re-use of the information contained within this document should be fully referenced, quoting the author, title, university, degree level and pagination. Queries or requests for any other use, or if a more substantial copy is required, should be directed to the author.

Acknowledgements

I am deeply grateful to my supervisory team, Professor Jingchen Zhao, Alexandra Kastrinou, Prince Amadi and Gary Wilson (former supervisor), their feedback and guidance throughout the course of this research has been invaluable. I would certainly have struggled without their sage advice, support and constructive critique. Their comprehensive and timely feedback, coupled with meticulous attention to detail, with several drafts going back and forth, has led to the final construction and completion of this thesis. We had many riveting discussions during our supervisory meetings over the years, pertaining to the subject matter of this research, but also to the research related seminars and conferences I attended. My supervisory team, especially Professor Jingchen Zhao, always encouraged and inspired me to go above and beyond.

Further, I would like to thank Dr. Ekaterina Aristova and her team at the Bonavero Institute of Human Rights at Oxford University for their support during the course of my doctoral research. The opportunity to join a series of seminars at Oxford during my research was incredible, where I was also selected to present my research to a specialist Business and Human Rights audience.

Finally, I would like to thank my family, especially my parents, Mahmud and Farzana, my siblings and most importantly my wife, Rabiya, for their love and support. Rabiya, despite the most difficult and anxious of times amidst the Covid-19 pandemic, you have always been my rock. I would also like to mention our children, Mustafa and Nayel, you mean the world to us.

Abstract

This thesis critically examines how the UK seeks to prevent, punish and remedy modern slavery through the Modern Slavery Act 2015 (MSA) by interrogating it in its international and domestic context. In respect of the latter, particular regard is had to corporate disclosure requirements and standards, as well as the nature of directors' duties in the UK, so as to situate MSA obligations within their wider national context. Crucially, this thesis draws upon the comparative jurisprudence and experience of – especially but not exclusively – France's devoir de vigilance (FDV), and posits that UK law in this area would benefit from adopting certain aspects of the FDV into the MSA and/or other areas of domestic company law. This thesis therefore focuses on comparing two prominent national legislative regimes which are both said to be aimed at upholding international human rights in the context of modern slavery. In analysing the FDV from doctrinal and applied angles, it is hoped that meaningful dialogue can be engendered in highlighting potential areas for improvement in the MSA. In particular, by holding up those findings as a mirror against the MSA regime and considering the underlying nature of directors' duties thematically, this thesis recommends the adoption of the FDV in the UK, modified as necessary to ensure harmony with the prevailing legislative structure. Further, reforms to directors' duties under the UK company law have been recommended, thereby promoting a shift towards enlightened stakeholder capitalism instead of the existing enlightened shareholder value principle currently enshrined in the law. Ultimately, it is hoped that the adoption of a wide FDV-type obligation which will cover global supply chains with a relevant UK nexus, supported by effective enforcement mechanisms (such as mandatory rules, with meaningful sanctions for non-compliance and the provision of specialised enforcement bodies) will result in an enhanced level of respect for human rights among businesses in the UK and elsewhere.

Table of Contents

Abstract 4
Table of Contents 5

Chapter 1: MNEs harming people and planet and the evolving regulatory architecture that surrounds them, a multi-jurisdictional comparative analysis of soft and hard law frameworks 7
1.1. Introduction 8
1.2. Research Methods 11

Chapter 2: Literature Review 17
2.1. Preliminary Discussion from Literature Review 40

Chapter 3: Deconstructing Regulatory Models 57
3.1. The Institutional Design of Legislation 58
3.2. A Transparency Plan or a Diligence Plan 61
3.3. The Difficulty of Regulating Third Parties 81
3.4. The Role of Non-Governmental Organisations 86

Chapter 4: Modern Slavery and the case for its protection under the Companies Act 2006 and the UK Corporate Governance regime 94
4.1. The Companies Act 2006 98
4.2. Corporate Governance in the UK 147

Chapter 5: Comparative Jurisprudence: The French Duty of Vigilance 161
5.1. Background to the enactment of the FDV 163
5.2. Who does the law apply to? 165
5.3. The purpose of the law 172
5.4. Obligations under the law: Duty to formulate a vigilance plan in consultation with stakeholders under Para. 5 of Article 1 184
5.5. Obligations under the law: Duty to formulate a vigilance plan consistent with Para. 5 of Article 1 185
5.6. Obligations under the law: Duty to publish the vigilance plan and the report on its effective implementation under Para. 5 of Article 1 192
5.7. Liabilities and Remedies under the FDV 193
5.8. The FDV – Further room for improvement 205
5.9. Concluding Remarks 207

Chapter 6: Recommendations 209
6.1. Regulatory Framework: The Strategic Report, and the s172(1) Statement and the Non-Financial Information Statement within it 212
6.2. Application: S54 Statement under the MSA 235
6.3. The Corporate Governance Code, the Wates Principles and the Stewardship Code 247
6.4. Directors' Duties 253

Chapter 7: Conclusions 258
7.1. Overall Approach and Existing Scholarship on the FDV and MSA 260
7.2. Regulatory Models Generally 263

7.3. Integrating FDV-type obligations into the CA and CGC 268
7.4. Comparative law reflections – the FDV 272
7.5. Recommendations 277
7.6. Final Remarks 281

Bibliography 283
Legislation (UK) 283
Legislation (Non-UK) 283
Cases (UK) 285
Cases (Non-UK) 287
Other Authorities 288

Chapter 1: MNEs harming people and planet and the evolving regulatory architecture that surrounds them, a multi-jurisdictional comparative analysis of soft and hard law frameworks

"The choice is not globalization or not, but relatively legitimate globalization with a measure of democratic and pluralistic external accountability over powerful entities, and illegitimate globalization without such accountability" - Robert Keohane[1]

[1] Robert Keohane, 'Global Governance and Democratic Accountability' in Rorden Wilkinson (ed), *The Global Governance Reader* (Routledge 2005) 133.

1.1. Introduction

1. Research Context

Globally, the International Labour Organization (ILO) estimated that 40.3 million people live in modern slavery,[2] and despite the fact that, historically, the United Kingdom (UK) has been leading the way in tackling this insidious crime,[3] this pole position becomes questionable in relation to ensuring that Multinational Enterprises (MNEs) respect human rights in their activities and throughout their global supply chains.[4]

On 26 March 2015, the UK Modern Slavery Act 2015[5] (MSA) received royal assent. The Act is heralded as ground-breaking due to its imposition of obligations on every organisation of a certain size, to publish a modern slavery statement on its website. It is part of a wave of corporate social responsibility regulatory initiatives[6] that aim to increase transparency in global supply chains. For instance, other jurisdictions have also introduced mandatory reporting requirements on modern slavery, such as the French Duty of Vigilance Law 2017 (FDV)[7] and the California Transparency in Supply Chains Act 2010 (CTSCA). Supranational organisations have also stepped into the fray, with the United Nations having introduced in 2011 the Guiding Principles on Business and Human Rights (UNGPs)[8] that have become the soft law benchmark and inspiration for legal developments in the UK[9] and many other (civil and common law)

---

[2] International Labour Organisation, 'Forced Labour, Modern Slavery and Human Trafficking' <https://www.ilo.org/global/topics/forced-labour/lang--en/index.html/> accessed 13 October 2023.
[3] Walk Free Foundation, 'Global Slavery Index – Executive Summary' (*Walkfree.org*, 2018). < https://www.walkfree.org/global-slavery-index/2018/findings/executive-summary/ /> accessed 13 October 2023.
[4] Home Office, 'Transparency in Supply Chains Consultation' (9 July 2019) <https://www.gov.uk/government/consultations/transparency-in-supply-chains/> accessed 13 October 2023.
[5] Modern Slavery Act 2015 (MSA 2015).
[6] Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2015) 136 Journal of Business Ethics 699.
[7] Law No. 2017-399 (03/27/2017). <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=ididid> accessed 13 October 2023.
[8] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).
[9] Foreign and Commonwealth Office, 'UK National Action Plan on implementing the UN Guiding

jurisdictions.[10]

1.1.1 Research Focus

This thesis focuses on promoting corporate sustainability as its lodestar, proposing key reforms to directors' duties under s172 (duty to promote the success of the company) and s414CB(2) (contents of the non-financial and sustainability information statement) of the Companies Act 2006 (CA); (all references to earlier iterations of predecessor legislation, eg the Companies Act 1985, will be referred to in full). Furthermore, particular emphasis will be placed on analysing s54 of the MSA, a legal provision that aims to promote transparency and accountability within the global supply chains of MNEs. Issues like corporate sustainability may be addressed by both regulatory and governance strategies, rather than simply mandatory rules.[11] This thesis therefore proceeds on the assumption that legislative reform is a suitable method of furthering such goals.

The research question that arises is therefore:

> *"How can directors' duties[12] be reformed to promote corporate transparency, accountability and sustainability pervasively, with particular reference to how s. 54 MSA may be reformed in light of the FDV and how s172 and s414C CA can be reformed to empower the extra-territorial scope and impact of the said reformed s54 MSA?"*

1.1.2 Originality of Research Aims

Principles on Business and Human Rights' (27 May 2020).
<https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020> accessed 13 October 2023.

[10] Clifford Chance, 'Business and Human Rights: Navigating a Changing Legal Landscape' (*Cliffordchance.com*, May 2020)
<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/05/business-and-human-rights-navigating-a-changing-legal-landscape.pdf> accessed 13 October 2023.

[11] John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems, Legal Strategies and Enforcement' (2009) Harvard Law School Discussion Paper No. 664, 4.

[12] Companies Act 2006, ss 170 – 177.

The author's novel idea is that the thematic reformulation of directors' duties would lead to the creation of an additional internal buffer,[13] instilling a change to boardroom 'culture' when it comes to compliance with issues pertaining to modern slavery and human rights. The author seeks to conduct a critical analysis of the UK's corporate law, specifically examining the duties that company directors owe to all relevant stakeholders. The goal is to scrutinise the foundational principles, assumptions, and ethos of British corporate law and propose legislative reforms to address its identified shortcomings.

The objective, in this regard, therefore, is to undertake a comparative analysis of two jurisdictions, the UK and France, with particular emphasis on the FDV.[14] In this regard, this is indeed the first in-depth study incorporating a comparative dimension on the merits and demerits of the FDV itself. As several jurisdictions move towards mandatory human rights due diligence,[15] the FDV is arguably the most advanced and comprehensive substantive and extraterritorial legislation. That said, the author intends to draw upon learning from the jurisprudence of jurisdictions other than the UK and France, such as that of the Netherlands.[16] The FDV's core strength is the fact that it is the only law that truly upholds the third pillar of the UNGPs (access to remedy), which is the primary reason for its selection for the purposes of our comparative analysis, notwithstanding the legal and cultural differences between the two jurisdictions. Where helpful to understanding the overall comparative context, jurisprudence from other leading jurisdictions have been considered too, where appropriate.

---

[13] See e.g., 'Transparency in Supply Chains Consultation' (Submission by CORE Coalition, Anti-Slavery International, Amnesty International, Business and Human Rights Resource Centre, Christian Aid, Environmental Justice Foundation, Fairtrade Foundation, FLEX, Freedom Fund, Freedom United, Tradecraft Exchange, TUC, UNICEF and UNISON, 16 September 2019) <https://www.antislavery.org/wp-content/uploads/2019/09/TISC-Consultation-Response_FINAL_160919.pdf> accessed 10 October 2023.

[14] Law No. 2017-399 (03/27/2017). <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=ididid> accessed 10 October 2023.; it is, of course, technically incorrect to refer to the UK as a single jurisdiction but it is hoped that this shorthand will be forgiven for expedience.

[15] Louise Elridge, 'Mandatory Human Rights Due Diligence Is the Direction of Travel' (*Corporatejusticecoalition.org*, 23 October 2018) <https://corporatejusticecoalition.org/uncategorised/mandatory-human-rights-due-diligence-direction-travel/ /> accessed 10 October 2023.

[16] Julianne Hughes-Jennett, 'Dutch Child Labour Due Diligence Law' (*Lexology*, 8 July 2019) <https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3> accessed 10 October 2023.

1.2. Research Methods

1.2.1 Doctrinal Methodology

Doctrinal research consists of a detail-oriented and technical commentary on legal doctrine. The study first utilises a doctrinal, or black letter law, methodology to rigorously analyse the legal rules in the UK and France. The focus will be on the wording of primary sources in both jurisdictions' company and corporate governance law, as well as FDV law. Through a close examination of these primary sources, the research aims to identify similarities and differences between the legal rules, evaluating the positive and negative aspects of the current laws in France and the UK to suggest areas for improvement.

The study will extend its analysis to the judicial interpretation of the legal rules, focusing on case law in the UK and court decisions in France. Specifically, the ratio behind these decisions will be scrutinised. As of June 2020, only five notices have been filed in French courts, suggesting limited case law due to the recent introduction of these laws. However, this is expected to grow in the next three to four years. Legal decisions from both countries will be categorized based on the relevant legal rules and accessed through databases like Westlaw. Given the paucity of cases, particularly in the UK, case studies exploring broader regulatory impacts may be valuable. While case law typically holds more weight in common law jurisdictions like the UK, it will also provide useful insights into the French legal perspective.

To address the limitations in available case law from the UK and France, this study will also examine judicial decisions from other jurisdictions with comparable modern slavery legislation. This approach aims to anticipate how UK and French courts might interpret similar issues. By analysing British judicial reasoning, we can speculate whether UK judges would align with their French counterparts if specific rules from France's Duty of Vigilance Law (FDV) were incorporated into the UK's Modern Slavery Act (MSA). This is particularly relevant given FDV's broader focus, which appears more claimant-friendly than the MSA.

Additionally, the study will explore whether expanding directorial duties under the UK's Companies Act (CA) could enhance judicial enforcement of the MSA. This will involve a review of existing CA case law, particularly how the principles of "enlightened shareholder value" and "good faith" have been interpreted to address environmental, social and governance concerns.

In addition, the genesis of each jurisdiction's regulation will be examined, as this will reflect the unique path dependency and trajectory of each jurisdiction. Such narrative structures reflect each society's reflexive self-understanding. There is, too, a need to be conscious of fundamental structural differences between common law and civilian legal systems; accordingly, comparative law research of this type must be conscious of the overall context.[17] It will also incidentally raise the thorny issue as to the extent which law merely reflects underlying understandings or actively constructs them. For instance, parliamentary debate preceding the introduction of the MSA will be examined to establish the key considerations that led to the introduction of the bill. Amendments of drafts over time can also establish what particular wordings were intentionally selected over others and the attendant implications of such wording.

1.2.2. Socio-Cultural Comparison

This thesis would also adopt a comparative methodology. As noted by Legrand, laws do not operate in a vacuum – they are the creation of, and must function within the culture and legal system of the relevant jurisdiction.[18] To ensure an accurate comparative analysis, this thesis will account for the differing socio-cultural contexts that have influenced the adoption and interpretation of regulations in France and the UK.

Montesquieu previously argued in his seminal work "Spirit of the Laws" that the political and civil laws of each nation are specific to the people for whom they are made. According to Montesquieu, laws are deeply entrenched in and inseverable from

[17] Barry Nicholas, *An Introduction to Roman Law* (1st edn, Oxford University Press 1962) v.
[18] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232, 238.

each nation's context.[19] Accordingly, a simple black-letter comparison of the FDV and the MSA (if possible) would be insufficient, especially an exercise to transplant the provisions of the FDV over to the MSA or into the overall structure of directorial duties under the CA.

Kahn-Freund echoes that comparative law as a tool of law reform may be dangerous if not utilised properly due to the historical background behind the introduction of laws into specific cultural contexts. He identifies that there needs to be certain conditions that "make it desirable or even make it possible for those who prepare new legislation to avail themselves of rules or institutions developed in foreign countries."[20] The use of comparative law "becomes an abuse only if it is informed in a purely legalistic spirit which ignores the social but above all, political context".[21]

Specifically, Kahn-Freund's analogy, which originates from his expertise in labour law, highlights that collective bargaining provisions cannot be directly transposed between the UK and the United States due to divergent parliamentary and political systems. This analogy is highly relevant to the present discussion on supply-chain values. A key point for further analysis could be the contrasting approaches to "transparency" in the MSA versus the more comprehensive due diligence required by the FDV. For instance, Gardner points out that transparency is held to different standards between local producers and institutional stakeholders such as governments and companies, and the situational context of the standard is important in considering what is acceptable and not.[22] In this context, for example, local producers may have more grassroots information on immediate supply chains without the leverage to demand diligence, while institutional stakeholders may have leverage, but lack precision and willpower in identifying areas for diligence.

The exercise of directors' duties' "in good faith" is also a potential area for cultural exposition. It is trite law that directors owe fiduciary duties to their company, but only

[19] Montesquieu, 1749, *De L'Espirt des Lois* (The Spirit of Laws), Livre I Gallimard, Paris, reprint, JP Mayer and AP Kerr (eds), (1970).
[20] Otto Kahn-Freund, 'On Uses And Misuses Of Comparative Law' (1974) 37 The Modern Law Review 1.
[21] ibid.
[22] TA Gardner and others, 'Transparency And Sustainability in Global Commodity Supply Chains' (2019) 121 World Development 163.

rarely to anyone else, even their shareholders.[23] Teubner strongly argues that "good faith is irritating British law",[24] and the transplantation of the continental principle of *bona fides* directly into British contract law has "caused a great deal of irritation". Although Teubner's analysis focuses on contract law, a similar exposition on what the concept of exercising directorial duties "in good faith" means and whether this mandatorily includes the consideration of environmental, social, and governmental concerns in line with "a healthy infusion of communitarian values", as suggested by Brownsword.[25]

An alternative suggestion, that if structural problems result in difficulty in directly transplanting the same legal rules across jurisdictions, a solution through functional equivalence can be met, where diverse legal rules are utilised across jurisdictions to meet the same ends. Zweigert and Kötz[26], proffer a *praesumptio similitudinis* presuming a similarity in practical results even for different legal systems. In addition, aside from the UNGPs, there also exist other international or national frameworks, such as the European Charter of Human Rights[27], that aim to tackle general human rights issues. However, the more specific frameworks form a patchwork of specialised principles and regulations that focus on specific human rights issues.

Alternatively, we can consider the argument of cultural convergence: that with internationalisation and globalisation, nations inevitably converge towards socio-economic structures, making the uniformity of law possible and ideal. The UNGPs serve as a global framework that seeks to address human rights risks arising from businesses. Further, it is natural that certain jurisdictions will have a higher natural tendency towards conversion – the UK and France would have both been substantially influenced by European Union jurisprudence while Commonwealth common law jurisdictions would broadly have been working from the same framework of English common law and British legal traditions. In this field, therefore, comparisons between

[23] *Peskin v Anderson* [2001] BCC 874, [33] to [35]; *Vald Nielsen Holdings A/S v Baldorino* [2019] EWHC 1926 (Comm), [747].
[24] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 Modern Law Review 11.
[25] Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 Journal of Contract Law 197.
[26] Konrad Zweigert and Hein Kötz, *Introduction to comparative law* (3rd edn, Clarendon Press, 2011).
[27] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, <https://www.refworld.org/docid/3ae6b3b70.html/> accessed 13 October 2023.

the UK and Australia, for example, would be relevant.[28]

1.2.3. Functional Equivalence Approach

Gordley postulates a variant of the functional equivalence approach, which he terms the teleological approach.[29] Under this model, comparative research can be conducted in furtherance of the ultimate societal objectives, which for our purposes, are the promotion of corporate sustainability and empowerment of basic human rights, especially in developing countries. For example, in examining the content of legal rules and the cases in which they are applied, a purposive approach will be adopted to understand the ambiguities behind certain provisions. The general principles that underlie these provisions will be elucidated.

Within the teleological method, are two modes of thought applied within the same holistic theoretical framework. Firstly, the sociological approach to teleology relies on a historical study of the legislator's actions at the time the law was introduced, as well as a factual study of the actual impact of legislation on society. To supplement this, the ideological approach to teleology suggests that legal rules reflect the socio-political values behind that particular provision.

In this study, the author will examine both sociological and ideological approaches behind the legal provisions enshrined in FDV and MSA. For instance, on the sociological approach the author will look at the most visible impetus behind the introduction of these two legislations, such as the Rana Plaza tragedy and the social outcry that followed. In addition, the author will look at the historic arguments that preceded the FDV and MSA, such as global frameworks that were previously introduced and the institutional debate preceding their introduction, for example at United Nations level, to understand the primary concerns and drivers behind different countries' introduction. On the ideological approach, the author will look at the current values and interests that have evolved in society and see whether these goals can be met, or further refinement is required to reach current goals.

---

[28] Lisa KE Hsin, 'Modern Slavery in Law: Towards Continuum of Exploitation' (2020) 26(1) Australian Journal of Human Rights 165, 168.

[29] James Gordley, 'Comparison, Law and Culture: A Response to Pierre Legrand' (2017) 65 American Journal of Comparative Law (special issue) 133.

As this research transitions into Chapter 2, the focus will shift to a critical review of existing literature. This will provide an academic context within which the sociological and ideological underpinnings discussed in Chapter 1 can be further evaluated and analysed.

Chapter 2: Literature Review

“"Greater transparency is an unstoppable force. It is the product of growing demands from everybody with an interest in any corporation - its stakeholder web - and of rapid technological change, above all the spread of the Internet, that makes it far easier for firms to supply information, and harder for them to keep secrets. Firms now know that their internal e-mails may one day become public knowledge, for instance, and many big companies must co-exist with independent websites where employees can meet anonymously to air their grievances. With greater transparency will come greater accountability and better corporate behaviour. Rather than engage in futile resistance to it, firms should actively embrace transparency and rethink their values and generally get in better shape.”[30]

[30] Don Tapscott and David Ticoll, T*he Naked Corporation: How the Age of Transparency Will Revolutionize Business* (3rd edn, Free Press 2012).

Literature Review

The purpose of this literature review is to gain an understanding of the salient topics and terminology in this area of study. Secondly, it will also enable the author to evaluate existing academic work on directorial duties, the MSA, and the FDV. Lastly, it will help the reader gain an understanding of how this work will offer a novel contribution to the body of academic literature by framing this work against the backdrop of other academic work on the topic.

2.1. Forced Labour involves a range of activities

The Forced Labour Convention No. 29 (1930)[31] defines forced labour as "all work which is extracted from any person under the menace of any penalty for which the person has not offered himself voluntarily." Accordingly, forced labour is not simply slavery but can be equated with "low wages or poor working conditions [...] or situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives."[32] However, Skrivankova has pointed out that most definitions of modern slavery refer to more severe and criminal forms of labour exploitation, but there exists a "continuum of exploitation and interventions, ranging from decent work to extreme exploitation."[33] Indeed, even in a developed country like the UK, the shades of grey that exist within the cloak of exploitation has caused judges difficulties in practically demarcating the line between sharp business practice and illegal exploitation.[34] The diversity of labour situations complicates the ability to monitor compliance with the requirements of the modern slavery regime, because the dearth of "clear definitions"[35] to demarcate the transition point between acceptable and non-acceptable supply chain practices results

[31] International Labour Organisation, C029 - Forced Labour Convention, 1930 (No. 29) (*Convention C029 - Forced Labour Convention, 1930 (No. 29).* <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029 /> accessed 13 October 2023.
[32] Steve Gibbons, 'A Modern Definition of Forced Labour' (2008) 14(4) Journal of the International Centre for Trade Union Rights 12.
[33] Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' (*JRF* 23 November 2010) <https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation/> accessed 13 October 2023.
[34] Lisa KE Hsin, 'Modern Slavery in Law: Towards Continuum of Exploitation' (2020) 26(1) Australian Journal of Human Rights 165, 169.
[35] ibid.

in multiple possible interpretations.

In particular, Allain, Crane, LeBaron and Behbahani[36] have pointed out that there are a variety of business models short of the most extreme forms of exploitation, that still fall within the context of unethical supply-chain models. His team identifies four broad business models of forced labour as such, namely cost-minimising and/or revenue generating producers and/or intermediaries.

In the UK, Allain and team identify that the UK's economy has created a pool of people vulnerable to forced labour, especially within the construction, food, and cannabis industries. "Broad structural conditions"[37] within the economy, such as "immigration status, forms of labour market inequality, and immobility rooted in the government's light-touch regulation of business"[38] can result in such business conditions. In particular, sector-specific conditions can give rise to situations ripe for exploitation, such as "illegality of products (cannabis), volatility and self-regulation of labour providers (construction), and seasonality (food)."[39]

A glaring issue with the MSA is that it is overly-reliant on requiring reporting in the hope that this will raise standards across supply chains, focussing on reporting but not probing deeper beyond the surface. Compared to the MSA, the Dutch Child Labour Due Diligence Law goes beyond a mere requirement for transparency reporting, and requires companies to investigate whether there is a "reasonable suspicion that the goods or services they provide have been produced using child labour."[40] If so, such companies will need to put in place action plans to address and publish the diligence they have uncovered. In comparison, however, the FDV goes one step further by introducing not just a legal obligation pertaining to child labour, but a general legal obligation to carry out and implement plans to address due diligence uncovered.

---

[36] Jean Allain and others, 'Forced Labour's Business Models and Supply Chains' (*JRF* 18 November 2013) <https://www.jrf.org.uk/report/forced-labour's-business-models-and-supply-chains> accessed 13 October 2023.

[37] ibid.

[38] ibid.

[39] ibid.

[40] Julianne Hughes-Jennett, 'Dutch Child Labour Due Diligence Law' (*Lexology*, 8 July 2019) <https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3> accessed 9 October 2023.

Another matter is how the comprehensiveness of a legal regime is linked to the ability to invoke severe penalties. Individual and collective responsibility on directors (within the context of their overall duties owed to relevant stakeholders) is a possible way to invoke responsibility and compliance with the law. However, the FDV itself falls short of this even at company level. The initial version of the FDV adopted on 21 February 2017 included provision for a civil fine of up to EUR 10 million for non-compliance. However, this was struck down by a decision of the Constitutional Court on 23 March 2017 on the basis that this constituted a criminal sanction (although periodic penalty payments ("*astreintes*") and civil liability action ("*responsabilité civile*") were deemed permissible).[41] This was ironic, given the substantive nature of the measure, and reflects a common tension in the regulatory field for human rights concerns in due process in the ECHR more generally. The argument was that due to the general nature of the FDV, these provisions fell short of the standards of clarity and legal predictability that would allow the imposition of criminal liability and the requirements of Article 8 of the 1978 French Declaration of the Rights of Man and the Citizen, which only allows the imposition of criminal penalties that are "strictly and clearly necessary."[42]

2.2. The Argument for Extraterritoriality

Globally, the issue of comprehensiveness is worsened due to the ability of companies to distribute their supply chains across different jurisdictions to avoid domestic penalties. For instance, following the collapse of the Rana Plaza building in Bangladesh in 2013, the Accord on Fire and Building Safety[43] was signed, which was supposed to be a legally binding agreement between trade unions and brands to address minimum health and safety standards within Bangladesh. However, Bright[44] points out that even though this accord has led to significant improvements in worker welfare,

---

[41] *Décision n° 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.
[42] Declaration of the Rights of Man – 1789 <http://hrlibrary.umn.edu/education/frdeclaration.html> accessed 9 October 2023.
[43] The Bangladesh Accord on Fire and Building Safety (*The Bangladesh Accord*) <https://bangladeshaccord.org/> accessed 9 October 2023.
[44] Claire Bright, 'Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers MWP 2020/01.

international brands can evade its requirements through the practice of law shopping and selecting states with less stringent laws than Bangladesh for production. Therefore, the need to "regulate at the source", namely, the "home-state of the sub-contracting company"[45] is essential to reaching a meaningful solution.

This is supported by research by Schutter et al., who argue[46] that the exercise of extraterritorial jurisdiction in regulating business activities overseas based on the regulated entity, is not just justified, but an obligation on home states. This is because they have active personality under international law. Under the principle of active personality, a state has a right to apply its laws to prosecute illegal conduct committed by its citizens overseas, in order to protect its interests from abroad. Stating that "if we accept to build on the extraterritorial obligations of States, the accountability gap that economic globali[s]ation has created can be closed," Schutter points especially to the perceived need to moralise the behaviour of business in the context of economic globalisation[47] as a driving force in the use of extraterritorial jurisdiction.

2.3. Managerial Approaches to Compliance

Overall, studies agree that the response and implementation of the MSA has been at best mixed and at worst, disappointing. CORE, for instance, reported in 2017 that "reporting on due diligence was [is] limited, with companies indicating continued heavy reliance on audits (usually carried out by a third party or even by the supplier itself) and certification schemes."[48] This is despite research indicating that many such audits and schemes are ineffective in detecting and correcting crimes such as modern slavery in supply chains.[49] In contrast, Rühmkorf and LeBaron suggest that a more

---

[45] Julianne Hughes-Jennett, 'Dutch Child Labour Due Diligence Law' (*Lexology*, 8 July 2019) <https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3> accessed 9 October 2023.
[46] Olivier De Schutter and others, 'Human Rights Due Diligence: The Role of the State' <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf> accessed 9 October 2023.
[47] ibid.
[48] CORE, 'Risk Averse? Company reporting on raw material and sector-specific risksunder the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015' <https://corporatejusticecoalition.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf > accessed 9 October 2023.
[49] Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15.

direct approach would be that in the Bribery Act, which "recommends to companies that the principal way to address bribery" would be to employ "anti-bribery procedures with their direct suppliers and to require these suppliers to request the same of their sub-suppliers."[50] Having appropriate policies in place would be a defence to the offence of failing to prevent bribery, thus brining a contractual model into the realm of criminal law.[51] Under this model, company reporting was of a higher quality, with this stronger priority given to the issue at hand communicating that companies were "serious about this issue."[52]

The Guidelines for Multinational Enterprises revised by the Organisation for Economic Cooperation and Development (OECD) in 2000 emphasised that MNEs should "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".[53] This is echoed by the introduction in the OECD Declaration on International Investment and Multinational Enterprises, which recommends that MNEs observe the Guidelines "operating in or from their territories".[54] Although not legally binding instruments, these instruments have persuasive force in pressuring MNEs to be compliant with certain business codes of conduct. Similarly, the UN's Sustainable Development Goals (SDG), specifically SDG 8.7, calls on states to take "immediate and effective measures to eradicate forced labour, end modern slavery, and human trafficking".[55] Further, the UNGPs, which were endorsed in 2011, is said to be an authoritative global standard in addressing corporate responsibility with respect to human rights, with its second pillar calling for corporate responsibility to protect human rights through recommendations for a human rights due diligence process and a statement of policy commitment to respect human rights, for instance.

---

[50] ibid.
[51] Bribery Act 2010, s 7(2).
[52] Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15.
[53] Jill Murray, 'A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD' (2001) 30 Industrial Law Journal 255.
[54] OECD, 'Declaration on International Investment and Multinational Enterprises' <http://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144 > accessed 9 October 2023.
[55] UNDP, 'UNDP Sustainable Development Goals', <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> accessed 9 October 2023.

How, then, ought such issues be regulated on the international and domestic spheres? Parker and Nielson[56] posit that there are two different approaches to compliance, namely objectivist research and interpretative oriented research. Under the former approach, compliance is assessed by an objective standard and can be observed through means independent of the organisation. Under the latter approach, meaning is constructed and shaped based on how the organisation understands and interprets the standard. In particular, Edelmen and Talesh are strong proponents of the interpretative approach, arguing that a binary question of compliance or non-compliance[57] is misleading because law is seen as an external force to organisational processes. Rather, it is more helpful to consider how the organisation itself interprets "compliance."

Edelman's endogenous theory of law identifies legal and organisational fields which are distinct yet overlapping, with "different core logics".[58] The interactions between these two fields in turn generates the process of "managerialising" law, which involves "the infusion of managerial or business values into law, and is spurred by the legalisation of organisations".[59] Monciardini et al have gone one step further by applying Edelman's theory to the field of modern slavery, finding how compliance professionals play a key role in framing ambiguous rules and devising a variety of organisational responses to modern slavery law.[60] Through empirical research, Edelman suggests that the manner in which managers understand and interpret the law may actually come to influence the legal field, with law becoming "constructed within the social fields that it seeks to regulate."[61]

---

[56] Christine Parker and Vibeke Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56 The Antitrust Bulletin 377.

[57] Lauren B Edelman and Shauhin A Talesh, 'To comply or not to comply – that isn't the question: how organisations construct the meaning of compliance', in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar 2012).

[58] Lauren B Edelman, *Working Law Courts, Corporations, and Symbolic Civil Rights* (The University of Chicago Press 2016) 23.

[59] ibid.

[60] David Monciardini, Nadia Bernaz and Alexandra Andhov, 'The Organizational Dynamics of Compliance With the UK Modern Slavery Act in the Food and Tobacco Sector' (2021) 60(2) Business & Society 288. Also see: Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility,' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007), 207 – 240; Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 Modern Law Review 1037.

[61] Lauren B Edelman, *Working Law Courts, Corporations, and Symbolic Civil Rights* (The University of Chicago Press 2016) 26.

Stevenson and Cole previously identified that modern slavery statements demonstrate great inconsistency in quality, quantity, and structure of information. In addition, the modern slavery statements produced so far lack attribution, whether intentionally or unintentionally.[62] BHRRC have identified that a number of such modern slavery statements are non-compliant, as they are either not displayed prominently on websites or lack the signature of a director, with only 19% of statements held on the Modern Slavery Registry complying with these three requirements.[63] This suggests at best a misunderstanding, or at worst disregard for even the most seemingly basic requirements of the MSA. Regardless, however, such inconsistency in compliance provides strong argument for looking to compliance professionals as being partly responsible for different results across the board.

2.4. Directors as a Receptacle for Responsibility

It is not self-evident why directors should be held personally responsible for acts or omissions of the company generally. Supply chains for larger corporations are long-tailed and involve a plethora of middle managers in between to question as regards any obvious relationship between a particular director's acts or omissions and a specific end-result. From a moral perspective, however, the reason why directors are well-placed to be responsible for non-compliant corporate actions is because the board of a company is integral in determining the overall strategy of the company. The European Economic and Social Committee has expressed that "boards have a vital part to play in the development of responsible companies."[64] This is especially applicable to company law in the UK, where the board of directors is a single entity (and which is understood as a primarily contractual, rather than regulatory, creature[65]), unlike variants present in other systems. For instance, Germany has a two-tier board version (Aufsichtsrat), which splits management and supervision. This means that the nexus

[62] Mark Stevenson and Rosanna Cole, 'Modern Slavery in Supply Chains: A Secondary Data Analysis of Detection, Remediation and Disclosure' (2018) 23 Supply Chain Management 81.
[63] Business & Human Rights Resource Centre, 'FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action' (*Business-humanrights.org*, 19 November 2018) <https://www.business-humanrights.org/en/ftse-100-the-uk-modern-slavery-act-from-disclosure-to-action> accessed 14 October 2023.
[64] European Commission Green Paper: The EU corporate governance framework, COM (2011) 164 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF> accessed 14 October 2023.
[65] CA 2006, s 33(1).

of strategic decision making, and the heart of business, is crowned more clearly on the board of directors in the UK. Much like how auditors and general counsel play a gatekeeping role in preventing inadvertent or adverting corporate misconduct, directors have more than a purely commercial role to play - and gatekeeper against corporate misconduct more broadly than the notion of making uncommercial decisions.

From a legal perspective, one might argue that the concept of separate legal personality, as exemplified in the landmark House of Lords decision *Salomon v Slomon & Co Ltd* [66], affirms the principle of corporate entity separateness. Berle and Gardiner suggest that evolution of business practice worldwide has only deepened the transformation of business enterprises from personal or family affairs into larger, separate legal entities.[67] This thesis does not seek to challenge this well-enshrined principle in general company law. However, it is not novel to recognise that there are cases where directors' duties and responsibilities extend into the personal realm of the director themself; the failings of a company do not stop short at its incorporation limits. For example, the doctrine of "piercing the corporate veil" can result in personal liability if it can be proven that directors used the corporation to perpetuate fraud, exploit a corporate opportunity personally or to avoid an existing personal liability.[68]

Additionally, under UK company law, directors have a duty of care and skill towards their company. This legal duty is what this thesis will attempt to sharpen, even though the moral bases of directorial duty have been touched on above. The most significant black-letter embodiment of the legal basis of directors' duties in relation to responsibility over decisions of the company is contained in S172 of the CA. S172(1) of the CA contains what is usually viewed as the most controversial duty imposed on directors under the act. Its ambit is broad and encompasses a wide range of conduct. It is set out below as:

---

[66] *Salomon v Salomon & Co Ltd* [1897] AC 22; *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

[67] Berle, A., & Means, G. (1932). The Modern Corporation and Private Property. New York: Harcourt, Brace & World; DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852.

[68] *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *Dorchester Finance Co v Stebbing* [1989] BCLC 498; *Re Barings plc* (No 5) [2000] 1 BCLC 523; *JJ Harrison (Properties) Ltd v Harrison* [2002] BCC 729; *Fairford Water Ski Club v Cohoon* [2021] EWCA Civ 143.

"A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –

(a) The likely consequences of any decision in the long term

(b) the interests of the company's employees

(c) the need to foster the company's business relationships with suppliers, customers and others

(d) the impact of the company's operations on the community and the environment

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly between the members of the company."[69]

This requires directors to firstly, act in good faith in a manner that is most likely to promote the success of the company for the benefit of its members. In doing so, they are to have regard to (but are not limited to) the list of factors enumerated from (a) to (f). To this end, at the end of the 1990s, the Company Law Review Steering Group (CLRSG) conducted a comprehensive review of UK company law, and introduced the concept of enlightened shareholder value (ESV).[70] Numerous studies have also been carried out to evaluate the impact of introducing ESV into company law through first-hand accounts of directors and companies at a grassroots level.[71]

In practice, it is the directors of the company that will bear the burden of compiling and producing the MSA statement, as well as shoulder responsibility for the annual reporting requirement on considerations under s172.[72] This is because even though there is no explicit criminal responsibility for directors in failing to comply with the requirements of s54, directors remain bound by their broad fiduciary duties to the

[69] CA 2006, s 172.

[70] Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework, 1999, London, Department of Trade and Industry, para 5.1.12.

[71] Virgina Harper Ho, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 (1) Journal of Corporation Law 59.

[72] The Companies (Miscellaneous Reporting) Regulations 2018, regulation 2.

company.[73] Thus, it will be the directors who would shoulder a greater level of responsibility for breaching the obligations under s54. However, whilst responsibility rests with the directors,[74] it is unlikely to trouble them unduly: s54(5) merely lists the possible issues discussed within the report, rather than making them mandatory.[75] For instance, Monciardini et al. address the risks of the "managerialisation" of modern slavery through "symbolic structures that come to be associated with legal compliance even when they are ineffective at tackling modern slavery."[76]

2.5. Tensions in understanding shareholder value

Corporate decision-making is constrained by four "modalities", namely, law, social norms, markets and architecture, which compete for consideration.[77] In British company law, directors' ultimate duty lies with the company, under s. 170 CA. However, the author believes that the attractions of the capital markets, especially for public-listed companies, have shifted the board's attention away to maximising shareholder value *for its own sake* insofar as this increases the company's attractiveness as an investment.[78] This has not been assisted by pronouncements such as that of the Hampel Committee Report, which recognised that listed companies' objective should be "the preservation and greatest practicable enhancement over time of shareholder investment".[79] Shareholder interest can indeed influence directors' to

[73] However, this may be enforced by injunction: MSA 2015, s 54(11). Failure to comply with a court order like an injunction could, in turn, amount to criminal contempt of court which may result in a custodial sentence: *Official Receiver v Brown* [2017] EWHC 2762 (Ch), [56].
[74] MSA 2015 <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted/> accessed 14 October 2023.
[75] Home Office, 'Transparency in Supply Chains' (9 July 2019) <https://www.gov.uk/government/consultations/transparency-in-supply-chains/> accessed 14 October 2023.
[76] David Monciardini, Nadia Bernaz and Alexandra Andhov, 'The Organizational Dynamics of Compliance With the UK Modern Slavery Act in the Food and Tobacco Sector' (2021) 60(2) Business & Society 288. Also see: Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility,' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007); Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 Modern Law Review 1037.
[77] Benjamin J Richardson and Beate Sjåfjell, 'Capitalism, the sustainability crisis, and the limitations of current business governance' in Beate Sjåfjell and Benjamin J Richarson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015) 4, 31. R
[78] See, for example, the UK Corporate Governance Code. (2018), Principle 1A. <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf/> accessed 14 October 2023.
[79] Final Report of the Committee on Corporate Governance (London: Gee Publishing, January 1998) <https://ecgi.global/code/hampel-report-final/> accessed 14 October 2023.

take their corporate governance responsibilities more seriously. However, for the principal reasons set out below, this has limited real impact on modern slavery governance.

Firstly, there is an extant confusion between corporate responsibility and social responsibility. For instance, corporate governance codes are heavily influenced by institutional investors[80], and tend to promote rules and regulations that protect the interests of shareholders rather than promoting social responsibility per se. Although the present version of the CGC (2018)[81] has a strong stakeholder flavour, this is potentially an anomaly rather than the norm, and a development that may have been influenced by the global financial crisis and the introduction of the MSA. Largely, however, the inclusion of ethical supply chain considerations into these codes is not guaranteed, and even so, are poorly defined in scope, although an ambitious attempt has been made in the form of Principles 9 to 11 of the UK Stewardship Code 2020 to provide impetus and direction to investors. For instance, Principle 9 requires signatories to engage with issuers to maintain or enhance the value of assets, Principle 10 requires signatories, where necessary, to participate in collaborative engagement to influence issuers directly or by others on their behalf, while Principle 11 requires signatories, where necessary, to escalate stewardship activities to influence issuers. Secondly, institutional investors, such as BlackRock, pressure companies to take their environmental, social, and governance (ESG) obligations more seriously driven by a metric of long-term financial gain[82]. This is backed by the realisation by increasingly enlightened investor groups that social and environmental strains are real, and climate change and social unrest can seriously jeopardise long-term financial gains even though short-term bets may prosper.

The problem with inadvertently relying on shareholder value as a proxy for company interest or social responsibility is that this opens up a broad range of possibility for

[80] See, generally, Jean J Du Plessis and Chee Keong Low, 'Corporate Governance Codes Under the Spotlight', in Jean J Du Plessis and Chee Keong Low (eds), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses* (Springer International Publishing 2018).
[81] The UK Corporate Governance Code. (2018) <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf/> accessed 14 October 2023.
[82] BlackRock Sustainability <https://www.blackrock.com/corporate/sustainability/> accessed 13 October 2023.

abuse. In the first instance, shareholder value can actively run contrary to ethical supply-chain values. Rather than relying on fair wages and transparent supply chain sourcing, companies can seek to minimize costs by relying on low-wage workers or sourcing goods from pirated or illegal sources. In the second instance, ethical supply-chain values are only valued insofar as they benefit shareholder interests, which are fickle and varying in scope and degree based on the capital markets and investment theses of various institutional investors.

There is of course, the argument that the CA makes adequate provision for consideration of ethical concerns within the concept of shareholder value. For one, the Department of Trade and Industry Consultative Company Law Reform (2005) document preceding the introduction of the CA, referred to the concept of "enlightened shareholder value", stating that "the basic goal of directors should be the success of the company for the benefit of its members as a whole, but to reach this goal, directors will need to take a properly balanced view of the implications of the decisions over time and foster effective relationships with employees, customers and suppliers, and in the community more widely."[83] This is a clear signal to directors that in considering shareholder interests, regard should be had to the interests of the community as well, the enlightened tag and reference to s172 as an inclusive duty, which necessarily is a over-arching duty which would overlap with their other duties owed.

2.6. Reporting Requirements in FDV

The *exposé des motifs* (explanatory memorandum) of the draft law indicated that the goal of introducing the FDV was twofold. It is firstly, intended to "encourage multinational companies to act responsibly with the aim of preventing tragic events that would violate human rights and harm the environment",[84] whether in France or internationally. Secondly, it aims to "obtain remediation for the victims"[85] if damage

[83] Department of Trade and Industry, 'Corporate Law Reform: Briefing by Department of Trade and Industry' <https://pmg.org.za/committee-meeting/10369/> accessed 13 October 2023.
[84] AN, proposed law no. 2578, 11 February 2015, at 4.
[85] Stéphane Brabant, Charlotte Michon and Elsa Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Duty of Vigilance' (December 14, 2017) <https://www.business-humanrights.org/sites/default/files/documents/Law on the Corporate Duty of Vigilance - Vigilance

has been caused.

The duty of vigilance imposes three obligations on the company. The first obligation is to actively establish a vigilance plan. The plan should set out:

> "reasonable vigilance measures for identifying risks and preventing serious human rights abuses […] that result from the activities of the company and those of the companies which it controls, as well as the activities of any subcontractors or suppliers with which the company has an established commercial relationship, where these activities are connected to the relationship."[86]

The most striking difference between the FDV and the MSA is that the former compels companies falling under its ambit to implement a "vigilance plan". This lies in contrast to the MSA, which simply requires companies to report on their efforts, if any, to identify modern slavery related risks within their operations and supply chains. Article 1 of law, which incorporates Art. L.225-102 of the French Commercial Code, states that the vigilance plan has to include:

(1) A mapping that identifies, analyses, and ranks risks;
(2) Procedures to regularly assess, in accordance with risk mapping, the situation of subcontractors or suppliers with whom the company maintains an established commercial relationship;
(3) Appropriate actions to mitigate risks or prevent serious violations;
(4) An alert mechanism that collects potential or actual risks, developed in working partnership with the trade union organisations representative of the company concerned;
(5) A monitoring scheme to follow up on the measures implemented and assess their efficiency.[87]

Plan - Intl Rev.Compl_. & Bus. Ethics.pdf> accessed 13 October 2023.

[86] French Commercial Code, art L. 225-102-4, para 3.

[87] English translation of the French Commercial Code <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf > accessed 13 October 2023.

Whether or not vigilance measures are "reasonable" or not is ambiguous. In assessing whether this obligation has been fulfilled, parliamentary debates indicate that reference can be made to issues such as contractual commitments, certifications, and partnerships with stakeholders.[88]

Secondly, the plan needs to be effectively implemented. This is a crucial difference from the MSA, as the explicit presence of this second obligation ensures that statements and plans are not merely declaratory, but are grounded in implementation. Thirdly, the company's vigilance plan, as well as its plans for effective implementation, must be included in the company's annual management report. The publication of this plan could be informative in bridging the gap between the public and shareholders in relation to the actions the management has taken to comply with its vigilance obligations, where the new stakeholder-centric reporting provision under s172 may have a similar function. Additionally, it enables external monitors to assess independently whether the Vigilance Obligations are being served. This seems to be a better utilization of a hybridization of legislation concepts[89] described by Rühmkorf and LeBaron, where private standards and private monitoring strategies are integrated with public governance.

In October 2019, Total, a French multinational energy company was taken to court by six environmental groups in France and Uganda due to alleged failures to implement its vigilance plan in Uganda. This is the first legal action brought under the FDV, with claimants hoping that "this legal action will mark a turning point and the jurisprudence created could serve for many other cases."[90]

2.7. Proving Causation

Articles 1240 and 1241 of the French Civil Code provide the general rule for civil liability. Under Article 1240, "any act of man that causes damage to another shall

[88] MSA 2015.
[89] Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15.
[90] Business & Human Rights Resource Centre, 'Total Sued Under France's New Duty of Vigilance Law' (*Business-humanrights.org*, 23 October 2019) <https://www.business-humanrights.org/en/latest-news/total-sued-under-frances-new-duty-of-vigilance-law/ /> accessed 13 October 2023.

oblige the person by whose fault it occurred to repair it", while Article 1241 provides that "one shall be liable not only by reason of one's own acts, but also by reason of one's imprudence or negligence."[91] Consequently, causation is one of the three preconditions required before a claim can be brought. This therefore opens up the problem of proving that the damage caused to the claimant was due to a fault of the company to comply with its publication and vigilance obligations. However, Bright points out that the burden of proof is a huge obstacle that claimants need to prove in human rights[92] accountability, although this is partially mitigated by the ability of grassroots NGOs to provide critical access to information and impact that civilian claimants may lack.[93]

In addition, the obligation on companies is only an *obligation de moyens*, namely, an obligation to take all steps in their power, rather an *obligation de résultat*, or an obligation to guarantee that damage will not be caused. Consequently, the fact of damage is insufficient to prove this causal link. French parliamentary debates have provided some examples of what may be helpful in assessing causation, such as stakeholder partnerships and contractual commitments.[94]

Furthermore, commentators[95] have provided that there is potential for disagreement on whether "the adequate causality (*causalité adequate*) theory or equivalence of conditions (*equivalence des conditions*) theory should apply to the question of causation, with each party likely to favour the theory that best supports their case."[96] There is some room for manoeuvre, therefore, whether causation in this context ought to be understood in a consequential way as in England[97] or in a more philosophical sense. Watson has pointed out that English and French law methods for establishing

---

[91] English translation of the French Civil Code <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf/> accessed 13 October 2023.
[92] Claire Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary' in Angelica Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018).
[93] Julianne Hughes-Jennett, 'Dutch Child Labour Due Diligence Law' (*Lexology*, 8 July 2019) <https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3> accessed 13 October 2023.
[94] AN, report no. 2628, op cit., at 79.
[95] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires, at 3.
[96] ibid.
[97] *South Australia Asset Management Corporation v York Montague Ltd* [1996] UKHL 10 ('SAAMCO').

tortious liability are "stylistically divergent."[98] However, both systems have evolved to reach "remarkably similar"[99] conclusions in reaching practical solutions despite their methodological differences. For instance, the French law of delict is based on a single Article 1384 of the Civil Code. In contrast, English tort law is casuistic in nature and relies on the general tort of negligence under *Donoghue v Stevenson*[100] and specific torts to establish causation. Yet, both systems meet at a broadly similar level.[101]

2.8. Socio-Cultural Influences historically affect management outlook

One could suggest that the various approaches to managerial involvement and liability for ethical oversight in supply chains derives from differences in national culture. For instance, on occasion, executives may have lifetime or longer-term contracts due to the prevalence of company loyalty culture, which increases the importance of internal and external reputation as a deterrent against short-termism.[102] However, this is considered unusual in British listed public limited companies, as the UK's corporate governance code recommends fixed one-year contracts (subject to review).[103]

Alternatively, with a greater concentration of ownership in countries such as Germany and Japan, equity-based compensation as part of managerial compensation packages are less lucrative, with management remaining a separate body not generally providing significant capital. Therefore, managers have traditionally been in theory able to take a longer-term view because financing has traditionally been more through banks than equity. Consequently, incentives in order to minimise the principal-agent problem and forcibly align the interests between owners and managers are less inflated in Germany and Japan, compared to the UK and United States.[104]

---

[98] Danny Watson, 'Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability' (2013) 2 Manchester Student Law Review 1 <http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1(Watson).pdf/> accessed 22 October 2023.
[99] ibid.
[100] *Donoghue v Stevenson* [1932] UKHL 100.
[101] French Commercial Code, Article L. 225-102-4, para 3.
[102] This is one possible reason why the CA 2006, at sections 188(1) and 188(2) attempts to strike a balance by requiring shareholder approval if a company is to enter into fixed term service agreements with directors of a duration over two years.
[103] The UK Corporate Governance Code (2018), D.1.5. <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf/> accessed 22 October 2023.
[104] Siti Nuryanah and Sardar MN Islam, *Corporate Governance and Financial Management* (Palgrave

The Cadbury Committee recommended that companies should have remuneration committees to determine levels of executive compensation, and such committees should be composed of non-executive directors. However, such reliance on boards committees to align executive remuneration with long-term sustainable performance and ethical behaviour may be a step too optimistic. A study done by Yermack has found that the timing of awarding stock options often coincides with (positive) changes in company stock prices, suggesting that there may be a level of informal influence that managers exercise over these ostensibly independent committees.[105] Additionally, whilst relying on stock-based awards to align owner and managerial interests may be a way of bridging the gap between systems in the UK and United States versus native "insider" systems in Germany and Japan, the limitation is that artificially providing stock-based awards may exacerbate short-termism amongst managers.

Compliance with the MSA leads to limited short-term enhancements of company value: as ethical as comprehensive action to prevent supply chain abuse may be, rewards are more in the absence of negative press coverage than in the positive catapulting of share prices to new heights. Managers faced with the imminent vesting of share options on a year-by-year basis might therefore take risks to distort share prices in the temporary favour at the expense of long-term value and compliance. This makes the MSA of limited importance to managers, who may not stay with the company long enough to see the effects of their poor decisions on the company – especially when they themselves face limited individual liability.

There are no legal requirements or corporate governance code regulations requiring employee representation or representation of other stakeholders on managerial boards, although the 2018 UK Corporate Governance Code has only recently begun to introduce engagement provisions. Both France and the UK have also transposed the EU Non-Financial Reporting Directive. However, even prior to the introduction of the EU Non-Financial Reporting Directive, France enacted measures related to environmental, social, and governance (ESG) measures into its *Nouvelles régulations*

Macmillan 2015) 217.

[105] David Yermack, 'Good Timing: CEO Stock Option Awards and Company News Announcements' (1997) 52 The Journal of Finance 449.

économiques Act.[106] The later expansion of the *Grenelle I and Grenelle II* Acts also included a broader range of information specifying how companies would have to consider social and environmental consequences of its activities. It also had a reporting criteria that required boards to provide information on how it had committed to sustainable development.

Additionally, the transplantation of quasi- FDV French law into the UK context could be greatly influenced by the socio-economic differences between the two nations. Historically, France has had a more interventionist state role in the corporate landscape compared to the UK's more laissez-faire approach. France's more interventionist approach towards corporate governance is embedded in its historical and socio-political landscape. As Schmidt suggests, the French state has traditionally played a central role in shaping economic activities, often through direct intervention in sectors deemed crucial for national interest.[107] This phenomenon can be ascribed to France's "dirigiste" economic model, characterized by state-led industrial policies and strategic planning. In contrast, the UK has typically preferred self-regulation, emphasising on soft law and best practices in corporate governance, while France, through instruments like the Grenelle I and II Acts, has often used hard legislation to enforce corporate responsibilities on social and environmental issues. Chiapello and Medjad[108] suggest that these acts are a continuation of France's efforts to ensure businesses are held accountable for their ecological footprints, emphasising both transparency in operations and proactive measures to mitigate environmental harm.

Conversely, the UK's approach to corporate governance has roots in its liberal market economy and the prominence of equity markets. Historically, British firms have been subjected to market mechanisms that often prioritise shareholder value over other stakeholders. This has generally led to a preference for self-regulation and soft law, wherein firms are encouraged to adopt best practices voluntarily, as opposed to stringent state-imposed requirements. The UK's adherence to soft law can be seen in

[106] Yves Charles Zarka, *Le Monde émergent* (A Colin 2010).
[107] VA Schmidt, From State to Market?: The Transformation of French Business and Government (Cambridge University Press 1996).
[108] E Chiapello and K Medjad, 'An Unprecedented Privatisation of Mandatory Regulation: The Case of the Grenelle Environmental Round Table in France' (2009) 22 *Accounting, Auditing & Accountability Journal* 1217.

its preference for codes of practice, such as the Cadbury Code, which provides guidance on corporate governance but does not legally mandate compliance. Also, McNeil and Li suggest the principle of "comply or explain" embedded in these codes epitomises the UK's flexible approach, allowing firms to adopt bespoke governance practices aligned with their unique circumstances.[109]

Another significant distinction lies in the board structures of firms in both countries. Aguilera and Cuervo-Cazurra point out that the UK predominantly operates on a single-tier board structure, where non-executive directors play a pivotal role in corporate governance. This amalgamation of perspectives within a single board intends to foster collaborative decision-making, promoting a balance between strategic management and objective oversight. However, the potential downside is that the line between governance and management might get blurred. If non-executive directors become too engrossed in the operational details, or too close to the executive team, they might lose the objectivity required to hold the executives accountable.

France, on the other hand, has a dual-board structure with a clear separation between management and supervisory functions, which may offer a more rigorous check on managerial decisions, particularly in areas of ethical and environmental considerations.[110] Composed exclusively of non-executive members, its primary role is to oversee the actions and decisions made by the Management Board. It possesses no direct managerial powers but holds the Management Board accountable. In contrast, the Management Board consists of executive members who are responsible for the daily operations and strategic decisions of the company.

Aguilera and Cuervo-Cazurra posit that such a distinction in board structure might make French companies more attuned to broader stakeholder concerns, given the inherent checks and balances the dual-board system offers. This clear separation can be advantageous in situations where rigorous oversight is necessary, ensuring that management decisions are continuously and robustly scrutinised. Particularly for

[109] MacNeil and X Li, '"Comply or Explain": Market Discipline and Non-compliance with the Combined Code' (2006) 14 *Corporate Governance: An International Review* 486.
[110] RV Aguilera and A Cuervo-Cazurra, 'Codes of Good Governance' (2009) 17 *Corporate Governance: An International Review* 376.

ethical and environmental considerations, this dual structure might ensure that the management's actions are not just profit-driven but are also socially and environmentally responsible. So compared to the UK, this system might be particularly effective in mitigating risks associated with managerial short-termism or potential unethical decisions, given the vigilant oversight by the supervisory board.[111]

Furthermore, the concept of stakeholder engagement has different roots and emphasis in both countries. French corporate culture traditionally places a higher emphasis on collective interests, reflecting its socio-political milieu. France's focus on co-determination and worker participation, as seen in their worker representation on boards, underscores the importance it places on balancing the interests of various stakeholders.[112] Conversely, the UK, with its Anglo-Saxon tradition, prioritises shareholder value, often at the cost of sidelining other stakeholders.

The relationship between firms and their financial systems also differs. As observed by Rajan and Zingales, the UK's market-based financial system pushes firms towards short-termism, as they are continuously under the scrutiny of capital markets.[113] In contrast, the French financial system is more bank-oriented[114]. Firms tend to rely heavily on banks for their financing needs. This model often translates into more stable and longer-term relationships between banks and firms. With less immediate pressure for quarterly returns, companies in a bank-based system like France's can often take a more strategic, long-term view of their operations. La Porta, Lopez De-Silances and Schleifer suggest this can particularly benefit areas that demand long-term commitments, such as ethical supply chains and ESG investments.[115] Banks, having a more direct and long-standing relationship with firms, might be more willing to finance projects that have a longer gestation period but are ethically and environmentally sound.

---

[111] RV Aguilera and A Cuervo-Cazurra, 'Codes of Good Governance' (2009) 17 *Corporate Governance: An International Review* 376.
[112] M Goyer, 'Capital Mobility, Varieties of Institutional Investors, and the Transforming Stability of Corporate Governance in France and Germany' (2007) 11 *Competition & Change* 71.
[113] RG Rajan and L Zingales, 'The Great Reversals: The Politics of Financial Development in the Twentieth Century' (2003) 69 *Journal of Financial Economics* 5.
[114] M Goyer, 'Capital Mobility, Varieties of Institutional Investors, and the Transforming Stability of Corporate Governance in France and Germany' (2007) 11 *Competition & Change* 71.
[115] La Porta, R., Lopez-de-Silanes, F., and Shleifer, A. (2002). Government ownership of banks. *The Journal of Finance*, 57(1), 265-301.

Aside from socio-economic and regulatory cultural differences, another key issue that needs to be considered is the difference between common law and civil law systems which makes grafting quasi-FDV obligations into the UK difficult. The foundational differences between common law and civil law systems go beyond mere procedural nuances; they represent divergent legal traditions and philosophies that can profoundly influence the interpretation, application, and transplantability of laws between jurisdictions.

The UK's legal system is rooted in the common law tradition, characterized by the doctrine of judicial precedent. In this system, decisions by higher courts are binding on lower courts. This means that the interpretation and application of laws can evolve over time through a series of judicial decisions, leading to a dynamic and adaptive legal environment[116]. However, a downside of the common law system can be its perceived ambiguity. Since it is heavily reliant on case law, legal principles can sometimes appear to be in flux until solidified by a landmark case. This fluidity, while allowing adaptability, can pose challenges when integrating foreign laws, which may be drafted with a different set of legal presumptions and contexts in mind.

France, in contrast, operates under a civil law system, which is primarily statute-based. Laws in this system are typically detailed, codified, and offer comprehensive rules for various situations. The role of judges in civil law jurisdictions like France is more to apply the law than to interpret it.[117] This approach provides a higher degree of predictability, as legal outcomes are more strictly tied to the written code.

However, one might argue that it is not just not inadvisable, but positively good, to have the UK as a bulwark for developing the positive steps in French law further. Because the common law system can evolve through judicial decisions, it is well-positioned to respond to emerging social issues, including the nuances of modern slavery and evolving standards of ESG consideration. Over time, as more cases on these issues come before the courts, the UK can develop a rich tapestry of

[116] K Zweigert and H Kötz, *Introduction to Comparative Law* (Oxford, Clarendon Press 1998).
[117] JH Merryman and R Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America (Stanford University Press 2007).

jurisprudence that provides detailed guidance on how laws on modern slavery are to be interpreted and applied, which could also inform decisions across other jurisdiction as well. For instance, court decisions can illuminate specific scenarios or business practices that constitute slavery, human trafficking, or forced labour, offering clarity for businesses and stakeholders.

Additionally, in cases related to modern slavery or ESG breaches, the principles of equity and fairness in the UK allow the courts to consider the broader social and ethical implications of corporate actions.[118] This means that businesses might not only be judged based on the strict letter of the law but also on broader equitable principles. As a result, companies might find themselves held to a higher ethical standard, pushing them to proactively ensure that their practices align with both legal requirements and societal expectations.

Indeed, the transplantation of quasi-FDV French law into the UK could be seen as a move towards a more holistic and stakeholder-centric approach to corporate governance, its successful implementation would require addressing the deeply entrenched socio-economic differences between the two countries. Without recognising and addressing these disparities, the transplantation could result in an awkward grafting of two fundamentally distinct corporate governance philosophies. However, given the codified nature of civil law, transplanting a specific French statute into a common law context like the UK's might present challenges but also opportunities as well for more dynamic and equitable development. French laws are crafted with the presumption of a comprehensive, codified backdrop, whereas the UK's system is built on layers of judicial decisions and interpretations. The common law approach means that the interpretation and application of the FDV could change over time as it is tested in various court cases, especially important in an evolving area of law.

2.9. Preconditions for Penalty

As mentioned earlier, the reason for the striking down of the original criminal penalty

[118] R Stone, The Modern Law of Contract (Routledge 2017).

for the FDV was the idea that the FDV legislation lacked the preconditions for the imposition of criminal penalties (as distinct from permissible periodic penalty payments ("*astreintes*") and civil liability action ("*responsabilité civile*"))[119]. In particular, the Constitutional Court made reference to “the broad reference to human rights and fundamental freedoms”, “the general nature of the terms used by the legislator”, “as well as the wide range of companies and operations covered by the duty of vigilance.”[120] Consequently, penalties were more limited. The full extent of penalties that fell outside the ambit of these concerns were the ability of parties with standing to seek civil injunctions to compel compliance, as well as periodic penalty payments. These periodic penalty payments are injunctive fines payable on a daily or per-event until a specific obligation is satisfied.

Article 2 suggests that in the event of a breach of the obligations stated in Article 1, the company may be held liable and responsible for compensation for the harm. This is something that perhaps the MSA would benefit from. However, victims are required to prove fault by the company which is a consequence of a violation under Article 1. Secondly, alleged victims also need to prove the presence of a causal link between the fault and the damage suffered. Proving causality is a common hurdle to overcome in both FDV and MSA when proving a breach of either regulation. In some ways, this is expected, as large MNEs which these regulations are particularly targeted at tend to have complex and long supply chains with multiple participants. Indeed, Ernst & Young (EY) has also carried out research that indicates that “companies consistently recognise that they are less advanced in their supply chain sustainability efforts than their direct operations due to the complex nature of sustainability in their supply chain.”[121]

2.10. Preliminary Discussion from Literature Review

[119] Décision n° 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[120] Declaration of the Rights of Man – 1789 <http://hrlibrary.umn.edu/education/frdeclaration.html> accessed 24 October 2023.
[121] ‘Eight ways to boost sustainability in your supply chain’ (*Ernst and Young Global Ltd*, 1 February 2019) <https://www.ey.com/en_gl/assurance/how-to-build-responsible-and-resilient-supply-chains> accessed 24 October 2023.

2.10.1. An Overview of the MSA and the FDV

2.10.1.1. Territoriality

The acceleration of globalisation has resulted in the traditional understanding of the supply chain becoming increasingly complex. The transnational nature of production and information means that companies can essentially "govern at a distance",[122] not only geographically, but also in terms of multiple chains of command preventing direct control. Therefore, a purely domestic law that only considers activities within the boundaries of one specific jurisdiction are at best meaningless and at worst counterproductive to ensuring that oppressed supply-chain workers are not denied substantive legal protection.

MSA s54 stipulates that bodies and partnerships, wherever incorporated or formed respectively, which carry on a business or part of business in the UK and which has an aggregate global turnover of £36 million or more will need to prepare a transparency statement each financial year. Foreign companies, their subsidiaries, and overseas branches of UK companies that engage in business transactions with the UK will also have to comply with this legislation. Unlike the FDV, the nexus to the UK can be found more widely (with no employee headcount threshold); however, the use of turnover as an initial threshold sets it apart from the FDV threshold, which relies on headcount.

Article 1 of the FDV requires large French corporations ("*sociétés anonymes*") to implement diligence plans that do not just cover the parent company, but also activities of subsidiaries, whether controlled directly or indirectly, as well as subcontractors and suppliers with whom they have "established business relationships"[123], which provides thoroughness in reporting obligations.[124] In effect this requires diligence plans in relation to bodies where there is no direct access in relation to information and no legal right to it, so this would possibly throw up difficulty in lower-tiers of suppliers and

[122] See for example Lawrence Busch, 'Performing the Economy, Performing Science: from Neoclassical to Supply Chain Models in the Agrifood Sector' (2007) 36 Economy and Society 437.
[123] This has yet to be judicially defined but likely would be interpreted broadly.
[124] ibid.

subcontractors.[125] A company is considered an applicable large company if it is headquartered in France and has at least 5000 employees in France or at least 10000 employees worldwide (including through direct and indirect subsidiaries), or is a foreign company headquartered outside France, with French subsidiaries, if those subsidiaries employ at least 5000 people in France.

2.10.1.2. Voluntariness

The Home Office published its consultation report on the 22 May 2019. In particular, it recommended the removal of s54(4)(b) in the MSA. The removal of s54(4)(b) would substantively affect the rigour of the reporting regime. This is because under s54(4)(b), organisations may be able to circumvent reporting obligations by stating that they have not taken any steps to address modern slavery in their supply chains. Therefore, organisations in effect, face no limited legal penalties even if they choose to take this step.

In contrast, the FDV imposes an active obligation on companies to publish annual vigilance plans, the content of which is stipulated expressly in quasi-legislative guidance. Unlike the MSA, there is no option to opt out of content-based requirements for reporting: companies are expected to actively take steps, report, and act on risks identified in their supply chain.

2.10.1.3. Comprehensiveness

The MSA does not require adherence to any specific reporting template, and only provides suggested list of headers for inclusion, namely

(1) the organisation’s structure, its business and its supply chains;
(2) its policies in relation to slavery and human trafficking;
(3) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

[125] Whether employing contractual “mirror” provisions or other techniques.

(4) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
(5) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
(6) the training about slavery and human trafficking available to its staff[126].

Rather than being relegated to mere recommendations, these can be incorporated as mandatory inclusions inside the transparency statement.

In addition, s54 should require companies to consider the entirety of their supply chains, which means that this also includes lower tiers downstream and suppliers they may not even have full visibility over (to the extent they could carry out appropriate due diligence). As it is currently phrased, the MSA does not clarify if an organisation is only compelled to do a cosmetic sweep of its more immediate suppliers, rather than a thorough investigation of their supply chain. In contrast, the diligence plan required under the FDV also requires companies to appraise the impact that their organisation has on third parties like customers and suppliers. Such diligence plans are required for companies, as well as for their established suppliers, since the content of the plans should look at the impact on sub-suppliers right down the chain (as mentioned above). A study by B&R and EDH found that as a consequence of the FDV, the vast majority of French companies falling within its ambit have "performed or initiated new efforts to identify at-risk suppliers"[127]. In particular, companies have performed best in terms of the first stage of the risk assessment, namely, the risk-mapping aspect.

Turning to other consumer-oriented regimes may not be a silver bullet either. Chilton and Sarfaty have argued that mandatory disclosure regimes which push responsibility to consumers (such as the CTSCA) are unsuccessful and actually tend to exacerbate human rights abuses because of the different nature of risks across industries, information on "actual products" is not provided in supply chain disclosures, and

[126] MSA 2015, s 54(5).
[127] *Entreprises pour les Droits de l'Homme* (EDH) and B&L Evolution, 'Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans', 25 April 2018, 4.

"information in disclosures only provides weak proxies for human rights outcomes."[128] They carried out empirical market research that found that "consumer oriented" regimes are actively unproductive. The CTSCA, in particular, is applicable in USA's largest consumer base, here Chilton and Sarfaty emphasise that underlying this law is the hope that ethical disclosures will influence consumer purchasing decisions and impact reputation management for large conglomerates. For instance, the California Department of Justice Resource Guide makes repeated reference to how the act is intended to "educate consumers on how to purchase goods" and "empowers California consumers to join the fight".[129] However, an unintended consequence is that companies in the litigious US instead aim to make their disclosures as succinct as possible to minimise scrutiny for reputational reasons, instead of focussing on comprehensiveness and material changes to their supply chain.

In particular, certain aspects of human rights related disclosure regimes are inherently unsuitable for consumer action. For instance, consumers tend to be concerned about the quality of the product or end-service while supply chains are inherently long. In addition, non-specific disclosures on "minimizing risk" are not good indicators of the specific supply chain risks. This is because the degree and nature of risk varies within different countries, industries, and tiers of suppliers. A low-level risk in the UK, with an established set of public health and emergency procedures and organisations, may be a high level one in an undeveloped country due to the sheer lack of mitigating or emergency response capacity. Different industries can also have different types of risk: for instance, the risk of machinery malfunctioning in a blue-collar industry is of a different nature to the risk of blackmail in the debt-collection industry. Therefore, broad calls to "minimise risk" does not hold companies tightly to standards of accountability that are meaningful to their specific supply chain, as companies can simply pick the lowest or least cumbersome standard and tick-off the checkbox without giving further thought. For instance, companies are often not legally accountable for human rights abuses carried out in conflict-riddled countries or countries with compromised governments[130], which tend to "turn a blind eye" to less

[128] Adam S Chilton and Galit Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' (2016) 53 Stanford Journal of International Law 1.
[129] ibid.
[130] Joshua Karliner, *The Corporate Planet: Ecology and Politics in the Age of Globalization* (Sierra Club Books 1997) 6.

ideal supply chain conditions which therefore do not contravene domestic regulations. Furthermore, disclosures are inherently oversimplified, with consumers either being psychologically biased towards certain “brands” of companies (e.g. organic or natural) or simply failing to comprehend complex information in a meaningful and coherent manner. Even if consumers comprehended such information, reputational pressure might be insufficient to outweigh the product merits of a brand and consumers might still end up purchasing certain products regardless of the impact on far-off workers down the latter tiers of the supply chain. Consumers should put pressure on companies to act responsibly, but lack the incentives and tools to do so adequately.

2.10.1.4. Enforceability

A notable gap in the MSA compared to the FDV is the lack of compulsion to take active measures to monitor and address compliance with ethical supply chain requirements. The FDV does not directly compel companies to be ethical, but it inadvertently does so by compelling companies to come up with a due diligence plan that contains verifiable measures that they have established. This goes above and beyond a simple reporting and publication requirement under the MSA and is an ex-ante requirement rather than an ex-post requirement as in the MSA.

Such diligence measures should be aimed at preventing violations of human rights and damage to the environment. In particular, Article 1 of the FDV provides that although not a legal obligation, these diligence plans can be drafted in conjunction with input from internal and external stakeholders. A study of initial plans published in companies’ registration documents conducted by B&L and EDH provide that “most of vigilance plans are the fruit of a collaborative approach within the companies” “coordinated by CSR or sustainable development departments”[131]. A call to action in improving oversight and operation to supply chains is essential to beef up the initial call to transparency. Crane has identified that increasing transparency alone is insufficient without addressing governance gaps, which is a key area lacking in MSA

[131] Danny Watson, ‘Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability’ (2013) 2 Manchester Student Law Review 1 <http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1(Watson).pdf/> accessed 24 October 2023.

compared to the FDV.[132]

2.10.1.5 Consequences of Non-compliance: Private Remedies

Organisations that fail to comply with the MSA may face an injunction by the High Court to compel compliance, which is filed by the Secretary of State. Nolan and Bott consider that a transparency statement can itself promote compliance due to "reputational implications", not just in altering the behaviour of consumers, but also when it comes to power dynamics between institutional stakeholders, such as financiers, regulators, and companies.[133] However, compliance with the MSA might simply be a statement saying there has been no action taken. The UK government itself has since recognised that such a regime will lack effectiveness and has since called for consultations on reformation of the MSA.[134]

The FDV, in contrast, empowers civilians themselves to bring an action against the company if they have suffered harm, by filing a complaint with the French Courts. A limitation however in the FDV is that it that its ability to compensate victims seeking justice may be itself limited as there may be inadequate quantification information in a third-party action. Companies that breach the diligence requirements of the FDV can potentially face up to EUR 30 million in fines. Going further than the FDV or MSA, it is hereby proposed that directors should also be held individually or collectively (joint and several liability) responsible for failures to comply with MSA linked directly to breaches of s172 or their common law duty of care.[135] In addition, penalties can be adjusted not just to account for a fixed cap, but a proportionate impact on company operations and consequent attention. For instance, companies may have to pay meaningful amounts similar to the anti-competition regime, up to a percentage of

[132] Andrew Crane and others, 'Governance Gaps in Eradicating Forced Labour: From Global to Domestic Supply Chains' (2017) 13 Regulation & Governance 86.
[133] Justine Nolan and Gregory Bott, 'Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices' (2018) 24 Australian Journal of Human Rights 44.
[134] Home Office, 'Transparency in Supply Chains Consultation – Government response' (22 September 2020);
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf> accessed 24 October 2023.
[135] Which would also require the liberalisation of the derivative action provisions in the CA 2006, ss 263(1)(a) and 263(3)(b).

annual turnover. The EU anti-competition regime is taken very seriously by companies and informs a great deal of merger and acquisition diligence, which begs the question of why not the MSA or the FDV as well then.

2.10.2. The Framing of Directors' Duties

The argument for including ethical supply chain values into the considerations that directors are legally obliged to consider, relies on the value of standardization, so long as this relies on an open-ended principle rather than narrow rule. This is more reliable than relying on industry best-practice corporate governance codes, which vary across industries and across time, and may be cherry-picked to suit the needs of the company. This takes back the idea of directors requiring to act in the companies' interests, not shareholders' best interests, and shifts the discussion at board-level to strategies that actively ensure ethical supply-chain management and operation in conjunction with stakeholders such as employees and downstream suppliers. Additionally, this emboldens the MSA with stand-alone sense.

There is an argument that the wording of s172 already puts significant stand-alone emphasis on the need for directors to consider their operations in order to comply with the demands of s172. For instance, the welfare of indirect supply chain workers with no direct employment relationship might still be considered under the heading of "the impact of the company's operations on the community and the environment." Promoting the success of the company for the "benefit of its members" refers to shareholders for a company with share capital. However, the plausible "company interests" include the interests of both present and future members. In *Gaiman v National Association for Mental Health*[136], Megarry J indicated that the company's interests were those of "both present and future members…as a whole", further strengthening s172(1) which entreats directors to consider "the likely consequences of any decision in the long term."[137]

---

[136] *Gaiman v National Association for Mental Health* [1970] 2 All ER 362.

[137] Though on the extent to which shareholder primacy is still a dominant consideration, see, for example, Andrew Keay, 'Risk, Shareholder Pressure and Short-Termism in Financial Institutions: Does Enlightened Shareholder Value Offer a Panacea?' (2011) 5 Law and Financial Markets Review 435.

S172(2) states that occasionally, the constitution of the company might "consist of or include purposes other than the benefit of its members".[138] In the absence of such specific provision, however, the definition of "success of the company" remains open-ended and directors have the discretion to determine what success might look like and the process by which it can be achieved (as evidenced in the respect for bona fide business judgments elaborated on below).

Despite the ostensibly comprehensive wording of s172, directors are not held significantly responsible for ethical decision making because of the broad discretion afforded to them. It is worth noting that phrasing of heading (b) is quite narrowly framed as requiring directors to consider the need to foster specifically "the company's business relationships" with suppliers, customers, and others. What falls to be considered a "business relationship" remains open to interpretation, while what is considered a worthy "fostering" of a business relationship is not unlikely to involve the reception of some degree of gain for the company. In a long supply chain that involves communities in less developed countries, vastly unequal bargaining powers makes the gain from fairer contract terms a matter of ethics rather than economic gain.

Furthermore, the exhortation that directors should act in a manner that "would be most likely to promote the success of the company for the benefit of its members as a whole" does not require the value-laden supply-chain practices to be *preferred* over a medley of other considerations such as operational efficiency and profitability. On the contrary, directors are prohibited from acting in a manner that might damage the financial success of the company.

The idea is that bona fide board decisions should not be unduly interfered with by the judiciary. In a standard similar to the *Wednesbury* reasonableness standard, courts abstain from reviewing the content of a decision made by the board on objective grounds, unless the decision could not be one that a reasonable director will take – As Lord Wilberforce stated, "if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that

[138] Also see, generally, Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018).

purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management".[139] A high level of discretion is therefore afforded to boards, although a mere assertion of honest belief is not enough to excuse outright unreasonable behaviour.

There is however evidence that the judiciary is becoming increasingly well-equipped and prepared to be more interventionist in reviewing the decisions of directors. In *Westpac Banking Corporation v The Bell Group Ltd (In Liquidation) (No 2)*, in the Supreme Court of Western Australia, Drummond AJA suggested that "the impacts of corporate decision making on a wider range of interests than merely shareholders are now being given more recognition" and that this need to ensure protection of such broader interests "serves to explain why modern company courts have become more interventionist in reviewing the activities of directors than was traditionally the case."[140]

However, the judiciary, ultimately, is not the legislature and lacks the democratic pedigree to informally legislate through overly strong judicial coaching on ethical supply chain frameworks. It is therefore necessary to also amend or introduce a legislative framework that empowers the judiciary to consider strongly the reasonableness of directors' decisions with regard to the MSA. Such strengthening of the MSA is also important because legislation has a strong symbolic role in reflecting society's mores on an issue.

Aside from fiduciary duties under s172, s174 also imposes a common law duty applicable to directors of a UK company. This requires directors to exercise

> "the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by

[139] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] UKPC 3, 835.
[140] *Westpac Banking Corporation v The Bell Group Ltd (In Liquidation) (No 2)* [2012] WASCA 157; See similar judicial approaches of English and Canadian courts, *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155, 251; F*ulham Football Club Ltd v Cabra Estates pl*c [1994] 1 BCLC 363, 379; *People's Department Stores v Wis*e [2004] 3 SCR 461.

the director in relation to the company, and (b) the general knowledge, skill and experience that the director has"[141]

This indicates that directors will be held up to at least objective standards based on the particular role taken on by the director, with this standard possibly being raised if the director has exceptional skills or experience. To this end, the MSA should introduce a requirement for a designated board member responsible for the observation and compliance with the MSA statement as well as other environmental, social, and governmental concerns.

This also accords with the test of directors having a duty to maintain or acquire a minimum amount of knowledge. In *Re Barings plc and others (No. 5) Secretary of State for Trade and Industry v Baker and others*, it was stated that directors have a "continuing duty" to "acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.[142]" In light of the MSA, this duty requires them therefore to obtain knowledge on how to comply with the requirements of the MSA and exercise sufficient oversight over the supply chains of their respective companies. The existence of long supply chains and lines of delegation does not fully absolve them either: "Whilst directors are entitled ….to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions."[143]

In a sense, therefore, wilful blindness by failing to ask the right questions and delve deeper into compliance with the MSA could be a breach of this duty. For instance, in *Weavering Capital v Dabhia*[144], a director who failed to probe into information provided by another director was held to be in breach of his duties. Consequently, a failure to probe into compliance with MSA compliance by the MSA-designated director as well as the rest of the board should be an offence under the Company

[141] CA 2006, s 174.
[142] *Re Barings plc and others (No. 5) Secretary of State for Trade and Industry v Baker and others* (1999) 1 BCLC 4433.
[143] ibid.
[144] *Weavering Capital v Dabhia* [2015] BCC 741.

Directors Disqualification Act 1986 (if it were considered a separate substantive offence).

2.10.3. Subtle Influences on the Creation of Legislation

Private regulations, which refers to voluntary, private, nonstate industry and cross-industry codes, may be seen to use such initiatives as "politically neutral" strategies, which is another view espoused by Vogel[145]. In this school of thought, scholars speak of a "California effect" where private regulation obediently and complimentarily seeks to fill in the gaps left by public regulation[146], which itself provide an impetus for strengthened private initiatives.

In contrast, LeBaron and Ruhmkorf have carried out a fascinating study on the domestic politics over corporate accountability legislation and have drawn light on how industry actors use strategies such as the championing of weak regulatory initiatives to shape legislation.[147] They present with a cynical view on such corporate accountability laws, which "do little more than create statutory endorsements for existing private governance initiatives to address labour abuse, such as certification schemes and private auditing."[148] Having carried out an empirical study including of about 157 evidence statements submitted to Parliament by private actors over the crafting of the MSA starting from 2010, they have reached the conclusion that economic interests ultimately trump domestic initiatives to increase corporate accountability. In their view, the deficiencies in legislation are somewhat intentional. In fact, the MSA was a result of industry actors actively trying to "derail efforts to raise public labour standards" by lobbying for a weak form of legislation through a cunning mix of not just outright lobbying efforts against civil society, but through an underbelly of strategic partnerships between private businesses and other industry actors such as NGOs. This echoes Kaplan,[149] who finds that private businesses use

[145] Heike Bruch and Bernd Vogel, 'Organisationale Energie' in Heike Bruch, Stefan Krummaker and Bernd Vogel (eds), *Leadership – Best Practices und Trends* (Gabler, 2009).
[146] ibid.
[147] Genevieve LeBaron and Andreas Rühmkorf, 'The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act' (2017) 17 Socio-Economic Review 709.
[148] ibid.
[149] Rami Kaplan, 'Who Has Been Regulating Whom, Business or Society? The Mid-20th-Century

corporate and social responsibilities initiatives to "deflect" regulations. Kaplan defends the notion of "institutional maintenance", where companies utilise indirect strategies to ward off strong form regulations. This will be examined in greater detail further in later chapters.

In the initial stages of the drafting of the proposal, the UK government was faced with a broad choice between three models, namely, the "Bribery Act Model", the "Companies Act Reporting Model" and the "California Transparency in Supply Chains Model". The most stringent model, the Bribery Model, suggested that "criminal liability for forced labour in the supply chain, liability for acts of associated persons, and extraterritorial liability" would have been a strong deterrent against non-compliance. It went further than the MSA, for example, because companies would be found to commit a criminal offence, there is no total annual threshold for the companies to which this act applies. The middling moderate model, the Companies Act Reporting Model, would require the addition of a modern slavery segment to s414(c)(7) of the CA, which, in its current form, already states:

> "In the case of a quoted company the strategic report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—
>
> (a) the main trends and factors likely to affect the future development, performance and position of the company's business, and
> (b) information about—
>
> > (i) environmental matters (including the impact of the company's business on the environment),
> > (ii) the company's employees, and
> > (iii) social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies.

Institutionalization of Corporate Responsibility in the USA' (2014) 13 Socio-Economic Review 125, 148-150.

> If the report does not contain information of each kind mentioned in paragraphs (b)(i), (ii) and (iii), it must state which of those kinds of information it does not contain."

The purpose of the strategic report under s414 is to help members of the company make assessments on how directors have performed their duty to promote the success of the company under s172 beyond financial indicators such as current year earnings. The strategic report is under the remit of the Financial Reporting Council. ESG related disclosures are commonly addressed in companies' annual reports, but this strategic report goes beyond this, in particular, s414(c)(7)(b) which requires disclosures related to "environmental matters", including the impact of the business on the environment, social, community and human rights issues. If the company decides that these disclosures are immaterial and need not be reported, this should be disclosed as well.

Ultimately however, the Bribery Act model and the s414(c)(7) models were eventually disfavoured over the weakest model, which was the MSA's ultimate form as modelled on the California Transparency Act. In fact, the MSA could be said to be an even more diluted form of the California Transparency Act in the sense that the latter requires explicit disclosures on specific issues such as verifications, audits, and certifications, while the former only provides suggested headers for inclusion without any mandatory reporting requirements, with the option even left open for companies to state that they have not taken any steps that merit reporting.

LeBaron and Ruhmkorf explicitly refer to the MSA as lying on the "low stringency" end of the spectrum, compared to the FDV, which lies on the "high-stringency" end, as the latter includes binding public standards and sanctions for non-compliance as opposed to simply creating reporting obligations. Interestingly, they offer that a "hunch" they have for the variation between various EU countries' implementation of European Union Directive 2014/95/EU (the non-financial reporting directive (NFRD)) which lays down the rules on disclosure of non-financial and diversity information, lies in the differences in "the interactions between public and private governance mechanisms, and the political forces, forms of power and bargaining processes that

have made them."[150] However, they dispute the possible link between different governments between the royal assenting of the Bribery Act and the MSA, with Labour and Conservative-Liberal Democrats coalition leading the government respectively due to the pro-business biases of the Labour government.

However, three main differences in legislative process are offered between the passing of the Bribery Act and the MSA. Firstly, the lack of private governance alternatives, secondly, the absence of "strategic coalitions"[151] such as that between NGOs and private actors to influence the lobbying outcome, and thirdly, the focus of parliamentary debate in choosing between three different models on the table (for the would-be MSA) rather than tweaks to a single model (for the Bribery Act).

The FDV itself was only passed after a long four-year struggle, eventually prevailing due to sudden pushes due to the Rana Plaza factory collapse, and arguably, cultural shifts in understanding governance. Evans goes so far as to suggest that its eventual passing was unusual in France being the first country to act in a "global prisoners dilemma", and was hinged on "French acceptance of state intervention as the mode of problem solving and a Socialist government",[152] suggesting that it was not a surprise that France was the first country to introduce such strong legislation. Similar to the MSA experience, however, it was met with both direct and more discreet opposition from lobbyists, with French business associations using their connections and privileged access to various echelons of government to try to impede its progress. Given France's own economic troubles of its working class and the bill's unimpressive initial launch, it was not a foregone conclusion that it would pass and with much underlying punitive force.

However, sustained activism by activists can energize advocates. In particular, the Rana Plaza tragedy revitalized the concept of pejorative globalization and unchecked

---

[150] Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15.
[151] ibid.
[152] Alice Evans, 'Hope for Reform: Strengthening Corporate Accountability in Global Supply Chains' (ECPR Regulation and Governance Conference, Lausanne, Switzerland, May 2018) <http://www.bhrinlaw.org/documents/hope-for-reform.-alice-c.-evans.pdf> accessed 25 October 2023.

profit. However, the historically acrimonious relationships[153] between the French labour market and business associations led to wide mistrust of the latter's narrative of the current law, which rightly provoked scepticism about potentially weaker forms of the regulation which had been promoted, such as another call to observe international norms or simple reporting requirements. The idea of dialogue was therefore viewed more cynically than in other societies. In contrast, as mentioned above, relationships between government in the UK and other stakeholders such as labour unions and NGOs are more amiable, with the idea that cooperative policy making can be a more productive form of expectation setting.

2.10.4. Proposed Solution

The lack of a positive obligation to carry out diligence on supply chain ethics, the ability to opt-out of taking any action at all by simply issuing a statement to such effect, and the limited alignment of directorial incentives with MSA compliance are problems that plague the UK's ability to police modern slavery infringements properly. The potential solution to be explored by this thesis is the FDV, the main purpose of which has been to embed human rights, environmental, health and safety and security issues into company priorities leading to corporate sustainability.[154] The FDV, *prima facie,* is an improvement upon the current UK regulatory regime on a number of counts. Firstly, by mandating the issues that must be addressed by the company in the vigilance plan, directors would be prevented from cherry picking the issues that portray the company in a positive light and ignoring the negative issues. On the other hand, by mandating issues there may be a converse problem, that there is an incentive to merely look at the issues raised. It would be valuable to discuss whether a more specific versus a more flexible approach in the UK would be appropriate to reach an optimal level as a market for ethical behaviour and investments. Secondly, whereas the MSA merely requires a statement on what has been done, the FDV requires policies to be created to both prevent and mitigate any risks.[155] Finally, the penalties faced by companies and

[153] ibid.
[154] Madeleine Cuff, 'France Duty of Vigilance Law One Year on: What's Changed for French Corporates>' (*Business Green* 13 March 2018). <https://www.businessgreen.com/bg/feature/3028217/france-duty-of-vigilance-law-one-year-on-whats-changed-for-french-corporates> accessed 10 October 2023.
[155] 'France Adopts New Corporate "Duty of Care" Law' (*Ethical Trading Initiative*, 1 March 2017) <https://www.ethicaltrade.org/blog/france-adopts-new-corporate-duty-care-law> accessed 25 October

enforced[156] under the FDV, periodic penalty payments and civil liability action,[157] are much more stringent than current UK penalties which are mostly reputation. Although an injunction is available under the MSA, ex-poste action is less effective than creating a cultural change in company practice even without there being suit brought against them.

There is a clear gap in the existing literature in relation to the subject matter of this research project, although some inspiration has been found.[158] However, this would be the first time that a strong link would be explored between directors' duties and mandatory human rights due diligence. The adoption of stakeholder centric values and elements of the FDV respectively into UK directors' duty under s172 and s414CB(2) CA, would create a more robust and mandatory set of obligations for UK companies. Accordingly, the national business and human rights movement can benefit immensely if UK directors' duties are expanded to impose an obligation of creating vigilance plans either as part of the duty to promote the success of the company or as part of the duty of care, skill and diligence under s174 CA.[159] Most importantly, the reformulation of the enlightened shareholder value principle, embedded in s172 CA, has the potential to promote a shift towards enlightened stakeholderism, empowering not only the extra-territorial scope of s54 MSA in particular, but also sustainable business models through board accountability.

2023.

[156] Law No. 2017-399 (03/27/2017). <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=ididid> accessed 25 October 2023.

[157] ibid.

[158] Jingchen Zhao, 'Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability' in Beate Sjåfjell and Christopher M Bruner (eds), *Cambridge Handbook of Corporate Law*: *Corporate Governance and Sustainability* (Cambridge University Press, 2020) 38; Min Yan, 'The Corporate Objective Revisited: Part II' (2017) 38(2) Business Law Review 55, 60.

[159] Charlotte Villiers, 'Global supply chains and sustainability: the role of disclosure and due diligence laws' in Beate Sjåfjell and Christopher M Bruner (eds), *Cambridge Handbook of Corporate Law*: *Corporate Governance and Sustainability* (Cambridge University Press, 2020).

Chapter 3: Deconstructing Regulatory Models

Corporations typically treat disclosure as an end in itself, and not as a means to an end. That is, rather than significantly changing operations and using the transparency process as an opportunity for organizational learning, corporations simply seek to match existing practices to the disclosure framework – David Hess[160]

[160] David Hess, 'The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights' (2019) 56(1) American Business Law Journal 5.

3.1. The Institutional Design of Legislation

According to the UN Guiding Principles (UNGPs), States are "expected to adopt a mix of measures, whether voluntary, mandatory, national, or international, to foster business respect for human rights in practice."[161] But amongst these, the trend towards using legislation as a mode of compelling corporate social responsibility (CSR) is becoming increasingly popular.[162] The stringency of legislation has repercussions on stakeholder responses, and shapes the effectiveness of each model in compelling its desired outcomes. Corporate accountability, which can be defined as governance arrangements which allow certain actors, like national governments, to hold other actors, like MNEs, to certain standards, to judge whether or not they have met those standards, and to impose sanctions for non-compliance, is clearly relevant in such contexts.[163] Similarly, while both the MSA and FDV are forms of national regulation that aim to achieve corporate accountability, they do so in two very different ways. The MSA presents a softer form of transparency regulation compared to the FDV, which imposes active obligations on companies to adopt and publish due diligence plans in accordance with enumerated disclosure requirements. As enacted, both the FDV and the MSA have a disclosure requirement, but in this regard, "softer" refers to more flexible and non-binding forms of regulation that have emerged as a response to secure flexibility and adaptability of regulation to distinctive territorial economic, environmental, or administrative claims.[164] However, this is not a structural feature of the UK - as of August 2020, there have been proposals by the Department for Environment Food & Rural Affairs to introduce more penal options regarding forest risk commodities that can cause wide-scale deforestation in response to a proposed

[161] John G Ruggie, 'UN Guiding Principles, Principle 3 and Commentary, Letter of Response to a Public Letter by Swiss Business Associations Regarding Their Position on the Swiss Responsible Business Initiative' ; <https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 25 October 2023.
[162] Bright (n 43) 3.
[163] Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human RightsViolations in the Global South?' (2021) 22 Human Rights Review 109, 112.
[164] Charalampos Koutalakis, Aron Buzogany and Tanja A Börzel, 'When Soft Regulation Is Not Enough: The Integrated Pollution Prevention and Control Directive of the European Union' (2010) 4 Regulation & Governance 329.

mandatory due diligence requirement.[165]

Regulatory design is closely connected to enforcement strategy. Regulators face difficulty in designing strategies to monitor, detect, and achieve compliance due to a confluence of factors including but not limited to "resource constraints, conflicting institutional pressures, unclear objectives, and changes in the regulatory environment."[166] Braithwaite and Ayres propose a "responsive regulation approach to resolve this problem[167] as a more nuanced approach to the "crude polarisation" in regulatory approaches between compliance and deterrence, namely, the dispute "between those who think that corporations will comply with the law only when confronted with tough sanctions and those who believe that gentle persuasion works in securing business compliance with the law."[168] Consequently, they believed that compliance would be more likely when regulators utilized an enforcement pyramid with a range of sanctions, starting as first degree of severity at persuasion, followed by warnings, civil penalties, criminal penalties, license suspensions, and license revocations.[169] In addition, one of the requirements of a traditional responsive regulation model is that the regulated party and the regulator are in an iterative relationship, but the MSA as currently conceived falls outside this model as enforcement is carried out by non-governmental organisations and market pressures.

In this respect, the MSA seems to fall short of a tiered solution: there is simply no legal liability (as opposed to reputational or other consequences) if a company issues a statement that it has taken no steps to eradicate Modern Slavery, and even non-compliance with the publication of such statement is only lightly addressed through a potential injunction issued by the High Court and only enforceable only by the

[165] Department for Environment, Food and Rural Affairs, 'Due Diligence on Forest Risk Commodities' (August 2020) ;<https://consult.defra.gov.uk/eu/due-diligence-on-forest-risk-commodities/supporting_documents/duediligenceconsultationdocument.pdf> accessed 25 October 2023.

[166] Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 Modern Law Review 59, 61.

[167] See generally: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1995); Martin Lodge, 'Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate' in Steven J Balla, Martin Lodge and Edward C Page (eds), *The Oxford Handbook of Classics in Public Policy* (Oxford University Press, 2016), 559.

[168] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1995), 21.

[169] ibid, 35.

Secretary of State. While a company is unlikely to publish a blanket statement saying it has done nothing to eradicate modern slavery, it is clear that some companies pay greater attention to this than others. For example, Greene King tries to push responsibility to its suppliers with statements like, "Our suppliers vary enormously in terms of their size and expertise and many of those will themselves be reliant on their own supply chain, potentially across many countries, in order to be able to supply relevant goods or services to us."[170] In contrast, its competitor, JD Wetherspoon, at least outwardly demonstrates more willingness to engage with the spirit of the law and gives details on how it regularly audits its suppliers for Modern Slavery compliance.[171]

Aside from an enforcement pyramid posited by Braithwaite and Ayres, Baldwin and Black go one step further and argue that in order to be really responsive, regulators need to respond not merely to the question of compliance performance, but also need to consider "the firms' own operating and cognitive frameworks, broader institutional environment, the different logics of regulatory tools and strategies, and changes in each of these elements."[172] Therefore, implementing an effective modern slavery legislation needs deliberate coordination of these various regulatory tools, informal resources, and cultural or structural attitudes towards compliance in companies.[173]

The MSA either has overly limited or excess consideration of these five specific areas of company performance[174]: in contrast, the FDV seems to leave more space for consideration of each firm's specific circumstances by considering whether they have made "reasonable" efforts to address vigilance. It is uncertain if reasonableness is adjudged by an objective (i.e., absolute standard) or a subjective standard, but one assumes that each firm's specific industry, business model, and supply chain leaves

[170] Greene King, 'Modern Slavery Statement' (June 2020) <https://www.greeneking.co.uk/modern-slavery-statement/> accessed 25 October 2023.
[171] JD Wetherspoon, 'Anti-Slavery and Human Trafficking Statement 2018/2019' (29 July 2018), <https://wikirate.s3.amazonaws.com/files/5398930/20688963.pdf/> accessed 25 October 2023.
[172] Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 Modern Law Review 59, 69; see also Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility,' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009).
[173] Indeed, such cultural factors are particularly hard to change, hence an increasing resort to legislative solutions globally: Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human RightsViolations in the Global South?' (2021) 22 Human Rights Review 109.
[174] Such difficulties being inherent to any "one-size-fits-all" model.

enough devil in the detail for reasonability to consider part of, if not most, of the factors suggested by Baldwin and Black. For instance, what is considered reasonable diligence in an industry with long-term supply contracts may be different from an industry with quick customer turnover and less emphasis on long-term relationships.

3.2. A Transparency Plan or a Diligence Plan

3.2.1. Transparency Plans Not Necessarily Weak

The modern slavery statement under the MSA is commonly described as a mandatory transparency requirement, with applicable companies required to publish, under Section 54, a slavery and human trafficking statement for each financial year. There are several facets of transparency as a concept. On one hand, it may be seen as a regulatory mechanism or an initial step towards greater accountability. On the other hand, it may also be seen as an unnecessary burden, such as by introducing more information into decision making processes, and a source of conflict regarding data privacy, such as where detailed transparency about customer and supplier information might infringe on their preferences regarding publicity. In particular, however, supply chain transparency refers to "the extent to which information about a company's suppliers and their locations is readily available to consumers and other actors in the supply chain."[175] This has a positive connation with trust and can lead to more informed decision making, because this addresses information asymmetries between large companies and other stakeholders in society arising from private law mechanisms such as contracts[176] and certification schemes.[177] Certification schemes may be generally seen as ways of mitigating asymmetries through the use of third party assurances, but face some limitation – for example, they may allow for the endorsement of large-scale commercial operations that are willing to pay to be audited by third parties (which are regulated and independent to varying degrees) with

[175] Fair Labor Association, 'Supply Chain Traceability And Transparency' (*Fair Labor*, 27 December 2017); <https://www.fairlabor.org/projects/supply-chain-mapping-transparency-and-traceability/ > accessed 25 October 2023.
[176] See generally A Claire Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2018).
[177] Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15.

complicated relationships with the company being audited, the niche and issue-specific nature of certifications, and the difficulty of making certification schemes mainstream due to the multiple differing standards around.[178]

The MSA and the FDV notably differ in respect of their underlying approach to enforcement in that the latter compels companies falling within its ambit to draw up a vigilance plan with substantive obligations, while the former merely compels companies to report on their existing plans. Consequently, the MSA seems to be a form of transparency legislation that "merely endorses existing voluntary reporting without strengthening legally binding standards", although it does compel companies that meet its threshold requirements to make a statement, which moves it beyond purely voluntary reporting but only formally due to the low substantive requirements.[179]

Schedler conceptualises accountability as the link between the ability to know what an actor is doing, and the ability to make an actor do something else, which raises questions of whether transparency is able to provide for the also-important second portion of this requirement.[180] However, this does not mean that transparency plans always stand on the weaker end of the spectrum when it comes to implementing wider reforms, such as through cultural change. For example, Hale identifies three forces – market pressure, external discourse, and internal norms, that can have regulatory effect, but these accountability tools have their limitations as well and an accounting actor is crucial to holding them to account.[181] Transparency regulation can be effective, but only if robustly enforced and complied with diligently: the identification and communication of risks, if done properly, can genuinely transform corporate culture by changing internal organisational behaviour and core values, and alter directors' decision-making calculus. Hale also suggests that transparency can enhance regulatory

---

[178] Brendan May, 'Marine Stewardship Council: All Certification Schemes Have Their Limits' (*Reuters Events*, 1 November 2010); <https://www.reutersevents.com/sustainability/business-strategy/marine-stewardship-council-all-certification-schemes-have-their-limits/> accessed 25 October 2023.

[179] ibid.

[180] A Schedler, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc F Plattner (eds), *The Self-restraining state: power and accountability in new democracies* (Lynne Rienner 1999).

[181] Thomas N Hale, 'Transparency, Accountability, and Global Governance' (2008) 14 Global Governance: A Review of Multilateralism and International Organizations 73.

effects of norms and discourse. In addition, consistent reports to shareholders can be said, at least theoretically, to help them make informed decisions in exercising their right to vote for certain strategic decisions, or even interact and hold shares in companies. However, this is often not the case. Hess views that seeing transparency programmes such as the EU Directive on the Disclosure of Non-financial Information as a model for legislation is problematic due to several reasons.[182] Human rights metrics used in current reporting standards are based on data that is "easily collected, rather than most important", while problems of selective disclosure, impressions management, incomparable disclosures, and the use of disclosure as an end in itself (as opposed to a process that leads to organisational change) weakens such regimes.[183] Hess therefore suggests that moving forward, regulators should shift to a model based on regulatory pluralism that combines targeted transparency regulations that correct one disclosure mechanism's weaknesses through the complementary strengths of other mechanisms.

Specifically, the reporting obligations under the MSA require very minimal substantive disclosure and mostly relies on "non-coercive enforcement"[184]. Lacking a strong regulatory mechanism to police the quality of disclosures, and a willingness to enforce sanction, reporting may be both inadequate and counterproductive. In particular, misleading or overly rosy disclosures may paint "false realities" and be "detrimental to hopes of improving rights of workers and communities in the global supply chain."[185] This is especially crucial given the importance of third parties in the supply chain, which companies may not have oversight of in the first place. While there ought to be some sort of duty of vigilance (by whatever name known), there is the practical point that it is hard to know what one's suppliers are doing in far-off countries.[186]

On the other hand, however, there may be a potential for information overload via

---

[182] David Hess, 'The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights' (2019) 56(1) American Business Law Journal 5.
[183] ibid.
[184] Tim Bartley, *Rules without Rights: Land, Labor, and Private Authority in the Global Economy* (Oxford University Press 2020).
[185] Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21 Chicago Journal of International Law 323.
[186] Bright (n 43) 1.

transparency initiatives that affect the ability of stakeholders to make informed decisions. For further example, Laud and Schepers argue that there needs to be a focus not just on increased regulatory disclosure but also on “decipherable, useful and timely” information intelligibility for primary decision makers – an example raised is how many reviews of Enron’s Special Purpose Entities (SPEs) had limited idea of the depth of the problem because of the sheer volume of information received. Further, corporate leadership have also raised excuses of having unintelligible information in defending corporate fraud, suggesting that stakeholders much more “distant” to the process may find it even more difficult to make reliable decisions based on such unintelligible information.[187] At worst, “collective consumer cognitive dissonance”, as coined by Kawakami in his research on how laws advocating for transparency could do more harm, could result.[188] Such dissonance can result in apathy, disillusionment and contribute towards regulatory failure.

Hosseini, Shahri, Phalp and Ali therefore, propose that reference models (in the context of information systems) to manage stakeholder transparency requirements should include consideration of:[189]

(a) The actors involved in the process of transparency provision and the information flow among them
(b) The meaningfulness (in terms of comprehensibility) of the information made transparent through the disclosure of information
(c) The usefulness of such information for a particular audience in providing them with decision-making capabilities through disclosed information
(d) The quality (in terms of reliability and thoroughness) of information disclosed to its stakeholders.

Therefore, although transparency has been a crucial legitimation strategy for actors

[187] Robert L Laud and Donald H Schepers, ‘Beyond Transparency: Information Overload and a Model for Intelligibility’ (2009) 114(3) Business and Society Review 365.
[188] Mark T Kawakami, ‘Psychological Oversight: Why Bills Advocating for Transparency Could Do More Harm’ (2013) 2(1) Edinburgh Student Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242728> accessed 26 October 2023.
[189] Mahmood Hosseini and others, ‘Four Reference Models for Transparency Requirements in Information Systems’ (2018) 23 Requirements Engineering 251.

and institutions[190], it is equally important to approach meaningful transparency requirements from the perspective of both "information receivers and transparency seekers".[191] Social legitimation is a crucial tool for companies that cannot be understated – for example, Rio Tinto, which destroyed the Juukan Gorge caves in May 2020 to expand its Brockman 4 mine, met legal requirements but faced immense public and investor backlash for prioritizing profit over heritage, leading to bonus cuts in their leadership.[192] Transparency seekers, for example, might be actors– such as regulatory bodies and non-governmental organisations – that compel transparency actively and in an iterative process rather than being passive recipients of this.

Transparency can function as a means to an end in terms of pressuring profit-seeking corporations to act in accordance with their wider societal responsibilities for reputational reasons, particularly when other stakeholders, like institutional investors, take an active interest in such issues.[193] However, there is an intrinsic value to transparency in promoting accountability for its own sake: in a democratic society, there is a need to hold the powerful to account, even certain private entities.[194] There is, of course, a broader point to be made about the importance of corporate culture and the need to address culture to bring about a true root-and-branch change: it is hoped that such meaningful change can be achieve through greater stakeholder engagement, facilitated by such increased transparency.[195]

3.2.2. Due diligence models and a focus on risk assessment

Another model is the "due diligence model", which places responsibility on corporate actors to do proper audits and checks to ensure that human rights are respected in their

[190] Daniel R McCarthy and Matthew Fluck, 'The Concept of Transparency in International Relations: Towards a Critical Approach' (2016) 23 European Journal of International Relations 416.
[191] Mahmood Hosseini and others, 'Four Reference Models for Transparency Requirements in Information Systems' (2018) 23 Requirements Engineering 251.
[192] Clyde Russell, 'Column: Rio Tinto's Weak Response to Cave Blasts Will Trigger Stronger Reaction – Russell' (*Reuters* 25 August 2020) <https://www.reuters.com/article/us-column-russell-mining-rio-tinto/column-rio-tintos-weak-response-to-cave-blasts-will-trigger-stronger-reaction-russell-idUSKBN25L0JH> accessed 26 October 2023.
[193] Bright (n 43).
[194] Jane Nelson, 'The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct' (2007) Corporate Social Responsibility Initiative Working Paper No 34.
[195] Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human RightsViolations in the Global South?' (2021) 22 Human Rights Review 109.

operations, which is followed by the FDV. This concept of human rights due diligence is defined in the UNGPs 17-21. However, Salcito and Wielga identify that what human rights due diligence really means is complex, because previously, the Special Representative of the Secretary-General had "focused on the language of impact assessment"[196] through a study on the complex societal impacts of business activity.[197] However, this is rather inconsistent with the language of risk assessment in the final text of the UNGPs. Salcito and Wielga note that the difference between human rights impact assessments and human rights risk assessments is not currently "well defined", but have "quite distinct histories in corporate decision making".[198]

Human rights risk assessment (HRRA), which is more founded in enterprise development, views negative outcomes to human rights as important to managerial decisions and aims to identify downside risk. In contrast, human rights impact (HRIA) are more directed towards operational design and implementation and are utilised as tools to establish strategies.[199] The terminology of "impact assessment" might have been intentionally excluded in the UNGPs because these are less appropriate for assessing business relationships as compared to physical footprint of a project, and the use of risk-assessment terminology was to "ensure that business relationships, inclusive of relationships between financial backers and project implementers,"[200] fell within the ambit of human rights due diligence.

However, Bueno and Bright identify a "certain amount of uncertainty"[201] on the interplay between liability and involvement in adverse human rights related impact, citing, for instance, how commentary to Principle 17 of the UNGPs makes a comparison between the "non legal notion of contribution and the legal concept of

---

[196] Kendyl Salcito and Mark Wielga, 'What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?' (2018) 3 Business and Human Rights Journal 113, 114.
[197] Human Rights Council, 'Report on the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: human rights impact assessments – resolving key methodological questions', A/HRC/4/74 (4 February 2007).
[198] Kendyl Salcito and Mark Wielga, 'What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?' (2018) 3 Business and Human Rights Journal 113, 114.
[199] ibid, 115.
[200] ibid.
[201] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International and Comparative Law Quarterly 789, 794.

complicity in criminal law".[202] This generates a liability gap where the operations, products, or services are directly linked an adverse human rights impact but fall short of direct causation or contribution, which is one of the difficulties underlying juridification and especially criminal sanctions.[203]

3.2.3. A growing tide to due diligence models

Still, human rights regulation is becoming increasingly strengthened and is moving from a non-binding, advisory approach to more comprehensive legally binding duties.

Two recent legal developments of note in this area are *Okpabi v Royal Dutch Shell*[204] and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited.*[205] .The first case involves the judicialisation of corporate responsibility to respect human rights in the context of parent company liability in various jurisdictions, which will have knock-on implications on corporate liability in the larger value chain.[206] The second case refers to legal developments in specific multiple jurisdictions that not just encourage, but require companies to undertake human rights diligence to address modern slavery concerns.[207]

Bright, Marx, Pineau and Wouters[208] consequentially argue that corporate responsibility to respect human rights is progressively turning into a legal duty for lead companies to respect human rights in value chains where a lead company has a high

---

[202] This specifically became an issue in the FDVA scheme as certain criminal sanctions within that framework were considered to be unconstitutional: *Décision n° 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*
[203] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International and Comparative Law Quarterly 789.
[204]*Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191.
[205]*AAA & Others v Unilver PLC and Unilever Tea Kenya Limited [*2018] EWCA Civ 1532.
[206] See, for example, *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191, [23].
[207] While parent companies arguably have certain moral duties in respect of their subsidiaries, there are specific issues in English tort law in ascribing legal duties in a way that pierces the corporate veil: *AAA & Others v Unilver PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532, [36] says,'There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case.'
[208] Claire Bright and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business and Politics 667.

level of control over its business partners.[209] Generally, this changing tide is contrary to previous trends of "neoliberal trade liberalisation", which enabled markets to deprioritise or disregard social, environmental and human rights protections under the guise of removing barriers to trade under international trade organisations and trade agreements.

The prominence of the due diligence model has the potential to be further strengthened by the European Commission's announcement on the 29 April 2020 that it would introduce legislation in 2021 to make human rights due diligence mandatory for countries in the European Union[210]– a move that the UK is unfortunately, unlikely to come under considering the impetus behind Brexit and deliberations henceforth.

This EU initiative represents a high-water mark for international corporate human rights due diligence, and was in part inspired by the FDV, where France was the first country to pass such mandatory diligence in 2017 with calls for reform following since. The Commission also indicated in its announcement that it would consider the need to include provisions allowing corporate abuse victims to claim remedies, while also potentially going one step further than the FDV and extending the due diligence obligation to also include assessment of environmental impact as well. Recently, the EU Parliament has also issued an update as to the final shape the new legal regime is taking. "This law is a historic breakthrough. Companies are now responsible for potential abuses in their value chain, ten years after the Rana Plaza tragedy. Let this deal be a tribute to the victims of that disaster, and a starting point for shaping the economy of the future - one that puts the well-being of people and the planet before profits and short-termism. I am very grateful to those who joined me in the fight for this law. It ensures honest businesses do not have to participate in the race against cowboy companies," lead MEP Lara Wolters (S&D, NL) said after the end of negotiations.[211]

---

[209] *Vedanta Resources PLC and anor v Lungowe and others* [2019] UKSC 20.

[210] Hallitsija, 'European Commission Promises Mandatory Due Diligence Legislation in 2021' (30 April 2020); <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/> accessed 26 October 2023.

[211] European Parliament News, 'Press Releases' (14 December 2023); < https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment#:~:text=The%20new%20directive%20on%20corporate,pollution%2C%20deforestation%2C%20excessive%20water%20consumption> accessed 8 January 2024.

Prior to making this announcement, the European Commission carried out a study published on 24 February 2020, which included comparative analysis of different proposals based on due diligence requirements[212]. It identified that only just over one-third of (large) business respondents indicated that their companies undertook due diligence that considered all human rights and environmental impacts, with another third undertaking due diligence limited to certain areas. In addition, the majority of respondents who did carry out due diligence only included first-tier suppliers, while both business and general respondents indicated that the current legal landscape was not perceived as effective, coherent and efficient and did not provide companies with legal certainty about human rights and environmental due diligence obligations. Kali and Reyes identify that global supply chains are usually dynamically hierarchical and comprise a focal company surrounded by satellites at various levels, inclusive of upstream and downstream partners.[213] Wen and Zhao therefore argue that liability from common law negligence has only been successfully applied to holding companies in regard to subsidiaries' health and safety offences, which is significant enough to cause disruption in enforcing s54. Consequently, they propose that the three-part *Caparo* test of foreseeability, proximity, and reasonableness could equally apply to supply chain relationships and inform regulatory interactions between tortious liabilities of the focal company and supply chain disclosure.[214] Applying the analysis from first principles this could extend beyond first tier suppliers, particularly if companies have held themselves out as carrying out detailed audits on their suppliers' compliance with modern slavery regulations, for example.[215]

The study also assessed a range of regulatory models, from no change (Option 1), new voluntary guidance (Option 2), due diligence reporting (Option 3), or mandatory due diligence requirements with a legal duty of care requiring companies to take

---

[212] European Commission, 'Press Corner' (24 February 2020); <https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_323> accessed 26 October 2023.
[213] Raja Kali and Javer Reyes J, 'The Architecture of Globalization: A Network Approach to International Economic Integration' (2007) 38 International Business Studies 595.
[214] Shuangge Wen and Jingchen Zhao, 'The Bumpy Road of Home States' Regulation of Globalized Businesses - Legal and Institutional Disruptions to Supply Chain Disclosure under the Modern Slavery Act' (2020) 69 Catholic University Law Review 125; *Caparo Industries PLC v Dickman* [1990] UKHL 2.
[215] See, for example, JD Wetherspoon, 'Anti-Slavery and Human Trafficking Statement 2018/2019' (29 July 2018), <https://wikirate.s3.amazonaws.com/files/5398930/20688963.pdf/> accessed 26 October 2023.

objectively reasonable steps to discharge this duty of care (Option 4). Importantly, respondents were unconvinced that new voluntary guidance under Option 2 would lead to significant social, environmental, and human rights impact, with interviewees generally agreeing that "there is already enough voluntary guidance." Therefore, Option 4 was considered to have been the route taken by the FDV, as well as the EU Conflict Minerals Regulation 2017/821/EU, as compared to less onerous due diligence models under Option 3, which was the route taken by the EU Non-Financial Reporting Directive 2014/95/EU, as well as the modern slavery reporting obligations introduced by the UK, Australia, and California. However, further survey on the specificity on the preferred form of due diligence obligation revealed that respondents believed that there was a significant overall preference for general, cross-sector regulation that takes into account the specifics of particular standards for different sizes of companies across industries. This preference for regulation that does considers the specifics of each company holds despite there being an overall preference for underlying general standards that applied irrespective of size. While such variability in expectations can be problematic, this is arguably expedient and practical. Still, this is a genuine problem for small and medium enterprise businesses that lack economies of scale, as uniform regulation tends to benefit larger market players who consequently lobby for this as a means of excluding new entrants into the market.

In addition, comparison between empirical results of the MSA, and other more robust diligence plans suggest that transparency plans may fall short of the level of strength needed to sustain meaningful change. Since its inception in 2017, the FDV has catalysed approximately a dozen legal actions against major French corporations, a significant empirical indicator of its operational effectiveness. These cases are not mere statistics but represent a fundamental shift in corporate accountability. Specifically, companies from high-impact sectors such as oil, finance, and food manufacturing and retail have been propelled into the legal spotlight, underscoring the law's extensive reach and the seriousness with which its mandates are enforced.[216]

[216] Christelle Coslin and Margaux Renard, 'First Court Decision Interpreting the French Duty of Vigilance Law' (Hogan Lovells, 2 March 2023) https://www.engage.hoganlovells.com/knowledgeservices/news/first-court-decision-interpreting-the-french-duty-of-vigilance-law accessed 26 October 2023.

For example, on February 23, 2023, three non-profit organisations - Oxfam, Friends of the Earth, and Notre Affaire à Tous - initiated legal proceedings against BNP Paribas, accusing the bank of significantly backing fossil fuel industries and, consequently, heavily contributing to global climate change. A few weeks earlier, in January 2023, Danone received a legal notice from three different NGOs — Zero Waste France, ClientEarth, and Surfrider Foundation Europe. This action was notable as Danone was the inaugural French publicly traded company to adopt the status of a "Société à mission." The legal action against Danone was preceded by an official warning issued in September 2022 to various entities in the food and retail sectors—including Auchan, Casino, Carrefour, Danone, Lactalis, McDonald's France, Les Mousquetaires, Nestlé France, and Picard Surgelés—pertaining to their utilisation of plastics across their supply chains.

The empirical significance of the law is further highlighted by the Paris Civil Court's ruling in February 2023, the first of its kind and a concrete example of the law's practical application.[217] The case reinforces the importance of the collaborative dialogue between corporations and stakeholders, a unique feature of the French legal framework not mirrored in the UK's legislation, and gives more flesh to practical implementation of the FDV. For instance, the court's decision sets a precedent that goes beyond theoretical postulation, offering tangible evidence of how the FDV functions in practice and the legal ramifications of non-compliance. The court's interpretation adds a pre-litigation step for NGOs, emphasising that a formal notice must be sent months before court proceedings. This step aims to foster communication and potentially resolve issues amicably, aligning with the law's emphasis on collaboration and dialogue. However, the case also highlighted a procedural nuance. The NGOs' grievances, initially targeting the company's 2019 vigilance plan, shifted focus to the 2021 plan during the proceedings, leading the court to rule that the NGOs failed to adhere to the pre-litigation formal notice requirement. Additionally, the court outlined its limited jurisdiction in summary proceedings, chiefly verifying the existence and adequacy of a vigilance plan and identifying any blatant legal breaches.

[217] Simmons & Simmons, 'Latest News Regarding the French Corporate Duty of Vigilance Law' (Simmons & Simmons, 10 March 2023) https://www.simmons-simmons.com/en/publications/clf2ktvec022iu7l00mypqgri/latest-news-regarding-the-french-corporate-duty-of-vigilance-law accessed 26 October 2023.

This landmark decision will significantly influence forthcoming cases, given this court's exclusive jurisdiction over such claims. It prompts companies and stakeholders to re-evaluate their strategies, particularly emphasising the “co-construction of the plan” and the importance of dialogue during its formation. Furthermore, the ruling may encourage NGOs to pursue full-fledged common proceedings for a more comprehensive assessment of vigilance plans, reserving summary proceedings for clear-cut violations.[218]

Moreover, the FDV's influence is not insular but has had a ripple effect across the EU. The German Act on Corporate Due Diligence in Supply Chains, effective from January 2023, mirrors the proactive spirit of the French statute, suggesting the beginning of a data-backed trend towards more enforceable human rights protection within corporate governance. This empirical approach extends to anticipated EU-wide regulations. The proposed EU Directive on Corporate Sustainability Due Diligence, expected to synchronise due diligence obligations across member states, is also a testament to the growing recognition of the need for legally binding, enforceable frameworks supported by real-world application and results.

In contrast, the softer obligations under the MSA, have faced criticism for its limited impact in driving systemic change, particularly within high-risk sectors. This "soft law" approach, characterized by its emphasis on companies' self-reporting without stringent legal requirements or robust enforcement mechanisms, starkly contrasts with the FDV and more assertive legal frameworks like the US's Section 307 of the Tariff Act, which empowers authorities to ban imports suspected of links to forced labour, a move that has catalysed significant repayments from suppliers seeking entry into the lucrative American market.

Empirical data over the past five years, as compiled by the Business and Human Rights Resource Centre, underscores this discrepancy. The MSA despite raising awareness, has been largely ineffective in fostering substantial improvements in corporate

[218] Christelle Coslin and Margaux Renard, 'First Court Decision Interpreting the French Duty of Vigilance Law' (Hogan Lovells, 2 March 2023) https://www.engage.hoganlovells.com/knowledgeservices/news/first-court-decision-interpreting-the-french-duty-of-vigilance-law accessed 26 October 2023.

practices to tackle modern slavery. According to the Business and Human Rights Resource Centre, approximately 40% of companies persist in non-compliance, with no substantial legal repercussions, such as injunctions or administrative penalties, applied.[219] This regulatory leniency extends even to public sector supply chains, where issues are rampant, particularly among outsourced service staff like cleaners, who often face exploitative working conditions.

3.2.4. Problems with actionability in diligence models

Actionability in diligence models refers to the ability of a fact or quality to give cause for legal action. In order to be actionable and not ring empty as pure marketing tools, human rights risk assessments need to be able to trigger follow up and remediation. However, a joint study[220] by Norton Rose Fulbright and the British Institute of International and Comparative Law (BIICL) found that although 50% of surveyed companies had conducted some form of due diligence to evaluate their impact on human rights, 77% of companies that identified issues with their business relationships chose to address this solely amending contractual conditions. This purely internal and paper-driven approach potentially lacks depth – a simple rhetorical change in the paperwork would not necessarily be as helpful as a requirement to produce third party audits.

In addition, the study identified that although the UNGPs had explicitly highlighted that companies can have "an impact on virtually the entire spectrum of internationally recognised human rights,"[221] most interviewees only drew attention to labour rights risks in their supply chain, when other human rights violations including environmental and economic violations might also result from corporate practices (although the MSA as currently conceived only addresses forced labour, child labour,

[219] Business and Human Rights Resource Centre, 'Conclusions from Monitoring Corporate Disclosure' (February 2021) https://media.business-humanrights.org/media/documents/MSR_Embargoed.pdf accessed 14 October 2023.
[220] Norton Rose Fulbright, 'Exploring Human Rights Due Diligence' (February 2017); <https://www.nortonrosefulbright.com/en/knowledge/publications/0a6e811f/exploring-human-rights-due-diligence> accessed 26 October 2023.
[221] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Commentary on Principle 12 (UNGPs).

and human trafficking). Salcito and Wielga[222] note that this approach is inconsistent with the UNGPs, which "requires direct engagement with affected stakeholders",[223] and is "expected to be carried out differently by different entities to address different business enterprises and business relationships."[224] This idea that due diligence in itself is not a panacea is strengthened by commentary in Principle 17 of the UNGPs itself, which brings to bear the point that "business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[225]

What is considered to be appropriate action taken depends on the degree of involvement that a business had in causing the adverse impact – namely, when a business causes an adverse impact on human rights, it should take the necessary steps to cease this impact[226], and mitigate to the best of its ability any residual impact.[227]

Bueno and Bright also emphasise that aside from the degree of involvement in the adverse human rights impact, what is considered appropriate also depends on the leverage the company has over its business relationships and whether it should act on or increase its leverage, failing which, consider terminating this relationship.[228] The issue thus cannot simply be buried. This is, for example, in a situation where suppliers of a company use child or bonded labour to manufacture contrary to the terms of its contract but without any intentional or unintentional pressure from the enterprise to do so. A framework for degree of involvement and consequently measuring appropriate action could be the five types of value chains identified by Gereffi, Humphrey, and Sturgeon[229], based on the level of power asymmetry between buyers and suppliers,

[222] Kendyl Salcito and Mark Wielga, 'What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?' (2018) 3 Business and Human Rights Journal 113.
[223] ibid.
[224] ibid, 114.
[225] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Commentary on Principle 17 (UNGPs).
[226] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Commentary on Principle 19 (UNGPs).
[227] ibid.
[228] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International and Comparative Law Quarterly 789.
[229] Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12 Review of International Political Economy 78.

namely, markets, modular value chains, relational value chains, captive value chains, and hierarchy. The most extreme form of power asymmetry would be a hierarchy, where there is vertical integration of companies operating within the same industry, but below that, captive and relational value chains (for example) are characterised by transactionally dependent and highly monitored smaller firms, and mutual dependence respectively. Relational, modular, and market value chains have relatively more balanced power relations, where dynamics of control by lead firms are milder.

3.2.5. A Middle Point

A middle ground between the MSA and FDV seems to be the model followed in the UK Bribery Act 2011, which does explicitly not make compulsory the creation of a vigilance plan, but states that companies have a defence to the offence of bribery if they have "adequate procedures" in place, such as due diligence mechanisms[230]. This does not compel a specific course of action but creates strong inbuilt incentives for corporations to do so (and which has largely succeeded) and in a way which best fits their particular circumstance. This failure to prevent approach has subsequently been extended into the tax evasion sphere. Since suggested by the then Attorney General, Jeremy Wright QC MP in 2014, there have also been proposals to create a new corporate offence of preventing economic crime such as fraud when committed on behalf of or in the name of companies.[231] Similar to the MSA and the FDV, the Bribery Act originated as a reaction to widespread public outrage, in particular, the criticism received by the international community (such as the Organisation for Economic Co-operation and Development (OECD)) due to scandals such as those involving the BAE Systems, which was a "final blow"[232] for the UK government.

Prior to the Bribery Act, UK anti-bribery law was described as "inconsistent, anachronistic, and inadequate", with prevailing obligations having a stunted impact in policing bribery and corruption within British companies. For instance, the OECD

---

[230] Bribery Act 2010, s 7.
[231] Michael Goodwin, Michelle Sloane and Aimee Riese 'Failing to Prevent Economic Crime' (*Law Gazette*, April 9, 2019); <https://www.lawgazette.co.uk/practice-points/failing-to-prevent-economic-crime/5069921.article> accessed 26 October 2023.
[232] Gordon Belch, 'An Analysis of the Efficacy of the Bribery Act 2010' (2014) Aberdeen Student Law Review 134, 135.

published a report in 2008 stating that "overall, the Group is disappointed and seriously concerned with the unsatisfactory application of the [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions] Convention by the UK."[233] However, the years following the Act told a different story, suggesting that the Act did have a tangible impact despite its lack of a positive due diligence obligation.

Guidance for the Bribery Act was published in 2010, before the act came into force, and provided clear and practical advice on anti-bribery systems that what constituted "adequate procedures" for the purposes of a defence in the act. This was later updated in 2017 by Transparency International UK, which considered evolving anti-bribery legal and best practices that have evolved since the original genesis of the act. While bribery falls more squarely within the ambit of criminal law than modern slavery issues, this is a relatively recent development.[234]While controversial, the greater criminalisation of modern slavery rules is certainly not beyond the pale.[235]

3.2.6. The Potential for Self-Regulation and Meta Regulation

Aside from focussing on what external regulation can do, one should also not discount the rich potential for interaction with the companies being regulated themselves. As Carroll and Schwartz suggest, combining different strategies might be the best method to motivate a cultural change, that "encompasses the economic, legal, ethical, and discretionary expectations that society has of organisations at a given point of time."[236] With this in mind, self-regulation, is arguably a process where industry participants (rather than at a governmental level or within a firm only) introduce codes of practice that inform conduct within the industry. Rather than being an "esoteric distraction from more important mainstream policy instruments", they can be effective and complement existing regulatory efforts. Rees introduces three forms of self-regulation,

---

[233] OECD Directorate of Financial and Enterprise Affairs 'United Kingdom: Phase 2 bis' (*OECD*, 16 October 2008); <http://www.oecd.org/unitedkingdom/41515077.pdf> accessed 26 October 2023.

[234] James Lindgren, 'The Theory, History and Practice of the Bribery-Extortion Distinction' (1993) 141 University of Pennsylvania Law Review 1695, 1696 – 1698.

[235] See, for example, the nuance in *Décision n° 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*

[236] Mark S Schwartz and Archie B Carroll, 'Corporate Social Responsibility: A Three-Domain Approach' 13 Business Ethics Quarterly 503.

namely, voluntary, mandated, and mandated partial self-regulation.[237] In this situation, mandated partial self-regulation might be the best description of the current status quo, where both privately written rules are either privately enforced, or publicly written rules are internally enforced.

Gunningham and Rees argue that there are significant benefits to industry self-regulation, such as speed, flexibility, sensitivity to market circumstances, and lower costs (and thus arguably greater coverage)[238]. For example, industry practitioners have more in-depth and practical knowledge of the industry which might lead to more realistic standards that can consequently be better enforced. Internal industry peer pressure, as well as public comparison of peer companies, can raise general standards of behaviour and internalise responsibility for compliance. For example, increasing public concern to do with data privacy and collection issues have drawn privacy regulation into the limelight, with previously impervious tech companies such as Google, Facebook, and Amazon attempting to publicise their compliance with measures such as the General Data Protection Regulation out of fear of both formal pecuniary sanctions, as well as a public diatribe.

But one key difference is that industry actors do not do this out of charity, with Cheit[239] being on one end of the cynical spectrum and suggesting that "private standards-setting…is thought to be controlled by those who want the least done" as "consensus standards" of least resistance. This is especially reflected by Shamir's suggestion that corporate social responsibility contains a set of "vague, discretionary, and non-enforceable corporate responses to social expectations."[240] Still, being driven by private interests does not necessarily exclude forces for moral constraint and developing a well-developed industry morality.

---

[237] Joseph Rees, 'Self-Regulation: An Effective Alternative to Direct Regulation by OSHA?' (1988) 16(3) Policy Studies Journal 605.
[238] Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (2002) 19 Law & Policy 363.
[239] Ross E Cheit, *Setting Safety Standards: Regulation in the Public and Private Sectors* (University of California Press 2018) 212.
[240] See e.g., Ronen Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' (2004) 38(4) Law & Society Review 635 and Ronen Shamir, 'Mind the Gap: The Commodification of Corporate Social Responsibility' (2011) 28 Symbolic Interaction 229.

But separate from pure self-regulation, meta regulation also incorporates insight from external regulators, which can direct targets (entities to which the regulation applies and on whom the consequences of non-compliance are imposed). There are multiple varying definitions of meta-regulation, such as whether it focuses on the interaction between governmental regulation and self-regulation, or whether it refers more broadly to the interaction between different regulatory actors or levels of interaction.[241] Generally, however, this generally talks about how "each layer of regulation regulates the regulation of each other in various combinations of horizontal and vertical influence,"[242]and the "proliferation of different forms of regulation, whether tools of state law or non-law mechanisms, each regulating each other, as a key feature of contemporary governance."[243] In other words, one must consider the overall regulatory framework when considering such issues from the perspective of meta-regulation, or regulating the regulations.[244] For example, there has been efforts by government bodies to promote or even oversee self-regulation. An example raised by Coglianese and Mendelson is how the Securities and Exchange Commission (SEC) in the United States oversees the New York Stock Exchange and the National Association of Securities Dealers.[245] To an extent, self-regulation is unavoidable on a decentred analysis which draws upon social constructivism and autopoietic theory.[246]

In the sphere of corporate social responsibility and sustainable development, Rahim suggests that these two terms have become intercorrelated and convergent, and could be incorporated through business self-regulation in "weak economies where nonlegal drivers are inadequate or inefficient."[247] Where the overall legal-regulatory framework is not robust, then these broader factors take centre stage. This intercorrelation arises

---

[241] Martin Lodge, 'Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate' in Steven J Balla, Martin Lodge and Edward C Page (eds), *The Oxford Handbook of Classics in Public Policy* (Oxford University Press, 2016).
[242] Christine Parker and others, 'Introduction' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004), 6.
[243] John Braithwaite and Christine Parker, 'Conclusion' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004), 269.
[244] ibid.
[245] Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook On Regulation* (Oxford Unversity Press, 2010).
[246] Julia Black, 'Decentring Regulation: Understanding The Role Of Regulation And Self-Regulation In A Post-Regulatory World' (2001) 54 Current Legal Problems 103.
[247] Mia Rahim, 'Harnessing SD and CSR within Corporate Self-Regulation of Weak Economies – a Meta Regulation Approach' (2013) 118 Business and Society Review 513.

due to a semantic shift in what constitutes economic growth – where more inclusive objectives are part of a concerted outcome into achieving profit goals. In terms of human rights and modern slavery objectives, more robust supply chains could conceivably be integrated into the same proposition as well.

In weaker economies, however, this convergence is difficult to integrate into formal mandatory regulation because of the absence of public interest advocacy groups, the lack of organisation of civil society groups, high corruption rates, and a lack of media interest on specific issues.[248] In contrast, strong economies may be able to impose sanctions on corporate behaviour, even if not to a fully effective extent.[249] This is most commonly done by disclosure and publication requirements, which also draw on strong media entities to reinforce public rejection of businesses and particular products. In contrast, in weak economies, Belal suggests that the usual corporate attitude towards (for example) environmental responsibility is contained in the corporate dictum that "we are complying with all the rules and regulations, but we do not need to disclose"[250], due to the lack of strong market infrastructure and independent institutions. In essence, one has not escaped the laws of the jungle: he who carries the biggest stick prevails.

Braithwaite therefore, suggests that in such weaker economies, governments are the most powerful external stakeholder group to review business operations and intervene.[251] However, weaker economies cannot rely on either extreme of corporate self-regulation, or command and control authoritative regulation to reach corporate responsibility goals. Parker and Braithwaite therefore see the meta- regulation approach as a more responsive way to connect corporate regulations and ground-level sociological conditions, which places it at the "intersection of state regulation and self-regulation." Meta-regulation explicitly promotes "responsible and democratic moral deliberation about values and obligations by businesses."[252]

---

[248] ibid.
[249] Severyn T Bruyn, 'The Moral Economy' (1999) 57 Review of Social Economy 25.
[250] Ataur Rahman Belal, *Corporate Social Responsibility Reporting in Developing Countries: the Case of Bangladesh* (Routledge 2016) 38.
[251] John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34 World Development 884.
[252] John Braithwaite and Christine Parker, 'Conclusion' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004), 269.

According to Parker and[253] Braithwaite[254], law that meta-regulates corporate social responsibility needs to be directed towards policy goals or values that companies can take responsibility for, and not just end-result compliance with output rules. This is especially because the intricate details of corporate responsibility are often negotiated with industry[255]. Therefore, meta- regulation needs to be about requiring organisations to implement processes that help them reach the idea goals. For example, organisations need to institute responsibility into its structure and go "beyond compliance" via formal governance structures and management systems, such as communication programs, demonstrations of commitment, and information dissemination programs, in an iterative process that also includes audits that "feed back to the highest level and into the design and operation of the systems."[256]

An example of legal meta-regulation is for example, by determining "whether corporations have implemented appropriate compliance systems" through "determinations of corporate liability" and introducing "good legal risk management practice to implement processes to ensure internal corporate responsibility for meeting regulatory goals."[257] Another tool of legal meta-regulation is where regulators "settle potential regulatory enforcement actions with businesses only on condition that they implement internal changes to identify, correct and prevent future wrongdoing"[258], or where probation orders are made requiring companies to do specified things as a portion of the sentence on the organisation. Thirdly, another technique of meta regulation involves requiring companies to implement "internal corporate conscience mechanisms"[259], as a "condition of licenses or permissions required" before companies can engage in certain activities – an example being raised of how local community consultations are often required in permissions processes in environmental

[253] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2010); John Braithwaite and Valerie Braithwaite, 'The politics of legalism: Rules versus standards in nursing home regulation' (1995 4 *Social and Legal Studies* 307.
[254] John Braithwaite and Valerie Braithwaite, 'The politics of legalism: Rules versus standards in nursing home regulation' (1995) 4 *Social and Legal Studies* 307.
[255] ibid.
[256] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2010) 88.
[257] See also, Bribery Act 2010, s 7 for a similar approach in the bribery sphere.
[258] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2010).
[259] ibid.

management systems, and how financial services firms are required to introduce certain internal systems and abide by investor disclosures (such as know your client processes) to obtain financial licenses. Such measures work best when bolstered by full and frank disclosure of relevant information to all stakeholders in the interest of transparency.[260]

Ruiz-Benitez de Lugo[261] suggests that the transparency statement in the MSA constitutes a meta-regulation approach, as companies are given "maximum flexibility in deciding how to structure their statements", and this would "encourage in-depth analysis by each company as to how best to comply." Still, such a comply and explain system needs to be complemented by stronger formal legislation – for example, the MSA only suggests that companies might disclose information in the suggested categories rather than requiring strong disclosure against compulsory categories. An example of a stronger form of such meta-regulation might be found in the CTSCA, which requires companies to disclose their activities across five categories, namely, verification, audit, certification, internal accountability, and training. The current approach in the MSA has "created space for lax, rather than in-depth" compliance and "limited uptick in supply chain due diligence"[262], as compared to the CTSCA, where compliance measures are more effective. However, a balanced approach needs to be taken, as reflected in the Independent Anti-Slavery Commisioner's Annual Report[263], as this could stifle innovation and reduce compliance into a "tick-box exercise", inevitably reducing the social optimality of the regulation.

3.3. The Difficulty of Regulating Third Parties

---

[260] Jane Nelson, 'The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct' (2007) Corporate Social Responsibility Initiative Working Paper No 34.; Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human RightsViolations in the Global South?' (2021) 22 Human Rights Review 109.

[261] Lucia Bird Ruiz-Benitez de Lugo, 'Battling Human Trafficking: A Scrutiny of Private Sector Obligations under the Modern Slavery Act' (*Global Initiative*, 29 May 2018); <https://globalinitiative.net/battling-human-trafficking-a-scrutiny-of-private-sector-obligations-under-the-modern-slavery-act/> accessed 26 October 2023.

[262] ibid.

[263] Independent Anti-Slavery Commissioner, 'Annual Report 2015-16'; <http://www.antislaverycommissioner.co.uk/media/1097/annual-report-2016.pdf> accessed 27 October 2023.

3.3.1. An Onus on Multinationals

Given the pressure on reducing costs as well as the tide of globalization, companies rarely operate exclusively within one country and often have global supply chains involving suppliers, agents, distributors, brokers, transporters, and franchisees, to name a few. This generates both new opportunities as well as greater risk of monitoring.[264] This is reflected in areas outside of human rights abuses, and – according to a survey conducted by Ernst & Young in 2012, more than 90% of actions brought under the Foreign Corrupt Practices Act in the United States involved misconduct by a company's third party.

In February 2020, Refinitiv, a financial data institution, carried out a survey[265] of around 1800 global third-party relationship, risk management and compliance professionals about the scale, impact and challenges of third-party risk in relation to supply chains (via contractual mechanisms, audits or other means). Results were not promising: 60% of such professionals did not "fully monitor" third parties for ongoing risk, with 43% of third parties not receiving due diligence checks – 6% higher than the figure reported in 2016 and an unhappy indication of a growing trend. However, eradicating outsourcing would be unrealistic: 74% of respondents indicated that third party relationships enabled companies to be more flexible and competitive. The challenge of monitoring business partners remains one fraught with difficulty. This is especially so if the outsourcing is to a less regulated jurisdiction and where the first-tier supplier in effect subcontracts out to subsequent tiers that may be very loosely associated depending on rapidly fluctuating demand.

To address this, the FDV imposes requirements onto companies falling within its ambit to carry out extensive checks on their business partners, namely, companies that they directly or indirectly transact with (e.g. Suppliers, subsidiaries, and subcontractors). For instance, companies need to verify that remuneration paid to intermediaries are "value for money". However, in publishing guides to compliance,

---

[264] Manuel Castells, *The Rise of the Network Society* (2nd edn, Wiley-Blackwell 2009) 204 – 249.
[265] Phil Cotter, 'How Does Third-Party Risk Impact Supply Chains?' (*Refinitiv Perspectives* 26 May 2020); <https://www.refinitiv.com/perspectives/regulation-risk-compliance/how-does-third-party-risk-impact-supply-chains/> accessed 27 October 2023.

regulators need to balance between ensuring that companies are responsible for the entire supply chain, against a backdrop of information scarcity for the company at hand. According to Refinitiv's survey, 37% of respondents suggested that a "lack of data", and in particular, "reliable holistic data" was the biggest problem in identifying risk in their supply chains.

In addition, there is limited incentive to identify gaps in a supply chain created by third parties. For example, companies may fear providing detailed information on potential breaches or risks because of the fear of public criticism and naming and shaming.[266] There is also pecuniary potential for being treated the same (penalty-wise) as third parties for (inadvertent or not) complicity in infringement anyway, even if companies self-report gaps in their supply chain. This contrasts with the strategy opted by the Serious Fraud Office (SFO) in the Bribery Act, where as part of their strategy to fight bribery, they urged businesses to self-report[267] cases to them, with such self-reporting generating incentives such as reductions in fines and confiscations, and possibility of negotiating a civil settlement under the Proceeds of Crime Act 2002. In addition, the option of a Deferred Prosecution Agreement (DPA) under section 45 and Schedule 17 of the Crime and Courts Act 2013 presents a third way between civil recovery orders and no criminal action.[268] These stack up to provide compelling positive reasons for companies to actively seek to comply, rather than avoid or shun responsibility – a measure similarly utilized in the European Union's competition law rules which seek to generate compliance through self-reporting strategies.[269]

3.3.2. Capacity building in smaller supply chain participants

The UNGPs state explicitly that the "responsibility of business enterprises to respect

[266] Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81 Modern Law Review 1017.
[267] Serious Fraud Office Guidance for Corporates, 'Corporate Self-Reporting' (*Serious Fraud Office*, October 2012); <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/> accessed 27 October 2023.
[268] Ren-En Lim, 'Parting the Fog of the UK Bribery Act 2010: A Critical Discussion of What We Do Know about the Act and Why It Is in the Company's Interests to Comply with Its Provisions' (2017) 25 International Company and Commercial Law Review 1.
[269] European Commission, 'Competition Policy for the Digital Era'; <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf/> accessed 27 October 2023.

human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure."[270] In the joint study conducted by Norton Rose Fulbright and the British Institute of International and Comparative Law (BIICL), it was found that although most surveyed were large multinationals, their supply chains consisted of multiple small and medium-sized companies which lacked knowledge on the UNGPS and were less familiar with sophisticated human rights regimes, which relates back to the argument on economy of scale as discussed above in Section 3.2.3.[271] This is especially pressing in emerging economies, where small and medium-sized enterprises (SMEs) account for up to 60% of total employment.[272] In particular, such local companies on the ground needed to be handled with more of a capacity-building approach, such as through ongoing engagement and training. This can be exhausting for SMEs and multinationals themselves given the lack of guidance on how to help SMEs assist these issues specifically,[273] with 46% and 36% of SMEs in a joint survey carried out by the International Organization of Employers (IOE) and the International Labour Organization (ILO) being found to be lacking resources to meet their human rights responsibilities and being unsure about their obligations respectively.[274]

This is as contrasted against anti-corruption regimes, for instance, where the

[270] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Commentary on Principle 12 (UNGPs).
[271] British Institute of International and Comparative Law and Norton Rose Fulbright, 'Making sense of managing human rights issues in supply chains' (*BICL, 2018*) ; < https://www.biicl.org/documents/16_1937_making_sense_of_managing_human_rights_issues_in_supply_chains.pdf> accessed 20 August 2020; John G Ruggie, 'UN Guiding Principles, Principle 3 and Commentary, Letter of Response to a Public Letter by Swiss Business Associations Regarding Their Position on the Swiss Responsible Business Initiative' ; <https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 27 October 2023.
[272] World Bank, 'Small and Medium Enterprises (SMEs) Finance' (*World Bank*); <https://www.worldbank.org/en/topic/smefinance> accessed 27 October 2023.
[273] British Institute of International and Comparative Law and Norton Rose Fulbright, 'Making sense of managing human rights issues in supply chains' (*BICL, 2018*) ; < https://www.biicl.org/documents/16_1937_making_sense_of_managing_human_rights_issues_in_supply_chains.pdf> accessed 20 August 2020; John G Ruggie, 'UN Guiding Principles, Principle 3 and Commentary, Letter of Response to a Public Letter by Swiss Business Associations Regarding Their Position on the Swiss Responsible Business Initiative' ; <https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 27 October 2023.
[274] International Labour Organisation, 'Enabling Environment for Sustainable Enterprises' (*ILO*, 2017); <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/genericdocument/wcms_634222.pdf> accessed 27 October 2023.

International Chamber of Commerce specifically released an anti-corruption guide to help SMEs assess and manage corruption risk associated with engaging third party suppliers in light of the fact that such SMEs are "often on the receiving end of burdensome due diligence procedures of large multinational companies."[275] This guide provided "practical advice on how SMEs can cost-effectively conduct due diligence"[276], and is long lacking in the human rights diligence sector to empower multinationals and SMEs in actualizing the lofty goals of regimes. In addition, further regulatory support to encourage SMEs to adhere to human rights diligence, such as governmental incentives to SMEs fulfilling certain goals, as well as soft guidance via peer-learning opportunities and access to non-governmental organisations and experts[277] for personalised consultation is a crucial complement to any multinational-focused regulatory scheme.

There have been encouraging movements in turning greater attention to assisting SMEs to understanding the UNGPs and their responsibility to respecting human rights. In April 2019, the IOE in conjunction with global think-tank Shift, facilitated a workshop for 14 SMEs to explore challenges, experiences, and good practices for SMEs in implementing the UNGPs. This was only a small group and could be said to be self-selecting to an extent, because these SMEs had been pre-identified as sharing a "firm commitment to respect human rights and had varying experiences of putting respect for human rights into practice."[278]

Aside from capacity-building, however, SMEs that wish to be more compliant with human rights commitments need to know how to exercise leverage, whether contractually or otherwise, which may be lacking. Leverage is defined in the UNGPs

[275] International Chamber of Commerce, 'ICC Anti-Corruption Third Party Due Diligence: A Guide for Small- and Medium-Sized Enterprises' (*ICC*, 11 November 2016); <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/> accessed 27 October 2023.
[276] ibid.
[277] International Organisation of Employers, 'SMEs and the Responsibility to Respect Human Rights: A summary of a workshop with SMEs and IOE members on the UN Guiding Principles on Business and Human Rights' (May 2019); < https://shiftproject.org/wp-content/uploads/2020/01/index.pdf/> accessed 27 October 2023.
[278] ibid; see also Shift, 'Accountability as part of Mandatory Human Rights Due Diligence' (*Shiftproject.org*, 6 October 2020); <https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf> accessed 27 October 2023.

as "the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact."[279] However, participants in the aforementioned workshop voiced that as SMEs, they "lacked the concrete commercial leverage of larger multinationals" and consequently needed to "think more creatively about how to exercise their influence."[280] Such creative solutions offered included collaborating with similarly-sized industry peers to influence retailers, and having more intensive supplier selection processes. Outside of leverage training, empowering SMEs to re-shape their relationships through renegotiation is crucial as well.[281] In competitive markets, service or product price may be a crucial determining factor, but space for negotiation of non-price interests may still exists – for example, where the termination of a smaller supplier may lead to costly supply-chain disruption or uncertainties in locating similarly reliable suppliers.

3.4. The Role of Non-Governmental Organisations

3.4.1. A Diversity of Forms and Legitimacies

In the ground-breaking decision of *Nike v Kasky*, the claim of Californian consumer rights activist Marc Kasky against multinational sportswear manufacturer Nike was upheld by the US Supreme Court, which held that Nike had made false and misleading statements in relation to how much it paid its workers outside of the US.[282] Increasingly, in the realm of modern slavery and more generally, the appropriateness of third-parties like Non-governmental organisations (NGOs) bringing legal challenges against governmental and corporate entities in respect of human rights violations has gained traction.[283] There are different ways in which NGOs may engage with businesses in this sphere – the litigation route tends to be confrontational but an

---

[279] UN Guiding Principles Reporting Framework, 'Glossary'; <https://www.ungpreporting.org/resources/glossary/> accessed 27 October 2023.

[280] International Organisation of Employers, 'SMEs and the Responsibility to Respect Human Rights: A summary of a workshop with SMEs and IOE members on the UN Guiding Principles on Business and Human Rights' (May 2019); < https://shiftproject.org/wp-content/uploads/2020/01/index.pdf/> accessed 27 October 2023.

[281] ibid.

[282] *Nike, Inc. et al v Marc Kasky* [2003] USSC Case No 02-575.

[283] See for example*, R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386; *Keyu & ors v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

NGO may also engage in more consensual modes of communication such as through consultative processes.[284]

Similarly, NGOs come in numerous forms and vary in a non-exhaustive list of areas including funding, origin, size, purpose, and operations. There is no fixed or formal definition for NGOs, with the term being used inconsistently and the "diversity of NGOs straining any simple definition"[285]. The human rights community also lacks a firm framework to agree on "vetting NGOs" to ensure legitimacy, with definitional problems making it difficult to distinguish between "human rights groups deserving support or human rights groups deserving disbandment."[286] However, these organisations tend to represent a certain cause or subsection of society, and frequently call on tools such as campaigning, lobbying, and advocacy to influence public opinion and galvanize governmental change. Ayres and Braithwaite, interestingly, use a concept of PIGS (public interest groups) as a solution to the problem of regulatory capture, which allows government to retain the benefit of responsive regulation while allowing PIGs to operate as "private attorney generals" and given the same standing to "sue or prosecute under the regulatory state as a regulator."[287]

Crowley and Persbo identify significant growth in the number of NGOs in existence and posit that in at least specific areas, the growth in the number of NGOs coincides with a "perceived increase in the influence NGOs can and do exert upon governments".[288] For instance, human rights NGOs made substantial contributions to negotiations on the UN Charter and were key in making "human rights a vibrant and major force on the agenda of international diplomacy and discourse."[289] Article 71 of

---

[284] Jane Nelson, 'The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct' (2007) Corporate Social Responsibility Initiative Working Paper No 34.
[285] The Global Development Research Center, 'Definitions of an NGO' (*GDRC*); <http://www.gdrc.org/ngo/wb-define.html> accessed 27 October 2023.
[286] George E Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2009) 18 Michigan State University College of Law Journal of International Law 165.
[287] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1995) 101-132.
[288] Michael Crowley and Andreas Persbo, 'The Role of Non-Governmental Organizations in the Monitoring and Verification of International Arms Control and Disarmament Agreements' in John Borrie and Vanessa Martin Randin, *Thinking outside the box in multilateral disarmament and arms control negotiations* (UNIDR 2006) 225.
[289] William Korey, *NGOs and the Universal Declaration of Human Rights: 'A Curious Grapevine'* (Palgrave Macmillan 1998) 19; see also Claude E Welch, 'Review of NGOs and the Universal

the UN Charter also provides a legal basis for NGOs to receive consultative status within the UN and empower them to present their expertise and insights to UN bodies.[290]

They play a complicated role in each of these two pieces of legislation (the MSA and the FDV). On the one hand, they can be powerful forces holding companies to account where public regulators may be unable to – due to strictures or legislation or administrative red-tape. For instance, a number of NGOs have already independently come up with ranking systems to rate companies on their supply chain transparency efforts. Oxfam's "Behind the Brands" scorecard, for example, ranks companies on their supply chain transparency efforts, among other metrics.[291] Know the Chain also released a report that ranked companies on their effort to eliminate forced labour throughout the entirety of their supply chains as well.[292]

In addition, they can put pressure on companies to commit to voluntary, or strengthened reporting and transparency procedures. One example is the initiation of The Apparel and Footwear Supply Chain Transparency Pledge in 2017 and the publication of the Follow the Thread Report during the fourth anniversary of the Rana Plaza building collapse disaster in Bangladesh. The coalition, consisting of NGOs and strengthened by support from leading brands, urged more apparel and footwear companies to join 17 identified leading apparel brands to publish information to enable advocates, workers, and consumers to find out where their products were made.[293] Similarly, in 2018, NGOs Notre Affaire à Tous, Les Eco Maires, Sherpa, and Zea (together with 14 cities) called for Total to comply with the FDV in full, and in

---

Declaration of Human Rights: "A Curious Grapevine" by William Korey; Activists beyond Borders: Advocacy Networks in International Politics by Margaret E. Keck, Kathryn Sikkink' (2000) 22 Human Rights Quarterly 298.

[290] George E Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2009) 18 Michigan State University College of Law Journal of International Law 165.

[291] Behind the Brands, 'Company Scorecard'; <https://www.behindthebrands.org/company-scorecard/> accessed 28 October 2023.

[292] Know the Chain, 'The Benchmarks'; <www.knowthechain.org/benchmarks/3/> accessed 28 October 2023.

[293] Business & Human Rights Resource Centre 'Clothing companies should publish information about factories making their products to eliminate labour abuses, say unions & NGOs' (*Business-humanrights.org*, 25 April 2017); <https://www.business-humanrights.org/en/latest-news/clothing-companies-should-publish-information-about-factories-making-their-products-to-eliminate-labour-abuses-say-unions-ngos/> accessed 28 October 2023.

response, Total finally published a plan in 2019 which addressed the compliance issues raised by these parties regarding climate change issues.[294]

Another strong example of the power of independent NGOs coming in to fill the gaps left by government and private enterprise is the creation of a tool in June 2019 by NGOs Sherpa and CCFD-Terre Solidaire to identify companies subject to the law and verify whether they have published a vigilance plan, in response to their "regret that the French government did not set up any mechanism to monitor the law." This tool was developed in conjunction with data analysis specialist cooperative Dataactivist, with the twofold aim of enabling civil society actors to "keep the list up to date" and "enable all stakeholders to have access to published vigilance plans."[295] Evidently, this independent NGO-led initiative will increase transparency in this area.

3.4.2. A Duty to Consult

There is an "emerging body of literature"[296] that considers whether both national and international governmental organisations have a duty to consult with NGOs, where mandatory language is along the lines of how NGOs "shall be admitted", or whether consultation is merely "permissive"[297], a distinction which is significant in determining the nature of the regulatory space. A duty to consult is defined by Charnovitz as a duty to "listen with a good faith commitment to consider information provided by the consulting partner"[298], and could embrace general NGO access as well as specific advisory groups, stakeholder dialogues, and commentary.

There are strong intrinsic and instrumental reasons for why an inbuilt duty to consult

---

[294] Business & Human Rights Resource Centre, '14 cities & NGOs call on Total to comply with French Duty of Vigilance law' (*Business-humanrights.org*, 25 June 2019); <https://www.business-humanrights.org/en/latest-news/14-cities-ngos-call-on-total-to-comply-with-french-duty-of-vigilance-law/> accessed 28 October 2023.
[295] Sherpa, 'Companies subject to the duty of vigilance under the radar of NGOs' (*Asso-sherpa.org*, 27 June 2019); <https:// https://www.asso-sherpa.org/companies-subject-to-the-duty-of-vigilance-under-the-radar-of-ngos> accessed 28 October 2023.
[296] George E Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2009) 18 Michigan State University College of Law Journal of International Law 165.
[297] ibid.
[298] Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 American Journal of International Law 348, 368.

NGOs can be valuable to framing legislation. While there are cost and other implications for doing so, businesses arguably have a moral duty to engage in such consultation; further and pertinently, NGOs can be much closer to the ground on a granular supply chain level and can pick up insights from supply chain workers first-hand, that may pass unnoticed by inspectors or even company management themselves. Furthermore, Edwards notes that NGO's obligations to protect human rights (for instance), is an "obligation of result" rather than an "obligation of conduct" in terms of taking compliance steps or simply attempting to protect such rights.[299] This potentially provides a strong impetus and cuts through the noise of managerial compliance that may be attempted by less result-oriented organisations where the result involves human rights.

In fact, the importance of NGO information has long been recognised in international organisations, with NGOs exercising various modes of participation in UN processes to the extent that Willetts suggests that Article 71 of the UN Charter has become customary international law.[300] And, as early as 2003, the UN Secretariat had found that involving NGOs increasingly should "become a regular component of the General Assembly's work"[301]. In the UK, a practice of launching consultations regarding the MSA is laudable – for instance, in August 2019, a consultation was launched to strengthen the obligation under s54 of the MSA and to improve the quality of statements published, following the publication of an independent review of the MSA undertaken by Frank Field MP, Maria Miller MP, and Baroness Butler-Sloan published in May 2019,[302] which included significant communications with NGOs on the topic.

---

[299] George E Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2009) 18 Michigan State University College of Law Journal of International Law 165.
[300] Peter Willetts, 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN' (2000) 6 Global Governance: A Review of Multilateralism and International Organizations 191.
[301] Global Policy Forum, 'Panel of Eminent Persons on United Nations-Civil Society Relations (Cardoso Panel)' (*Globalpolicy.org*); <https://archive.globalpolicy.org/component/content/article/226-initiatives/32340-panel-of-eminent-persons-on-united-nations-civil-society-relations-cardoso-panel.html> accessed 28 October 2023.
[302] Lewis Silkin, 'Home Office consultation on modern slavery statements and compliance audit" (*Lewissilkin.com*, 15 August 2019); <https://www.lewissilkin.com/en/insights/home-office-consultation-on-modern-slavery-statements-and-compliance-audit/> accessed 28 October 2023.

However, NGOs are often, partisan, towards certain causes and may come into conflict with each other, or stymie efforts to strengthen legislation. These conflicts can occur at the fundamental level of policy, or occur at a process-stage where disagreements arise over where to reach a particular strategy or outcome. NGOs are answerable to their constituents. These constituents can be industry association members of the victims of the human rights cause they are pledged to. For instance, in the study carried out by the European Commission prior to introducing proposals for an EU-wide mandatory due diligence framework, company and industry association survey respondents were out of sync when it came to expressing preferences over their preferred regulatory model. Interestingly, whether or not for purely altruistic reasons, a large number of companies themselves expressed support for a mandatory due diligence regulation, as compared to the industry organisation respondents, the majority of which were in favour of the least enforceable regulatory options – although it was unclear the extent to which these supporting companies were large businesses or not.

In addition, any duty to consult needs to be supported by a strong framework distinguishing between legitimate and less successful NGOs in order to separate the chaff from the wheat.[303] In his work focused on human rights NGOs, Edwards identifies certain characteristics that he believes are critical for successful human rights NGOs, such as their[304]:

(a) Mission;
(b) Adherence to human rights principles;
(c) Legality;
(d) Independence;
(e) Funding;
(f) Non-profit status and commitment to service;

[303] To an extent, the English courts already do so in relation to public interest standing for judicial review applications brought by NGOs where the suitability of the relevant applicant is assessed broadly, considering factors like their expertise and resources: *R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd* [1994] 4 All ER 329 (No 2). Such a multi-textured analysis, while not always straightforward, is clearly possible.

[304] George E Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2009) 18 Michigan State University College of Law Journal of International Law 165.

(g) Transparency and accountability;
(h) Adaptability and responsiveness;
(i) Cooperative and collaborative nature; and
(j) Competence, reliability and credibility.

By no means does Edwards intend this to be an exhaustive or exclusive list, as some of these characteristics may overlap, and there may be NGOs which do not possess all of these characteristics which are successful and vice versa. However, having a framework within legislation or at least guidance on how to circumscribe the range of opinions that should be consulted is crucial.

To conclude, the UK Government's recent response[305] to the consultation on the Transparency in Supply Chains provision in the MSA has been the subject of criticism by NGOs[306], based on the fact that no meaningful sanctions and enforcement measures seem to be on the horizon. Furthermore, no specific timeframe regarding the proposed legislative amendments to the MSA has been provided. Five years on from the introduction of the MSA, if the UK claims to be a world leader on business and human rights, perhaps it ought to show some sense of urgency in introducing an effective enforcement mechanism, such as the proposed "Single Enforcement Body". It remains to be seen how effectively the regulatory architecture of modern slavery regime will evolve in the UK and beyond. However, it is quite evident that the regulatory infrastructure in relation to supply chain due diligence, at least in the global north[307], is likely to witness a paradigm shift towards the 'hard law'[308] end of the spectrum over

[305] Home Office, 'Transparency in Supply Chains Consultation – Government response' (22 September 2020); <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf> accessed 28 October 2023.
[306] Corporate Justice Coalition, 'Joint civil society response to the Government's response to the Transparency in Supply Chains consultation' (*Corporatejusticecoalition.org*, 26 October 2020); <https://corporatejusticecoalition.org/wp-content/uploads/2020/10/Civil-society-joint-response-to-Government-TISC-response_FINAL-261020.pdf > accessed 28 October 2023.
[307] Shift, 'Accountability as part of Mandatory Human Rights Due Diligence' (*Shiftproject.org*, 6 October 2020); <https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf> accessed 28 October 2023.
[308] Anita Ramasastry, 'Mandate of the Working Group on the issue of human rights and transnational corporation and other business enterprises' (United Nations Human Rights Office of the High Commissioner, 22 October 2020); <https://www.ohchr.org/Documents/Issues/Business/EU_Directive_on_HR.pdf> accessed 28 October 2023.

the next two years.[309] As the winds of change continue to blow through the UK's modern slavery regulatory landscape, the current state of play cannot be taken as static. This is a dynamic area globally, and the tensions that exist within the current framework are a symptom of how this is an area of flux.

309 Elisabeth Nadal, 'Multinationals and human rights abuses: are there any good news?' (Open Democracy, 27 October 2020) <https://www.opendemocracy.net/en/democraciaabierta/lmultinacionales-abusos-derechos-humanos-hay-alg%C3%BAn-avance-en/> accessed 28 October 2023.

Chapter 4: Modern Slavery and the case for its protection under the Companies Act 2006 and the UK Corporate Governance regime

The detrimental impact of the social norm of shareholder primacy that company law has allowed to dominate can hardly be over-estimated. Taking back the power of company law to define what the purpose of the company is – re-embedding it in society – and what the duties of the board and by extension management must be, is clearly key to changing how business operates - Beate Sjåfjell[310]

[310] Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) Business and Human Rights Journal 179.

Chapter 1 of this thesis sought to lay down the research methodology to be used in establishing the case for reforming director's duties (specifically s172 of the CA) for protection against modern slavery, Chapter 2 laid down the literature and some preliminary observations, while Chapter 3 laid down the current regulatory framework as it exists whilst also identifying some areas for reform. In line with this, Chapter 4 will not only capture the historical trajectory of the relevant director's duties but also highlight how the modern regulatory regime can be effectively reformed, in step with comparative jurisprudence as well as academic discourse on the subject. The work of two leading experts on the subject, Dalia Palombo and Daniel Attenborough, is discussed in particular detail.

In this chapter, other than the MSA, two key areas of the UK law and regulation where the case for increased protection against modern slavery can be made will be highlighted and discussed, namely:

(i) The CA, specifically s172 and 414 of the CA; and
(ii) The UK Corporate Governance Code (CGC), the Wates Corporate Governance Principles for Large Private Companies and the UK Stewardship Code.

Before moving forward, the obvious question, or, more accurately the elephant in the room, must be addressed. Namely: in the presence of the MSA, why is there a need to reform the CA in relevant parts and the Corporate Governance regime?

The answer to this question lies with Nigel Topping who recognised the five mechanisms through which disclosure leads to a behavioural change in the corporate culture.[311] While there are various models that seek to enunciate the means of effecting institutional behavioural change, the Topping approach is both clear and generally accepted as being the most comprehensive intellectual framework in this field.

[311] Nigel Topping, 'How Does Sustainability Disclosure Drive Behavior Change?' (2012) 24(2) Journal of Applied Corporate Finance 45.

Firstly, the "WGMGM" way (i.e., "what gets measured gets managed"; a term coined by the Adair Turner of the Financial Services Authority). For Topping, this essentially translates into providing valuable insight by the use of metrics, such that he quotes that in 2006 when Walmart submitted its questionnaire to Carbon Disclosure Project (CD P), it figured out two things. Firstly, that its carbon footprint due to refrigerants used in the department stores was more than its truck fleet, and secondly that 92% of its carbon footprint was beyond its direct control. Hence, this led to increased engagement with suppliers and commitment to reduce supply chain emissions.

Secondly, the "Strategic Conversation". Such that when you require a corporation to disclose its strategy to deal with any ESG[312] matter, it led to the board room discussion regarding, for example, the company's current statistics or the trends around the world, which in turn leads to more informed and insightful strategies rather than a mere compliance statement (see discussion below). Topping quotes the leading technology company EMC saying that the formulation of an informed strategy led them to track their strategies' implementation which led to discovery of increased cost-saving opportunities, new plant locations etc.

Thirdly, consider bench-marking. Topping states that the key to disclosure requirements leading to changed corporate behaviour is to develop a standardisation of ratings. A rating is a compressed representation of all that the company has done in an annual year to address the ESG problems into one single metric. It gives the company an opportunity to assess its performance with that of its peers, competitors and neighbours, identifying which competitive edge led to changed behaviour.

Fourthly, "Investor Use of Data". This is by far the most volatile and effective method of driving ESG conscientious behaviour in corporations. To explain this head, it would be better to quote Aviva Investors which stated that:

[312] That is to say, "Environmental, Social and Governance". This is a broad category of considerations that a corporation ought to have regard for which go beyond the "pure" profit motive.

The CDP[313] data helps us to determine the quality of an individual company's management response and is a factor in our overall buy, sell and hold decisions. When necessary, we make specific recommendations for change. At Aviva Investors we take this very seriously as the average length of time we hold a stock is for six years, which is longer than most companies long term strategy. At one extreme, if such a company had not even bothered to respond to the CDP, then we tell them that unless this changes, we may vote against the report and accounts at the company's next AGM. This is proving quite a successful sanction.[314]

Therefore, after requiring the companies to disclose their metrics, the same data can be provided to the institutional investors, who will then effect the requisite change in their own right as the "owner/shareholder" of the company.

Finally, look at investors raising the bar. This essentially amounts to investors taking a more proactive role in regulating the company's carbon emissions and ESG compliance. While this puts the focus squarely on investors, it should be noted that other stakeholders do have a role to play, sometimes in an analogous capacity.

Therefore, the answer to the questions asked above is simple: increased disclosure requirements led to changed behaviour in the corporate boardroom (to the extent that such measures can be quantified and, therefore, effectively managed). Such that, the annual reporting envisioned in the CA and CGC will result in the MNEs being more aware of the ground realities of human exploitation and abuse (and/or modern slavery) in the supply chains and employee matters. More awareness will in turn translate into more willingness to do something (the WGMGM model) and encourage changes in the prevailing corporate culture within the MNE itself and

[313] "CDP" refers to a global corporate governance initiative formerly known as the "Carbon Disclosure Project".
[314] Nigel Topping, 'How Does Sustainability Disclosure Drive Behaviour Change?' (2012) 24(2) Journal of Applied Corporate Finance 45, 47, quoting from CDP, 'Case Study: Aviva Protects Clients by Driving Action on Climate Risk' (*Cdp.net*, 1 January 2014) <https://www.cdp.net/en/articles/investor/case-study-aviva-protect-clients-by-driving-action-on-climate-risks > accessed 28 October 2023.

its supply chain. Further, when required to disclose such information on their website (s426B of CA, discussed below) as well as in their annual and directors' reports, the board is more likely to adequately address them to mitigate any "reputational risk"[315] as well as to effectively compete with the competitors (the Bench-marking way) than to silently sweep them under the corporate rug, being the (usual) default option.[316]

In this vein and as will be further considered below, the recent report on modern slavery titled, "*Preventing Modern Slavery and Human Trafficking, 2021*"[317] by the Financial Services Sector makes this same argument, such that it identifies five key principles to adhere to in the fight against modern slavery. Namely, "Tone at the Top" (*inter alia,* acknowledgement by the directors of practices of modern slavery in their supply chains); "Detect and Disrupt" (i.e. the core of the MSA's due diligence requirement[318]); "Monitor and Report" (what the proposed changes discussed in this chapter to director's duties, the CGC and the Wates Principles would essentially bring about); "Invest and Engage" (what the proposed changes to the Stewardship Code would bring about); and, finally, "Support, Collaborate and Educate" (what non-profits can do).[319]

Such cultural and behavioural approaches, coupled with transparency and disclosure expectations, are indeed effective methods in driving systemic change within large organisations based on FDV ethos.

4.1. The Companies Act 2006

4.1.1. Introduction

[315] In the sense of the risk of negatively impacting the business because of bad publicity / overall business risk.
[316] See, for example, Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 (5) Harvard Law Review 1333, 1379.
[317] Themis International Services, 'Preventing Modern Slavery and Human Trafficking: An Agenda for Action across the Financial Services Sector' (2021) <https://respect.international/wp-content/uploads/2021/01/Preventing-MSHT-Full-Report.pdf /> accessed 28 October 2023.
[318] MSA 2015, s 54.
[319] Themis International Services, 'Preventing Modern Slavery and Human Trafficking: An Agenda for Action across the Financial Services Sector' (2021), 11 <https://respect.international/wp-content/uploads/2021/01/Preventing-MSHT-Full-Report.pdf /> accessed 28 October 2023.

Prior to the passing of the CA, directors' duties were largely governed by common law, drawing its principles from the law of trusts and agency.[320] Naturally, however, this arguably stymied legal clarity and accessibility to it for the laymen directors. While judges and lawyers may be well versed with skimming through finely-distinguished precedents, their precise application to specific facts[321], the same may not be readily apparent for a layman director. Therefore, a lack of clear and explicit codification of such duties was a key barrier in ascertaining what would and would not apply in any given situation. This further created a risk of (practical) legal retroactivity as directors may just as well be held accountable for adherence to duties which they did not know applied to them.[322]

Therefore, it came as no surprise that with the drafting of the CA, directors' duties were to be given statutory footing. Based on the Final Report of the CLRSG, this was done primarily with three objectives in mind.

Firstly, one must consider clarity and accessibility of the law, the former especially in terms of scope, i.e., in whose interest must companies be run, reflecting *"modern business needs and wider expectations of responsible business behaviour*"; next, to correct defects in the common law; and, finally, to make the development of the law predictable.[323] The case for reforms to increase protection against modern slavery is made with regards to the first of these fields in making the law more accessible and comprehensible so that the standards which businesses must adhere are made clear – both compliance *ab initio* and penalising non-compliance will become more straightforward.

---

[320] Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 (5) Harvard Law Review 1333, 1379; *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [14] to [16].
[321] Even then, the case law does not always speak with one voice. Contrast, for example, *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165 with *In Plus Group Ltd v Pyke* [2002] 2 BCLC 201 on the question of directors being able to compete with their company.
[322] See generally Parker Hood, 'Directors' Duties Under the Companies Act 2006: Clarity or Confusion?' (2013) 13(1) Journal of Corporate Law Studies 38.
[323] CLRSG, 'Modern Company Law for a Competitive Economy: Developing the Framework' (London, DTI, March 2000).

4.1.2. Historical Development of Directors' Duties, focussing on the "duty to promote the success of the company"

Ordinarily, the concept of a "director" of the company, and consequently the expectations from him, has been equated with that of a trustee of a trust fund, however, as Sealy argues this is misplaced.[324] Sealy states that in the earlier times, when the companies were largely unincorporated and were formulated by the deed of settlement, there were separate organs for the directors of a company – people that were to make executive risk-taking decisions as well as exercise managerial control over the company's assets, and trustees – people that held the legal title to the properties (although, sometimes these two organs would coincide).[325] Although, both the directors and the trustees could exercise control over the assets, the fact that only the trustees held legal title to them was treated as a mere technicality.[326] A director is not merely a trustee – the director has a fundamentally commercial role and this is reflected in the meaning and interpretation of the s172 duty. The paternalistic roots of trusteeship (acting as a *bonus pater familias*) are several steps removed from the role of the modern director.

The concept of trustees such as "trustees for the family trust assets" existed even before the eighteenth century.[327] However, Sealy argues that the whole concept of a "trustee" in the strict "true trust" sense, as it exists today, developed in the nineteenth century with the common usage of the word "fiduciary" and is self-evidently distinct from the role of a "director", such that the trustees were afforded very little discretion in dealing with the trust fund and their every act was carefully guided either by the directions of the beneficiary or the guidelines by the court.[328] On the other hand, a director's ability to deal with a company's property has no such restrictions and they are expected to exercise the "judgment of a business man" and undertake risks for the continued running of the company.[329] This is of course subject to certain restrictions on their powers, such as the ability to issue

[324] L S Sealy, 'The Director as Trustee' (1967) 25(1) Cambridge Law Journal 83.
[325] ibid 84.
[326] ibid 86.
[327] See for example, Keech v Sandford [1726] EWHC Ch J76.
[328] Sealy (n 302) 86-87.
[329] ibid 89, and as reflected in the so-called "indoor management rule": *Royal British Bank v Turquand* [1856] 6 E&B 327.

shares but only to raise capital and not only to dilute shareholding, which are primarily shareholder matters.[330]

That is of course not to say that the directors of a company do not hold any fiduciary duties, or that there is no overlap between the two concepts. The directors of the company, even with their risk-taking discretion are still the "*trustees of the money*", as per Lindley LJ in *Re Land's Allotment Co.*[331]*,* such that should corporate resources be grossly misapplied, their decision-making would be subject to a check by the courts of law. Against this historical backdrop, the (somewhat) fiduciary nature of the duties owed by directors to their company developed, such that Lord Cranworth LC in *Aberdeen v Blaikie Bros* held that:

> *A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal.*[332]

It is in this statement of Lord Cranworth LC that perhaps the first iteration of the current s172 (and s177) of the CA is found.

Over the years that followed, the "duty to promote the success of the company", meaning shareholder primacy[333], continued to develop, such that it is in the case of *Re Smith & Fawcett Ltd.*[334]that the traditional and more conservative formulation of this duty is found. Lord Greene MR held that:

> *The principles to be applied in cases where the articles of a*

---

[330] Sealy (n 302) 94; accordingly, it is considered "inevitable" that directors would have better knowledge of a company's affairs than the shareholders: *Vald Nielsen v Baldorino* [2019] EWHC (Comm) 1926, [744].
[331] *Re Land's Allotment Co* [1894] 1 Ch 616 per Lindley LJ.
[332] *Aberdeen Railway Co. v Blaikie Bros* [1854] 1 Paterson 394, 399.
[333] This being the dominant dogma in the UK: Jingchen Zhao, 'The curious case of shareholder primacy norm: calling for a more realistic theory' (2012) 15 International Trade and Business Law Review 1; Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' (The New York Times September 13, 1970) <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html/> accessed 28 October 2023.
[334] *Re Smith & Fawcett Ltd* [1942] Ch 304.

> *company confer a discretion on directors are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company.*[335]

Thereby, Lord Greene effectively gave a "subjective element" to this duty such that unless egregious circumstances exist, the court shall not interfere in the executive decision-making of the directors. This was further expanded upon by Jonathan Parker J in *Regentcrest v Cohen* wherein he held that:

> *The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director, at the relevant time, might have acted differently. Rather, the question is whether the director honestly, believed that his act or omission was in the interests of the company. The issue is as to director's state of mind.*[336]

The subjective test understandably has been criticised as giving the director's too much leeway to do as they please without any fear of accountability.[337] A director must turn his mind to the facts and be duly satisfied that he has come to an appropriate business decision – but it has often been said that reasonableness – like beauty – lies in the eyes of the beholder.

Furthermore, it was in 1970 in the case of *Charterbridge v Llyods Bank Ltd* that Pennycuick J formulated a more objective test to be applied to the "duty to promote the success of the company" as being "*whether an intelligent and honest man in*

---

[335] ibid 308 (Lord Greene MR).
[336] *Regentcrest plc v Cohen* [2001] BCC 494, 513 (Jonathan Parker J).
[337] Benedict Sheehy and Donald Feaver, 'Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted or Prescribed?' (2014) 37(1) Dalhousie Law Journal 345.

the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions are for the benefit of the company".[338] This more objective formulation of the objective test has subsequently been followed in the English case law, for example in *Madoff v Raven.*[339]

Accordingly, while a director's state of mind or *bona fide* views are of relevance, these have to be measured against what "*an intelligent and honest man*" would have done: it could be said that there are a range of reasonable actions which a director might legitimately take in any given situation, but that certain choices might fall outside of that band if no reasonable director would have taken them. The net result of this is that the director's "duty to promote the success of the company" as it exists in s172 (read together with s174) of the modern CA (and elsewhere in the common law world) is considered an objective-subjective standard.[340]

4.1.3. Director's Duties are owed to, and enforceable by, the Company

The CA itself upholds legal orthodoxy and the need to keep the law as certain as possible. It restricts the scope of the enforceability of such broad-brush duties to the company itself (or to a member bringing a derivative claim on behalf of the company within the meaning of Part 11 of CA). It normally does not allow even a shareholder or any other stakeholder (such as an employee in the supply chain, or organised activist groups which may have any interest in invoking the duties for the purposes of protection against modern slavery) to do so.[341] The old rule that

[338] *Charterbridge Corp Ltd. V Llyods Bank Ltd* [1969] 3 WLR 122.
[339] *Madoff Securities International Ltd (In Liquidation) v Raven* [2013] EWHC 3147 (Comm).
[340] *Charterbridge Corp Ltd. V Llyods Bank Ltd* [1969] 3 WLR 122; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *Re HLC Environmental Projects Ltd* [2013] EWHC 2876; also see, for example, the Western Australian case of *Bell Group Ltd. (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239. This decision built upon the foundational English case of *Barnes v Addy* (1874) LR 9 Ch App 244.
[341] In respect of shareholders, it is not inconceivable that directors being (secretly) involved in modern slavery and human trafficking could give rise to the usual shareholder claims, namely : CA 2006, s 994 unfair prejudice, CA 2006, s 230 derivative claim, *Universal Project Management Ltd v Fort Gillicker Ltd* [2013] Ch 551, [26] common law "multiple" derivative claim or, in the case of quasi-partnerships, causing a breakdown in trust and confidence justifying a just and equitable winding per *Chu v Lau* [2020] UKPC 24, [17]. However, such claims are simply not designed to deal with non-personal, non-pecuniary harm and so would require significant shoehorning to succeed.

the only proper claimant for a wrong done to the company is the company itself is still good law.[342] Although, as Dignam and Lowry note *"many environmental groups and employees hold shares in companies"* and so *"the section may well have more bite than it seems".[343]* However, as ordinary shareholders, it is trite law that one must first have the power to, for example, requisition a general meeting of the company and propose a resolution for the removal of directors who are not conducting the affairs of the company appropriately, i.e., (typically) own a 5% shareholding.[344]

What is interesting is that because of the plethora of individuals associated with the company, the scope of the CA might be broader than initially perceived. One could conceivably transition from viewing directorial duties as merely a private agreement among the company and directors to introducing a broader legal framework. This brings to mind the key question of the import of derivative claims in holding directors accountable for their decisions.

Derivative claims traditionally allow shareholders to sue insiders of the corporation, such as directors, executives, or other shareholders, for breaches of a duty, and offer a potential mechanism to enforce directors' duties and corporate accountability. Typically, the corporation itself would be the proper party to bring the suit, but the promise behind the derivative action is that the corporation is unwilling or unable to sue on its own behalf due to the wrongdoing of its leaders; thus, the shareholder steps in as a representative to protect the interest of the company and its shareholders. The promise of derivative actions specifically in addressing modern slavery in supply chains is not slight - shareholders could bring derivative actions against the board on behalf of the company. Additionally, the publicity surrounding derivative actions could be an extra-legal impetus to raise awareness of the MSA and its requirements among directors and other stakeholders, thus compelling them to take it more seriously.

---

[342] *Foss v Harbottle* (1843) 2 Hare 461; contrast this to the availability of public interest standing in the case of judicial review proceedings against government bodies: *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [2003] EWHC 1 (Admin).
[343] Alan Dignam and John Lowry, *Company Law* (10th edn, Oxford University Press 2018) 419.
[344] CA 2006, ss 168 and 303(2)(a).

However, they are far from a panacea. Reisberg comments that they can be expensive, time-consuming and disruptive; additionally, they can be used by shareholders to pursue personal agendas instead of the interests of the company. [345] If derivative actions in relation to the MSA are abused by strike suits filed by plaintiffs with no real interest in corporate governance or socially ethical outcomes, this could be counterproductive and demeaning to the entire raison d'être of the MSA. One could argue that in the United Kingdom, a shareholder must seek permission from the court to bring a derivative claim and that this serves as a sufficient filter for spurious claims, especially since the courts need to consider factors such as whether the member was acting in good faith. While this is certainly a filter, it is crucial to realise that the court's permission to disallow spurious derivative claims in relation to the MSA is reactive rather than proactive. In essence, the company's potential involvement in practices that violate the MSA might have already used harm before any derivative action is initiated. Further, the mere bringing of a publicity-heavy, but ultimately feeble and self-serving derivative claim in relation to the MSA by a member could tarnish a company's reputation unjustifiably even if they have taken steps to comply with it.

Any potential lack of proactiveness with derivative claims could be difficult, because shareholders may be more focused on financial outcomes rather than ethical concerns, leaving gaps in the enforcement of perceived non-commercial issues such as ESG concerns. This becomes even more problematic when considering passive institutional shareholders who may lack the motivation to initiate claims or monitor company's adherence to the MSA actively. Additionally, due to either regulatory or tax considerations, both institutional and individuals often possess their claims indirectly, anyhow. This complicates their ability to file a derivative claim without navigating a challenging legal process. Thus, while derivative actions have their place, relying on them solely would be an incomplete and potentially inefficient method to uphold the principles and objectives of the MSA.

---

[345] Reisberg, A. (2007). Derivative actions and corporate governance: Theory and application. Oxford University Press.

Even if non-spurious, sufficiently proactive derivative suits are brought forth, there are issues in circumscribing the court's permission to grant them. In the United States, recent shareholder derivative actions, like *Lee v Frost*[346], against OKPO Health, are illuminative of judicial stances on issues that may touch outside of the bottom line - in this case, on diversity in board representation. The plaintiffs accused OKPO Health of being disingenuous in their proclamations on valuing diversity and highlighted the dearth of diversity on the board and top management. What is interesting, however, is that the U.S. District Court for the Southern District of Florida dismissed the claim, not because this claim had no merit in itself, but because of the lack of concrete facts supporting the allegations. This pattern can also be seen in *Elliemaria Toronto ESA v NortonLifeLock Inc.*[347]*,* where the court ruled against claims that the latter had misled stockholders about its inclusion and diversity initiatives because the plaintiff's disclosures were puffery.

More recently, ClientEarth v Shell Plc & Ors[348] was an unprecedented step for a minority shareholder, ClientEarth, initiating a derivative claim against the board of directors of Shell in the UK. Encouragingly, noteworthy support came from important institutional investors in Shell, signalling a rising interest in fossil fuel divestment and litigation driven change. This underpinned a broader paradigm shift in the applicability of derivative claims, especially in the realm of environmental and human rights related issues. At the crux of their contention was Shell's perceived non-compliance with the Paris Agreement, posing a potential threat to the company's longevity. The claim was anchored in S172 and S174 of the CA, namely, the duty of promoting the long-term success of the company and acting with due diligence, care and skill respectively.

Despite all these encouraging signs, this suit however, hit a roadblock, when the English High Court declined permission for the claim by underscoring the autonomy typically granted to directors in decision making. The court's reluctance stemmed from its perception of derivative actions as exceptional and reserved for egregious cases, touching on how derivative claims need to be assessed against the

[346] *Lee v Frost* [2021] US Dist 232029 (SD Fla).
[347] EllieMaria Toronto Esa v NortonLifeLock Inc, et al [2021] WL 3861434 (ND Cal).
[348] ClientEarth v Shell Plc & Ors (Re Prima Facie Case) [2023] EWHC 1137 (Ch).

non-exhaustive list of factors contained in S263 CA. This is certainly disappointing and shows the limits of derivative claims - even if read together with statutory provisions enshrining certain obligations on companies. That activists are turning to various instruments and sources of legal obligation to enforce ESG related concerns simultaneously inspires and yet is a woeful critique of the failures of each: for example, ClientEarth also filed permission in 2023, challenging the United Kingdom's Financial Conduct Authority for approving Ithaca Energy Plc prospectus, arguing that it lacked proper climate risk disclosures and hindered investors' ability to judge Ithaca's financial status.[349]

However, a point should be made that any increased availability of derivative claims in ESG related corporate governance actions, while not mainstream yet, does not replace the need for strengthening of directors' duties under the CA to more robustly reflect the expanded scope of directorial oversight in global and more socially cognisant businesses. In the seminal Cayman Islands case, Renova Resources Private Equity Limited,[350] Foster J cited Gower,[351] clarifying that when derivative legal actions are permitted, the member is "not really suing on his own behalf or on behalf of the members generally, but on behalf of the company itself." Though the lawsuit may appear as if the shareholder represents other shareholders or himself/herself, in reality, "its true nature is that the individual sues on behalf of the company" and as a representative of the company - the rights stem from the company itself. This underscores the derivative action's fundamental nature: it is not a remedy for individual shareholders but a mechanism through which a company's rights, which might have been neglected or overlooked by its current leadership, can be vindicated.

This distinct character means that the existence of derivative actions serves a different, albeit complementary, function to that of directors' duties. While derivative claims allow shareholders to step into the company's shoes and ensure that its rights are upheld, strong and well-defined directors' duties ensure proactive responsibility, accountability, and care in the first place. The two mechanisms thus

[349] ClientEarth v. Financial Conduct Authority (Ithaca Energy plc listing on London Stock Exchange).
[350] Renova Resources Private Equity Limited [2009] CILR 268.
[351] Gower L, *Modern Company Law* (3rd edn, 1969) 587.

interact symbiotically: clear directors' duties set the benchmark for directorial conduct, and derivative claims provide a backstop to ensure these standards are maintained when internal company processes fall short. Therefore, to meaningfully advance the objectives of the MSA and truly embed ESG considerations into corporate decision-making, both robust directors' duties and a functional derivative claim system are essential. The strengthening of the former not only makes the latter more effective but also reinforces the evolving expectation of directorial responsibility in an increasingly interconnected and ethically-conscious global business environment.

Turning to the directors' duties enshrined in the CA:

Section 170(1) of the CA reads:

> *The general duties specified in sections 171 to 177 are owed by a director of a company to the company.*

This section essentially gives statutory effect to the rule in *Percival v Wright*[352], which concerned the usurpation of business opportunities and self-dealing. The shareholder brought a claim against the director for non-disclosure and lost. It was held that the director owes a duty to act in the best interests of the company and failure to disclose information regarding an on-going negotiation to a shareholder did not amount to breach of that duty. The director owes the duty to the company and not to the shareholder.[353] Similarly, in *Multinational Gas and Petrochemical Company Limited v Multinational Gas and Petrochemical Services Limited*[354], this principle was extended such that the duty is not owed to an individual shareholder, or to a creditor present or future, but to the company itself, such that if there is a breach by the directors that detrimentally affects the rights of the creditors, and such a breach has been ratified by the shareholders, a claim under director's duties does not lie. In this case, the court unanimously rejected the argument that a duty

[352] *Percival v Wright* [1902] 2 Ch 421, [33].
[353] Unless special factual circumstances apply: *Vald Nielson Holding A/S v Baldorino* [2019] EWHC 1926 (Comm), [747].
[354] *Multinational Gas and Petrochemical Company Limited v Multinational Gas and Petrochemical Services Limited* [1983] Ch 258.

is owed by the shareholders or the company to its creditors.[355]

The abundance of case law that has developed in this regard has further developed in a very circumscribed sense, such that a duty of disclosure may arise in certain takeover situations and close-family corporation setup, but not otherwise.[356] Surveying the precedents, it becomes apparent that the body of law under the CA has moved only slightly away from shareholder primacy approach to more responsible business behaviour or pluralism, that would give every stakeholder a right to hold the company accountable.[357]

Moreover, any attempt by an outsider to enforce such a course of action has been rebuffed by the UK judiciary. Since an outsider does not possess locus standi to bring a claim for enforcement of directors' duties, a novel way around is by means of a judicial review, albeit that is only possible in cases involving state entities. Such that, in the case of *R (on the application of People & Planet) v HM Treasury*[358], the claimant argued that the UK Financial Investments Ltd. (**UKFIL**) must adopt an interventionist approach and adopt policies so that they did not support businesses that were harmful to the environment by way of their carbon emissions or were insufficiently respectful of the human rights, and in this regard must require Royal Bank of Scotland, in which UKFIL was a major shareholder, not to do so. The judge held that UKFIL's policies were consistent with the Green Book published by the UK government which contained the British government's policy on climate change, and to require the UKFIL board of directors to go a step further, against the subjective reasoning and the consequent discretion allowed to them under the director's duties regime within CA, in protecting the environment, was not warranted.[359] Similarly, while a UK parent company may be found liable

---

[355] Although note that equivalent duties may be owed to creditors where companies are in the "zone of insolvency" (broadly, when a competent director would reasonably consider that there is a risk of a business becoming either balance sheet or cash flow insolvent in the short-term): *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 Note the s 172(3) duty is still owed to the company: it is to whom it is owed that changes.

[356] Likewise, special rules sometimes apply to the resolution of shareholder disputes in "quasi-partnerships" (generally, closely-held private companies): *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

[357] Jingchen Zhao, 'The curious case of shareholder primacy norm: calling for a more realistic theory' (2012) 15 International Trade and Business Law Review 1.

[358] *R (on the application of People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin).

[359] ibid [35].

in tort for human rights abuses committed by its subsidiaries abroad, this is only possible in very narrow circumstances.[360]

Simply put, as the law stands today, the fiduciary duty of the directors under the CA is owed to the company, the duty is to be exercised for the benefit of the company, and while this benefit has been statutorily made to include, for example, "community interests", no-one except the company itself can enforce such an interest and, as already discussed in detail in Chapter 1, since exploitation in the form of modern slavery is more often than not a practice that makes financial sense, it is highly unlikely that a company itself would want to enforce such a course of action, subject to any application of enlightened shareholder value or various stewardship codes of institutional investors (discussed below).[361] This is especially so because the pursuance of the long-term aims may directly conflict with the immediate interests of the company.[362] Evidently, more robust measures in this regard would be highly desirable.

4.1.4. Director's Duties under the CA: s172 and s174

Part 10 of the CA deals with the provision related to the company's directors while Chapter 3 deals specifically with the 'General Duties of Directors', spanning across s170 to 181. As discussed before in Section 4.1.2, the relevant provisions for this purpose are s172 and s174. Looking at it in the context that the director's duties within the CA were intentionally kept at "a high level of generality"[363] so as to resemble a mere statement of principles, the fact that s172 contains phrases such as, "impact…on the community", "desirability of…maintaining a reputation", "likely consequences…in the long run" "interest of the employees" and "need to foster…relationships with suppliers" suggests that s172 of the CA

---

[360] *Okpabi & ors v Royal Dutch Shell plc & anor* [2021] UKSC 3, [149] to [151].

[361] Such agency problems are a common theme in company law: John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems, Legal Strategies and Enforcement' (2009) Harvard Law School Discussion Paper No. 664; <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf> accessed 29 October 2023.

[362] Elaine Sternberg, 'The defects of stakeholder theory' (1997) 5 Corporate Governance 3.

[363] Law Commission and Scottish Law Commission, 'Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties' (1998) (Nos 261 and 173 respectively).

was far ahead of its time and intended to cater to the modern business practices, within the ethical business standards.[364] It is within these phrases that one strives to find the duty to protect against modern slavery.

Furthermore, while discharging this duty to act "in the best interests of the company" and give considerations to the relevant factors, the director is required to exercise "reasonable care, skill and diligence", within the meaning of s.174. This means that he must exercise the reasonable diligence expected of a person in that position, and if he possesses certain unique qualifications, he act to the standard of, say, a diligent accountant or solicitor and not against an ordinary reasonable person, as held in *Re City Equitable Fire*.[365] More commonly put, the test is that of "objective floor, subjective ceiling", such that an amiable lunatic is no longer safe and all directors must reach a minimum objective standard.[366]

Furthermore, in discharging their duty under s174 to be skilful, careful and diligent in promoting the success of the company, and giving due consideration to all the factors mentioned within s172, it does not help a director's case to be passive or inactive. In fact, they are required to be active and expected to keep abreast of the running of the company's business.[367] In the case of *Re Barings*[368], and then again in *Lexi Holdings v Luqman*[369], it was held that a director, even if he delegates his duties, has a duty to supervise the workings of the company and being passive, inactive or having no time is no defence to his failure to do so.

Therefore, while s172 talks about the duty to promote the success of the company,

---

[364] However, it is suggested that this so-called "Enlightened Shareholder Value" approach was a compromise between traditional Anglo-American conceptions of businesses as purely economic entities and a push towards "mandatory pluralism": Richard Williams, 'Enlightened Shareholder Value in UK Company Law' (2017) 35(1) UNSW Law Journal 360, 361.

[365] *Re City Equitable Fire Insurance Company Limited* [1925] Ch 407.

[366] *Re D'Jan of London Ltd* [1994] 1 BCLC 561; Blanaid Clarke, 'Duty of Care, Skill and Diligence—From Warm Baths to Hot Water' (2016) 56 Irish Jurist 139. Also see Vanessa Finch, 'Company Directors: Who Cares about Skill and Care?' (2016) 55(2) Modern Law Review 179 and the well-known trusts case of *Re Vickery* [1931] 1 Ch 572, 573 where a missionary without financial experience acting as trustee trying his incompetent best failed miserably, and was held liable for this failure.

[367] This is even so in the case of non-executive directors who ought to provide independent checks on management: *Equitable Life Assurance Society v Bowley & Ors* [2003] EWHC 2263, [41].

[368] *Re Barings plc* [1999] 1 BCLC 433.

[369] *Lexi Holdings plc (in admin) v Luqman* [2009] EWCA Civ 117.

the fact that it is complemented by s.174 makes the duty under s172 more prone to be measured against a strict and objective standard (the objective floor, subjective ceiling standard).[370]

4.1.5. Enlightened Shareholder Value

The concept of ESV became relevant in the western legal literature and the British legislative thought-process as the result of the rampant environmental and human rights abuses undertaken, intentionally or unintentionally, by the MNEs of the day. In fact, based on the compilation of Ministerial statements published by the Department for Business, Enterprise and Regulatory Reform (now Department for Business, Energy & Industrial Strategy) in June 2007, Margaret Hodge, the then-Minister of State for Industry and the Regions is recorded to have commented on s172 of the CA. She stated that it *"captures a cultural change in the way in which companies conduct their business*" and "*pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones".* However, in her same statement she also famously stated that this section can be seen either as marking a radical change or simply codifying the previous law, thereby showing that the whole issue is highly contested both as to the precise status of the common law prior to s172 and as to the precise effect of s172 after its enactment.[371]

Simply put, ESV means that instead of focussing solely on the financial gains of the shareholders, the company is also responsible for and *"should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests*".[372]

[370] *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; Re HLC Environmental Projects Ltd [2013] EWHC 2876; also see, for example, the Western Australian case of *Bell Group Ltd. (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239. This decision built upon the foundational English case of *Barnes v Addy* (1874) LR 9 Ch App 244.
[371] HC Deb 17 October 2006, vol 450, col 789.
[372] R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman Publishing, Boston 1984) 31; Committee on Corporate Governance, *Final Report* (Gee Publishing 1998) para 1.18; David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' (2010) Washington & Lee Legal Studies; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750> accessed 29 October 2023.

These long-run orientations found their way within s172 of the CA as, representatively, “impact…on the community”, “desirability of…maintaining a reputation”, “interest of the employees” and “need to foster…relationships with suppliers”.

Under s172 of the CA, the director is to “have regards to” these considerations while exercising their duty to act to “promote the success of the company for the benefit of the members as a whole”, a duty which is enforceable only by the company itself. The term “have regards to” actually means “give proper consideration to” measured against the subjective reasoning of the director himself and not by an objective standard, as clarified the Minister of State.[373] However, surveying the case developed under this regime, and detailed above, it becomes clear that where absolutely no consideration has been given, the court is still likely to apply an objective standard, perhaps reflecting what the court is more familiar with in general.[374]

4.1.6. The Case against reforming Director’s Duties to reflect Modern Slavery

Some have expressed opposition to increasing modern slavery legislation in this way. Particularly, in his open letter published with the Harvard Kennedy School[375], John Ruggie argues against the recent European Commission’s deliberations in favour of reforming director’s duties to reflect mandatory human rights and environmental due diligence requirements. He voices three specific reservations against this.

Firstly, directors are not the primary force behind the apparent problem of “short-termism”, rather the institutional investors are the drivers of this in their demand for consistently high and steady returns (see the discussion on the Stewardship

---

[373] HC Deb 17 October 2006, vol 450, col 789.
[374] See, for example, *Davies v Ford* [2020] EWHC 686 (Ch).
[375] John G Ruggie, ‘European Commission Initiative on Mandatory Human Rights Due Diligence and Directors’ Duties’ (February 2021) Harvard Kennedy School; <https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf/> accessed 29 October 2023.

Code, 2020 below). He states that, "*even union pension funds, university endowments and sovereign wealth funds have sought higher returns in riskier and shorter-term investments in order to meet their commitments to current and soon-to-be beneficiaries.*"

Secondly, opposition to such a change in the director's duties would be enormous, and may essentially vitiate the whole process. He states that in the US, hedge funds and private equity investors are the biggest opposition to "stakeholder statutes" and consistently lobby against it. Regardless of their precise motives, this general opposition towards "stakeholder statutes" is well-entrenched in the US.[376]

Finally, adding words to director's duties to include references to "stakeholder's concerns", such as in the UK company law, has made, "*little difference in practice, if any*". He says that the same is true of Canada, post-the ruling in *BCE v Debentureholders*, which was expected to navigate the board in a different direction.[377]

On the face of it, Ruggie's critique seems reasonable. However, the fact of the matter is that John Ruggie wrote this in the context of the US regulatory regime and the US market, which in many material aspects is very different from the UK corporate regulatory regime and the British market. For starters, the institutional investors and their averments to the stakeholder's interest is not such a big issue in the UK as it is in the US, since the Stewardship Code (discussed in detail below) was introduced and codified by the institutional investors themselves and boasts of hundreds of signatories since its introduction in 2018.[378] Ruggie's second scepticism is rebutted on the same grounds. Fundamentally, US corporate governance is rules-based whereas the rest of the world follows a principled approach.

---

[376] See, for example, Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563.

[377] *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560.

[378] Paul Davies, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020) European Corporate Governance Institute – Law Working Paper 506/2020/ <https://ecgi.global/sites/default/files/working_papers/documents/davies5062020final.pdf > accessed 29 October 2023.

However, as far as the third critique is concerned, this must be conceded. Such criticisms have been made in the UK context specifically too.[379] As argued in this thesis at numerous places, the current corporate regulatory framework, as it exists presently, is imperfect in many ways such as in its technicalities, market-compliance, legality, procedural/logistical issues, effectiveness and so on.[380] The fact that academics, politicians and lawyers are actively lobbying to reform the same speaks volumes.[381] Accordingly, Ruggie's critique, to the limited extent it applies to the UK, is not inconsistent with the arguments advanced in this thesis.[382]

Thirdly, it is crucial to recognise the role of judicial culture in these potential reforms. The disparities in judicial approaches, as vividly demonstrated in the Shell cases in Dutch and English courts, could also present significant challenges in revising s172 and s174 in a meaningful way. For example, Davies[383] highlights these disparities through a comparative examination of two cases involving ClimateEarth and Shell, showcasing how divergent judicial approaches can lead to markedly different outcomes in similar legal issues. One of the central themes in Davies' analysis is the contrast between the Dutch and English courts' approaches to setting commercial objectives for companies, particularly with respect to environmental concerns. The Dutch court's decision in the case of Milieudefensie vs. Royal Dutch Shell plc[384]

---

[379] Arad Reisberg, 'The UK Stewardship Code: On the Road to Nowhere?' (2015) 15(2) Journal of Corporate Law Studies 217.

[380] See generally: Vanessa Finch, 'Company Directors: Who Cares about Skill and Care?' (2016) 55(2) Modern Law Review 179; Paul Davies, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020) European Corporate Governance Institute – Law Working Paper 506/2020/ <https://ecgi.global/sites/default/files/working_papers/documents/davies5062020final.pdf > accessed 31 May 2021.; and Benedict Sheehy and Donald Feaver, 'Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted or Prescribed?' (2014) 37(1) Dalhousie Law Journal 345.

[381] See generally: Claire Bright, 'Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers MWP 2020/01, 1; Julia Black, 'Decentring Regulation: Understanding The Role Of Regulation And Self-Regulation In A Post-Regulatory World' (2001) 54 Current Legal Problems 103; and Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org* February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 8 March 2021.

[382] Business and Human Rights Resource Centre, 'Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards' (*Business-humanrights.org* March 2021) <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 29 October 2023.

[383] Paul Davies KC (hon), 'Shell: A Tale of Two Courts' (Oxford Business Law Blog, 6 October 2023) https://blogs.law.ox.ac.uk/oblb/blog-post/2023/10/shell-tale-two-courts accessed 29 October 2023.

[384] Vereniging Milieudefensie v Royal Dutch Shell plc, C/09/571932 / HA ZA 19-379 (Hague District

demonstrates a willingness to specify commercial objectives, holding Shell accountable for a 45% reduction in CO_2 emissions by 2030, including "scope 3" emissions. This decision was grounded in Dutch tort law's "unwritten standard of care," showcasing a civil law system's propensity for interpretive flexibility and reliance on soft law and international standards not directly binding on Shell. This proactive stance, however, faced criticism for potentially oversimplifying complex, multifaceted issues, such as the global responsibility for emissions reduction and the realistic impact of imposing such obligations on one company. In stark contrast, the English court in ClientEarth v Shell plc[385] upheld the traditional view that commercial objectives are a management prerogative, not judicial. The court's reluctance to serve as a "supervisory board" over Shell's climate strategy, despite allegations of breaches of directors' duties under s172 and s174, underscores the common law judiciary's reticence to intervene in corporate decision-making. This stance is reinforced by the principle articulated in Howard Smith Ltd v Ampol Ltd[386], emphasising that courts should not act as appellate bodies for management decisions. Furthermore, the court's finding that the derivative action lacked good faith, being more about advancing ClientEarth's policy agenda, reflects a judicial culture wary of activism perceived as encroaching on managerial discretion or being propelled by ulterior motives. These cases underscore that judicial culture matters immensely in the context of corporate governance reform. The Dutch court's activism might be seen as a leap forward in corporate accountability, aligning with international climate goals, yet it raises questions about judicial overreach and practical outcomes. Meanwhile, the English court's deference to corporate autonomy might preserve managerial discretion but at the cost of potentially overlooking broader societal interests and ethical imperatives, including those related to modern slavery. The hesitance shown by the English court, particularly, suggests that any reform to directors' duties in the UK, such as those proposed to address modern slavery concerns, would need to navigate deeply entrenched judicial principles. These principles prioritise corporate autonomy and view the court's role as limited in directing corporate behaviour. Thus, while legislative reform is necessary, its effectiveness may ultimately hinge on a judiciary's interpretative stance, which is informed by its cultural context. This underscores the

Court, 2021).

[385] Client Earth v Shell plc [2023] EWHC 1897.

[386] Howard Smith Ltd v Ampol Ltd [1974] AC 821.

multifaceted challenges in reforming directors' duties to reflect modern ethical concerns, requiring a delicate balance between legal mandates, judicial interpretation, and corporate governance practices.

4.1.7. Alternate solutions to ESV

Aside from Ruggie, others have expressed concerns about the ESV model. Palombo argues for three major solutions[387], other than the ESV, to address the "stake-holder interest" namely the "purpose objective", the "oppression claim" and "co-determination". Similarly, Attenborough's critique of the rule of shareholder's primacy model and the stakeholder's interest model[388] is relevant to the discussion at hand. He also introduces his own theory, which can be termed as an alternate to the ESV, that is "*The Equitable Maximization and Viability Principle*" (the "**EMV**"). Within this EMV, case for protection against modern slavery will be made.[389] In contrast, Keay is a proponent of the entity maximisation and sustainability model (the "**EMS**" model).[390]

This chapter will focus on the analysis of Palombo and Attenborough in particular, with the arguments advanced by Keay being integrated into the relevant sub-sections so as to facilitate comparative analysis. The paragraphs immediately below focus on Palombo's proposals relating to the "purpose objective", the "oppression claim" and "co-determination".

3.1.7.1. The Purpose Objective

Palombo argues that UK company law must require the corporations to state a purpose of the corporation, which should, for intents and purposes, guide the board

---

387 Dalia Palombo, "The Future of the Corporation: The Avenues for Legal Change" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 29 October 2023.
388 Daniel Attenborough, 'Giving purpose to the corporate purpose debate: an equitable maximization and viability principle (Winner of the SLS Annual Conference Best Paper Prize 2011)' 2012 Legal Studies 4.
389 ibid.
390 Andrew Keay, 'Ascertaining the Corporate Objectives: An Entity Maximisation and Sustainability Model' (2008) 71(5) Modern Law Review 663.

of director's decision-making rather than the principle of shareholder's primacy. She further states that this purpose could then be enforceable by the stakeholders of the company, rather than merely shareholders, by way of derivative action on behalf of the company and the like. She proposes to make changes to the s172 of CA to reflect this such that it should read:

> *A director of a company must act in the way that he considers, in good faith, would be most likely to promote the ~~success~~* ***purposes*** *of the company ~~for the benefit of its members as a whole~~.* ***In defining its purposes, a company must*** *have* ***fair*** *regard (amongst other matters) to*
>
> ***(a)*** ***the benefits of its members as a whole;***
> ***(b)*** *the likely consequences of any decision in the long term;*
> ***(c)*** *the interests of the company's employees;*
> ***(d)*** *the need to foster the company's business relationships with suppliers, customers and others;*
> ***(e)*** *the impact of the company's operations on the community and the environment;*
> ***(f)*** *the desirability of the company maintaining a reputation for high standards of business conduct; and*
> ***(g)*** *the need to act fairly as between members of the company.*
>
> ***The purposes of the company must represent a variety of interests.***
> ***If a company is part of a corporate group, the above obligations apply also in respect of the corporate group.***
>
> (emphasis added)

This stands in direct contrast with Keay's Entity Maximisation and Sustainability (EMS) model, which argues that the goal of the company is to maximise the wealth of the company as an entity, and to ensure that the company is sustained financially.[391] Such a model – seemingly – is fundamentally inward-looking, unlike Palombo's explicitly outward-looking "purpose objective". Of course, by

---

[391] ibid.

emphasising both the importance of the company as a separate legal entity and the goal of maximising the wealth of the company as an entity[392], the EMS model necessarily requires the directors, in the discharge of their management responsibilities, to consider all relevant stakeholders rather than simply striving to enrich shareholders. It could be said, therefore, that Keay's approach represents an ideological middle ground as between that of Palombo and Attenborough (discussed more below), on the one hand, and traditional / conservative views of company law within the common law world.

Such a "purpose objective" paradigm signifies a transformative shift from the traditional primacy of shareholder interests towards a more encompassing, multi-faceted vision of corporate objectives. However, while this is a revolutionary reconsideration on corporate direction, it has not gone without criticism. Davies,[393] in particular, brings forth five major objections.[394] Firstly, he objects over the mandatory integration of social or communal elements in business purpose statements. Secondly, he has doubts over the feasibly of adopting corporate purpose statements as he deems them "embarrassingly simple" as this will not be adopted by shareholders or directors. Thirdly, he believes this may be a use of the law to "shield" directors from adverse reactions from their shareholders. Fourth, this adopts an entity-centric, managerial view of the organisation. Last, there are inherent difficulties in the need for a higher regulatory body or using court oversight to determine corporate purposes.

Similarly, Fisch and Solomon[395] further question historical, doctrinal and theoretical bases for corporate purpose. They argue against the general belief that purpose can serve as a legal rein on managerial discretion or as an apparatus to boost stakeholder interests over shareholder priorities. It is true Fish and Solomon believe that contrary to what one might expect, the "mutability of the corporate charter" and "flexibility of the business judgment rule" gives corporate managers

---

[392] ibid.
[393] Davies, P. L. (2022) 'Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements' (ECGI - Law Working Paper No. 666/2022).
[394] Mayer, C. (2023) 'The Purpose of Corporate Purpose Statements: A Response to 'Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements' by Paul Davies' (ECGI - Law Working Paper No. 694/2023).
[395] ibid.

[396] enough leeway to think about stakeholder and societal interests "irrespective of a broad formulation of corporate purpose." They further dissect the real-world applications and limitations of corporate purpose, pointing out that mere statements of purpose, particularly when they're vague, offer neither direction nor legal protection to corporate stakeholders.

However, another practical difficulty arises in balancing the legitimate interests and expectations of different constituent groups are manifold. This becomes more pronounced when the objective is to crystalline a unified corporate purpose from these multitudinous interests. For example, a company's stakeholder ecosystem includes shareholders, employers, suppliers, customers, local communities and more. Each group contains unique aspirations and concerns, which may come into conflict with each other - for example, while shareholders may prioritise dividends and stock price appreciation (especially retail investors, who cannot usually be said to have a deep appreciation for the larger corporate purpose of a company), employees may emphasise job security and fair wages. An overarching corporate purpose that makes a pale attempt at encapsulating all these interests in a single statement or two may end up being too vague, lacking the specificity needed to guide managerial actions along operational ambiguity. Worse, an intentionally broad and inclusive corporate purpose could be exploited as a tool for greenwashing or superficially aligning with popular sentiment without genuine commitment. This risks eroding trust and making genuine social goals trite. Lastly, priorities evolve with time, external events, and shifting societal values, with stakeholders themselves having to contend with their own dynamic changes in their priorities. Any purpose statement would thus require continuous revisiting and potential calibration to remain relevant.

Mayer[397] suggests that Davies critique orbits a binary world view: one dominated by the Friedman doctrine, emphasising shareholder primacy, and another, that transcends mere financial profitability. His argument rests on the assertion that in either of these worlds, corporate purpose statements are either redundant or simply

[396] ibid.
[397] ibid.

unworkable. Mayer believes that contrary to Davies' interpretation, Palombo is not advocating for a dilution of board accountability, but rather its amplification, so the focus remains on shareholder centricity and diverges from Davies' entity-centric interpretation. In addition, he underscores the non-prescriptive nature of legally binding purpose statements, suggesting that they are not restrictive but empowering. This flexibility encompasses both private and social objectives, benefitting a myriad of stakeholders ranging from stakeholders to communities. Perhaps one of the more compelling facets of Mayer's rebuttal is the spotlight on an issue that Davies seemingly overlooks: the potential for corporations to harm others. Purpose encompasses more than profit, it can outline operational limits, stakeholder values, and societal impact. This potential harm has profound implications on market functionality and the willingness of corporations to commit genuinely to positive purposes. As Fisch and Solomon suggest, "no purpose statement can eliminate Chevron's carbon footprint or make Philip Morris' cigarettes healthy."[398] Therefore, the very possibility of serious harm may require a more stringent intertwining of both private and public laws, directorial duties, and corporate obligations, aiming to curtail bad-actor and detrimental corporate actions.

4.1.7.2. The Oppression Claim

Furthermore, Palombo takes inspiration from the Canadian "Oppressive Claim" law where the claimant is anyone considered "proper" as per the discretion of the court (which may include stakeholders, and not merely shareholders)[399], who can then sue the board of directors for running the company in a way that is "oppressive" (or perhaps unfairly prejudicial) to the interests of certain class of individuals. In this way, Palombo argues, the stakeholders will have two remedies open to them, that under a derivative claim which will award damages to the company, and that under the oppressive claim which will award damages to the affected party.[400] In common law parlance, perhaps this is best understood as a

[398] Fisch, J. E. and Davidoff Solomon, S. (2021) 'Should Corporations Have a Purpose?' (Faculty Scholarship at Penn Carey Law 2163). Available at: https://scholarship.law.upenn.edu/faculty_scholarship/2163.
[399] Canada Business Corporation Act 1975, s 238.
[400] Davies (n 349).

statutory tort claim – while some in Canada celebrate this progress, others are uncomfortable with how it fits within a traditional contract-based analysis of company law.[401]

Section 241 of the Canada Business Corporation Act 1975 (as amended) is reproduced below:

(1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates:

- *(a) any act or omission of the corporation or any of its affiliates effects a result;*
- *(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or*
- *(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of*

Although, in the Canadian law, the interests that are protected are specifically those of "security holder, creditor, director or officer", Palombo argues that an equivalent provision should be introduced in the UK with an expansive definition such that, the persons whose interests are protected must include "*trade unions, consumers associations, NGOs, and a substantially large group of individuals that are affected by the activities of the company"*.[402] After all, one ought to take a broader view of the role of companies as societal entities rather than purely economic units.[403]

---

[401] Mohamed Khimji and Jon Viner, 'Oppression – Reducing Canadian Corporate Law to Muddy Default' (2016) 86 Canadian Legal Information Institute Documents 123, 128.

[402] Davies (n 349).

[403] Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) Business and Human Rights Journal 179.

An important discussion relevant to this suggestion of Palombo is its parallels with s.994 of the CA. Under English law, only a shareholder has the *locus standi* to take up a petition under s.994: that only protects the interests of (typically) a minority shareholder.[404] However, what Palombo suggests, and what would be the natural consequence of following the Canadian "Oppressive Claim" route, is that a separate provision which protects the interests of stakeholders as well, and gives the stakeholders the *locus standi* to enforce them, must be introduced.

However, this paper submits that either a separate provision could be introduced or this s.994 itself could be amended to reflect the afore discussed changes, such that s.994 of CA should read:

> *(1) A member of a company****, or any other person considered "proper" in the discretion of the court,*** *may apply to the court by petition for an order under this Part on the ground:*
>
> *(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members* ~~*(including at least himself),*~~***or of its security holder, creditor, director or officer, or of trade unions, consumers associations, NGOs****; or*
>
> *(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial*
>
> (emphasis added)

In this way, stakeholders could be awarded damages if the corporation's actions are prejudicial to, or oppressive towards, their interests, and these stakeholders would naturally include people protected under the head of "modern slavery" for the purposes of this thesis.

Palombo's advocacy for a broader application of stakeholder litigation has its

[404] *Legal Costs Negotiators Ltd, Re* [1999] 2 BCLC 171.

merits. Nevertheless, expanding the scope to introduce trade unions, non-governmental organisations, and other collective entities may result in a lack of clear boundaries, which makes it difficult for a court to ascertain the legitimacy of a claim. Thompson, in his work on corporate litigation, has emphasised the importance of specificity in delineating the rights of plaintiffs to avoid overly broad interpretations that can lead to excessive litigation, suggesting that the shareholder role holds a "sacred space in corporate transactions."[405] Further, expanding the oppression claim might dilute the principle of shareholder primacy, which remains a cornerstone of UK corporate law. For instance, Worthington has constantly advocated for shareholder primacy, believing that shareholders, as residual claimants, should hold a special position in corporate law.[406]

Ultimately, the theoretical underpinning behind expanding the oppression claim, as articulated by Palombo, is rooted in a more inclusive understanding of corporate responsibility. In similar vein, Bebbington and Larrinaga[407] have often pointed out the limitations of traditional accounting practices in capturing the entire gamut of corporate impacts, especially when it comes to environmental sustainability and social justice issues. In their works, they emphasize the need for accounting to evolve in order to cater to the changing dynamics of modern businesses that are now, more than ever, being scrutinised for their wider societal impacts. Their research often touches upon the idea that while financial numbers are crucial, they do not tell the full story of a corporation's societal footprint. Bebbington and Larrinaga argue for a more integrated approach to accounting – one that includes qualitative metrics and narratives alongside quantitative data. Such an approach, they believe, would provide stakeholders, including investors, with a more comprehensive view of a company's operations and its true impact on society and the environment - something this essay believes could sit alongside an expanded oppression claim to allow more meaningful involvement beyond the traditional

---

405 Robert B Thompson and D Gordon Smith, 'Toward a New Theory of the Shareholder Role: A Sacred Space in Corporate Transactions' (2001) 80 Texas L Rev 261 https://digitalcommons.law.byu.edu/faculty_scholarship/31.

406 Sarah Worthington, 'Directors' Duties, Creditors' Rights and Shareholder Intervention' (1991) 18 Melbourne University Law Review 12.

407 Jan Bebbington and Carlos Larrinaga, 'Accounting and Sustainable Development: An Exploration' (2014) 39 *Accounting, Organizations and Society* 395, DOI: https://doi.org/10.1016/j.aos.2014.01.003.

shareholder.

Infusing Bebbington and Larrinaga's emphasis on corporate transparency and accountability offers an enriching dimension to the oppression claim, because their call for a comprehensive and transparent accounting mirrors the ethos behind the expanded oppression claim and gives it more bite. This call for necessity for a holistic approach to corporate impact, echoing Palombo's push for broadening the range of stakeholders recognised in the oppression claim. The essence is clear: modern corporations, as societal entities, have obligations that transcend traditional financial metrics, necessitating an inclusive approach that acknowledges a broader spectrum of stakeholders, from NGOs to trade unions.

Drawing on this, the incorporation of modern slavery as a protected interest within this expanded oppression claim could prove transformative. This is because it effectively shifts the narrative of corporate responsibility from being solely an economic one to encompassing broader societal issues. By so doing, it would provide an actionable avenue for those marginalised by modern slavery practices to seek redress and hold corporations accountable. This aligns with Bebbington and Larrinaga's call for businesses to be honest and transparent in their operations, ensuring that corporate actions, in reality, align with their public commitments.

Nevertheless, the call for expansion is not without challenges. Thompson’s and Worthington's critiques, as discussed above in this same section, underscore the need for caution. The risk of diluting shareholder primacy and the potential for excessive litigation are genuine concerns. As the business ecosystem evolves, striking a balance will be paramount. It is not just about creating new avenues for litigation but building a corporate environment where companies are genuinely accountable for their broader societal impacts. This sentiment resonates with the idea that the law's evolution is as much about culture and mindset as it is about statutes and provisions.

4.1.7.3. Co-determination

Palombo also argues that English law should make it mandatory to have one

representative of other stakeholders (in this case, employees) in the board of directors.[408] While there has been some historic employee consultation in British businesses, this has never been as strongly mandated legally as in France or Germany, for example (perhaps simply being reflective of the profits-first ethos of Anglo-American capitalism, which one finds less in continental practice).[409] Within the aegis of Keay's EMS model, it would be wise for directors of companies to take into account the views of all relevant stakeholders so as to improve the quality of decision-making, thereby supporting the long-term success of the company.[410]

Strine, Kovvali, and Williams' analysis aligns closely with Palombo's push for co-determination[411]. Like Palombo, they recognise the implications of reduced worker voice in corporate decision-making, leading to increased income disparities and suppressed worker rights. Strine et al illustrate this with the striking decline in corporate gain-sharing among American workers in recent generations, attributing the disparity to the rising dominance of stock markets and the dwindling influence of workers in corporate governance. The COVID-19 pandemic has accentuated these disparities, drawing attention to the vast inequities in the U.S. capitalist system. This has led to rising demands for better wages, improved working conditions, and fairer health benefits for workers. Notably, political leaders from both major parties are advocating for reforms, with Prominent senators such as Tammy Baldwin, Elizabeth Warren, and Bernie Sanders having introduced or supported legislation to this effect.[412]

This underscores Palombo's argument that embedding stakeholder representation, especially that of employees, within boards can be a crucial corrective measure. Such an approach not only strengthens decision-making by incorporating a wider array of perspectives but also serves to balance the skewed gains that lean heavily

---

[408] Davies (n 349).
[409] Frank Woolridge, 'Employee Participation in France and Germany' (2000) 43 Amicus Curiae 26, 32.
[410] Keay (n 357).
[411] Leo E Strine Jr, Aneil Kovvali and Oluwatomi O Williams, 'Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice And Power Within American Corporate Governance' (2021) Faculty Scholarship at Penn Carey Law 2256 < https://scholarship.law.upenn.edu/faculty_scholarship/2256>
[412] ibid.

towards stockholders at the expense of labour.

Still, one challenge in legislating for co-determination is elaborated on by Strine et al. They highlight that judicial decisions in the United States have often favoured corporate interests, making it challenging for external regulations to protect stakeholders effectively. In particular, they pay attention to a series of court decisions that seem to prioritise corporate interests over labour and stakeholder rights. In the United States, cases such as Janus v. Am. Fed'n of State[413], Wal-Mart Stores, Inc. v. Dukes[414], and Harris v Quinn[415], have historically tipped the scales in favour of corporations, often at the expense of labour interests. This legal precedent adds layers of complexity to Palombo's thesis: introducing co-determination not only confronts the ingrained corporate ethos but also must navigate a judicial landscape that has historically favoured corporate over labour interests. Nonetheless, this emphasises the pressing need for reform in corporate governance, with co-determination being a compelling solution.

Additionally, looking at countries such as Germany, where co-determination is reasonably effective, one discerns that for co-determination to succeed, a wider cultural shift must first take place. Codetermination is a "philosophical and practical commitment"[416], grounded in the belief and actionable approach that both managers and employees should jointly craft essential company strategies, make pivotal decisions, and mould the organisation's objectives and ethos. Its deep roots in political philosophy because it underscores the significant role that major corporations play in intricate democratic societies. It ensures that these corporations' internal governance reflects aspects of representative democracy. For instance, McGaughey has pointed out the resurgence of codetermination in post-World War II Germany, highlighting the U.S.'s efforts to rebuild democracy in Germany and prevent a resurgence of fascism. Further emphasising this point,

[413] Janus v Am Fed'n of State, Cnty & Mun Emps 138 S Ct 2448 (2018).
[414] Wal-Mart Stores, Inc v Dukes 564 US 338 (2011).
[415] *Harris v Quinn* 573 US 616 (2014).
[416] Leo E Strine Jr, Aneil Kovvali and Oluwatomi O Williams, 'Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice And Power Within American Corporate Governance' (2021) Faculty Scholarship at Penn Carey Law 2256 https://scholarship.law.upenn.edu/faculty_scholarship/2256

Hayden and Bodie[417] argue that democratic participation theories support the concept of collaborative governance in various business scenarios.

It is a desirable proposal but this would come across the problems of majority rule in the board (and indeed face resistance on that basis) and so is not likely to make a tremendous difference.[418] Further, Strine et al also point out that in countries that practice board codetermination, the methods for appointing worker directors commonly fall into two categories: either through employee elections or direct union nominations to the board. While the guidelines for voter eligibility are regulated, they generally allow only domestic employees to vote, irrespective of their citizenship. For instance, in Germany, an employee, regardless of immigration status, is eligible to vote as long as they are based within the country. Crucially, this means that German codetermination rights do not apply to employees in foreign branches or subsidiaries, even if they are German nationals.[419]

This approach raises significant challenges in the context of a globalised economy, particularly for American policymakers. As Fuhrmans[420] suggests, with many US-based corporations having larger international workforces than domestic ones, this could lead to a problematic imbalance. This problem is likely to extend to English companies as well. If international employees are excluded from the codetermination process, it might relegate them to a status inferior to their counterparts in the United Kingdom. Conversely, including them might unintentionally drive British corporations to move even more jobs overseas. Therefore, in addressing modern slavery and promoting worker voice in MNEs, simply adopting a codetermination model may not be fully effective.

[417] Grant M Hayden & Matthew T Bodie, 'Codetermination in Theory and Practice' (2021) 73 Fla L Rev 321.
[418] Davies (n 349).; see also, for example, Companies (Model Articles) Regulations 2008, Sched. 1, Art 7.
[419] 1976 German Co-determination Act
[420] Vanessa Fuhrmans, 'Big U.S. Companies Reveal How Much They Rely on Overseas Workers' (2018) Wall Street Journal, 11 April <https://www.wsj.com/articles/big-u-s-companies-reveal-how-much-they-rely-on-overseas-workers-1523448000> accessed 30 October 2023.

4.1.8. Alternate solutions to ESV by Daniel Attenborough

As mentioned above, Attenborough would propose the EMV as an alternative to c the shareholder's primacy model and the stakeholder's interest model, with the case for protection against modern slavery being made within this EMV framework.[421]

Attenborough states that the rule of "shareholder wealth maximization" (i.e. shareholder primacy), and the "stakeholder's interest" / "stakeholder orientations theories", are polar opposites and that both of them have their limitation despite wider acceptance / application in the modern world. He states that the former is favoured by the financial, legal and economic orthodoxy, while the latter is favoured by management and business ethics theorists, and has a "communitarian" colour to it.[422]

.

4.1.8.1. Ambit and Critique of the Shareholder's Wealth Maximization

Attenborough states that "shareholder wealth maximization" presupposes that the shareholders are the owners of the corporations, much like a private property owner, and thereby only their interests must be protected as they are most likely to incur loss.[423] However, he states that this reasoning is inconsistent with the fact that a corporation *per se* is a separate legal entity and cannot be called as anyone's property, *stricto sensu*.[424] This is especially true in light of the way a corporation "*can own property in its own right; it can be prosecuted and punished for criminal activity; it enjoys various rights under law; and it is subject to tax liability*".[425] Attenborough also states that a shareholder (*qua* shareholder) has no direct managerial control over the board of directors, so as to make them accountable to them in line with the common notions of ownership and the law of agency – unless, and even then in very limited circumstances, one considers certain major

---

[421] Attenborough (n 355).
[422] ibid 10.
[423] ibid 7.
[424] ibid 16-17.
[425] ibid 17.

(institutional) investors.[426] Attenborough states that this characterisation of the word "corporation" is further supported by the observations of Lord Halsbury LC in the landmark case of *Salomon v Salomon.*[427] Indeed, in this regard, Attenborough is aligned with Keay's EMS model – Keay argues that the directors of the company should aim to maximise the sustainable wealth of the company as an entity, which is distinct from the wealth of the shareholders.[428]

He also states that common argument advanced in favour of the "shareholder's wealth maximization" is that as the balancing of the rights of shareholders and stakeholders may inspire the directors to choose a less-profit bearing route, adherence to concepts such as stakeholder's interest or corporate social responsibility is against the spirit of free enterprise and (as applicable) the right to fully enjoy the benefits of one's private property.[429] Attenborough states that the notion that balancing shareholder's rights with stakeholder's interest leads to poor gains is not empirically supported by any data[430] and so this line of argument should fail. Rather, he says that a "viable corporation" is the best solution (discussed below within his own EMV theory).

4.1.8.2. Ambit and Critique of the Stakeholder's Interest Model

Introducing the stakeholder's interest, or as he also calls it "the Communitarian Corporate Theory", Attenborough says that this theory saw the light of the day by the works of Edwin Dodd on corporate purpose[431], and since then has evolved into a giant that finds its way in the corporate governance mechanisms of most of continental Europe and North America, including most notably US's anti-takeover

---

[426] Attenborough (n 355) 10 – such as through shadow director liability or as a *trustee de son tort*; also note that Weeran makes a similar argument, however, she goes a step further and states that corporations simply put are as much of a shareholder's property as a stakeholder's: Megan E Weeren, 'Fiduciary Duty and Social Responsibility: Implications of The Business Roundtable's Statement on The Fiduciary Duties of Boards of Directors to Corporate Stakeholders Other Than Shareholders' (2021) 2(6) Corporate and Business Law Journal 157.
[427] *Salomon v. Salomon and Co Ltd* [1897] AC 22, 30.
[428] Keay (n 357).
[429] Attenborough (n 355) 8-9.
[430] ibid 11.
[431] E Merrick Dodd, 'For whom are corporate managers trustees?' (1932) 45 Harvard Law Review 1145.

statutes.[432] Notably, Attenborough points out the advancements to this model by Edward Freeman, as conceptualising the contributions to a corporation not merely in monetary terms, so as to make the shareholders the ultimate owner, but in other terms as well, such as investment of time and energy, ideas, dedication by the stakeholders, has greatly influenced and shaped the model as it exists today. It has been considered that as some of these stakeholders lack contractual protection, so deserve due consideration by the directors.[433]

Moving on to the stakeholder's interest or the "Communitarian Corporate Theory", Attenborough argues that it is admitted position of the proponents of this corporate model that the rightful balancing of both shareholder's rights and stakeholder's interest is simply "unworkable".[434] He expands on this by giving the following examples such that *"workers would seek to maximize their wages and thus damage the ability of the corporation to invest for the long run; that creditors would be more inclined to favour a conservative course and thus prevent corporations from taking the needed risks, and so on"*.[435] Keay, however, points out that although a common critique of stakeholder theory is that it's unrealistic for directors to juggle multiple interests, however, even within the realm of shareholder primacy, directors often find themselves having to balance varying shareholder interests.[436] This is because shares can be diverse, such as ordinary or preference shares, and each type can have distinct, sometimes conflicting, interests. For instance, certain preferred shareholders might align more with creditors than with common shareholders. Additionally, some shareholders might be short-term investors, while others are long-term. There are also those who diversify their investments across multiple companies, while some might invest heavily in just one. However, one issue with this analogy is that unlike shareholders, whose interests can be relatively easily quantified in terms of share price and dividends, other stakeholders' interests are more qualitative. How does one measure the value of community goodwill, employee morale, or environmental preservation in concrete

[432] Attenborough (n 355) 12.
[433] ibid.
[434] Attenborough cites Elaine Sternberg, 'Stakeholder theory exposed' (1996) 2 Corporate Governance 4; Elaine Sternberg, 'The defects of stakeholder theory' (1997) 5 Corporate Governance 3.
[435] Attenborough (n 355) 14.
[436] Keay (n 357).

terms that can be weighed against financial metrics?

Further, there is usually difficulty in ascertaining who counts as a stakeholder, and if there exist a hierarchy of those stakeholders.[437] The broad definition of a stakeholder, as someone who can affect or is affected by the achievement of the organisation's objectives, means that potentially any individual or group could qualify. This can include employees, customers, suppliers, shareholders, local communities, and even competitors. With such a vast array of potential stakeholders, determining whose interests should be considered becomes a daunting task. Even if one were able to comprehensively list all stakeholders, another challenge arises: how should their interests be prioritised? Often, the interests of different stakeholder groups conflict with one another. For example, employees might desire higher wages, which could come at the expense of shareholder dividends. Alternatively, a local community might want stringent environmental protections that could increase costs for suppliers. Determining which interests take precedence can be a subjective exercise, leading to inconsistent and potentially inequitable decision-making.

Attenborough cogently addresses these limitations of the shareholder's wealth maximisation theory and the stakeholder's orientation theory in his understanding of the EMV.

4.1.8.3. Equitable Maximization and Viability Principle, the "EMV"

Attenborough introduces his own version of the perfect corporate model called "Equitable Maximization and Viability principle" or EMV, which has two components:

(i) Respect, protect, and fulfil the legitimate interests and expectations of the constituent groups that contribute to the corporation ("**Equitable Maximization**"); and

[437] ibid 13.

(ii) Facilitate the corporation's viability so that its future is guaranteed with sufficiently high probability ("**Viability**").

4.1.8.3.1. Equitable Maximization

Explaining this model, Attenborough solves the problem of adequately defining the "constituent group" of stakeholders by using the definition of "community of interest" given in the Delaware case of *Credit Lyonnais v. Pathe.*[438]

Furthermore, he states that the "legitimate interests and expectations" of this constituent group would require *"consideration of what the parties would have wanted to have included in their contract"*[439], where there exists disparity in the bargaining positions, what would they have included had such a parity existed? Illustratively, "*if asked, before entering into a contract, creditors would expect there to be an implicit term that directors would not act in a way that would undermine the possibility of timely repayment. Employers and suppliers would expect something similar as far as their interests are concerned. Consumers might be willing to provide loyalty and custom, but on the implicit basis that the corporation would provide high quality products and services, but without passing on the costs of doing so."*[440]Therefore, as per Attenborough, after defining the stakeholder himself, the ambit of its protectable interests is his "legitimate expectations", those which are already implicitly extant in everyday business but, so far as the current regulatory regime is concerned, are not given adequate protection. Legitimate expectations have a clear public law flavour[441], but the point is that corporations do not exist solely for private gain.[442]

Moving forward, the duty regarding these legitimate interests and expectations, as per Attenborough, falls on the directors, such that they must uphold the "respect,

[438] *Credit Lyonnais Bank Nederland NV v. Pathe Communications Corp*1991 Del Ch LEXIS 215, [34] (Chancellor Allen); Attenborough (n 355) 15.
[439] Attenborough (n 355) 28.
[440] ibid 27.
[441] *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.
[442] Although see *O'Neill v Phillips* [1999] UKHL 24 per Lord Hoffmann, who considered the notion of "legitimate expectations" to be unhelpfully nebulous in practice.

protect and fulfil" standards of care.[443] These three levels of "*preventative and remedial obligations*" were first introduced by Shue[444], are hereby imported into Attenborough's EMV, and essentially move from "*the predominantly cost-free and passive obligation to respect, to the gradually more active and resource-demanding obligations to protect and fulfil, all depending on the factual situation".*[445] After all and in any event, for a company to succeed financially in the long term, it must ensure that it achieves this success in a sustainable manner.[446] Ultimately, as a matter of fact, a certain level of ethical behaviour is necessarily required to avoid negative regulatory and / or reputational outcomes when one is considering the overall life cycle of a company.

(1) Respect

This simply means, in line with the concept of "negative duties" within the international human rights regime, that the directors must make sure that the company refrains from breaching any of the constituent group's legitimate expectations. Illustratively, if a company is operating in Latin America, and is utilising business practices that violate the access to land and water of indigenous groups, then the duty to respect in that situation would simply be to avoid actively or intentionally further breaching their legitimate expectations.[447] This makes intuitive sense – minimally, companies should not be actively harming others.

However, the duty to "respect" can be criticised for being a passive obligation. It only asks companies not to harm, rather than urging them to take proactive measures that benefit stakeholders. This might limit the potential positive impact of businesses on their stakeholders. Further, the concept of "respect" can be seen as ambiguous because without clear guidelines or standards, companies might struggle to determine what exactly constitutes a breach of "legitimate expectations." This can lead to inconsistent interpretations and applications.

---

443 Attenborough (n 355) 15.
444 Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, (2nd edn, Princeton University Press 1996) 52.
445 Attenborough (n 355) 25.
446 Keay (n 357).
447 Attenborough (n 355) 26.

Additionally, when it comes to navigating trans-national supply chain lines in the context of ensuring labour protections, basing the "respect" component on the idea of legitimate expectations may be problematic because these expectations can vary widely between stakeholders and over time. They are also subject to cultural, social, and economic influences, which can make them challenging to identify and standardise across different businesses or industries. Even worse, companies might use the ambiguous nature of "respect" to justify their actions post-facto, arguing that they believed they were acting in line with stakeholders' legitimate expectations, even if they were not at first instance.

(2) Protect

Within this head, the duty extends, simpliciter, to employ internal strategies and policies, so that the third-party contractors, subsidiaries or suppliers of the company also exercise the duty to respect.[448] Due to the obligation to make institutional frameworks, this duty is a "light positive duty". Some critiques to consider of the "light positive duty" view, however, is that defining the obligation as a "light positive duty" can be ambiguous. The intensity and extent of the required efforts by corporations to ensure protection remain unclear. This can lead to inconsistent application and challenges in enforcement.

However, the flip side is that the term "light positive duty" offers flexibility, allowing corporations to tailor their obligations based on their specific circumstances, size, nature of business, and operational capacities. One-size-fits-all rules can sometimes be overly restrictive or irrelevant for certain businesses. This approach might ensure broader acceptance and application by providing leeway. The intention behind the term could be to provide a starting point for businesses, emphasising a shift towards increased responsibility. As best practices emerge and become standardised, the concept can be refined and further specified. An example of this would be the "free trade zones" in the developing countries where tax exemptions, subsidised costs of factory set-ups and liberalised

[448] Attenborough (n 355) 26.

employment and environmental laws are in place, such that the company's initial years of operations are relatively hassle-free. However, once this honeymoon period ends, companies often tend to move away to other such safe havens, rather than pay the increased tax and other burdens. The duty to protect would require the companies to pay the additional costs and make sure that their subsidiaries operating extra-territorially do the same as well, which would involve the company undertaking a due diligence strategy to identify the "high risk areas" of such negligence. Labelling the duty as "light positive" might encourage corporations to take proactive measures voluntarily. By not mandating an exhaustive list of stringent requirements from the onset, businesses might feel more motivated to innovate in their approaches to fulfilling this duty, leading to the development of more effective and efficient strategies over time.

It Is important to note here that the duty to conduct due diligence processes and the duty to supervise extra territorial subsidiaries, is something that so far only the FDV did. However, in light of the recent UK Supreme Court decision in *Okpabi v Royal Dutch Shell Plc*[449]this might change. In this case, the Supreme Court held that the Nigerian communities affected by the pollution caused by oil spillage and extraction in Nigeria by the Royal Dutch Shell Plc, the parent company of the Shell Group of Companies, incorporated in UK but having subsidiaries in Nigeria, can sue the parent company in the UK courts for damages. It was held that there was a good arguable case that the parent company owed a common law duty of care to the victims of the subsidiary company overseas, as it exercised significant control over material aspects of the subsidiary's action and / or had otherwise assumed responsibility. While the actual *ratio* of the judgment is fairly narrow, it may be that there will be something of a ripple effect.[450] The Supreme Court's decision in *Okpabi*, although claimant-friendly, still only answers the question of threshold as far as English law is concerned i.e., whether the claim is arguable enough to proceed. This judicial approach is certainly consistent with decisions like

[449] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
[450] ibid [149] to [151]; *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5.

Unilever[451], *African Minerals*[452], *Vedanta*[453] *and Maran.*[454] However, despite the dynamic approach taken in *Okpabi,* the floodgates are far from open.[455] Nevertheless, it must be borne in mind that this decision comes in light of the huge outcry for climate change that finds favour with the popular opinion of the day. Recent decisions by the UK and Dutch courts are showing signs of a change in judicial attitudes in improving access to justice. However, it remains to be seen whether parent-subsidiary liability can extend to parent-supplier liability, depending on how the concept of "control" is interpreted in future cases. The Dutch courts have certainly taken an expansive and benevolent approach to the question in the recent decision against Shell.[456] Here the Dutch court construed the standard of negligence with reference to the UNGPs, as it held that MNEs are responsible for the protection and respect of human rights and the remediation of human rights violations throughout their value chain. The court reasoned that Shell is liable for the greenhouse gas emissions of both its own operations and of those by its business partners throughout the value chain. This shift in judicial attitudes towards accountability of lead companies in MNEs can be observed in both common law[457] and civil law jurisdictions.[458] Can the same support be expected for the fight against modern slavery, a relatively new concept even in the human rights arena? The same cannot be said with certainty.

Therefore, in a way, Attenborough's model of corporate responsibility is more akin to FDV than the ESV model currently in operation within the UK. As will be discussed below, the EMV model, while it serves as a much-needed alternative to the ESV, is better accommodated with the Strategic Report Regime, rather than the Director's Duties and s172 of CA.

---

[451] *AAA and Others v Unilever PLC & Anor* [2018] EWCA Civ 1532.
[452] *Kadie Kalma & Ors. V African Minerals Ltd &* Ors [2020] EWCA Civ 144.
[453] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.
[454] *Begum v Maran* [2021] 3 WLUK 162.
[455] *Municipio de Mariana v BHP Group plc and BHP Group Ltd* [2020] EWHC 2930.
[456] *Milieudefensie & Others v Shell Petroleum NV & Others* (C/09/365482/HA ZA 10-1665) (the Netherlands).
[457] *Nevsun Resources Ltd v Araya & Others [2020] SCC 5.; James Hardie Industries Plc v White* [2019] NXSC 39.
[458] European Center For Constitutional And Human Rights, 'Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court' (ECCHR, 7 November 2019); <https://www.ecchr.eu/en/press-release/sherpa-and-ecchr-to-appeal-decision-in-lafargesyria-case-at-french-supreme-court/> accessed 14 October 2023.

(3) Fulfil

The duty to fulfil under the EMV is essentially remedial in nature, such that after due adherence with the respect and protect mechanisms, if any of the constituent groups suffer a loss, or failing to meet their legitimate interests or expectations, the company will make good that loss, by remedial action including but not limited *"to take measures necessary, including appropriate constitutional, budgetary, policy and other measures, to create, maintain and* ***restore the opportunities for each constituent group or individual*** *within its jurisdiction to obtain full satisfaction of their legitimate expectations* ***which cannot be secured by personal efforts****".*[459]

Still, this is not without any challenges. The broad and undefined nature of the duty to fulfil can lead to a plethora of lawsuits, as aggrieved parties might find it easier to make claims based on a wide range of perceived unmet expectations. This can result in a drain on company resources and potential reputational damage, even if the company is found not to be at fault. By making corporations responsible for not only respecting and protecting but also fulfilling expectations that "cannot be secured by personal efforts", there is a potential risk of placing an unrealistic burden on corporations. This could deter businesses from certain investments or projects, fearing potential repercussions. Additionally, while the duty includes taking remedial action, it is not explicit about what actions are deemed adequate or appropriate. This lack of clarity can lead to disputes between the company and its stakeholders regarding the sufficiency of measures taken.

One way to get around these difficulties in risking an overly litigant-friendly atmosphere is to set and publicise clear expectations - just because the duty is broad does not mean that individual companies cannot establish their internal guidelines and metrics. Corporations can provide clear, internally-defined standards on how they plan to address and fulfil this duty, offering clarity to stakeholders. If any potential issue eventuates, the duty to fulfil can encourage proactive engagement

[459] Attenborough (n 355) 27.

with stakeholders to address mismatches in expectations. Regular and meaningful dialogue can pre-empt potential disputes, ensuring that stakeholder expectations are managed and met. This fosters trust and can actually enhance a company's reputation, as they are seen to be taking their broader responsibilities seriously. Ultimately, the duty's essence is to rectify and remedy. Instead of seeing it as a potential source of conflict, companies can approach remedial action collaboratively, working with stakeholders to identify mutually agreeable solutions. This collaborative spirit can actually strengthen stakeholder relations. Further, the possibility of increased litigation does not necessarily mean that all claims will be frivolous or unjustified. Legal systems have mechanisms in place to filter out unfounded claims. Moreover, the duty's broad nature can be further clarified and refined through case law over time, especially in a common law system like the UK's, providing more clarity to corporations.

4.1.8.3.2. Viability

Essentially, this means to prioritise long-term gains, such as sound investments, retention of human capital due to their value in terms of experience and innovation - as opposed to short term increase in dividends or harmful business practices that expose employees to dangerous work environments in order to cut costs, leads to the corporation's decline, and eventual insolvency.[460]

As opposed to corporate survival (merely the avoiding of insolvency) or corporate sustainability (which typically would still mean adhering to shareholder's primacy), Attenborough introduces corporate "viability" and states that "*the corporation's workforce, its relationship with suppliers and creditors, reputational value, and creating distinctive, 'greener' products, is also a necessary source of significant competitive advantage*" and that "*this might entail making less profit one year compared with the previous one, but still optimizing the entity for the future to ensure its life expectancy*".[461]

[460] ibid 29.
[461] ibid 32.

Within Attenborough's EMV model, one is essentially importing the various strengths and benefits of the FDV, as explained in Chapter 1 earlier, and requiring corporations to undertake a duty to "respect, protect and fulfil" certain standards by keeping in mind the principle of "viability", simply put to **"equitably maximize the value of their corporations".** Now that Attenborough's model of EMV has been explored in detail, it is imperative that an analysis of the application of this model to the case of modern slavery is conducted hereafter.

4.1.8.4. EMV and the Case for Modern Slavery

The fact that EMV accommodates "legitimate interests and expectations" of the "constituent groups", it is not difficult to imagine this accommodating "protection against modern slavery" within the supply chains and employees of a corporation as well since absence of modern slavery would definitely be a "legitimate expectation" of the employees.

However, how might one import this theory into the current UK corporate regulatory framework? In line with the discussion in this chapter, two avenues arise: directors' duties, more specifically s172 of the CA, and the Strategic Report, more specifically s414A of the CA, (explained in detail below).

Attenborough's thesis would favour the former; however, the EMV ideals could be imported to the latter as well.

To put Attenborough thesis into perspective, he says that directors (not the corporation) must be subjected to mandatory legal rules to undertake the duty to "respect, protect and fulfil" the required standards.[462] This means that directors are required to comply with the due diligence requirement (within the duty to protect) and make sure that "legitimate interests" are protected, or for this purpose "modern slavery" is eradicated or more realistically, limited as much as possible. Directors are also required to undertake remedial action against such violations (within the duty to fulfil), if and when they arise. Further, the directors are held personally

[462] Attenborough (n 355) 6.

liable and not just the corporations, should they fail to implement such due diligence measures and also more importantly, if they fail to make good a loss that occurs as a consequence thereof.[463]

Therefore, with the regime of the Director's Duties, and more specifically s172 (read with s170) (personal liability of directors for failure to give due consideration to listed objectives, including employee and community matters), it would involve importing the meaning to the words "give due consideration to" essentially the duty to "protect and fulfil". So, in line with this, the duty to give "due consideration to" would now not only be subjectively evaluated according to the director's reasoning, but would involve a strict obligation to protect and fulfil. In other words, it would involve the directors' personal liability for breach of the duty to protect (carry out due diligence), as well breach of the duty to fulfil (make good a loss that occurs). This would incentivise them, as the directing minds and wills of their company, to act decisively to prevent modern slavery.

Moving on towards the Strategic Report regime, and more specifically s. 414A (6) (provision for imposition of fine upon directors for failure to publish a strategic report), this would involve a duty on the directors to necessarily report on the steps taken by them in discharge of their duty to carry out due diligence and remedial actions, and to give reasons (if any) for not taking such steps. Failure to do either of these would involve imposition of a fine in line with s. 414A (6). However, notably Attenborough's original thesis of EMV itself does not envision a reporting regime, and so would be complemented by such an obligation.

4.1.9. Strategic Report under Chapter 4A of Part 15 of the CA

4.1.9.1. Legislative Development of the Strategic Report

Although s172 was enacted with the tandem that it will operate in consonance with

[463] Contrast this to Rachel Chambers, Sophie Kemp and Katherine Tyler, 'Report of Research into how a Regulator could Monitor and Enforce a Proposed UK Human Rights Due Diligence Law' (Kingsley Napley LLP, 21 August 2020) 4 which would advocate allowing for a simplified civil penalties procedure where one simply needs to prove breach and damage to sue a company for modern slavery compliance failures.

increased disclosure requirements, that did not turn out to be the case in practice. Around 2005, the UK government felt that though the economy was witnessing a "cultural shift" towards the ESV model, these ethos were not effectively upheld by boards of directors in their decision making. Therefore, the Companies Act 1985 (Operating and Financial Review and Director's Report etc.) Regulations 2005[464] was passed, which required quoted companies and medium and large sized non-quoted companies to publish an Operating and Financial Review (**OFR**). Under the Department of Trade and Industry's Guidance on the OFR and the changes to the director's report (2005), the OFR was to contain "*qualitative and forward-looking information*" and "*directors will need to consider whether it is necessary to provide information on a range of factors that may be relevant to the understanding of business, including, for example, environment, employee and social and community issues*".[465]

However, as the OFR was an extremely watered-down version of the need of the hour improved "shareholder/stakeholder interest balance", it proved to be highly controversial; soon after its enactment in March 2005, it was repealed in January 2006.[466]

What complicated matters further was that at that time, the EU too had the same policy on dealing with stakeholder's interest as the OFR Regulation itself, such that European Accounts Modernization Directive (2003)[467] required the company's directors to publish a "Fair Business Review" (**FBR**) which must include "financial and non-financial key performance indicators (including those specifically relating to environmental and employee issues)".

However, the UK government reattempted legislatively improving "stakeholder's interests" by virtue of s417 of the CA, a now-repealed provision.[468]

---

[464] SI 2005/2011.

[465] Department of Trade and Industry, 'Business Review Guidance' (2005).

[466] Companies Act 1985 (Operating and Financial Review) (Repeal) Regulations 2005 (SI 2005/3442). This was also in part due to the HM Treasury's concerns of its effect on the UK company's effectiveness. In general, reporting-only obligations can be seen as being an inadequate means of enforcing compliance: Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021) 4.

[467] Directive 2003/51/EC, Art. 14.

[468] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (S.I.

Section 417 of the CA, as it then read, required most companies to produce a business review that contained a fair review of the company's business and the risks faced by the business so that the members could asses the directors' performance of their s172 duty to promote the success of the company.

The requirement to prepare a "Business Review" (**BR**) was the template upon which the current requirement to prepare a strategic report was built upon.[469] Under s417 of the CA, if a director failed to prepare the BR, there was no personal liability.[470] This was one of the key areas that were improved upon in the provisions of the strategic report. Furthermore, for a quoted company there existed a requirement "to the extent necessary" to report about social and community issues (s417(5)(b)) but not human rights issues, strictly speaking. This was further developed upon by virtue of the strategic report.

4.1.9.1 Relevant provisions regarding the Strategic Report and discussion

To further strengthen the ESV strategy, the CA was again amended to insert Chapter 4A to Part 15 of CA[471] which made the preparation of a strategic report, that is the way the company's business affects stakeholders, compulsory for certain kinds of companies.

Relevant provisions of Chapter 4A are partially reproduced below: s414A deals with the duty to produce a strategic report (and the penalties for failing to do so); s414C sets out the requirements for the report's contents; s414CA sets out the requirements for the strategic report to contain a non-financial information statement; s414CB explains the requirements for the contents of the statement; finally, s414CZA specifies the duty to make a statement (and its contents) on the directors' compliance with their s172 duties while s426B says that this compliance

2013/1970), reg 1(2)(3) and 5.

[469] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (S.I. 2013/1970), reg 2.

[470] Save to the extent that liability could be found under the main directors' duties provisions (i.e. CA 2006, ss 171 to 177).

[471] By virtue of The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (S.I. 2013/1970), regs 1(2)(3) and 3.

statement must be made available online.

The requirement to publish a strategic report is mandatory for all companies, except small-sized companies (s414A(2)). This strategic report is to include a fair review of the company's business which includes, but only *"to the extent necessary"*, its employee matters (s414C(2) and (4)). Although the statute does not explain what it means by employee matters, this is the place where any indication, or reporting, as to modern slavery would logically come about. As argued in Chapter 1 and then again in 2, modern slavery is a vice that must be vigorously policed and prevented, the compulsion to report on it (within the head of employee matters or otherwise) must be introduced within CA. However, even if this is done, the CA will still have territorial limitations, and so the reporting would be circumscribed to modern slavery within the UK and only *"*to the extent necessary*"* as assessed by the company's board of directors on an inevitably subjective evaluation test. In this vein, it is galling to note that there have never been any successful prosecutions of any UK companies for failures to prevent modern slavery abroad.[472]

Furthermore, the content on which it is obligatory to report further broaden for quoted companies, such that they should also include information about *"social, community and human rights issues",* and if they do not report as such, they should report that too (s. 414C (7)). Within the head of "*company's employees*" and "*human rights issues*", it is more plausible to envision some form of reporting about modern slavery. Modern slavery issues are human rights issues: working from first principles, to be complicit in depriving individuals of their liberty is a breach of human rights that ought to be reportable – however, without specific guidelines and mechanisms, this alone would not nearly approximate anything like the searching standard demanded by the FDV in practice. However, this provision too is met with the same weakness as that of s.414A, and only has territorial application and only *"to the extent necessary"*.

[472] Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 30 October 2023.

Additionally, for specific types of companies, such as banking companies (s. 414CA (1)), the CA states that they must also include within their strategic report a *"non-financial information statement"* that will, but only *"to the extent necessary",* include information about employees, social matters or respect for human rights (s. 414CB (1)). If the statement does not include such information, it should also report to this effect (s. 414CB (4)). Interestingly, this provision resembles the FDV, such that it mandates the reporting of the company's policies regarding these matters and any due diligence undertaken by it, as well as the effectiveness thereof (s414CB (2)).[473]

Moreover, the company is also required to include within their strategic report how have they discharged their obligations under s172 (as per s414CZA, a similar requirement also exists within the Provision 5 of the Code of Corporate Governance – discussed below). This shows that the government implicitly accepts that the ESV model represented by s172 is inadequate and is gradually, to say at a glacial speed, moving towards a form of corporate governance that extends beyond shareholder primacy.

Lastly, a failure to publish such a report would make the directors of the company personally liable for a fine on indictment, and a statutory maximum fine for summary proceedings (s414A (5) and (6)). Accordingly, the law does have some impact but its punitive measures are weak: for the directors of very large companies, even a significant fine can be a mere slap on the wrist.

4.1.10. Strategic Report and the case for personal liability of the directors for failure to be diligent about 'Modern Slavery'

As discussed above in Section 4.1.9, CA, s414A (6) makes the directors subject to a fine if they fail to publish a strategic report. However, this provision applies only when they do not publish a report at all. Legally-speaking, if the board of directors of a company publish a strategic report that merely takes a lackadaisical view of

[473] Bright (n 43) 1.

the company's business, with no discussion whatsoever on employee, social or human rights matters, because the directors considered no further information was *"necessary"* in their subjective opinion, the requirement under s414A is effectively complied with, and no liability as to a fine can be invoked by the majority shareholders (or the company itself).[474] After all, a stakeholder cannot invoke the compliance of director's duties (s.170(1)). While the standard expected of directors and the enforcement of that standard are separate matters, their inadequacy in this regard is, detrimentally, mutually reinforcing. Strictly speaking, the bar is set low in terms of what is required of directors in this regard – but even ensuring compliance with this standard is difficult because of the underlying ethos of company law in the UK that, where a wrong is caused to a company, it is only the company itself that is the proper plaintiff in litigation.[475]

This needs to change, and the requirement to compulsorily report on modern slavery and to be diligent in the pursuit of eradicating it within their supply chains (or businesses in general) must be introduced. Otherwise, the strategic report is nothing more than a form of soft law that very well represents the cultural shift in the importance to be given to stakeholders, but does nothing to *actively* make the corporations adhere to it. This by itself would be an important first step but is a necessary but insufficient condition to drive real change. There are also suggestions that a pre-determined director must be held responsible for the concerned company's compliance, or lack thereof[476], with the Strategic Report requirements, and this is an avenue that could be explored by the legislature as well.

---

[474] Perhaps a *de facto* self-regulation situation is sometimes inevitable, but it is still undesirable: Julia Black, 'Decentring Regulation: Understanding The Role Of Regulation And Self-Regulation In A Post-Regulatory World' (2001) 54 Current Legal Problems 103. Nudges are often inadequate: Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 30 October 2023.

[475] *Foss v Harbottle* (1843) 2 Hare 461.

[476] Consider the *dicta* in *Nerijus Antuzis & ors v DJ Houghton Catching Services Ltd & ors* [2019] EWHC 843 (QB). Also see, generally, Claire Bright, 'Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers MWP 2020/01, 2-3; and Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021), 4.

4.2. Corporate Governance in the UK

4.2.1. A brief introduction to the UK Corporate Governance model

Traditionally, dialogue surrounding corporate governance in the UK has focussed on the interests of stakeholders (specifically employees), rather than solely insisting on rule of shareholder primacy.[477]However, with the introduction of Thatcherism, the rule of shareholder primacy prevailed such that it resulted in "*reform of pension provision, healthcare and social welfare…removal of employee protection*", "[*e]mployment reform had made it easier and less costly for companies to dismiss employees*" and "*booming market in takeovers and mergers had resulted in further rationalization of employees*".[478]

Parkinson argues that the rule of shareholder primacy cannot be justified on moral grounds to the effect that due to their property interests, their interest should take primacy.[479] He states that the ideal model of corporate governance lies neither in giving primary consideration to shareholders nor in giving primary consideration to stakeholders[480], but in the concept of *"corporate social responsibility"* such that corporations, concerned with their financial gains as they must be, are also responsible for the environment and the community in which they operate.[481] In effect, it can be said that Parkinson himself leaned towards, or actively supported, the introduction of ESV into the CA. In fact, he was the architect of the idea in question.

Cheffins built on this further and considers that:

> *[S]takeholders need incentives to make firm-specific investments that are*

[477] Frank Woolridge, 'Employee Participation in France and Germany' (2000) 43 Amicus Curiae 26, 32; Richard Williams, 'Enlightened Shareholder Value in UK Company Law' (2017) 35(1) UNSW Law Journal 360, 376 interestingly notes the alternative regulatory route of disqualifying irresponsible directors from holding such positions.
[478] Alan Dignam and John Lowry, *Company Law* (10th edn, Oxford University Press 2018) 419.
[479] Gavin Kelly and John Parkinson, 'The Conceptual Foundations of the Company: A Pluralist Approach' in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Hart Publishing 2000).
[480] ibid.
[481] ibid.

allegedly pivotal ingredients of long-term corporate success…The thinking is that companies are too important to the economy to exist for the benefit of a single constituency, namely the shareholders. Regulation which secures fair treatment for potentially vulnerable stakeholder groups is therefore justified, even if the measures in question may reduce corporate profits.[482]

Furthermore, corporate governance in the UK is considered by Parliament to not merit statutory regulation.[483] This is generally seen as being effectively complied with in the form of a voluntary code, adopted by the Financial Reporting Council.[484] However, attitudes in these regards are changing, such that Theresa May stated that *"the people who run big businesses are supposed to be accountable to outsiders, to non-executive directors, who are supposed to ask the difficult questions…"*. She also promised to *"…have not just consumers represented on company boards, but employees as well"*.[485]However, although that particular political promise never saw the light of the day, the fact that mainstream politicians and people in power are increasingly becoming sensitised to these issues is good news for this cause. Therefore, future legislation on the matter to reflect this can be expected, including in respect of modern slavery.[486]

4.2.2. The UK Corporate Governance Code (as amended in July 2018)

---

[482] Brian R Cheffins, 'Corporations' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003).

[483] Parliament, 'White Paper' (2002) <https://publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439ap07.htm> accessed 30 October 2023., Vol I, para 3.31.

[484] The mechanics of how this is said to work is explained in detail in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815.

[485] Adam McCulloch, 'Businesses are Resisting Worker Representation on Boards' (Personnel Today, 3 May 2019), <https://www.personneltoday.com/hr/businesses-resist-worker-representation-on-boards/> accessed 30 October 2023.

[486] Note, for example, the Modern Slavery (Amendment) Bill that is currently being debated in Parliament. While it is rare for private member's bills to pass, this bill would "amend the Modern Slavery Act 2015 to prohibit the falsification of slavery and human trafficking statements, to establish minimum standards of transparency in supply chains in relation to modern slavery and human trafficking, and to prevent companies using supply chains which fail to demonstrate minimum standards of transparency": Out-Law News, 'UK Legislation Proposed to Tackle Modern Slavery' (*Pinsentmasons.com*, 22 June 2021), <https://www.pinsentmasons.com/out-law/news/uk-legislation-proposed-to-tackle-modern-slavery> accessed 30 October 2023.

The UK Corporate Governance Code ("**CGC**"), as adopted by the Financial Reporting Council, and as developed as a result of the Cadbury Committee (1992)[487], Greenbury Committee (1995)[488] and the Hampel Committee (1998)[489] among others move on the presupposition that stakeholders are best served by the company pursuing profit-maximising policies.

In its current form as amended in July 2018[490], the CGC is *"applicable to all companies with a premium listing, whether incorporated in the UK or elsewhere".*[491] Furthermore, it also requires the directors of the parent companies to make sure that there is adequate cooperation within the company group so that the parent company's governance obligations under the CGC are effectively discharged[492].

Moreover, the CGC operates on a "comply or explain" basis, such that the Listing Rules, Rule 9.8.6 (R) (6)[493] requires the listed corporations to make a statement as to how they have complied with the Principles, and additionally with the Provisions, and to explain any non-compliance thereof. It also encourages to include within this statement the relevant parts in the corporation's annual report[494] or its strategic report where such compliance has been mentioned.[495] Furthermore, CGC states, in relevant part that "*it is important to report meaningfully when discussing the application of the Principles and to avoid boilerplate reporting*" and that "*the effective application of the Principles should be supported by high-quality reporting on the Provisions. These operate on a 'comply or explain' basis*

[487] Cadbury Committee, 'The Financial Aspects of Corporate Governance' (Gee Publishing, 1 December 1992), <https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf> accessed 30 October 2023.
[488] Study Group on Directors' Remuneration, *Directors' Remuneration* (Gee Publishing, 17 July 1995), <https://ecgi.global/code/greenbury-report-study-group-directors-remuneration> accessed 30 October 2023.
[489] Committee on Corporate Governance, *Final Report* (Gee Publishing, 1998).
[490] Financial Reporting Council, 'UK Corporate Governance Code' (July 2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF/> accessed 30 October 2023.
[491] ibid 3.
[492] Financial Reporting Council, 'UK Corporate Governance Code' (July 2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF/> accessed 30 October 2023.
[493] Financial Conduct Authority, 'FCA Handbook' (2021): <https://www.handbook.fca.org.uk/handbook/LR/9/8.html#D506> accessed 30 October 2023.
[494] CA 2006, s 415.
[495] Bright (n 43) 2-3.

and companies should avoid a 'tick-box approach'"[496]. While effective regulation comprises a range of approaches and possible institutional frameworks, it can often be the case that simply encouraging self-regulation or "nudging" businesses in the right direction is inadequate; rather, a regulator with real, centralised powers may prove most impactful.[497] The "comply-or-explain" model means the CGC has a tongue but not teeth – the market may (or may not) mete out punishment: this is good but more can be done. Merely compelling disclosure is not enough – regulation must have real impact: there ought to be a regulatory body that has extensive investigative and regulatory powers, rather than pushing enforcement to parties like civil society who lack the relevant expertise or funding to do so.[498] Clearly, the CGC model lacks the rigour of the FDV approach, if one were to focus on modern slavery specifically.

The CGC contains a total of 18 Principles (Principles A-R) and 40 Provisions. The Principles and their explanatory Provisions relevant for the case of modern slavery are explained and discussed below:

4.2.2.1. Board Leadership and Company Purpose

Principle A of the CGC reads as follows:

> *"A successful company is led by an effective and entrepreneurial board, whose role is to promote the* ***long-term sustainable success of the company,*** *generating value for shareholders and* ***contributing to wider society."*** *(emphasis added)*

Arguably, within the term "wider society", social and humanitarian goals such as

[496] ibid.
[497] Julia Black, 'Decentring Regulation: Understanding The Role Of Regulation And Self-Regulation In A Post-Regulatory World' (2001) 54 Current Legal Problems 103; and Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 30 October 2023.
[498] Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021), 4.

effective protection against modern slavery can be accommodated.[499] However, as the CGC merely requires a statement to the effect of compliance with this Principle, in absence of an express provision pertaining to supply-chain abuses, human rights issues and other modern permutations of exploitation, a statement regarding modern slavery in this context is highly unlikely to be made by a corporation.[500]

Moving forward, Principle B requires the companies to lay down their "*purposes, values and strategies*", and to make sure that the company's business practices align with these "*purposes, values and strategies*" and also to take "*corrective action*" in case a contrary practice is observed.[501]

The fact that this Principle specifically mentions "*corrective action*" and to make a statement to the effect of what was done in lieu of such a "*corrective action*" is good news for this case. Again, arguably, once a provision relating to modern slavery is introduced into the CGC, this Principle would come in handy in forcing the corporation to take proactive and remedial steps to protect against it.

Similarly, Principle E requires the company to *"ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success."* This is perhaps most closely connected with modern slavery in the CGC regime, such that once the company has formulated its "purposes, values and strategies" within Principle B, it can then apply them for the benefit of its workforce, including supply-chain workforce, and take remedial and corrective action, as applicable.

Notably, Provision 5 of the CGC contains express requirement to effectively engage with the stakeholders, albeit this is mentioned after the requirements to effectively engage with shareholders and uphold their demands.[502] It reads as

---

[499] Bright (n 43) 2-3.
[500] Comparatively and illustratively, consider the many shortfalls of the MSA, s. 54 duty: Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021), 4.
[501] Bright (n 43) 4.
[502] Provisions 3 and 4 of the CGC.

follows:

> ***The board should understand the views of the company's other key stakeholders and describe in the annual report how*** *their interests and the matters set out* ***in section 172 of the CA have been considered in board discussions and decision-making****. The board should keep engagement mechanisms under review so that they remain effective. For engagement with the workforce, one or a combination of the following methods should be used:*
> *• a director appointed from the workforce;*
> *• a formal workforce advisory panel;*
> *• a designated non-executive director.*
> *If the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective. (emphasis added)*

However, this Provision then essentially brings us to the broad terms under s172 of the CA and the subjective reasoning test, as discussed above in Section 4.1.2.

In July 2018, the Financial Reporting Council ("**FRC**") issued the "Guidance on Board Effectiveness" ("**Guidance**")[503] in the context of CGC, whereby it expanded on the Principles and Provisions of the CGC. This explanation is very helpful in understanding the CGC and how this thesis can be imported into it. For example, the Guidance stated that the board of directors must have a clear understanding about the ways to ensure a *"company's viability*", which may involve decisions that may prick to some (short-term) investors and will not always involve financial considerations.[504] This includes cultivating a healthy culture within the meaning of, among other values, "respect", "accountability" and "a shared purpose".[505] Furthermore, it states that in accessing the meaning to be given to the terms "social and environmental considerations", within the Guideline 46,

[503] Financial Reporting Council, 'Guidance on Board Effectiveness' (July 2018), <https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF/> accessed 30 October 2023.
[504] ibid 3.
[505] ibid 6.

the board should look towards voluntary frameworks, such as the UN Sustainable Development Goals[506], to identify relevant risk areas. This Guidance does have more of a stakeholder orientation but one must consider the socio-legal landscape as a whole.

4.2.2.2. Audit, Risk and Internal Control

Principle O of the CGC appears to be a watering hole in a desert for the purposes of this case, such that it reads as follows:

> *"**The board should establish procedures to** manage risk, oversee the internal control framework, and **determine the nature and extent of the principal risks the company is willing to take in order to achieve its long-term strategic objectives**" (emphasis added)*

This shows that within the strategic long-term objectives that a corporation must seek, which as discussed above in Section 4.1.9.1 would include non-financial considerations as well, in order to effectively look after them, the company is required to employ procedures to determine such risks. However, the fact of the matter is that the explanatory Provisions, under this title of the CGC, appear principally to be about audit and regulatory compliance matters[507]and so far, the CGC does not expand on Principle O in the direction of constituting a Principle which would be a (lighter) version of the FDV. This would be desirable and, indeed, necessary so as to spur on the effective prevention of modern slavery with a UK nexus.

4.2.2.3. Does the UK Corporate Governance Code contain the blueprint to accommodate "Protection against Modern Slavery"?

While the CGC contains obligations such as "pursue long-term gains", "employ

[506] The latest are the UN Sustainable Development Goals 2030: https://sdgs.un.org/goals accessed 30 October 2023.
[507] See for example Provisions 28 and 29 of the CGC.

corrective action in this pursuit" and "determine risk areas", the fact that there isno express mention of any "social matters", "community matters", "supply-chain abuses" and "forms of human exploitation", although there is a reference to the "interests of wider society", makes an import of such an interpretation to CGC, and therefore expecting the corporations to make a statement to this effect, at best, wishful thinking.

It is recommended that such a specific provision should be added to the CGC. This would militate against the failure of the MSA by placing compliance within an established regulatory framework.[508]

4.2.3. The Wates Corporate Governance Principles for Large Private Companies (as amended on December 2018)

After the promulgation of the Companies (Miscellaneous Reporting) Regulations in 2018 ("**2018 Regulations**")[509], certain companies[510] were required to make a statement ("**Corporate Governance Arrangements**") within their director's report[511] to the effect of:

> *(a) which corporate governance code, if any, the company applied in the financial year,*
> *(b) how the company applied any corporate governance code reported under sub-paragraph (a), and*
> *(c) if the company departed from any corporate governance code reported under sub-paragraph (a), the respects in which it did so, and its reasons for so departing*[512]

[508] Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 30 October 2023; Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021), 4.
[509] Companies (Miscellaneous Reporting) Regulations 2018.
[510] Which are not exempted under Companies (Miscellaneous Reporting) Regulations 2018, reg 22.
[511] CA 2006, s 415.
[512] Companies (Miscellaneous Reporting) Regulations 2018, reg 26.

Thus, the Wates Corporate Governance Principles for Large Private Companies ("**Wates Principles**")[513] was developed for the benefit of the private companies, as opposed to the CGC which is only applicable to listed companies. It proceeds on a "*apply and explain*" approach[514], and contains merely six Principles, out of which three are relevant to this thesis:

Principle 1, like the Stewardship Code, requires the companies to formulate their purpose and to make strategies to achieve that purpose, with the objective of enhancing the company's long-term value, which has been explained to include "*positive relation building with the company's stakeholder*"[515].
Again, within the term "stakeholder", an affectee of modern slavery would be accommodated, not just shareholders or direct victims.

> Principle 4 requires the companies to identify and mitigate the possible risks to its long-term value, which has been expanded upon to include both tangible and intangible assets[516], which in turn has been stated to include "*social matters…workplace relationships, supply-chains and ethical considerations*".[517]

A welcome departure of the Wates Principals from the anodyne and repetitive language, and considerations, of the CGC and the Stewardship Code is its express mention and attention to supply-chain matters and ethical considerations in it. It can safely be argued that within the meaning of these terms, the case for protection against modern slavery can be made readily.[518]

---

[513] Financial Reporting Council, 'Wates Corporate Governance Principles' (December 2018), <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf#:~:text=The%20Wates%20Principles%20introduce%20an,arrangements%2C%20without%20being%20unduly%20prescriptive/> accessed 30 October 2023.
[514] ibid 8.
[515] ibid 11.
[516] Financial Reporting Council, 'UK Corporate Governance Code' (July 2018) 17, <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF/> accessed 30 October 2023.
[517] ibid 18.
[518] Although one hopes such reporting obligations will not be circumvented through the use of sophisticated but opaque drafting like with the MSA 2015, s. 54: Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021) 42.

Accordingly, companies following the Wates Principles must explain in their Corporate Governance Arrangements Statement how they have **identified and mitigated** the possible risks / exposures to supply-chain abuses, modern slavery, human exploitation etc. in their business practices. Within this requirement, there must be express identification, as well as some corrective / remedial action (under the meaning of the word 'mitigate') by a corporation.3

Furthermore, an interesting observation made within the Wates Principals in the context of such mitigation of risk is that "*such opportunities may often be dependent on an agreed risk appetite and the company's long-term strategy and prospects"*.[519]This shows that within the Wates Principles, and the established rule of shareholder's primacy, it is recognised on humanistic considerations that a certain level of "agreed risk" is a must to operate with dignity in a community as well as to maintain the long-term value and reputation of the company.

This relates to the final relevant Principle 6 of the Wates Principles, such that:

> *Directors should foster effective stakeholder relationships aligned to the company's purpose. The board is responsible for overseeing meaningful engagement with stakeholders, including the workforce, and having regard to their views when taking decisions.*

The explanatory note to this principle states that to prioritise issues under his Principle, the company may look to other "*recognised international frameworks and standards*" to formulate its strategy and to prioritise its values more effectively.[520] This is similar to the wording of the Guideline 46 of the Guidance mentioned above.

---

[519] Financial Reporting Council, 'Wates Corporate Governance Principles' (December 2018) 17, <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf#:~:text=The%20Wates%20Principles%20introduce%20an,arrangements%2C%20without%20being%20unduly%20prescriptive/> accessed 30 October 2023.

[520] ibid 21.

4.2.3.1. The Wates Principles and the Case for Modern Slavery

Compared to the CGC or the Stewardship Code, the Wates Principles are more amenable to accommodating modern slavery due to the obligation within them to "*identify and mitigate risks*" related to "*supply-chain matters and other ethical considerations*". That being said, although every company that does not fall within the exemptions provided under Reg. 22 of the 2018 Regulations, is required necessarily to submit a Corporate Governance Arrangements Statement in which they have to specify the CGC (in the case of large private companies, this would be the Wates Principles) that they adhere to and how, they are only required to submit a statement in this regard and explain any non-compliance. No liability whatsoever exists for their failure to actually identify and mitigate the risks – unlike in the FDV framework, although failure to publish such a statement could very well make "every officer of the company" liable on a summary conviction to a fine not exceeding level 3 on a standard scale.[521] There is, of course, the market-based reputational "stick", but the severity of this varies by sector and geographical focus. Comparatively, this arguably gives this form of disclosure more impact than the MSA, s54.[522]

4.2.4. UK Stewardship Code (as amended in 2020)

The UK Stewardship Code ("**Stewardship Code**")[523] came into effect on 1 January 2020. It is a voluntary code that institutional investors, such Asset Owners and Asset Managers ("**Institutional Investors**"), and service providers can adhere to, and report such an adherence annually in the form of a "Stewardship Report" submitted to the FRC. The FRC then evaluates these reports and those that meet

[521] Companies (Miscellaneous Reporting) Regulations 2018, Reg 27 (8) and (9).
[522] Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 30 October 2023.
[523] Financial Reporting Council, 'UK Stewardship Code' (2020); <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf/> accessed 30 October 2023.

the reporting expectations are labelled as a Signatory to the Code ("**Signatory**")[524].

It works by an "apply and explain" approach. It aims to make the corporate business practices more inclined to a responsible behaviour by having the Signatories hold them accountable by doing certain things such as:

- To engage with the corporations to maintain or enhance the value of assets, such as meeting the chair of the company etc. (Principle 9)
- To work in a collaborative engagement with other stakeholders, such as non-profits, to influence corporations to make certain thematic changes (Principle 10)

The Introduction to the Stewardship Code defines "Stewardship" as:

Stewardship is the responsible allocation, management and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefit for the economy, the environment and society.[525]

It calls the institutional investors the "*guardians of the market integrity*" and notes that considerations of social factors have recently become increasing relevant in investors decisions.[526]

The Code consists of 12 principles for institutional investors, and six principles for service providers. However, only the principles relevant to the thesis at hand have been explained and discussed below. Principle 1 of the Stewardship Code consists of a duty on the Signatories to formulate their purpose that creates "*long term benefits for the clients and beneficiaries leading to sustainable benefits for the economy, the environment and society*" as well as to report within their Stewardship Report as to the strategies they have employed to adhere to that

---

[524] ibid.
[525] Financial Reporting Council, 'Wates Corporate Governance Principles' (December 2018) 4; <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf#:~:text=The%20Wates%20Principles%20introduce%20an,arrangements%2C%20without%20being%20unduly%20prescriptive/> accessed 30 October 2023.
[526] ibid.

purpose.

The fact that a consideration within the formulation of such a purpose is "*society*" and that the principle requires a statement as to how this has been complied with, is relevant for this purpose. Moreover, principle 4 of the Stewardship Code requires signatories to engage in market-wide identification and response to "systematic risks", and to report as to how they have engaged with the stakeholders in forming meaningful alliances to address them.

The requirement to identify and respond to systematic risks has parallels with the FDV. Additionally, principle 7 also requires the Signatories to prioritise some issues which are of importance to them (whether environmental, social, governance-related or climate-related) over others. In its explanation as to how this prioritisation can be done, the Stewardship Code states in part:

> *Signatories should explain:*
> *…*
> *How they have ensured that*
> *- **tenders have included a requirement to integrate stewardship** and investment, including material ESG issues; and*
> *- **the design and award of mandates include requirements to integrate stewardship** and investment to align with the investment time horizons of clients and beneficiaries.*[527] *(emphasis added)*

Such actions would, arguably, go a long way in ensuring that institutional investors play a role in ensuring market integrity and socially responsible business practices. It is submitted that the Stewardship Code could also do well with having an express provision to ensure that the corporations in which they invest in do not engage with socially harmful and exploitative practices. A case in point would be the ethical funds that would not invest in weaponry, tobacco or alcohol industries. There may be definitional and demarcation issues in this regard, but this is something that should be on the agenda regardless. This would be the first step in the direction of

[527] ibid 15.

the case for modern slavery as this thesis intends to establish. Effecting change through institutional investors will pave the way for even more effective intervention in preventing modern slavery, such as those based on the FDV model.

4.2.5. Concluding Remarks

To conclude, it remains to be seen whether company law in the UK can evolve in such a way that responsibility remains with the top leadership without the insulation of corporate boards from decisions that have an enormous impact on modern slavery issues in their global supply chains. One of the key questions is how much board oversight is needed for effective management of a company's environmental and human rights risks? Where the FDV does not make board approval of corporate compliance statements necessary, the MSA does, this being one of its few strengths. The level of impact the proposed European Commission legal initiative set to introduce a legal requirement of mandatory human rights and environmental due diligence expected in June 2021 would have on the aforementioned issues, remains to be seen.[528] However, the recent EU Parliament vote clearly indicates a paradigm shift towards hard law, this evolving regulatory landscape provides a foretaste for those MNEs incorporated and/or operating in the EU, who have not allocated resources nor attention to tackling modern slavery, instead exacerbating systemic inequality between the global north and south.

---

[528] John Morrison, Phil Bloomer and Camille Le Pors, 'Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards' (*Business-humanrights.org* 3 March 2021); <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 30 October 2023.

Chapter 5: Comparative Jurisprudence: The French Duty of Vigilance

The effective implementation of the French Act on the Duty of Vigilance has proved to be problematic as a result of its lack of effective monitoring and enforcement mechanisms. The shortcomings of the French experience should be taken into account in the context of other mandatory HRDD legislation initiatives – Virginie Rouas[529]

[529] Virginie Rouas, 'Achieving Access to Justice in a Business and Human Rights Context' (University of London Press 2022) 377.

It is submitted that the FDV can prove instructive in the UK context in remediating certain potential gaps in the regime introduced by the MSA. On 27 March 2017, the National Assembly of France enacted the Law No. 2017-399 which introduced the FDV into the French Commercial Code. It introduced two articles to the French Commercial Code, i.e., Law No. 225-102-4 (requiring certain enterprises to formulate, implement and publish a vigilance plan – "**Article 1**") and Law No. 225-102-5 (requiring remediation for harm that is caused and liability for failure to comply – "**Article 2**").[530]

By and large, there are strong early indications that the FDV has been successfully implemented by the MNEs to which it applies. It is the first law of its kind to hold the MNEs (to an extent – see, in particular, 7.3 below) responsible for socially and environmentally harmful effects of their, and their subsidiaries', activities in other jurisdictions, i.e., the FDV has extraterritorial application, with real consequences for non-compliance. Some have argued that the traditional "legal compartmentalisation" associated with complex corporate organisational structures has been hit with a serious blow by this law[531]. This is because affected people can now bring their claims directly before the French Courts, subject to the satisfaction of the burden of proof. Furthermore, the FDV is also a milestone in a growing tide of European support for the strengthening of legal mechanisms on mandatory horizontal due diligence on both environmental and human impacts of business operations - for instance, in February 2019, the European Parliament's Subcommittee on Human Rights published a study recommending the establishment of a duty of vigilance for European companies.

This chapter will detail the content of the FDV law and its scope of application to make a case for a similar enactment within the UK. In creating a positive duty with extraterritorial application and strong penalties for non-compliance, the FDV

[530] Law No. 2017-399 further stated that these provisions will apply from the "*first financial year opened after the publication of this law*".
[531] Juan Ignacio Ibañez and others, 'Devoir de Vigilance: Reforming Corporate Risk Engagement' (iPoint-systems GmbH, 9 June 2020) 11, < https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 31 October 2023.

represents a bright-line rule for compliance while effectively punishing non-compliance with appropriate sanctions, whereas it might be said that the MSA regime has some clarity as to expected, normative standards – but is less effective in policing such standards meaningfully.

It must be mentioned here that translation of the text of Law No. 2017-399 wherever reproduced in this chapter has been taken from the *Vigilance Plans Reference Guidance*[532]by SHERPA.[533]

5.1. Background to the enactment of the FDV

On 24 April 2013, the Rana Plaza Building in Dhaka, Bangladesh collapsed to the ground, causing 1,135 deaths and wounding 2,000 others.[534] Rana Plaza was one of the major centres of Bangladesh's clothing market, which itself is one of the largest clothing export countries in the world. Subsequent to the tragedy, it transpired that many major French clothing brands regularly sourced their products from Rana Plaza and that the supply demand had put the local traders at increased pressure. Even though it had been communicated to them that the Plaza had some construction flaws and they should relocate, they had ignored these warnings due to increased international clientele pressure, even threatening to lay off persistent employees. Ultimately, the Rana Plaza collapsed.[535]

It was felt that corporations which regularly source their products from outside the developed world, and therefore are indirectly responsible for those workplace

---

[532] Sherpa, 'Vigilance Plans Reference Guidance' (*Asso-sherpa.org*, 2018) <https://www.asso-sherpa.org/wp-content/uploads/2018/12/Sherpa_VPRG_web_pageapage-min.pdf> accessed 31 October 2023.

[533] "Securing a Hybrid Environment for Research Preservation and Access", a non-governmental organisation with research capabilities and widespread influence in this sphere.

[534] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 8 July 2021 and Christophe Clerc, 'The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains' (2021) European Economic, Employment and Social Policy, ETUI Policy Brief No. 1/2021.

[535] See generally, on the interlinkage between the culpability of MNEs in failing to monitor their supply chains and the Rana Plaza tragedy: Taskin Iqbal, *The Enlightened Shareholder Value Principle and Corporate Social Responsibility* (Routledge, 2021).

conditions, must be attributed some responsibility for the abuses in their supply chains. Christophe Clerc observes that:

> *The Rana Plaza tragedy demonstrated the need to regulate companies which use subsidiaries, subcontractors and suppliers to carry out underpaid work, without consideration for core humanitarian principles, including trade union and workers' rights. Structures permitting companies to profit from such abusive practices should be replaced by a principle of company responsibility for their entire value chain.*[536]

The UNGPs[537] further supplement this position[538], as adopted by the Human Rights Council via its resolution of 16 June 2011.[539] The Guiding Principle 1 states that "*States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*". In the context of responsibilities of business enterprises, Guiding Principle 13 states that:

> *The responsibility to respect human rights requires that business enterprises:*
> *(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
> *(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*[540]

---

[536] Christophe Clerc, "The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains" (2021) European Economic, Employment and Social Policy, ETUI Policy Brief No. 1/2021.

[537] UN Guiding Principles on Business and Human Rights 2011, <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 10 July 2021. It is perhaps curious to separate out the need for a direct link and "contribution" towards these impacts. However, it accords with international human rights law that there is a distinction between attribution and damage: Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015) 9.

[538] Also see the proposed Corporate Due Diligence and Corporate Accountability Directive at the EU level, another piece of evidence of further global systemic change in this field: European Parliament, 'Legislative Train Schedule', <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-corporate-due-diligence/> accessed 31 October 2023.

[539] United Nations Human Rights Committee Resolution 17/4 (UN Doc A/HRC/RES/17/4), adopted 16 June 2011.

[540] UN Guiding Principles on Business and Human Rights 2011,

In one of the parliamentary sessions preceding the enactment of the Law No. 2017-399, it was specifically mentioned that the French government was drawing on these principles and giving effect to its international obligations in promulgating that law. [541]

However, this was not the first time France required large companies to report on nonfinancial matters. In 2001, the Law No. 2001-420[542] (*Nouvelles Régulations Economiques* – New Economic Regulations 2001) was enacted. This required listed companies to include in their annual management report[543] information concerning the social and environmental consequences of their activities. Other such examples include Grenelle II[544] (non-financial declaration as required under EU Directive 2014/95/EU) and the Law No. 2012-557[545] (relating to transparency in social and environmental matters).

5.2. Who does the law apply to?

The scope of the FDV raises key practical and theoretical issues. It can be said that the FDV, rightly, applies to a wide range of businesses, subject to certain qualifications. The FDV applies to "*any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad*".[546]

<https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf/> accessed 31 October 2023.

[541] '*Report Done on behalf of the Law Commission Constitutional, Legislation and General Administration of the Republic on the Proposed Law (No. 2578), Relating to the Duty of Vigilance of Parent Companies and Ordering Companies*' French National Assembly Parliamentary Report No. 2628 (11 March 2015)

[542] L. no. 2001-420, 15 May 2001 on new economic regulations: OJ 16 May 2001, at 7776.

[543] French Commercial Code Law No. 225-102 requires certain companies to publish an annual management report. This is akin to the Director's Report under Section 415 of the CA 2006.

[544] L. no. 2010-788, 12 July 2010 on a national environmental commitment: OJ 13 July 2010, at 12905.

[545] L. no. 2012-557, 24 April 2012 on the obligations of transparency of the companies in social and environmental matters.

[546] Law No. 2017-399, art 1 para 1.

The above underlined phrases and words have caused confusion about the scope of application of FDV. In other words, whose registered office is required to be situated within the French territory or abroad, the parent company or the subsidiary? Further, what is meant by direct and indirect subsidiaries, does it cover only *de jure* control i.e., over 50% shareholdings or does it also cover *de facto* control i.e., parent companies whose advise the subsidiary is accustomed to act on? Additionally, what is meant by the term "employees", i.e. does it merely include "traditional" salaried employees or broader interpretation in this context is reasonably incidental?[547] Finally, what type of corporate forms does the FDV apply to?

In a report commissioned by the French Ministry of Economy and Finance, it was specifically recognised that the first problem with the FDV law is the uncertainty regarding the companies to which it applies, i.e., "*no State service currently has all the information necessary to determine whether the Act applies to a particular company [or not]."*[548]As a result, it was recommended that a State service be dedicated for this purpose "*to collect confidential data, process them using the definition filters of the Law and promote respect for obligations of the Duty of Vigilance by warning the companies concerned of the risks incurred…[in addition to the invocation of the voluntary jurisdiction of a French court*[549]*] this service could play a role actively promoting the Duty of Vigilance, in the best interests of the companies themselves*."[550] There are also conceptual issues relating to the use of specific corporate vehicles, not all of which even potentially fall within the scope of the FDV.

[547] *Uber BV v Aslam* [2021] UKSC 5.
[548] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, <https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises/> accessed 31 October 2023.
[549] See for example under art 1 para 7 or art 2.
[550] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises/> accessed 31 October 2023, at 24.

In light of these discussions, it has been argued that the FDV will only apply to about 150-200 MNEs.[551] However, SHERPA has in fact identified 263 MNEs that are subject to the law, whether or not they have formulated vigilance plans; while it may be that such differences are explained by differences in methodology rather than any sort of fault or culpable error, it appears likely that there was, initially, a degree of underestimation.[552]

5.2.1. Whose registered office is required to be situated within the French territory or abroad, the parent company or the subsidiary?

By its decision of 23 March 2017, the French Constitutional Court held that the phrases "*whose registered office is located within the French territory*" and "*whose registered office is located within the French territory or abroad*" within Law No. 2017-399 refer to the registered office of the subsidiaries.[553] That is, the parent company (which is required to formulate, implement and publish the vigilance plan) must in all circumstances be incorporated in France.

Where the relevant threshold is the number of employees, where the number of employees in the parent company and its French subsidiaries collectively are 5,000 or more, then it is subjected to the FDV law. If the number of employees in the parent company and its French and foreign subsidiaries collectively are 10,000 or more, then it is subjected to the FDV law.

The French Constitutional Court further clarified that it is immaterial if the parent company itself is a subsidiary of another foreign company, so long as the criteria is fulfilled, the parent company will be required to submit a Vigilance Plan.[554]

It is interesting to note here that the criterion of using the number of employees, as

[551] Stéphane Brabant and Elsa Savourey, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' 92 Dossier Thematique 1.
[552] Sherpa, 'Duty of Vigilance Radar' <https://vigilance-plan.org/search/> accessed 31 October 2023.
[553] Constitutional Court Decision No. 2017-750 DC dated 23 March 2017, para 3.
[554] French Official Journal (JO), 'Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies' 28 March 2017, text no. 5.

opposed to the turnover (as applied by the MSA) or a combination of the turnover and the number of employees (as applied in another French enactment[555]) is novel and does not find parallel elsewhere. In a way, this is a useful metric in that it is harder to hide an employee "off-balance sheet".

5.2.1.1. Exemption under the Law No. 2017-399

Para. 2 of Article 1 states that certain companies are exempted from this requirement. That is, (A) "*subsidiaries or controlled companies*" (meaning indirect subsidiaries) that fulfil the threshold mentioned in Para. 1 of Article 1 in their own right are exempt for the requirement to formulate, implement and publish the vigilance plan, so long as (B) "*the company that controls them, within the meaning of Article L 233-3 of the French Commercial Code*" fulfils that requirement. It has been argued that this provision intends to elide the FDV and the duty to formulate, implement and publish a vigilance plan.[556]

This exemption is inspired by another Law No. 2016-1691[557] (commonly known as "**Sapin 2**") which requires the production of "consolidated group accounts" and this exemption was introduced into the Law No. 2017-399 at a later stage so as to avoid duplication.[558]

(A) "Subsidiaries or Controlled companies"

Law. No. 233-1 of the French Commercial Code defines a "subsidiary" as:

> *"When a company owns more than half of the capital of another company, the second company shall be regarded, in order to apply this chapter, as a subsidiary of the first company."*

As for indirect subsidiaries / "controlled companies", Law No. 233-3[559] of the

---

[555] R. no. 225-104, 9 August 2017 on the implementation of Directive 2014/95/EU.
[556] Brabant and Savourey (n 499) 8.
[557] L. no. 2016-1691, 9 April 2016 on production of consolidated group accounts.
[558] Brabant and Savourey (n 499) 7.
[559] L. no. 233-3.

French Commercial Code envisions four types of control by a company over another entity. (i) where the company "*directly or indirectly holds a fraction of the capital that gives it a majority of the voting rights at that company's general meetings*"; (ii) where the company of itself "*holds a majority of the voting rights in that company by virtue of an agreement entered into with other…shareholders";* (iii)where it effectively determines the decisions taken due to its "*voting rights*"; and (iv) where in its capacity as a shareholder of the company, it has the power "*to appoint or dismiss the majority of the members of that company's administrative, management or supervisory structures*", so long as the said voting rights amount to 40% or above and "*no other shareholder directly or indirectly holds a fraction larger than its own*". In this way, Law No. 233-3 covers not only the notion of traditional control but also "presumption of control" and "joint control."[560]

Giving a literal statutory interpretation to the Law No. 2017-399, it can be argued that while only the employees of the parent company and its subsidiaries are taken into account in calculating whether or not the FDV is applicable to a particular entity, when determining the qualification for an exemption, not only the subsidiaries are exempted (so long as they fulfil the criteria), but the controlled companies are also exempted (so long as they fulfil the criteria) even though their employees were never required to be counted in the initial calculation for the purpose of application of the said law.

(B) "The company that controls them, within the meaning of Article L 233-3 of the French Commercial Code"

For a discussion of the meaning of the term "controlled company": see 2.1 above.

In light of the OECD Guidelines on Multinational Enterprises[561], it has been argued that the notion of control within Law No. 233-3 must be interpreted expansively and not narrowly so far as the FDV is concerned. [562] So that the notion of control

[560] L. no. 233-3 at III.
[561] OECD, 'Guidelines for Multinational Enterprises 2011', <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 31 October 2023.
[562] C Hannoun, "The duty of vigilance of parent companies and ordering companies after the law of March 27, 2017" Dalloz soc. 2017.

with the Law No. 2017-399 will be even broader and more far-reaching than that contained in Law No. 233-3. Arguably, this aligns with over-arrching policy needs in tackling the ill of modern slavery and human rights violations.

5.2.2. What is meant by direct and indirect subsidiaries, does it cover only de jure control i.e., over 50% shareholdings or does it also cover de facto control i.e., parent companies on whose advice the subsidiary is accustomed to act upon?

For a discussion of the meaning of the term "subsidiary": see 2.1 above.

The preparatory work[563] of the Law No. 2017-399 favours the position that the term "subsidiary" covers only those entities in which the parent company holds 51% or more shareholding, so that only the employees of such a company will count towards the benchmarked number of employees. This interpretation, however, contrasts with the interpretation given to a similar provision in the Sapin 2 law by the French Constitutional Court where it was held that the term "direct subsidiary" in the law must be given the definition contained in Law No. 233-1 and to the term "indirect subsidiary" must be given as that contained in Law No. 233-3.[564]

It has been argued that given an express reference to the Law No. 233-1 has been omitted from the text of the FDV, and the term "indirect subsidiaries" has been specifically included, a broad interpretation must be given to it which covers "controlled companies".[565] In other words, indirect control is a question of fact, rather than a term of art.

In practice, both such interpretations have been used by the French multinational corporations in their formulation of a vigilance plan.[566] For the purposes of this thesis, it is argued that the position consistent with the preparatory work preceding

---

[563] Or *travaux préparatoire* (roughly equivalent to Hansard in the UK): AN, rep. no. 2628, 11 March 2015, spec. p. 64 (defining "subsidiary" by citing article L. 233-1 of the French Commercial Code).
[564] Constitutional Court Decision No. 2016-741 DC dated 8 December 2016, para. 14; see relevant definitions at 2.1(A) and 2.1(B) above.
[565] C Hannoun, "*The duty of vigilance of parent companies and ordering companies after the law of March 27, 2017"* Dalloz soc. 2017.
[566] Brabant and Savourey (n 499) 6.

the Law No. 2017-399 must be preferred. While policy considerations might suggest taking an overly-inclusive approach, on balance, the stricter approach arguably achieves greater legal certainty.

5.2.3. What is meant by the term "employees", that is does it merely include salaried employees?

In another similar enactment under the French law, namely Article R. 225-104[567] relating to disclosure of non-financial information, the term used is "permanent employees".[568] It has been argued that this term has a clearer meaning than the term "employees" which seems to exclude people other than the salaried staff (eg consultants, contractors, temporary agency staff and/or unpaid interns).[569] There is an attraction in applying a bright-line rule that is supported by existing judicial practice.

5.2.4. What type of corporate forms does the FDV apply to?

Article 1 and 2 are situated within the French Commercial Code amongst provisions dealing with public limited companies (in French, *société anonyme*), i.e., within Chapter V, Title II of Book II. It is therefore the case that the FDV definitely applies to public limited companies.[570]

Also, the reference in Law No. 226-1 that "[w]*here they are compatible with the special provisions specified by this chapter, the rules on…public limited companies, with the exception of Articles L.225-17 to L.225-93, shall apply to partnerships limited by shares*" seems to suggest that the FDV duty also applies to

---

[567] R. no. 225-104, 9 August 2017 on the implementation of Directive 2014/95/EU.
[568] The relevant text reads:
- *For any company whose securities are admitted to trading on a regulated market: €20 million for the balance sheet total, €40 million for total net turnover and 500 for the average number of permanent employees employed during the financial year;*
- *For any company whose securities are not admitted to trading on a regulated market: €100 million for the balance sheet total and total net turnover, and 500 for the average number of permanent employees employed during the financial year.*

[569] Brabant and Savourey (n 499) 7.
[570] Brabant and Savourey (n 499) 3.

partnerships limited by shares[571] (in French, société en commandite par actions).[572]

Similarly, Law No. 229-1 which deals with the provisions governing a European Company (in French, societas europaea) reads that, "[a] *European company is governed by the provisions of (EC) Council Regulation No. 2157/2001 of 8 October 2001 relating to the status of a European company, those of the present chapter and those applicable to public companies which are not contrary thereto*". As such, the FDV also applies to European Companies.

However, a debate exists as to whether or not the FDV applies to a Simplified Company Limited by Shares (in French, *société par actions simplifiée* or "**SAS**"). Law No. 227-1 deals with the provisions governing SAS and reads in part, "[w]*here they are compatible with the special provisions specified by this chapter, the rules on public limited companies, with the exception of Articles L.225-17 to L.225-126 and L.225-243, shall apply to the simplified company limited by shares*." Michel Germain and Pierre-Louis Perrin have argued that since Articles 1 and 2 do not form part of the negative referrals in Law No. 227-1, the FDV is applicable to SASs.[573] In fact, in an empirical study conducted by Ibañez, Bayer, Xu and Cooper, seven such SASs that have voluntarily subjected themselves to the FDV law have been identified.[574] Perhaps, it is because it is at least arguable that SASs are subject to the FDV that they "voluntarily" submit to its requirements.

5.3. The purpose of the law

Para. 3 of Article 1 is reproduced below for ease:

> "*The plan shall include reasonable vigilance measures adequate to identify*

---

[571] Which must be distinguished from société en commandite, which is the French equivalent of the English Limited Liability Partnership (or LLP).
[572] Sophie Schiller, 'Exegesis of the law relating to the duty of vigilance of parent companies and contracting companies' (2017) La Semaine Juridique Entreprise et Affaires 15, 20.
[573] Michel Germain and Pierre-Louis Périn, *SAS – The simplified joint stock company* (6th edn Joly éditions 2016) para 109-1.
[574] Juan Ignacio Ibañez and others, 'Devoir de Vigilance: Reforming Corporate Risk Engagement' (iPoint-systems GmbH, 9 June 2020) 14, < https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 31 October 2023.

risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship."

There are a few salient points to note:

(1) FDV requires the parent company to formulate a vigilance plan, which shall consist of measures reasonable enough to identify risk and to prevent severe impacts on human rights and fundamental freedoms, and on the health and safety of individuals[575].

(2) The vigilance plan must be formulated with the following goal in mind: To protect against the activities of the parent company, the companies it controls (directly or indirectly) within the meaning of II of Law No. 233-16 (sole control of a company), subcontractors with which it has an established commercial relationship and suppliers with whom they have an established commercial relationship.

Further, note that the FDV law's scope only extends to the risk and severe impact related to human rights, fundamental freedoms, health and safety of individuals and environment so harm to property may not be covered as explicitly as they might be.

5.3.1. The law protects against the "risk" and "severe impact" on human rights and fundamental freedoms, and on the health and safety of individuals

[575] Only the phrases relevant to this research are discussed. That is, e.g., harm to environment is not discussed.

5.3.1.1. The meaning of the term "risk"

During drafting of the Law No. 225-102-4 and 225-102-5, it was felt the reference to "risk" is too vague and that some standard/norm of what constitutes as a "risk" must be provided within the framework of the law to enable its effective implementation in their specific context.[576] That is, it was feared that the vagueness of the term "risk" would amount to a "tick box" approach to compliance until it was standardised. However, the French government deemed it appropriate to retain the term in original noting that since the FDV itself is being promulgated in light of the "*sufficiently precise and comprehensive nature of the international commitments undertaken by France*"[577], there was no need for such an additional clarification. Brabant, Michon and Savourey expand on this and note that:

> *"[d]efined as such, the notion of 'risk' mentioned in the law is similar to that of 'potential adverse impacts on human rights' defined by international standards and frameworks…Although the required measures may bring to mind traditional risk management processes found in companies, there is, however, a fundamental difference: the purpose of the vigilance approach is to protect individuals and the environment whereas the purpose of classic risk management processes is to protect the company."*[578]

In terms of application, it has also been argued that in light of para. 5(1) of Article 1 which reads "*[the vigilance plan shall include] a mapping that identifies, analyses and <u>ranks risks</u>*", not all the risks to human rights etc. are supposed to be protected against "*but only those risks that the company has identified as the most severe, based on the company's ranking of their risks*"[579] are supposed to be protected against.

---

[576] AN, rep. no 2628, 11 March 2015, spec. p64.
[577] French National Assembly Parliamentary Report No. 4242 'Annex to the Report on the Proposed Law relating to the Duty of Vigilance of Parent Companies and Ordering Companies' (23 November 2016).
[578] Brabant, Michon and Savourey (n 81).
[579] Juan Ignacio Ibañez and others, 'Devoir de Vigilance: Reforming Corporate Risk Engagement' (iPoint-systems GmbH, 9 June 2020) 16, < https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 31 October 2023.

5.3.1.2. The meaning of the term "severe impact"

The French government took a similar approach to define the term "severe impact" as it took to defining the term "risk" and left it as it is. However, like the term "risk", the term "severe impact" can also be defined with reference to the applicable international human rights norms, or so the jurists have tried.[580]

A related phrase "severe human rights impact" has been used in the UNGP 14 and has been defined in the UN Interpretative Guide to the Guiding Principles with reference to "*its scale, scope and irremediable character*."[581] Such that, "*its gravity and the number of individuals that are or will be affected…will both be relevant considerations*" and the term "*irremediability*" mean "*any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact."*

The term "severe Impact" has also been equated with the more commonly used term "salient human rights issues"[582], which are issues that "*stand out because they are at risk of the most severe negative impact through the company's activities or business relationships*."[583]

5.3.1.3. What is meant by "human rights and fundamental freedoms, and on the health and safety of individuals"?

The French Parliament was of the opinion that (like the definition of "risk") the international norms and standards corresponding to these terms is "*sufficiently*

[580] Brabant, Michon and Savourey (n 81) 7.
[581] United Nations Office of the High Commissioner on Human Rights, 'The Corporate Responsibility to Respect Human Rights – An Interpretative Guide' (*OHCHR*, 2012): < https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf > accessed 31 October 2023.
[582] Brabant, Michon and Savourey (n 81) 8. See also, Juan Ignacio Ibañez and others, 'Devoir de Vigilance: Reforming Corporate Risk Engagement' (iPoint-systems GmbH, 9 June 2020) 16, < https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 31 October 2023.
[583] Shift, 'Introduction to Salient Human Rights Issues' (*Shiftproject.org* 2016): <https://shiftproject.org/resource/video-introduction-to-salient-human-rights-issues/> accessed 31 October 2023.

precise and comprehensive"[584] and must be determined with reference to international commitments of France. However, it did explicitly cross-reference a number of such commitments such as the Universal Declaration of Human Rights 1948 (UDHR), International Covenant on Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), European Convention on Human Rights 1950 (ECHR) and European Union Charter of Fundamental Rights 2000 (CFR).[585]

It was further clarified/elaborated that the terms "*human rights and fundamental freedoms, and on the health and safety of individuals*" includes "*first-generation rights and public liberties (property right, freedom of conscience, political rights, habeas corpus, etc.), second-generation rights (right to work, access to healthcare, education, right to strike, etc.), and third-generation rights (environment, bioethics, etc.).*"[586]

In other words, the definition of the scope of human rights protections, as envisaged by the legislature, reflects a comprehensive and modern understanding of all that the concept can be said to encompass.

5.3.2. The law protects against the activities of the parent company, the companies it solely controls (directly or indirectly) and a certain category of subcontractors and suppliers

The vigilance plan established under the FDV must identify risks and prevent severe impact caused due to the activities of the company formulating the said plan, i.e., the parent company.

5.3.2.1. Sole-controlled Companies (direct or indirect control)

The vigilance plan should also protect against the risks and severe impact associated with the companies it controls (directly or indirectly) within the

[584] AN, rep. no. 4242, prec., at 11.
[585] AN, rep. no. 2628, prec., at 66.
[586] AN, rep. no. 2628, prec., at 66.

meaning of II of Law No. 233-16 (sole control of a company, in the context of consolidated group accounts), as opposed to III (joint control) or IV (significant control, i.e., holding 20% or more shareholdings).

The sole control of a company exists where:

> *"1. When a majority of its voting rights are held by another company;*
>
> *2. When a majority of the members of its administrative structures are designated by another company for two successive financial years [and] the consolidating company is deemed to have effected such designations if, during that financial year, it held a fraction of the voting rights greater than 40%, and if no other partner or shareholder directly or indirectly held a fraction greater than its own;*
>
> *3. When a dominant interest is exerted over the company by virtue of a contract or the terms and conditions of its memorandum and articles of association, when the applicable law allows this."*[587]

So, the definition to be applied is a broad, functional one – rather than a technical definition that may be eluded via deliberate corporate restructuring.

5.3.2.1.1. Direct Control

A company solely and directly controls another company if it has at least 50% or more shareholding in that company, it has 40% or more shareholding in that company provided no other entity has a greater shareholding (i.e. a plurality) or it exerts dominant interest over that company by virtue of any written instrument (eg a shareholders' agreement). The last of these three conditions is subject to interpretation on a case-to-case basis.

[587] Law No. 233-16.

In the context of direct control, Brabant, Michon, and Savourey have argued[588] that the reference to III of Law No. 233-16 means that the company must have "exclusive control" over the other entity, which can be in the form of "legal control" (sub-article 1), "de facto control" (sub-article 2) or "contractual control" (sub-article 3) which means that the company is entitled able "*to use or to direct the use of assets of another company in the same way that it controls its own assets*".[589] So, again, we see the application of a practical, functional definition.

5.3.2.1.2. Indirect Control

It has been argued that due to the addition of the words "indirect control" the scope of FDV has been considerably enlarged, such that Sophie Schiller notes, pithily and convincingly:

> *"[the companies targeted are those] that are directly and also indirectly controlled, in other words all of those, with no limits to the chain of control, over which a company exercises a decision-making power, whether they are direct subsidiaries (filles), second tier subsidiaries (petites-filles), or third tier subsidiaries (arrières-petites-filles), etc."*[590]

In this way, the FDV requires parent companies to protect against activities of the companies over which it exerts a decision-making power, however, far removed in the chain of control. A company would be well-advised to carefully determine its scope of FDV at the on-set of its compliance. This could include special purpose vehicles incorporated for joint venture operations abroad – certain reserved decision-making and/or veto powers are typical in Joint Venture Agreements.

5.3.2.2. Sub-contractors and Suppliers

Additionally, the FDV law requires the parent companies to protect against

---

[588] Brabant, Michon and Savourey (n 81) 2.
[589] '*Memo to Consolidated Accounts 2019*' Francis Lefebvre Edition at 2001.
[590] Sophie Schiller, 'Exegesis of the law relating to the duty of vigilance of parent companies and contracting companies' (2017) La Semaine Juridique Entreprise et Affaires 15, 21.

harmful activities of only those subcontractors (1) and suppliers (2) with which the parent company has an "established commercial relationship (3)", and that only to the extent that the said harmful "*activities are related to this relationship* (4)".[591]

That is, the subcontractors and suppliers having a relationship with the parent company which falls short of an "established commercial relationship" will not be covered under this law. Moreover, for the subcontractors and suppliers which are covered under this law, they must be subcontractors or suppliers of the parent company to fall within the scope of the FDV.

5.3.2.2.1. The meaning of the term "sub-contractor"

The term "sub-contractors" was discussed in the parliamentary debates[592] preceding the enactment of the Law No. 2017-399 and it was stated that the definition of the term as present with the Law No. 75-1334[593] (relating to the issue of sub-contracting) will be incorporated. The definition of "sub-contracting" within the Law No. 75-1334 reads:

> *"sub-contracting is the operation by which an undertaking called a subcontractor [sous-traitant], through a subcontract and under his responsibility, entrusts to another person called a sub-contractee [sous-traité] the performance of all or part of the service contract or the public procurement contract, that it entered into with the principal [maître de l'ouvrage]"*

Therefore, there must be a principal with which the undertaking or sub-contractor has entered into a service or public procurement contract. The sub-contractor then further delegates all or part of its obligations under the contract to a sub-contractee (or sub-sub-contractor). It has been argued that this definition of a sub-contractor is restrictive and will provide the much-needed clarity about the ambit of scope of

[591] Art 1, para 3.
[592] AN, rep. no. 2628, 11 March 2015, at 65 (defines subcontracting using the definition provided by the law of 31 December 1975 on subcontracting and mentions the risks posed by successive subcontracting).
[593] L. no. 75-1334, December 31st, 1975 on subcontracting, art 1: OJ 3 Jan. 1976.

FDV, achieving greater legal certainty and predictability – albeit a trade-off of this being a narrower duty.

5.3.2.2.2. The meaning of the term "suppliers"

As opposed to the definition of the term "sub-contractors", the definition of the term "suppliers" is neither clear nor was it ever made the subject of parliamentary debates preceding the law. Academics have argued that if the ordinary meaning is given to this term, it would effectively cover all the persons, natural or legal, that have any part to play in the operations of a company, thereby widening the scope of the FDV beyond comprehension.[594] In fact, it has specifically been recognised in a report commissioned by the French Ministry of Economy and Finance that requiring companies to protect against the activities of their suppliers (even with the so-called qualification of having an "established commercial relationship") could be onerous and impractical, such that it was recommended that companies be given the discretion to prioritise certain suppliers over the other (first or second tier suppliers) to better formulate and implement the vigilance plan.[595] While this might lead to instances of wilful ignorance, a practical balance must be struck.

The ordinary definition of the term "suppliers" includes, for example, the EU Directive 2004/18/EC[596] (since repealed) which defines it as, "*any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or work, products or services.*"

As the FDV is inspired by the UNGPs, it is helpful to note here that within the UNGPs regime it is envisioned that the parent company will be responsible for the activities of both its "*upstream and downstream*"[597] suppliers. That is, the UN

---

[594] Brabant, Michon and Savourey (n 81) 2.
[595] Conseil général de l'économie (January 2020), *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donne'ses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 31 October 2023.
[596] Directive 2004/18/EC of 31 March 2004 on the procedures for the award of public works contracts, public supply contracts and public service contracts, since repealed, at art. 1 and 8.
[597] Brabant, Michon and Savourey (n 81) 5.

Interpretative Guide to the UNGPs reads, "*[a] business enterprise's value chain…includes entities…which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise."*[598]

However, within the FDV, it is argued that the express use of the term "suppliers" (and not suppliers and buyers) would imply that for the time being the FDV only holds the parent company responsible for its upstream suppliers. While this may seem like an arbitrary distinction, practically, the dynamics of the typical commercial relationship is that one has more leverage over suppliers than buyers.

5.3.2.2.3. The meaning of the term "Established commercial relationship"

Another French law, the Law No. 442-6-5 (I)[599] of the French Commercial Code (on the sudden termination of established commercial relationship), and the abundant jurisprudence developed thereunder was consistently cited with approval in the preparatory works of the Law No.2017399 with reference to the term "established commercial relationship".[600] The French Parliament was particularly inspired by the definition of the term provided in a decision of the Commercial, Financial and Economic Chamber (*Chambre commerciale de la Cour de cassation*, the French apex court for commercial matters) where it was defined as, "*a partnership which each party can reasonably expect to continue in the future.*"[601] While one may readily infer (or indeed prefer) a wider interpretation, it is important to interrogate such assumptions.

In fact, the French Parliament sought to justify the inclusion of broad-ended entities like suppliers in the FDV by saying that the addition of the qualification "established commercial relationship" sufficiently restricts the meaning of the term suppliers. That is, "*we used a wording allowing for a clarification of scope of sub-contracting, which*

---

[598] United Nations Office of the High Commissioner on Human Rights, 'The Corporate Responsibility to Respect Human Rights – An Interpretative Guide' (*OHCHR*, 2012) 8: <https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf > accessed 31 October 2023.
[599] L. no. 442-6-5
[600] AN, rep. no. 2628, at 36 and 71.
[601] Decision of the Commercial, Financial and Economic Chamber dated 15 September 2009.

was too extensive and which, in certain circumstances, could cover catastrophes out of the control of the instructing party. We retained what was important: solid contractual relationships, and chose a precise legal term".[602] It is clear that a balance must be struck between over-inclusivity and over-exclusivity; the question of whether or not such a balance has been struck must be assessed with respect to the overall context. It is submitted that the balance struck by the French legislature is reasonable in the circumstances.

5.3.2.2.4. "Activities…related to this relationship"

This phrase in the FDV is inspired by the wording of UNGP 17(b) which states that the parent company must protect against severe human rights impact that it "*may cause or contribute to through its own activities*" as well as the severe human rights impacts that are "*directly linked to its operations, products or services by its business relationships*."[603] The parent company is not responsible for the severe human rights impacts that are not "directly linked" to this business relationship.

The idea behind including sub-contractors and suppliers within the scope of FDV was to hold the parent company responsible for entities that fall within its *sphere d'influence* (equivalent of "leverage" in English).[604]

5.3.2.2.5. Whose sub-contractors and suppliers: the parent company's or the parent company's and the sole-controlled companies'?

There is some ambiguity about whose "sub-contractors and suppliers" the parent company is supposed to protect against: merely its own or that of its own and its sole-controlled companies?

[602] French National Assembly, *Full minutes of the Session on Wednesday 23 March 2016* at 2393.
[603] UN Guiding Principles on Business and Human Rights 2011: <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 31 October 2023, principle 17(b).
[604] M Lafargue, 'Law on the Duty of Vigilance of Parent Companies and Contracting Companies: Entering a New Era?' JCP S 2017, 1169, 2.

Brabant, Michon and Savourey have explained this position.[605] They have stated that the enacted version of the law reads "*from the activities of the company and of those companies it controls…as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship",* whereas a previous version of the draft law read "*from the activities of the company and the companies which it controls…as well as the activities of* <u>*their*</u> *subcontractors or suppliers with whom they have an established commercial relationship*."[606] Based on the omission of the word "their" and the principle of statutory interpretation that the legislature does not waste words, it can be argued that the omission was intentional to limit the scope of FDV only to the sub-contractors and suppliers of the parent company, and not of its controlled companies.

However, this position is difficult to defend in light of the discussion reproduced in 5.3.2.2. (6) below.

5.3.2.2.6. Whose "established commercial relation": the parent company's or the parent company's and the sole-controlled companies?

The current version of the law reads, "*from the activities of the company and of those companies it controls...as well as the activities of subcontractors or suppliers with whom* <u>*they*</u> *have an established commercial relationship."* The fact that the plural word "they" has been used seems to suggest that the "established commercial relationship" must either be with the parent company or the sole controlled company.

In fact, this specific question was referred for determination to the French Constitutional Court and it was held that:

> *"the ambit of the economic partners of the company subject to the obligation to establish a plan…includes all of the companies controlled directly or indirectly by this company as well as all of the subcontractors*

[605] Brabant, Michon and Savourey (n 81) 3.
[606] AN, draft law no. 708, 23 March 2016, at p. 2. See also, AN, draft law no. 2578, 11 Feb. 2015, 14.

and suppliers with which [they have] an established commercial relationship, irrespective of the nature of the activities of these companies, their workforce, their economic weight or the place of establishment of their activities."[607]

In light of this, the position taken in 5.3.2.2. (5) above becomes difficult to defend. For the purpose of this thesis, it is accordingly argued that the FDV covers either one of the parent company's or the sole-controlled companies' sub-contractors and/or suppliers with which they have an established commercial relationship, i.e., a relation that both of them expect to continue in the future and not arrangements like a one-off supply contract.

5.4. Obligations under the law: Duty to formulate a vigilance plan in consultation with stakeholders under Para. 5 of Article 1

The first part of Para. 5 of Article 1 is reproduced below for ease:

"The plan is meant to be drawn up in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level"

It has been argued that the FDV requires the parent company to first identify all of its own stakeholders, and if possible, the stakeholders of its sole-controlled companies, sub-contractors and suppliers.[608] After this is done, *"[t]he diversity of stakeholders requires each company to…operate a deliberate choice, in the spirit of self-regulation, between possibly conflicting interests*"[609] and prioritise certain stakeholders over the other. In this regard, it is also important "*to include both internal stakeholders, with whom the company has usually already started a dialogue, and external stakeholders,*

[607] Constitutional Court Decision No. 2017-750 DC dated 23 March 2017, para 11.
[608] Brabant, Michon and Savourey (n 81) 5. In terms of the relevant theoretical framework, also see: James E Post, Anne T Lawrence and James Weber, *Business and Society: Corporate Strategy, Public Policy, Ethics* (10th edn, McGraw-Hill 2001).
[609] Tiphaine Beau de Lomenie and Sandra Cossart, 'Duty of Vig ilance: Stakeholders and the Duty of Vigilance' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires, 50(94), 3.

with whom companies might be less comfortable."[610]

The parent company can then determine, at its discretion, what suits it more: stakeholders organised along sectoral lines or territorial lines.

5.5. Obligations under the law: Duty to formulate a vigilance plan consistent with Para. 5 of Article 1

The second part of Para. 5 of Article 1 is reproduced below for ease:

> *"[The vigilance plan] shall include the following measures:*
>
> 1. *A mapping that identifies, analyses and ranks risks;*
> 2. *Regular evaluation procedures regarding the situation of subsidiaries[611], subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping;*
> 3. *Appropriate actions to mitigate risks or prevent severe impacts;*
> 4. *An alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the* representative trade union *organisations within the company;*
> 5. *A system monitoring implementation measures and evaluating their effectiveness."*

Evidently, the content of the vigilance plan must minimally comply with these five provisions.

Of these, pertinent and pressing issue is the "mapping of risks" (including the identification, analysis and prioritisation of risks) since it will then determine the future mitigating and preventive action of the company.[612] The requirement to have "regular evaluation procedures" in place post-the initial risk assessment is due to the

[610] ibid.
[611] To be read as "sole-controlled companies" as (i) the ambit of sole-controlled companies is much wider than subsidiaries; and (ii) Para 3 of Article 1 makes reference to sole-controlled companies.
[612] Brabant, Michon and Savourey (n 81) 5.

apprehension that risks are ever-changing and the risk management actions that were initially put in place may no longer be relevant. The company is therefore required to take up regular (in the context, annual) evaluation procedures to check if the mapped risks still represent the ground reality.

For similar reasons, the power to map risks is not only given to the company but also to the stakeholders by virtue of the "alert and complaint mechanism", which must also be drawn in consultation with them. Other conditions associated with the development of such a mechanism is that it must be given sufficient publicity, and have "*predictability, equity and transparency*"[613] in line with UNGP 31.

There are important ex ante legislative approaches that can help embed resilience through implementation of the concept of "corporate social competence" into business models of MNEs, thereby leading to corporate sustainability, effective resource allocation and through effective risk management and strategic planning. The principle of corporate social competence can be empowered through effective stakeholder participation, which would certainly align with Pillar 2 and 3 of the UNGPs. The pivotal role played by the board of directors in the implementation of corporate social competence would further instil and promote a culture of sustainable behaviour within MNEs.[614] Furthermore, there is a requirement for the company to take appropriate (some translations read "tailored"[615]) actions to mitigate the risks so identified and to prevent severe impacts on human rights. That is, the actions taken must be "proportionate" to the risks so identified and would depend on surrounding circumstances. For example, if the risk is within the parent company's or a sole-controlled company's activities, the parent company can of itself remedy it, or require it to be remedied by the exercise of its voting power in the general meeting. However, if the risk is related to the sub-contractor or the supplier, the parent company will need to put in place effective conditions in the contract or mobilize trade unions of the areas, to remedy it. The scope of what such an action could entail has been elaborated by Brabant, Michon and Savourey, such that it could be *"a new policy, the inclusion of*

[613] Brabant, Michon and Savourey (n 81) 12.
[614] Jigchen Zhao, 'Reimagining corporate social responsibility in the era of COVID-19: embedding resilience and promoting corporate social competence." (2021) 13 Sustainability 6548, at 14.
[615] Brabant, Michon and Savourey (n 81) 10.

human rights criteria in processes which already exist, audits, the development of self-assessment tools, actions to raise awareness or training plans for staff working in the activities which are most at risk, etc.”[616]

The mapped-risks, alert and complaint mechanism as well as the “tailored” actions are then subjected to systematic monitoring to evaluate their effectiveness.

As such, the language of Para. 5 does not warrant detailed comments. It must be noted that Para. 6 of Article 1 gives the power to the Council of State to expand on the requirements of a vigilance plan by way of a decree. It provides for the power to elaborate on this law by way of secondary legislation, including the power to “*detail the methods for drawing up and implementing the vigilance plan, where appropriate in the context of multi-stakeholder initiatives within sectors or at territorial level*.”

It is helpful to use empirical data to determine how Para. 5 has been interpreted by the French MNEs to which it applies.

5.5.1. Practical application of the FDV to MNEs

Globally, businesses ought to comply with their legal obligations to prevent modern slavery and human rights abuses for intrinsic and extrinsic reasons. In assessing the efficacy of the various legal regimes that govern this concern globally, one must consider secondary sources which evaluate empirical observations.

Based on a report published by Ibañez, Bayer, Xu and Cooper in 2020, which collected empirical data regarding compliance with the FDV, it was found that a total of 134 MNEs formulated a vigilance plan and published the plan and its implementation report, with an average compliance score of 66% based on 42 performance indicators (17 represented the requirements under the FDV, 14 represented relevant UNGPs and 11 represented general transparency requirements).[617] This is promising – it suggests

[616] Brabant, Michon and Savourey (n 81) 11-12.
[617] Juan Ignacio Ibañez and others, ‘Devoir de Vigilance: Reforming Corporate Risk Engagement’ (iPoint-systems GmbH, 9 June 2020) 4, <https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 31 October 2023.

compliance is seen as a desirable normative state.

In the same report, two major reasons for non-compliance and ineffective compliance were also identified[618]: (i) learning curve – the law itself is fairly recent and companies are still attempting to figure out what is expected of them; and (ii) the law is a "catch 22"[619] – if they do not publish it, they became liable, if they publish it, it is used against them in court (i.e. committing itself to a standard is seen as undertaking a guarantee to meet it).[620] MNEs, as a matter of policy, ought to be better supported in understanding their obligations – both in terms of knowing whether or not they need to prepare a vigilance plan, and, if so, the contents of such a plan.

5.5.1.1. Establishing a "FDV Working Group"

Since the FDV requires a lot of work and in order to comply with its requirements, companies have established "FDV working groups" within their corporate structure to better coordinate the said plan; its formulation and implementation.[621] Although most of the corporations that are subject to this law will already have a dedicated Human Rights Department ("**HR**"), or even a Corporate Social Responsibility ("**CSR**") Committee of the board, at their disposal, the requirements of FDV are too broad-ended and extensive to be effectively covered under it. For example, the purchasing departments of corporations (which were previously excluded from such centralised decisions) would also need to be consulted to give effect to the "supplier relationships" angle of the FDV.

Illustratively, the company Schneider Electric has established[622] a "Duty of Vigilance Committee" which is managed by its CSR department to formulate and implement its vigilance plan. The said committee comprises CSR colleagues, plus those with

---

[618] ibid 132 et seq.

[619] A paradoxical situation from which an individual cannot escape because of contradictory rules or limitations.

[620] In a sense, board composition can have a pivotal effect on how such countervailing concerns are weighted against the penalties for non-compliance: Edina Ederhardt-Toth, 'Who Should be on a Board Corporate Social Resonibility Committee?' (2017) 140 Journal of Cleaner Production 1926.

[621] Brabant, Michon and Savourey (n 81) 8- 9.

[622] Schneider Electric, 'Human Rights Policy' (10 December 2022): <https://www.se.com/uk/en/download/document/Human_Rights_Policy/> accessed 31 October 2023.

environment, purchasing, health and safety and other expertise. Such an approach has the potential to drive organisational change, by better integrating CSR into the wider business. Further, having sub-committees of boards take the lead in specific areas allows organisations to leverage their greater potential to be nimble and their depth of specialised knowledge (such knowledge being a relevant factor when considering their appointments).[623]

5.5.1.2. Mapping of risks – Learning from Schneider Electric

Again, we discuss the case of Schneider Electric and the procedures it has put in place for mapping the risks associated with its (A) sole-controlled companies, (B) sub-contractors and (C) suppliers.

(A) Sole-controlled Companies

As a policy matter, Schneider Electric has strengthened the prevention and control mechanisms related to human rights, health and safety and environmental issues across all of its corporate structure. Additionally, for sole-controlled companies located in countries at risk of forced or child labour or recruitment of migrant workers, Schneider Electric requires such sole-controlled companies to further strengthen their prevention and control mechanisms.[624]

(B) Sub-contractors

At the procurement stage, Schneider Electric has required the management to evaluate if the procured work is from a known risk country and if it is a high-risk activity. If that is the case, then the management is required to undertake a compulsory due diligence regarding the operations of the potential sub-contractees and only when the

[623] Edina Ederhardt-Toth, 'Who Should be on a Board Corporate Social Responsibility Committee?' (2017) 140 Journal of Cleaner Production 1926.
[624] Brabant, Michon and Savourey (n 81) 11. See generally, Schneider Electric, 'Human Rights Policy' (10 December 2022):
<https://https://www.se.com/uk/en/download/document/Human_Rights_Policy/> accessed 31 October 2023.

sub-contractee is cleared, the contract is granted.[625]

(C) Suppliers

Schneider Electric has categorised the suppliers with which it and its sole-controlled companies have an established commercial relationship, which amounts to about 40,000 suppliers, into two categories: strategic suppliers and other suppliers. Strategic suppliers, which amount to approximately 1,100 suppliers, collectively represent 62% of their purchasing revenue and are required to comply with the ISO 26000 (Social Responsibility) Program.[626]

The other suppliers are subjected to three successive tiers of scrutiny: (1) Inherent risk-analysis (based on the country of their production house and the harmful qualities of the product/solution purchased by Schneider Electric); (2) Self-assessment questionnaire; and if required (3) On-site audit carried out by Schneider Electric.[627]

5.5.1.3. Appropriate Action – Vinci Group, STMicroelectronics and BNP Paribas

Appropriate action is context-specific and, sometimes, lateral thinking is required to put in place effective mechanisms where atypical or multijurisdictional complexities arise. The Vinci Group, a premier construction group, has taken two steps to mitigate the risks and prevent severe impacts on human rights throughout its corporate structure and value/supply chains. Firstly, it has published and widely circulated a Human Rights Guide[628], tailored to the risks associated with its operations, which helps all levels of the management in deciding what to do in certain situations and it also helps the potential affectees in knowing about their rights and the remedies available to them. Secondly, it has executed a trade agreement between itself, its joint-venture

---

[625] Schneider Electric, ‘Human Rights Policy’ (10 December 2022): <https://www.se.com/uk/en/download/document/Human_Rights_Policy/> accessed 31 October 2023.

[626] ISO 26000 (2010): <https://www.iso.org/publication/PUB100258.html> accessed 31 October 2023.

[627] Brabant, Michon and Savourey (n 81) 11. See generally, Schneider Electric, ‘Human Rights Policy’ (10 December 2022): <https://www.se.com/uk/en/download/document/Human_Rights_Policy/> accessed 31 October 2023.

[628] Vinci, ‘Vinci’s Guide on Human Rights’ (20 April 2017): <https://www.vinci.com/publi/manifeste/vinci-guide_on_human_rights-en.pdf> accessed 31 October 2023.

entity Qatari Diar Vinci Construction (QDVC) and the international trade union BWI to protect labour rights in its Qatari construction ventures and make due diligence on construction sites mandatory. This is an example of a tailored solution to a common problem, i.e., because Qatar is a risk country with regards to labour rights, a specific agreement involving an influential organisation like the BWI was executed at the onset to discharge FDV obligations and protect Vinci Group's economic interests.

The STMicroelectronics have specifically worked towards forced labour and migrant worker rights by implementing strict conditions upon their recruitment agencies, such as audits in the country of the recruitment agencies to protect workers who have migrated to those countries against potential and actual risks. So, for example, STMicroelectronics has a significant presence in Malaysia where Indonesian, Nepalese and Sri Lankan workers are regularly employed. Such in-country audits help the company in detecting and mitigating the risks associated with migrant workers. Other measures that STMicroelectronics has taken include covering the costs of the recruitment agencies (to ensure no debt is due on the migrant worker), ensuring that there is an employment contract in place which must be in the language of the migrant worker and prohibiting the retention of sensitive documents relating to the migrant workers.

BNP Paribas, a premier banking group, has incorporated a "human rights criterion" into its client assessment tools for the purposes of credit facilities and other sectoral policies.[629]

5.5.1.4. Monitoring Systems[630]– ENGIE

ENGIE perhaps dealt with the issue the most holistically. It formulated a policy which required all of its business units and other associated entities to comply with international human rights norms in their operations, and then required each unit to submit an annual compliance report on how far they have complied with the norms.

[629] BNP Paribas, 'Statement on Human Rights': <https://group.bnpparibas/uploads/file/uk_declaration_bnp_sur_droit_de_l_homme.pdf > accessed 31 October 2023.

[630] In the sense described in Brabant, Michon and Savourey (n 81) 13.

This monitoring methodology makes sure that every unit of ENGIE's business enterprise knows what is expected of it and also how it must demonstrate annual improvement.[631]

5.6. Obligations under the law: Duty to publish the vigilance plan and the report on its effective implementation under Para. 5 of Article 1

Para. 5 of Article 1 is reproduced below for ease:

> *"The vigilance plan and the report concerning its effective implementation shall be published and included in the report mentioned in article L. 225-102"*

Law No. 225-102 itself refers to the "management report mentioned in the second paragraph of article L. 225-100", which is the annual management report concerning "*an objective and exhaustive analysis of the company's business development…[t]o the extent necessary…the analysis includes, where appropriate, the key performance indicators of a non-financial nature ...such as information pertaining to environmental issues and personnel matters*." The French annual management report, for all intents and purposes, is the annual report presented before the shareholders in an AGM within the UK.

Brabant, Michon and Savourey have held that the length of the vigilance plan and the related report, or its position within the annual management report, is immaterial so long as the vigilance plan and the related report are easily identifiable (for example, with a title) and have all the content required under the second part of Para. 4 of Article 1.[632] For the purposes of Law No. 2017-399, the inclusion of the vigilance plan and its related report in the annual management report or the provision of a link where such a report can be found on the company's website is sufficient for the purposes of "publishing" it.

---

[631] Brabant, Michon and Savourey (n 81) 13.
[632] Brabant, Michon and Savourey (n 81) 14.

It must be noted that Article 4 of Law No. 2017-399 states that "*for the financial year during which this Law [FDV] was published…article L. 225-102-4 [Article 1] of the said Code applies, with the exception of the report in its penultimate [Para. 5] paragraph*." That is to say, during the year that the FDV was published, i.e., 2017, only the vigilance plan was required to be published and included in the annual management report. However, from the next year onwards, both the vigilance plan as well as the report concerning its "*effective implementation*" were required to be published and included in the report under Law No. 225-102.

It has been argued that the requirement to publish and include in the annual management report the vigilance plan and the report on its effective implementation will help with "*increased transparency with the aim of informing investors, consumers and more broadly all stakeholders on company practices, and enabling them to make informed decisions on whether or not to place their "trust" in such companies*."[633]

5.7. Liabilities and Remedies under the FDV

The explanatory note to the draft FDV laid down its aims and objectives and read that:

> "*[T]he goal is to "encourage multi-national companies to act responsibly with the aim of preventing tragic events" in France or abroad that would violate human rights and harm the environment, and to "obtain remediation for the victims" where damage is sustained."*[634]

Therefore, the objective of the FDV was to prevent the happening of tragic events (Prevention) and to remedy the damage sustained (Remediation). To give effect to this objective, initially the FDV contained three types of liabilities: (i) a civil fine[635]

---

[633] Home Office, 'Transparency in Supply Chains etc. A practical guide' (2017), 4 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf>.

[634] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires, at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 4.

[635] Law No. 2017-399, art 3.

for failure to "*establish and effectively implement*" a vigilance plan and its related report; (ii) a periodic penalty payment[636] for failure to "*establish and effectively implement"* a vigilance plan and its related report after being called to do so; and (iii) damages for the harm caused "*that the execution of these obligations could have prevented."*[637]

As the precise scope of the term "*establish and effectively implement*" is not clear, and because criminal and civil penalties must be defined by law (*nullum crimen nulla poena sine lege* – no punishment without crime), the French Constitutional Court held the provision related to the imposition of a civil fine to be unconstitutional and struck it down.[638] Only the other two liabilities were retained in the promulgated version of the FDV.

5.6.1. Periodic Penalty Payment for failure to "*establish and effectively implement*" a vigilance plan and its related report under Para. 7 of Article 1

Para. 7 of Article 1 is reproduced below for ease:

> *"When a company receiving a* <u>*formal notice to comply*</u> *with the obligations laid down in paragraph I, does not satisfy its obligations within three months of the formal notice, the competent court may,* <u>*at the request of any party with standing*</u>*, order the company, including under a* <u>*periodic penalty payment*</u>*, to respect them."*

It appears that at the request of "*any party with standing*", the court may order a company to comply with the FDV obligations (the "*formal notice*"), and if the company fails to do so then on the passing of three months, such an order for compliance may be accompanied by a periodic penalty payment. Brabant and Savourey have argued that the amount of such a periodic penalty payment "*may need*

[636] Law No. 2017-399, art 1 para 7.
[637] Law No. 2017-399, art 2.
[638] Constitutional Court Decision No. 2017-750 DC dated 23 March 2017, para 3. However, such decisions turn on matters of French constitutional law; there is no reason to think that one would reach a similar conclusion in the UK context in relation to such civil regulatory regimes.

to be sufficiently large to bring about swift changes in companies' behaviour"[639], i.e., to serve as a deterrent.

This provision of the law was challenged by a group of French Senators before the French Constitutional Court for lack of "*accessibility and comprehensibility of the law*." However, it was held that because only a person with a standing can bring forward such a request to the court, this provision is constitutionally valid.[640] However, given that the phrase "*any party with standing*" has been given a broad meaning by the French Parliament[641], so that it could include "*victims, NGOs and trade unions*" as well as "*competitors*" and "*media, social networks and civil society*"[642],

Due to the fact that a wide array of litigants can request a court to order a company to comply with the FDV, and that the FDV itself contains obligations not only to establish a plan but also to "*effectively implement*" it, this provides a multi-pronged approach in facilitating compliance. This is also because of the reputational risk involved with the issuance of such a "*formal notice*" and the power of the court to "*order the publication, dissemination or display of its decision or an extract thereof*"[643] that the companies can be expected to, at the very least, comply with the FDV requirements. This is a testament to the merits of the FDV such that "*preventive action is essential to raising company awareness, limiting the negative impact of their activities on human rights and thus reducing the number of potential victims of such impacts.*"[644]

There is also the possibility of the amount accrued as a result of such a periodic penalty payment forming part of a "compensation fund" as opposed to be submitted to the Public Treasury, as the latest draft for the reform of French civil liability law proposes

---

[639] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires, at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 4.

[640] Constitutional Court Decision No. 2017-750 DC dated 23 March 2017, para 3.

[641] Amendment No. 65 to the Text No. 2628, submitted on the first reading in the French National Assembly on 26 March 2015.

[642] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 4.

[643] Law No. 2017-399, art 2 para 3.

[644] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 4.

this.[645] Remediation is an important function of the justice system, and this is achieved via this mechanism.

5.6.2. Damages for the harm caused "*that the execution of these obligations could have prevented*" under Law No. 225-102-5 (or Article 2)

Article 2 reads in part that:

> *"Following the conditions provided in articles 1240 and 1241 of the Civil Code, a breach of the obligations defined in article L. 225-102-4 of this Code, establishes the liability of the offender and requires him to remedy any damage that the execution of these obligations could have prevented."*

The reference to Law No. 1240 ("*any human action whatsoever which causes harm to another*"[646]) and Law No. 1241 ("*everyone is liable for harm which he has caused*") of the French Civil Code further strengthens the proposition that the case for damages under FDV can only be successful where it is proved that it was in fact "caused" due to the specified breach.

Academics have equated[647] this penal provision in the FDV with the usual French law of torts, which requires there to be a damage, a breach of a specified duty of care (A) and causation (B). Furthermore, under the FDV law, only a party with a *locus standi* (C) can bring a claim before the French Courts[648] and it will need to establish *a priori* that there has been a damage.

(A) "*[B]reach of the obligations defined in article L. 225-102-4*"

The obligations contained in Law No. 224-102-4 (or Article 1) are wide-ranging

---

[645] Draft reform of civil liability law, French Ministry of Justice, March 2017, Article 1266-1.
[646] French Civil Code 2016: <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> accessed 31 October 2023.
[647] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 2.
[648] Law No. 2017-399, art 2 para 2.

and broad. They include the obligation to establish a vigilance plan (arguably, this is a strict liability obligation) with "*reasonable vigilance measure*"[649] (what is "reasonable" is subject to ambiguity), and to "*effectively implement"*[650]it (what is the standard of effective implementation?).

The French Parliament recognised these problems and held that the duty of care under the FDV is not the "*actual attainment of that result* [*obligation de résultat*]" rather the obligation is "*to take all steps in their power to reach a certain result* [*obligation de moyens*]"[651]. It also provided a list of what such steps would include, including but not limited to "*contractual commitments, certifications, partnerships with stakeholders etc.".*[652]

Therefore, so long as the parent company "*take[s] all the steps in their power*" to "*mitigate risks or prevent serious impacts*"[653], the breach of duty of care is not established.

(B) Causation, that is "*any damage that the execution of these obligations could have prevented*"

The task of establishing causation, in the context of FDV and long supply chains, is even more difficult than establishing breach. Groulx, Regan and Parance note that, "*[The] plaintiff retains the burden of demonstrating causality between the harm and a lack of an effective plan*."[654]

Brabant and Savourey argue that the concerned parties to a litigation, as well as the French Courts, will have to make a judgment call as to which one of the two theories of causation present within the French civil liability regime applies here:

---

[649] Law No. 2017-399, art 1 para 3.
[650] Law No. 2017-399, art 1 para 1.
[651] AN, report no. 2628, at 31, 55 and 59 and AN, report no. 3582, 16 March 2016, at 14. See also, Nicolas Cuzacq, 'Commentary on the legislative proposals relating to the duty of vigilance of parent companies and ordering companies' (2014) Rev dr trav 2 at 265.
[652] AN, report no. 2628, at 79.
[653] Law No. 2017-399, art 1 para 3.
[654] Elise Groulx Diggs, Mitt Regan and Beatrice Parance, 'Business and Human Rights as a Galaxy of Norms' (2019) 50(2) Georgetown Journal of International Law 309.

the theory of "adequate causation" (what was the most likely determining cause of the damage sustained? This is equivalent to the "but for" test of causation in the English law) or the theory of "equivalence of conditions" (i.e., each factor contributed to causing the damage and must be held jointly or severally liable).

The UNGP 19(b), however, seems to prefer the theory of "adequate causation". It reads, "*[a]ppropriate action will vary according to: (i) [w]hether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship*."

In a report commissioned by the French Ministry of Economy and Finance regarding the FDV law, it was expressly recognised that there is a need to balance countervailing factors:

> *"A company exercises power in its sphere of influence (suppliers, partners, etc.). The actors in this sphere of influence depend in part on relations with the company ordering party. The stronger this dependence, the less the ordering company can ignore the consequences of their decisions….The more the sphere of risks extends, the more urgent and urgent is the search for a manager, that is to say of someone, natural or legal person, capable of indemnifying and repairing. But the law is not for all that an open door to the vindictive search of a company. responsible, and therefore necessarily guilty, even if it is not at fault, as long as it has "Deep pockets"."*[655]

Therefore, it is more likely that in the context of FDV and the long supply chain and extra-territorial obligations involved, the test for causation will be more stringent i.e., the theory of "adequate" causation will apply. There is, perhaps, a

[655] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donne'ses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 31 October 2023., at 65 and 66.

need to draw a line in the sand, but showing a causal link is crucial.Needless to say that with such conditions, the successful establishment of a case for damages under the FDV becomes more and more fanciful.

(C) Locus standi – only a person with a standing can bring a claim

By its decision of 23 March 2017[656], the French Constitutional Court gave a restrictive interpretation to the phrase "person with standing" within the FDV and held that only the actual victims will have such a *locus standi*. This, coupled with the fact that class actions by NGOs or trade unions already face many hurdles in France[657], effectively means that the victims will face hurdles in bringing a successful claim in France, a key issue to consider when assessing the FDV regime as a whole. On the contrary, in practice, the locus standi provided under the FDV to victims and NGOs has been the key strength of the FDV, upholding the spirit of Pillar 3 of the UNGPs. Brabant and Savourey also identify geographical distance, awareness of rights and procedural laws in France and other social, financial and linguistic barriers as possible hurdles in a successful case for damages.[658]

5.6.3. Liabilities and Remedies in practice

SHERPA has committed to monitoring the formal notices and civil lawsuits initiated under the FDV in the form of a periodically updated report, titled, "*Duty of Vigilance Radar: Follow Up on Current Cases*"[659]. For the purposes of this section, the data produced in the latest version of this report (July 2021) is used.

[656] Constitutional Court Decision No. 2017-750 DC dated 23 March 2017.
[657] Jacques Héron and Thierry Le Bars, *Droit judiciaire privé (Private judicial law)* (Montchrestien 2012) 96-101 and Patrice Macqueron and others, *Associations: Fondations, congrégations, fonds de dotation (Associations, Foundations, Congregations and Endowment Funds)* (Lefebvre 2016) 232, 233 and 245.
[658] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 3.
[659] Bommier Swann, Lucie Chatelain and Camille Loyer 'Duty of Vigilance Radar: Follow Up on Current Cases*'* (*Sherpa*, July 2021): <https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf> accessed 31 October 2023.

5.6.3.1. Formal Notices

As of July 2021, seven formal notices have been issued under the FDV law. A brief summary of each of these cases is reproduced below. Thematically, it can be seen that there has been a particular focus on the rights of indigenous peoples and environmental concerns in developing countries. However, there is diversity within their particular facts and hence there is value in considering each in turn. In summary, they are:

Location	**Defendant / Sector**
Uganda	Total Energies – Oil and Gas
Colombia, Mexico and the Philippines	Teleperformance – Services
Mexico	Électricité de France – Utilities
Various	Total Energies – Oil and Gas
Chile	Suez Group – Utilities
Chile	Casino Group – Retail
Various	XPO Logistics – Services

5.6.3.1.1. Total Energies in Uganda

Total Energies was served with a formal notice on 24 June 2019 "*for failing to comply with its legal obligations to prevent human rights abuses and environmental damage in the context of its Tilenga oil mega-project in Uganda*"[660]. It has been alleged that Total Energies is forcefully evicting the local population there for "*patently inadequate compensation*" and that the oil exploration activities therein are causing massive damage to the environment.

[660] ibid.

5.6.3.1.2. Teleperformance in Colombia, Mexico and the Philippines

Teleperformance was served with a formal notice on 18 July 2019 for failing to alleged negligence in addressing workers' rights violations in subsidiaries located in Columbia, Mexico, and the Philippines. This included failing to include some significant violations in its vigilance plan, as well as "*possible infringements of the freedom of association and compulsory pregnancy tests for female workers*"[661]. Of these, freedom of association is a fundamental right that allows workers to join or form trade unions, and is vital for collective bargaining and ensuring workers' rights are protected. Imposing compulsory pregnancy tests, on the other hand, can be seen as a gross violation of privacy and a form of discrimination during hiring processes or for continued environment. Such practices can lead to a workplace environment where women's rights are compromised and they might face potential disadvantages based solely on their gender and reproductive choices. From a birds' eye view, the failure to identify, assess, and address these violations in a vigilance plan is significant and a breach of the obligation to provide a vigilance plan in accordance with the FDV.

5.6.3.1.3. Électricité de France (EDF) in Mexico

EDF was served with a formal notice on 3 October 2019 for failure to undertake its FDV obligations in the proposed wind farms project located on the lands of the indigenous community Unión Hidalgo of Mexico, more specifically it was alleged that the right to free, prior and informed consent (commonly known as "**FPIC**") of the indigenous community has not been respected. FPIC is protected within the framework of the international human rights regime, i.e., Indigenous and Tribal Peoples Convention, 1989[662], and also within the Mexican Constitution.

5.6.3.1.4. Total Energies and Climate Change

Total Energies was served with a formal notice on 19 June 2019 to bring its

[661] ibid.
[662] Indigenous and Tribal Peoples Convention, 1989: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Indigenous.aspx, accessed 31 October 2023.

activities in line with the Paris Agreement, 2016[663].

5.6.3.1.5. Suez Group in Chile

The Suez group has a subsidiary in Chile named Empresa de Servicios Sanitarios de Los Lagos (ESSAL) which controls 43% of the water supply market in Osorno, Chile. Over the years, ESSAL has had many operational malfunctions affecting the general health and environment in that area. Another one of these incidents occurred on 10 July 2019 which led to the contamination of drinking water with oil and citizens were left without a water supply for ten days. A health warning was also issued by the concerned authorities.

As a consequent thereof, Suez was served with a formal notice under the FDV on 9 July 2020.

5.6.3.1.6. Casino group in South America

The Casino group's sale of beef products in South America accounts for almost half of its global turnover (47%)[664]. It was served with a formal notice on 21 September 2020 where it was alleged that its beef policy and sourcing has resulted in deforestation in South America. There are also allegations of landgrabbing from indigenous groups.

5.6.3.1.7. XPO Logistics and the problems with out-sourcing

In 2018, XPO Logistics out-sourced 54.8% of its activities to various agencies and workers with which it has a temporary relationship, i.e., not an "established commercial relationship". This was seen as an attempt to evade responsibility for human rights and environmental abuses in its supply chain and it was served with

---

[663] UN Paris Agreement, 2015: <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 31 October 2023.
[664] Bommier Swann, Lucie Chatelain and Camille Loyer 'Duty of Vigilance Radar: Follow Up on Current Cases' (*Sherpa*, July 2021): <https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf> accessed 31 October 2023.

a formal notice on 1 October 2020. Such concerns could become increasingly pressing in the modern-day “gig” economy.

5.6.3.2. Civil Lawsuit for Damages

Similarly, there has been a significant growth in civil claims being brought so as to further compliance with the FDV. Again, thematically, there is a particular focus on environmental matters but it is appropriate to consider each in turn for fullness. In summary, they are:

Location	**Defendant / Sector**
Uganda	Total Energies – Oil and Gas
Mexico	Électricité de France – Utilities
Various	Total Energies – Oil and Gas
Chile	Suez Group – Utilities
Chile	Casino Group – Retail

5.6.3.2.1. Total Energies in Uganda

A civil law suit against Total Energies was filed on 23 October 2019 before the court of the first instance (Nanterre) after the concerned organisations felt that there was no improvement on the ground post-service of formal notice. Owing to the uncertainty within the FDV about the particular court seized of jurisdiction in this matter, in March 2020, the Nanterre declared that it in fact lacked jurisdiction and referred the case to a commercial court. This referral was challenged by the concerned organisations before the Court of Appeal of Versailles and on 10 December 2020, the appeal was dismissed. As of that date, the case is pending before the French commercial court.

Interestingly, the concerned organisations did not argue that Total Energies lacked

a vigilance plan. In fact, Total Energies already had a vigilance plan in place but they argued that its vigilance plan does not disclose the risks associated with its activities in a particular country, i.e., in Uganda. Total Energies in return argued that the FDV requires it to establish and implement a vigilance plan and not to disclose "*risks specific to individual projects*"[665].

5.6.3.2.2. Électricité de France (EDF) in Mexico

A civil suit against EDF was filed on 13 October 2020 and the judge asked EDF to suspend its project until compliance with the FDV obligations is shown. This case is currently on-going.

5.6.3.2.3. Total Energies and Climate Change

The civil lawsuit was filed on 28 January 2020 and it was alleged that Total Energies "*is [solely] responsible for approximately 1% of global greenhouse gas emissions*"[666]. This case is currently on-going.

5.6.3.2.4. Suez Group in Chile

The civil suit against Suez was filed on 7 June 2021 where it was alleged that the incident of 10 July 2020 occurred and worsened because of "*incomplete installation of alternative water points that should have been set up immediately by ESSAL, as well as by the insufficient and poor-quality water provided*". This case is currently on-going.[667]

5.6.3.2.5. Casino group in South America

The civil lawsuit was filed on 3 March 2021 and is currently on-going.

---

[665] B & HR Working Group, 'Business compliance with BHR legislation: transparency and human rights due diligence' (15 July 2021): <https://www.youtube.com/watch?v=zxHEQcHRlzE> accessed 31 October 2023.
[666] ibid.
[667] ibid.

5.8. The FDV – Further room for improvement

In a report commissioned by the French Ministry of Economy and Finance on the effectiveness of the FDV law[668], five recommendations were made:

(i) Subject more corporate forms to FDV (including General Partnership[669], i.e., *société en nom collectif* and a private limited company, i.e., *société à responsabilité limitée*) and make the criteria a mix of number of employees and annual turnover (rather than merely the number of employees, as it exists now);

(ii) Dedicate a state service for collection of confidential data etc. in the interests of determining the companies subjected to the FDV (to tackle with the problem of uncertainty as to the application of FDV);

(iii) Clarify certain terms within the law, in consultation with the Ministry of Justice and the Department of Civil Affairs;

(iv) Promote multi-stakeholder initiatives by including them in the State's public procurement processes etc.; and

(v) Mobilise the French government for a Europe-wide expansion of the FDV in the interest of fair competition.

Christophe Clerc, in an attempt to make a case for an EU Directive similar to the FDV law, goes further than the recommendations of the French Ministry and argues that to strengthen the goals sought to be achieved by the FDV, the following must be done:

---

[668] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donne'ses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 31 October 2023, at 10 and 11.

[669] This is different from a Partnership limited by shares.

(i) A dedicated public supervisory body must be made (what he calls the "Hall of Fame and Shame") to analyse which companies are subject to the FDV law, and whether or not their compliances are adequate. Moreover, "*a list of these companies should be made public and their plans made available on a specific website*"[670];

(ii) The small and medium enterprises (SMEs) must also be required to comply with the FDV (albeit a simpler version of FDV), rather than only a handful of MNEs[671];

(iii) Foreign companies doing business in France must also be subjected to it rather than merely companies incorporated in France, in the interest of fair competition (interestingly, Clerc uses the example of the UK's Modern Slavery Act 2015 to make a case for this);

(iv) There must be criminal sanctions for the "*most flagrant violations of the law, such as the lack of an established plan or monitoring process, or gross or wilful misrepresentation in the plan or the report on its implementation*".[672] By proposing "criminal sanctions", Clerc goes beyond the initially proposed "civil fine" under the FDV that was struck down by the French Constitution Court due to lack of "sufficient clarity" about the scope of its application[673]; and

(v) He further proposes "*[d]isgorgement of profits made by the company through suppliers and subcontractors which are not compliant with the core humanitarian principles*" and "*[p]unitive damages in the event of gross or wilful violation by the company of its duty of vigilance*"[674].

[670] Clerc (n 484) 3-4.
[671] On this particular point, one might say it would be proportionate to expect some due diligence on the part of SMEs; possibly, a *de minimis* threshold would be appropriate in exempting the smallest entities from this.
[672] Clerc (n 484) 3-4.
[673] Constitutional Court Decision No. 2017-750 DC dated 23 March 2017, para 3.
[674] Clerc (n 484) 4.

> Clerc justifies such harsh penalties on the basis of *ubi emolumentum, ibi onus*, i.e., "where there is profit, there is the liability".

Ultimately, while the implementation of the FDV as it currently stands has achieved the majority of its policy goals, some improvements are suggested – notably that its scope should be widened further, and the imposition of criminal sanctions should be made available. Such an approach would strengthen the FDV, widening and deepening its scope and rigour.

5.9. Concluding Remarks

The FDV applies to a limited number of companies, estimated by Brabant and Savourey to be around 150-200 and by SHERPA to be around 263, and academics have suggested that the scope of its application should be widened, i.e., to small and medium enterprises (SMEs) and companies doing business in France. While the FDV requires the establishment of an extensive vigilance plan, it also requires its successful implementation by the MNEs. However, it has transpired from the empirical data collected in the aftermath of FDV's promulgation that while majority of the MNEs formulated and published a vigilance plan, the related implementation measures were (as yet) inadequate and not up to the standard required. Furthermore, the practical difficulties (geographical and linguistic barriers) as well as the legal difficulties (burden of proof to show that the formulation of the vigilance plan would have prevented the harm) relating to the successful prosecution of the MNEs under the FDV Article 2 further compromises its effectiveness as humanitarian law.

That being said, the FDV is the most advanced law currently in field regarding the extraterritorial human rights abuses caused as a direct and indirect result of MNEs and is a useful precedent to make a case for similar protection regarding modern slavery in the UK.

While legislation at the EU level is no longer of direct relevance to the UK, it is additionally interesting to note that the European Commission is carefully studying

a legislative proposal on sustainable corporate governance in the context of providing EU businesses with greater clarity in combatting the phenomenon of forced labour globally.[675] Granted, while there is no direct equivalent to the FDV on the EU level (yet), the EU unequivocally "calls on EU companies to respect human rights, including labour rights, regardless of their location, size, sector, operational context, ownership and structure" and explicitly points to established international labour standards laid down in the UNGP and by the OECD and ILO.[676] This is not dissimilar to the FDV. Further, the EU has provided comprehensive practical guide to EU companies in fighting the phenomenon of forced labour through effective policies and management systems, careful analysis of risk factors for the same and considering appropriate mitigation strategies including remediation.[677] Again, this is not dissimilar to the FDV. Additionally, the European Union is conscious of existing EU, OECD, UN and ILO sectoral reporting and / or due diligence obligations / guidance which touch upon the issue of modern slavery (albeit tangentially).[678] Yet again, these notions of due diligence and reporting suggest direct parallels to the FDV.

If such early indications do ultimately result in a FDV-type obligation across the EU, the UK ought to study the FDV model even more closely – if nothing else, the many and various Anglo-European businesses (Shell and Unilever, just to name two) may well fall within the scope of such requirements independent of any UK legislative change. Looking at such MNEs might be useful in understanding how an FDV-type obligation would work in practice in the UK.

---

[675] European Commission, 'Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in their Operations and Supply Chains' (12 July 2021) 3. <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3664 > accessed 31 October 2023.
[676] ibid 1-2.
[677] ibid 4-8.
[678] ibid 9-11.

Chapter 6: Recommendations

Companies should define why they exist and justify the immense privileges that are conferred on them through their perpetual existence and limited liability. In particular, they should establish what benefits they confer on others in return for those privileges and affirm that the benefits that they themselves derive from their profits are not earned at the expense of others. The law should require firms to demonstrate that their constitutions – their ownership, governance, measurement and performance – ensure the fulfilment of their purposes – Colin Mayer[679]

[679] Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018).

So far, this thesis has discussed the current law in the UK and how it either does not protect or is clearly inadequate in protecting people from all over the world against the vice of modern slavery that occurs as a result of the operations of companies incorporated in the UK and the companies conducting their business in the UK. It was observed that in light of the Latin maxim of *ubi emolumentum, ibi onus* (where there is profit, there must be liability) and the UN Guiding Principle 1 (States should ensure that all business enterprises domiciled in their territory respect human rights throughout their operations) as well as the Rana Plaza tragedy, the law in the UK is in urgent need of amendment to reflect changing attitudes towards corporate social responsibility and corporate accountability: not only do consumers increasingly want to see evidence of corporate social responsibility initiatives, increasingly, at least some of these initiatives are becoming mandatory across a range of jurisdictions internationally[680]; further, international legislative norms are shifting and hyper-capitalist globalism is continuing to transform supply chains, necessitating effective cross-border governance. Modern global supply chains involve many players and there has been a paradigm shift from trade between countries to trade between the partners of global supply chains, necessitating a multifaceted analysis of corporate governance.[681]

While the concept of accountability in the context of (board) corporate governance has a particular Anglo-American flavour, it can be said to represent the cornerstone of global understanding of corporate governance best practices today.[682] It can be said, further, that accountability in fact comprises multiple concepts and considerations – particularly responsibility and transparency.[683]

The first chapter of this thesis explained and discussed the obligation to prepare

[680] Liwen Lin, 'Mandatory Corporate Social Responsibility Around the World: Emergent Varieties and National Experiences' (2021) 23 The University of Pennsylvania Journal of Business Law 429.
[681] Bistra Boeva, 'Corporate Governance and Global Supply Chains: How Self-Regulation Replaces the Lack of Regulatory Initiatives or Do Regulatory Initiatives Add Value to Corporate Governance' 4 Economic Alternatives 5, 6.
[682] Andrew Keay and Jingchen Zhao, 'Ascertaining the Notion of Board Accountability in Chinese Listed Companies' 46 Hong Kong Law Journal 671, 676.
[683] ibid 679.

and publish the s54 statement (slavery and human trafficking statement) within the MSA. The second chapter examined the different regulatory models adopted in different jurisdictions. The third chapter explained and analysed the relevant current companies and securities regulation primary legislation in the UK. Specifically, this chapter considered the directors' duties enshrined in the CA.[684]. In parallel of the discussions of the CA, consideration was made of the UK corporate governance regime and the disclosure requirements therein.[685]

Then, the fourth chapter undertook a detailed commentary on the parallel jurisprudence of France and their corporate accountability regime. The black letter of the FDV law in the French Commercial Code was discussed in detail, followed by a comprehensive overview of compliance therein in practice.

This chapter will draw on the observations and discussions made in the previous chapters to discern how UK law can be reformed to hold corporate bodies incorporated in the UK and those corporate bodies conducting business in the UK accountable for their activities in the UK and abroad which directly or indirectly result in modern slavery. The main theme for this thesis is the amendment of s172 of CA, to hold the directors of a company personally responsible in case the activities of the company result in modern slavery. However, as will be discussed below, this alone is necessary but not sufficient to address the issues concerning modern slavery and certain other changes in legal infrastructure will also be needed to empower this proposed amendment of s172 effectively so that it can become a catalyst for much needed change to 'boardroom culture', leading to equitable and sustainable decision making, especially in relation to the most 'vulnerable stakeholders', whether people or planet.[686]

---

[684] Namely, s 172 (duty to promote the success of the company) and s 174 (duty to exercise reasonable care, skill and diligence), plus the annual reporting requirements applicable to different types of companies including financial and non-financial reporting requirements (i.e., the strategic report under s 414A of CA 2006, the s 172(1) statement under s 414CZA and the non-financial information statement under s 414CA).

[685] Namely, the CGC statement under Listing Rule 9.8.6 (R) (6) and the corporate governance arrangements statement under Reg 26 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations, 2008.

[686] See, for example, a comparative, empirical study by Sheffield, Stanford and Yale Universities which underscored, inter alia, the need for transparency-based legislative intervention to be supported by stronger sanctions for non-compliance: Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale

6.1. Regulatory Framework: The Strategic Report, and the s172(1) Statement and the Non Financial Information Statement within it

As a preliminary point, it must be recalled that except for small-sized companies[687], all types of companies incorporated in the UK are required to prepare a "strategic report" for each financial year. If the company is a large-sized company, it is also required to include within its strategic report a "s172(1) statement"[688] and certain other companies are also required to include within their strategic report a "non-financial information statement".[689]

Various types of penalties / enforcement mechanisms are provided by law, in cases of failure to comply with this obligation – namely criminal fines[690], court orders[691] and civil penalties.[692]

It will be noted that a mix of criminal and civil enforcement measures are provided for in law. In terms of how such accountability is to be achieved, national governments have to make a choice. There are a variety of methods which may be deployed; however, an area of (at least, conceptual) bifurcation exists in choosing between imposing corporate criminal liability or corporate civil liability.[693] To this end, it is important to distinguish between corporate criminal and civil liability. The difference between corporate criminal and civil liability has been explained as follows:

> *…"corporate criminal liability" and "corporate civil liability,"…are simply labels … both impose liability on the corporation and further the goal of deterring corporate misconduct. However… [c]orporate criminal liability has stronger procedural protections; more powerful enforcement*

Universities 2021) 5.; Jack Dangermond, 'Our Planet As The Missing Stakeholder' (Forbes, 20 April 2020): <https://www.forbes.com/sites/esri/2020/04/20/earth-day-in-a-time-of-pandemic-our-planet-as-the-missing-stakeholder/?sh=323fc6946ad6> accessed 2 November 2023.

687 CA 2006, s 414A(2).

688 CA 2006, s 414CZA.

689 CA 2006, s 414CA.

690 Under CA 2006 ss 414A(5) and (6), 414D, 423 (read together with 425) or 451.

691 Under CA 2006 s 452.

692 Under CA 2006 s 453.

693 Keay and Zhao (n 630) 679.

devices; more severe and, arguably, unique sanctions (such as stigma); and a greater message-sending role than corporate civil liability.[694]

Historically, the common law struggled to impose criminal liability on corporations at all for various doctrinal reasons (*inter alia*, in fixing a legal person with the requisite *mens rea*).[695] However, it is now accepted that companies, as legal persons, ought to face criminal (not just civil) liability in a variety of situations.[696] Companies must take responsibility for the actions for which they are responsible. While it might be an abuse of the English language to ascribe morality and intention to a legal person, it can be said that the criminal law *"regulates behaviour"* by *"attaching a price to particular actions"* and – indirectly – by *"facilitating the operation and influencing the content of non-legal norms"*.[697]

Corporate criminal liability can serve that latter function when such a venture is "*characterized by deviant local norms*"[698]or "*when a non-legal function is violated*"[699] (regardless of corporate/legal form).[700] Similarly, it can be said that – as members of a *"team"* – all members of a corporation – potentially – *"experiences guilt if and to the extent that his or her contributions to the enterprise created conditions conducive to the wrongdoings"*.[701] Further, each member of the *"team"* would, separately, feel *"shame"* – underscoring the *"tension between their solidarity with the corporate enterprise and what the wrongdoer has done on their collective behalf"*.[702] To the extent that senior decision-makers take ownership of the results of their actions – or their complicity with the actions of others – such an analysis would appear reasonable.

While collective punishment in the criminal sphere is self-evidently wrong, it is an apposite observation that certain sanctions will have a broader impact on those associated with a (notional) "guilty party". Therefore:

---

[694] VS Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109(7) Harvard Law Review 1477, 1492.
[695] See, for example, *Sweet v Parsley* [1970] AC 132, [1969] 2 WLR 470; hence in part necessitating the definition of "person" to include bodies corporate in the Interpretation Act 1978, s 5 and Sched 1.
[696] Khanna (n 642) 1479.
[697] Ian B Lee, 'Understanding Corporate Criminal Liability' in Barnali Choudhury and Martin Petrin, (eds) *Understanding the Company* (Cambridge University Press 2017) 212.
[698] ibid.
[699] Khanna (n 642) 1505.
[700] CA 2006, s 169(2).
[701] Lee (n 645) 212.
[702] ibid.

> *… the condemnation intrinsic in criminal punishment is not directed at the corporation as an autonomous moral person, for its own misdeeds, but rather at the individual members of the corporate enterprise.*[703]

In this vein, additionally, the rationale for fixing companies (rather than individuals) with criminal liability has been explained as such:

> *…when the culpable individual within the corporate hierarchy was judgment-proof or not easily identifiable, maintaining optimal deterrence necessitated imposing liability on the corporation.*[704]

Accordingly, there is a pragmatic rationale for utilising corporate criminal liability: sometimes, it is not practical to prosecute specific individuals. Regardless, the real value of corporate criminal liability is in creating social stigma for wrongdoing. After all, *"reputational penalties begin to take their toll as soon as the share market becomes aware that the corporation has legal troubles"*.[705] Even in the most efficient of court systems, a "guilty" verdict and sentencing will take time if due process is followed.

Of course, such measures are primarily targeted at corporate – rather than board – accountability. However, there is not necessarily a clean bifurcation between the two. Ultimately, if the directors of a company negligently cause the company to become exposed to corporate criminal liability, it is always open to the shareholders to vote them out as of right.[706] This is something that must be done on an individual director level and that director must be accorded the opportunity to answer for themselves in person – thereby necessitating a process of dialogue-based accountability at the director level.[707]

In terms of corporate criminal liability, it is, further, noted that such objectives can often be achieved by way of regulatory sanctions too.[708] We will now turn to consider each of these in turn.

---

[703] Lee (n 645) 212.
[704] Khanna (n 642) 1486.
[705] ibid 1505.
[706] CA 2006, s 168(1).
[707] CA 2006, s 169(2).
[708] Khanna (n 642) 1534.

6.1.1. Overview of Existing Sanctions

6.1.1.1. A criminal fine under s414A (5) and (6) of the CA

A criminal fine under s414A (5) and (6) of the CA is imposed on the concerned director (i.e., the one responsible for "*filing accounts and reports*") of the company either by a Magistrate in exercise of their jurisdiction to try summary offences or by the Crown Court in exercise of its jurisdiction to try on indictment, for failing to prepare a strategic report, and, where applicable, all the statements within it. Such a fine has no maximum cap and is theoretically unlimited.[709]

Practically speaking, however, this fine is very difficult to impose. For a magistrate or a Crown Court to take cognisance of this offence, the same must be referred to it by a prosecutor, which in this case would be the Insolvency Service of Companies House. Evidence suggests that due to the large volume of companies that Companies House monitors, the said department is more likely to impose a civil penalty under s453 (discussed below) on a defaulting company than initiate criminal proceedings against its directors.[710] Therefore, it is likely that a complaint with regards to this offence may never be made to a Magistrate by the concerned prosecutorial service. In studies examining the economic efficiency or efficacy of applying fines in this context, it has been noted that there are certain resourcing implications involved when it comes to providing for enforcement of such civil penalties.[711] There is a need to fine-tune these efficiently and effectively.[712]

The possibility of a fine in itself may function as an adequate deterrent.[713] While the stigma of such criminal liability would theoretically sit with the company, senior managers run the risk of being tarred with the same brush and would be

[709] CA 2006, s 414A(6) read with the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85.
[710] Tom Williams, T, 'Directors and officers beware – criminal offences under the Companies Act 2006' (Harrison Clark Rickerbys Solicitors, 23 May 2017); <https://www.hcrlaw.com/blog/directors-officers-beware-criminal-offences-companies-act-2006/>, accessed 2 November 2023.
[711] Khanna (n 642) 1505.
[712] ibid.
[713] Lee (n 645) 212.

incentivised to toe the line.[714] There may be ways to mitigate such practical difficulties imposing fines – such as through the use of designated regulatory bodies that are appropriately resourced and focussed on ensuring compliance in this area.[715] Regardless, it is clear that change is needed.

In addition to this, the penalty under s414A (5) and (6) also suffers from a substantive defect, i.e., it only applies where the company has not prepared a strategic report at all, and not when the content of the report is inadequate or proceeds on a tick-box methodology.

In broad terms, it will be noted that such difficulties similarly apply in respect of Sections 6.1.1.2, 6.1.1.3 and 6.1.1.4 below.

6.1.1.2. A criminal fine under s414D of the CA

This offence, to some extent, appears to cater to the substantive problems with the offence under s414A as discussed above in Section 4.1.9.1.

A criminal fine under s414D of the CA against every director of the company for approval of a strategic report that does not comply with the requirements of the CA, which director(s) "*knew that it did not comply, or was reckless as to whether it complied, and failed to take reasonable steps to secure compliance*", can be imposed either by a Magistrate in exercise of its jurisdiction to try summary offences or by the Crown Court in exercise of its jurisdiction to try on indictment. Such a fine has no maximum cap and is theoretically unlimited.[716]

While the offence under s414A fines the directors for not preparing a strategic report, the offence under s414D fines them for preparing a strategic report that is not in accordance with the requirements of the Act. Be that as it may, s. 414D also suffers from substantive defects such that under the law as it currently stands, a

---

[714] ibid.
[715] Khanna (n 642) 1534.
[716] CA 2006, s 414D read with the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85.

strategic report that either does not contain non-financial information, identifies the type of non-financial information it does not contain or gives a "*clear and reasoned explanation*" for such non-inclusion of non-financial information, is in perfect compliance with the law – and therefore a fine under s414D could not be imposed in these circumstances. This must be compared with the FDV where tick-box or boiler-plate reporting is not only discouraged but fined[717], and the same is also a cause of action for the purposes of establishing civil liability for the harm caused.[718]

That is, under the FDV, the companies are not only required to prepare a vigilance plan, but the said vigilance plan must include "**reasonable** measures" and must be "**adequate** to identify risks etc." (emphases added) such that an objective criterion is applied. This is further strengthened by the fact that as discussed previously in Section 5.6.3.2.1, in the recent proceedings under the FDV against Total Energies for its activities in Uganda, the claimant has not taken the position that Total Energies did not establish a vigilance plan but that its plan was inadequate in so far as it did not disclose risks associated with its operations in Uganda.

In developing our main thesis regarding the amendment of s172 of the CA, we take inspiration from this offence under s. 414D and the FDV law which is explained in detail below. In the Anglo-American context of the legacy of the shareholder primacy approach, it has been suggested that, ultimately, successful measures to protect stakeholders other than shareholders must be clearly linked to the profit motive.[719] Heavy criminal sanctions linked to a duty of due diligence can help further such an aim.[720]

6.1.1.3. A criminal fine under s. 423 read with s. 425 of the CA

A criminal fine under s. 423 read with s. 425 of the CA against the company and "*every officer of the company who is in default*" (i.e., whoever "*authorises or*

[717] Law No. 2017-399, art 1 para 7.
[718] Law No. 2017-399, art 2.
[719] Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563, 2634.
[720] Khanna (n 642) 1511.

permits, participates in, or fails to take all reasonable steps to prevent, the contravention"[721]) for failure to circulate copies of the annual accounts and reports (including the strategic report, and where applicable all the statements within it) to the members, debenture holders and other persons entitled to receive a notice of a general meeting, can be imposed either by a Magistrate in exercise of their jurisdiction to try summary offences or by the Crown Court in exercise of its jurisdictions to try on indictment. Such a fine has no maximum cap and is theoretically unlimited.[722]

6.1.1.4. A criminal fine under s. 451 of the CA

A criminal fine under s. 451 of the CA against the director(s) of the company for failure to file the annual accounts and reports with the registrar (including the strategic report, and where applicable all the statements within it) can be imposed by a Magistrate in exercise of its jurisdiction to try summary offences. Such a fine has no maximum cap and is theoretically unlimited.[723] This section further provides that "*for continued contravention,* [the directors may also be liable for] *a daily default fine not exceeding one-tenth of the greater of £5,000 or level 4 on the standard scale*"[724] "*for each day on which the contravention is continued*".[725]

It Is interesting to note here that the concept of a "*daily default fine*" contained in s451 of the CA is parallel to the "*periodic penalty payment*" contained in Para. 7 of Article 1 of the FDV. It must also be noted that in so far as the enforcement mechanism is concerned, UK law appears to be better than the French law and goes beyond the FDV such that it doubly penalises the non-filing of the strategic report, i.e., once through a one-time criminal fine[726] and thereafter through a daily default fine for each day the default continues. Further, while the periodic penalty payment

[721] CA 2006, s 1121(3).
[722] CA 2006, s 425 read with the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85.
[723] CA 2006, s 451 read with the Sentencing Act 2020, s 122 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85.
[724] That is, £2,500 as per the Sentencing Act 2020, s 122.
[725] CA 2006, s 1125(2).
[726] It is recalled that a similar provision for the imposition of such a lump fine under the FDV was held unconstitutional by the French Constitutional Court. Constitutional Court Decision No. 2017-750 DC dated 23 March 2017, para 3.

is imposed on the company in France, the one-time criminal fine and the daily default fine is imposed on the directors in the UK.

Nevertheless, one key deficiency remains in the UK law. Under the FDV, "*any party with standing*" can bring such proceedings for a formal notice and periodic penalty payment against a company in court, which as discussed in the previous chapters, includes "*victims, NGOs and trade unions*" as well as "*competitors*" and "*media, social networks and civil society*".[727] That is not the case in the UK and the proceedings under s451 can only be initiated on the complaint of a prosecutor to the Magistrate which, owing to the practical difficulties discussed above, is rarely made.[728] This stands in contrast to the approach taken in some other common law jurisdictions. For example, in Canada, there is the "Oppressive Claim" law where the claimant is anyone considered "proper" as per the discretion of the court (which may include stakeholders, and not merely shareholders)[729], who can then sue the board of directors for running the company in a way that is "oppressive" (or perhaps unfairly prejudicial) to the interests of certain class of individuals. In this way, Palombo argues, the stakeholders will have two remedies open to them, that under a derivative claim which will award damages to the company, and that under the oppressive claim which will award damages to the affected party.[730]

It is argued that the concept of a "*person with standing*", which status is determined by the permission or leave of the court must be incorporated in the UK, as will be discussed below.

6.1.1.5. A court order under s452 of the CA

Similar to a "*formal notice* [for compliance]" under Para. 7 of Article 1 of the FDV, a provision for a "*court order* [for compliance]" under s452 of the CA exists in the

---

[727] Stéphane Brabant and Elsa Savourey 'A Closer Look at the Penalties Faced by Companies' (2017) Revue Internationale de la Compliance et de l'Éthique des Affaires at 2. See also, AN, proposed law no. 2578, 11 Feb. 2015, at 4.
[728] Reference is made to section 5.1.1.1.
[729] Canada Business Corporation Act 1975, s 238.
[730] Dalia Palombo, "The Future of the Corporation: The Avenues for Legal Change" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 2 November 2023.

UK, save for the complimentary, additional element of a "*periodic penalty payment*" which is missing in the UK.

The proceedings for a court order under s452 of the CA against the director(s) of the company requiring them to comply with the law, i.e., prepare, circulate, file and publish the strategic report, within 14 days' after service of a notice on them, can be made "*on the application of any member or creditor of the company or of the registrar*" and such an order may provide that the costs associated with the proceedings be borne by the director(s).

This provision suffers from the defect of a restrictive *locus standi:* only these three categories of people can initiate proceedings. This must be contrasted with the FDV where the proceedings for a formal notice can be brought by a "*person with standing*", and as discussed in previous chapters, the majority of these proceedings under the FDV were brought by various interest groups and NGOs.

It is argued that the concept of a "*person with standing*", such status being determined by the permission or leave of the court, must be incorporated in s452 of the CA.

6.1.1.6. A civil penalty under s453 of the CA

A civil penalty under s453 of the CA is imposed on the company by the registrar for failing to file annual accounts and reports with the registrar (including the strategic report and, where applicable, all the statements it comprises). The quantum of this penalty is provided in reg. 4 of the Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations, 2008 and ranges from £150 to £1,500 for a private company and £750 to £7,500 for a public company.

This provision also suffers from the defect of a restrictive *locus standi* as the proceedings for such a penalty can only be brought by the registrar, who would have a stretched capacity to penalise contraventions due to the large volume of

companies being monitored.[731]

In concluding the discussion on the problems with the strategic report regime (except the s172(1) statement and the non-financial information statement, discussed below), it could be said that insofar as the protection against modern slavery is concerned, the strategic report regime is deficient in its scope of application (as only few types of companies are required to report on human rights issues), its substantive content (it is perfectly lawful for a company to not report on a matter, or say that "I did not report on this matter" or say that "I did not report on this matter for this clear reason") and its enforcement mechanism (in that the general public, the victims of abusive practices in the supply chains, the NGOs etc. cannot initiate the enforcement proceedings).

It must be recalled that the strategic report regime as it currently stands operates on a "*Name and Shame policy*" (or as Clerc calls it, the policy of the "*Hall of Fame and Shame*"[732]) such that the strategic report of a company is compulsorily required to be distributed amongst its members,[733] and in case of a listed or public limited company, it is also required to be published on the company's website.[734] Therefore, the fact that the company chose not to report on an issue may at most involve reputational concerns, and not more. A transparency-based approach is not enough: empirical, comparative analysis suggests that stronger sanctions and an overarching human rights due diligence framework are needed to effectively compel systemic change to business practices such that the interests of all stakeholders are properly considered.[735]

6.1.1.7. A Critical Analysis of the s172(1) Statement

[731] A direct mechanism to provide compensation to victims has been considered to be one way in which deficiencies in the dominant transparency-based legislative framework in the UK and elsewhere can be addressed: Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 16.
[732] Clerc (n 484) 3 and 4.
[733] CA 2006, s 423.
[734] CA 2006, s 430.
[735] Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 5.

The requirement to prepare a s172(1) statement only applies to large-sized companies and even then, it has no mandatory content and the directors are merely required to describe in this statement how they have had regard to their s172 duty.[736] Of course, it is noted that – particularly in the case of micro-entities[737] – there ought to be a size threshold to many such measures to avoid placing an overly-cumbersome burden on companies.[738] As the strategic report itself is broadly information about the exercise of the s172 duty[739], it can be argued that, in a way, the s172(1) statement is therefore a summary of the strategic report.[740]

This concept i.e., that the s172(1) statement is a summary of the strategic report, is relied upon in this thesis to develop the main line of argument, as will be discussed below.

Moreover, the fact that the s172(1) statement is required to be published on the company's website[741], whether or not the company is quoted / listed, merits consideration in so far as the "Name and Shame model" of corporate accountability is concerned.[742] This is especially important since failure to make such a publication makes every officer of the company "*who is in default*"[743] liable for a fine.[744]

6.1.2. Rationale: Modalities of Liability and Accountability

[736] CA 2006, s 414CZA.
[737] As defined in the Small Companies (Micro Entities' Accounts) Regulations 2013, meaning entities with limited turnover, net asset value and/or employee headcount.
[738] Better Regulation Executive, 'Lightening the Load The Regulatory Impact on the UK's Smallest Businesses' (November 2010) 1 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31614/10-1251-lightening-the-load-regulatory-impact-smallest-businesses.pdf>, accessed 2 November 2023.
[739] CA 2006, s 414C(1).
[740] Financial Reporting Council, 'Guidance on the Strategic Report' (July 2018) 57 <https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf>, accessed 2 November 2023.
[741] CA 2006, s 426B(2).
[742] Clerc (n 484) 3 and 4.
[743] CA 2006, s 1121(3).
[744] CA 2006, s 426B(7) and (8).

6.1.2.1. A Critical Analysis of Substantive problems with the law

S. 414A of the CA requires all types of companies, except small-sized companies, to prepare a strategic report. This provision is *prima facie* expansive in its scope of application. However, on a closer examination, it transpires that to the extent the case for protection against modern slavery is concerned, this provision is excessively restrictive.

As far as the contents of s. 414C(4) of the CA go, the strategic report of a company must include both financial and non-financial information, however, the inclusion of such non-financial information is not made mandatory for medium-sized companies[745] and only large-sized companies are required to report on them.

This inclusion of non-financial information in the strategic reports of large-sized companies is further qualified "*to the extent necessary*" and "*where appropriate*".[746] That is, if a large-sized company, which is *prima facie* required by law to include within its strategic report such nonfinancial performance indicators, fails to do so, such failure would be tolerated if it could be justified as having been necessary and/or appropriate.

As far as the variations between large-sized companies are concerned, those which are unquoted / unlisted are only required to report on the nonfinancial information concerning the environment and employee matters.[747] In contrast, quoted / listed companies are required to report on nonfinancial information concerning the environment and the employee, social, community and human rights matters.[748]

As discussed before in Section 5.1.2, the interpretation of the term "*employee*" is likely to be limited to directly salaried employees in the UK so that people employed by the company abroad, whether directly or indirectly, who are victims of modern slavery are not required to be reported on by unlisted / unquoted

[745] CA 2006, s 414C(6).
[746] CA 2006, s 414C(4).
[747] ibid.
[748] CA 2006, s 414C(7).

companies, while the quoted / listed companies are required to report on them under the human rights head but not under the "*employee matters*" head.

The requirement on the quoted / listed companies is further limited by the proviso to s414C(7) which states that, where the strategic report of a listed company does not contain such information on the environment and the employee, social, community and human rights matters, it should state which of this information it does not contain,[749] and that would be the end of the matter. That is, the said quoted / listed company is not required to state its reasons for not including such information but is merely required to identify the undisclosed information.

It is argued that is precisely the problem with the current law. *Prima facie*, it appears to catch all types of companies (except small-sized companies) and appears to hold them accountable for human rights abuses in their supply chains, however, on a closer examination, it does not catch anyone at all. A parallel may be drawn with the EU's draft Corporate Due Diligence Sustainability Directive.[750] While the draft Directive is largely welcomed as a good step forward in furthering better corporate governance, some have said that it is troubling that only "large" or "very large" companies would come within the scope of the draft Directive – the vast majority of companies in any given economy would be small and medium-sized enterprises.[751] Such a criticism (among others) may well be levied in the context of s414A of the CA.

As for the foreign companies incorporated in the UK, only the companies which are incorporated in the UK are required to prepare such a report while other companies doing business in the UK (overseas companies) are not required to prepare a strategic report. It is also noted that currently the strategic report, or any statements required to be made therein, is not required to take into account the

[749] CA 2006, s 414C(7).
[750] European Commission, 'Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains' (23 February 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 2 November 2023 (the draft "Corporate Sustainability Due Diligence Directive" or the "Directive").
[751] Shift, 'Shift's response to the European Commission's Proposal for a Corporate Sustainability Reporting Directive' (*Shiftproject.org*, May 2021), < https://shiftproject.org/response-eu-commission-corporate-sustainability-directive/> accessed 2 November 2023.

impact of the company's operations abroad, i.e., the CA has territorial application. The aforementioned two points are the major shortcomings of this law and must necessarily be tackled in any of its proposed amendments.

6.1.2.2 Enforcement problems with the law

The law on strategic reports, insufficient and inadequate in substance as it may be, is also deficient in so far as its enforcement is concerned.[752] At this juncture, it is worth examining the concept of accountability in the corporate governance context in more depth. Accountability is the bedrock of Anglo-American jurisprudence on good corporate governance. It has become a fundamental concept in global understanding of how board and others with positions of responsibility ought to behave in a corporate context. However, good corporate governance might be understood through the lens of responsibility instead, for example.[753] Further, it is important to distinguish between board and corporate accountability – while "the company" as a legal person may be the entity that is deemed responsible for a wrong, there ought to be certain sanctions directed at the "*directing mind and will*" of the company – being, collectively, the directors, i.e. the board of the company.[754]

Accountability is a multi-part process. For a board of directors to be accountable to stakeholders, they must first accept that they have a responsibility towards their shareholders and other stakeholders: this takes various forms but ought, minimally, include consulting with and considering the opinions of, shareholders, suppliers, customers, employees, regulators and environmental and other relevant groups.[755] Otherwise, there will be a lack of effective engagement and co-operation in making use of such accountability mechanisms.[756] There are in fact four stages in effecting proper accountability:

---

[752] However, it is argued that its enforcement is still better than the enforcement for s. 54 of the MSA: this is discussed in Chapter 4 at Section 4.1.6.
[753] Keay and Zhao (n 630) 676.
[754] *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685; Andrew Keay, *Board Accountability in Corporate Governance* (Routledge, 2015).
[755] Andrew Keay, *Board Accountability in Corporate Governance* (Routledge, 2015) 122.
[756] Keay and Zhao (n 630) 679.

a. Firstly, the board should provide "*accurate information concerning its decisions and actions*", so that *shareholders are informed as to what has been done by it on behalf of the company".* This includes transparency, which "*involves making disclosure and providing reports concerning the work of the board"*;
b. Next, the board should explain and justify its actions within its area of responsibility "*including what it has done and what it has failed to do"*;
c. Then, there needs to be "*questioning and evaluating*" the reasons proffered by the board, subjecting their decision-making process to rigorous scrutiny; and
d. Finally, "*there is the possibility, but not the requirement, of the imposition of consequences*". This may simply comprise the passing on of feedback to the board, but could include sanctions, such as the removal of a director.[757]

Accountability – to all stakeholders, whether shareholders, employees, suppliers or non-governmental organisations, and in terms of effective consultation and the provision of information – as a *grundnorm* of good corporate governance is essential in legal systems that focus on economic governance, as is the case in Anglo-American jurisdictions, rather than administrative governance, which tends to be more prominent, for example, in the (former) Communist bloc.[758] Nevertheless, it can be said that corporate social responsibility should be recast as corporate social accountability, in the sense of applying the notion of board accountability to make such corporate social responsibility / accountability obligations more contextual, applicable and integrated in company law.[759]

Of course, all such measures, when considering compliance / enforcement perspectives, involve some level of cost, in terms of both time and pecuniary and non-pecuniary resources – so there is a need to calibrate these efficiently.[760] Accordingly, in the US (or indeed Anglo-American) shareholder-centric model of

---

[757] Keay and Zhao (n 630) 680.
[758] Keay and Zhao (n 630) 710.
[759] Jingchen Zhao and Shuangge Wen 'Corporate Social Accountability' (2022) 58 Stanford Journal of International Law 63, 69.
[760] Khanna (n 642) 1505.

corporate governance, it has been suggested that – to effect real change in relation to protecting the interests of other stakeholders like employees or the environment – measures are likely only going to be effective in the long-term if directors of companies are convinced that non-compliance would ultimately have a negative effect on their bottom-line:

> *Even when the traditional shareholder primacy viewpoint no longer wins the day, the apparatus that it generated will continue to influence the path of corporate conduct and legal reform for years to come.*[761]

6.1.3. A Critical Evaluation of the law surrounding the Non-Financial Information Statement?

Only certain types of companies (i.e., a traded company, a banking company, an authorised insurance company and a company carrying on insurance market activity – "**special companies**") that have more than 500 employees in any financial year are required to include within their strategic report a "non-financial information statement".[762] Such a statement must include, but only "*to the extent necessary*", information related to "*respect for human rights*".[763]

> S414CB(2) states that such an information must include "*a description of the policies pursued by the company in relation to the matters…any due diligence processes implemented*", "*a description of the outcome of those policies*", "*a description of the principal risks relating to the matters…where relevant and proportionate*", "*a description of how it manages the principal risks*" and "*a description of its* [operations] *which are likely to cause adverse impacts in those areas of risk*".

This is a reasonably holistic list but does not prescribe any minimum standards as such – either in terms of the content of any duty of vigilance (because there is no such duty) or in terms of the level of detail / the extent to which that any such

[761] Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563, 2634.
[762] CA 2006, s 414CA.
[763] CA 2006, s 414CB(1).

measures which the company may opt to take should be disclosed. It is noted that the content of such a non-financial information statement appears to be similar to the mandatory content of the vigilance plan under Para. 5 of Article 1 of the FDV.

Moreover, if such a statement does not include this information, the law does not merely require the company to identify the types of information it does not include but also to give an explanation for such non-inclusion, which explanation must be a "*clear and reasoned explanation*".[764] It must be borne in mind that so long as the company gives such a clear and reasoned explanation, it is well within its rights not to report on the concerned human rights matters. That is, this time, the law does try to enforce compliance among certain types of companies, but, simultaneously, gives them a back door from which to escape.

As with the strategic report, the law surrounding the non-financial information statement is deficient in its scope of application (being only applicable to the special companies), its substantive content (not requiring any mandatory disclosure) and its enforcement mechanisms (which are the same as those applicable to the strategic report).

Nevertheless, the law as it currently stands has its most advanced form of corporate disclosure, insofar as the case for protection against modern slavery is concerned, in the form of this "non-financial information statement", and this thesis takes its inspiration from this model, and the FDV law, to argue for legal amendments.

5.1.4. Potential reform of the law surrounding the Strategic Report and the s172(1) Statement and the Non-Financial Information Statement

Based on the discussions above, and categorising the recommendations as relating to legislative scope, legislative objects, sanctions and threshold, this thesis posits certain recommendations, thematically grouped in terms of legislative scope, legislative objects, sanctions and the applicable threshold.

---

[764] CA 2006, s 414CB(4).

6.1.4.1. Legislative Scope

Critically, in-scope companies must be required to prepare a strategic report that contains both financial and non-financial information (and not only to the extent necessary or where appropriate). Such mandatory, fulsome disclosure promotes transparency – a critical element of accountability.[765]

Such a strategic report must also contain a s172(1) statement, i.e., all companies except small-sized companies must prepare a s172(1) statement. While very small businesses have limited bandwidth to comply with various regulatory standards, SMEs are the backbone of the economy and must be brought within scope of such measures.[766]

Additionally, the term "non-financial information" must include "human rights issues, specifically forced labour and other forms of modern slavery" such that all type of companies must report on it. Such an approach is more comprehensive. Such a non-financial information must include, on a collective reading of s414CB(2) of the CA and Para. 5 of Article 1 of the FDV, the following:

(a) "*a description of the policies pursued by the company in relation to the matters…*[and the] *due diligence processes implemented*";[767]

(b) "*a description of the outcome of those policies* [and due diligence process]";[768]

(c) "*a description of the principal risks relating to the matters*";[769]

---

[765] Keay and Zhao (n 630) 680.

[766] Better Regulation Executive, 'Lightening the Load The Regulatory Impact on the UK's Smallest Businesses' (November 2010) 1 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31614/10-1251-lightening-the-load-regulatory-impact-smallest-businesses.pdf>, accessed 2 November 2023.

[767] See generally, CA 2006, s 414CB(2)(b).

[768] See generally, CA 2006, s 414CB(2)(c).

[769] See generally, CA 2006, s 414CB(2)(d).

(d) “*a description of how it manages the principal risks*”;[770]

(e) “*a description of its* [operations] *which are likely to cause adverse impacts in those areas of risk*”;[771]

(f) “*regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping”;*[772] and

(g) *“an alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the representative trade union organisations within the company”*[773]

Further, the reporting must relate to the impact of all of the companies’ operations, whether in the UK or abroad. This recommendation is further expanded, drawing from the FDV experience discussed in Chapter 5, to include operations of the subsidiaries and other companies controlled by the company, as well as sub-contractors and suppliers with which the company has an “*established commercial relationship*” (“*a partnership which each party can reasonably expect to continue in the future*”[774]). For the purpose of this thesis, the meanings given to these terms in France and discussed in Chapter 5 (i.e., tier 1, tier 2 suppliers etc.) are reasonable and must be introduced in the domestic law.

---

[770] See generally, CA 2006, s 414CB(2)(d)(i).
[771] See generally, CA 2006, s 414CB(2)(d)(ii).
[772] See generally, art 1 para 5(2).
[773] See generally, art 1 para 5(4).
[774] Decision of the Commercial, Financial and Economic Chamber dated 15 September 2009.

Finally, the *locus standi* for initiating proceedings for a court order for compliance under s. 452 on the company must be broaden in line with the example set by the FDV such that victims of supply-chain abuses, interest groups etc. must also be permitted to initiate such proceedings for compliance. Such an approach is not unknown in the UK, for example in the case of "*public interest standing*" in judicial review.[775]

6.1.4.2. Legislative Objects

Fundamentally, the leniency under the current law to merely identify the matters not reported on or to give "*clear and reasoned explanations*" for not reporting must be deleted, such that like the FDV, the strategic report must have mandatory reporting on the aforesaid nonfinancial matters. It must be noted that as with the FDV, such reporting must satisfy the test of objectivity / reasonableness so that the excessive subjective leeway granted to the board of directors be corrected. On a practical level, there is clear empirical evidence that placing the compliance burden on the shoulders of the board results in superior regulatory outcomes: in an assessment carried out by the World Benchmarking Alliance, there was a "strong positive correlation" between "companies'… assigning board responsibility for human rights" and effective compliance with human rights due diligence obligations generally and the allocation of "resources for day-to-day human rights functions" specifically.[776]

6.1.4.3. Sanctions

In line with the FDV Article 2, a specific tortious cause of action must be introduced in the UK for failure to prepare and implement such a policy or due diligence process that results in harm to another in the UK or abroad. This is critical to the fourth stage of accountability (discussed at section 5.1.2.1 above): it

[775] *R (on the application of Greenpeace Ltd) -v- Inspectorate of Pollution & Anor. (No 2)* [1994] 4 All ER 329.

[776] World Benchmarking Alliance (2022), 'Elevating Human Rights', <https://www.worldbenchmarkingalliance.org/publication/chrb/findings/elevating-human-rights-responsibilities-to-the-board-and-senior-management-level-appears-to-be-key-for-better-action-on-human-rights-due-diligence> accessed 2 November 2023.

would be open to anyone, including an unhappy shareholder, to commence proceedings on this basis and provide effective sanction for the board's failure to discharge its duties to the standard expected.[777] It is clarified that for the purposes of this thesis, we are not seeking to broaden the scope of such a civil liability beyond that contemplated in the FDV such that the relevant duty on the company would be an *obligation de moyens* (to take all steps in their power to reach a certain result) and notan *obligation de résultat* (actual attainment of that result)[778], and only a party with a *locus standi* would be able to bring this claim[779] and the "*but for*" test of causation will be applied.

This recommendation is in line with the conclusion derived from the study carried by Wen and Zhao[780] (discussed in the previous chapters) wherein it was argued that, like how the parent company can be held responsible for inadequate health and safety procedures of their subsidiaries, in the same way, the parent company should also be responsible for supply-chain abuses carried out by its suppliers.

Further, in accordance with the "*periodic penalty payments*" in the FDV, a civil penalty must also be introduced in law that, unlike the criminal fines that can only be imposed by the prosecutorial services, or the civil penalty under s453 that can only be imposed by the registrar (i.e., the Companies House), can be invoked by "*any person with standing*." This could be done either by introducing the element of a "*daily default fine*" in addition to a court order in s452, and / or by introducing the Canadian "*oppression claim*" in the law, as discussed in detail in Chapter 4.[781]

It is recalled that the latter would include amending s994 (unfair prejudice to minority shareholders) of the CA such that any "*person with standing in the*

---

[777] Keay and Zhao (n 630) 710.
[778] AN, report no. 2628, at p. 31, 55 and 59 and AN, report no. 3582, 16 March 2016, at p. 14. See also, Nicolas Cuzacq, 'Commentaire des propositions de loi relatives au devoir de vigilance des sociétés mères et des entreprises do'neuses d'ordre ("Commentary on the legislative proposals relating to the duty of vigilance of parent companies and ordering companies")' Revue de droit du travail 2014, at 265.
[779] This is parallel to Law No. 2017-399, art 2 para 2.
[780] Shuangge Wen and Jingchen Zhao, 'The Bumpy Road of Home States' Regulation of Globalized Businesses - Legal and Institutional Disruptions to Supply Chain Disclosure under the Modern Slavery Act' (2020) 69 Catholic University Law Review 125.
[781] See, for example, *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560.

discretion of the court"[782] can sue the board of directors for running the company in a manner which is oppressive to certain class of individuals that could include workers in the supply chain, and be awarded damages for that.[783]

It Is further recommended that, drawing from the experience of the anti-competition regime in the UK, such an unlimited penalty must also be imposed on the company itself, for failure to prepare a strategic report and failure to prepare a strategic report with its mandatory content, which fine must be proportionate to the profits made by the company, i.e., it must correspond to a percentage of the total turnover of the company, in so far as such profits are attributable to the profit maximisation schemes resulting in abusive and harmful practices with regards to the employees, the community and the environment.

To this end, it is recalled that the law as it currently stands exposes only the directors of a company to a statutory fine for such contraventions (i.e., non-preparation and inadequate preparation of a strategic report) under s414A and s414D. The law as it presently applies holds the company liable only for failure to circulate the annual returns and reports to the shareholders' etc. under s423 read with s425 to a statutory fine, and for failure to file such annual returns and reports with the registrar under s453 to a civil penalty.

Additionally, a dedicated government body must be established to generally monitor compliance with this law, i.e., are the disclosures, policies and their implementations mentioned in the strategic report adequate to address the specific risks associated with the business of the company, and to specifically prosecute negligent directors for the companies' offences.[784]

---

[782] Which can include "*trade unions, consumers associations, NGOs, and a substantially large group of individuals that are affected by the activities of the company*". Dalia Palombo, "The Future of the Corporation: The Avenues for Legal Change" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 2 November 2023.

[783] Reference is made to Section 5.1.7.2. of Chapter 5.

[784] *See*, for example, Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021)5. In this comparative, empirical study, it was found that a government body with prosecutorial powers (particularly, the power to fine), would be impactful in effecting meaningful change. Andrew Keay, 'Public Enforcement of Directors' Duties: A Normative Enquiry' (2014) 43 2 Common Law World Review 89; Australian Corporations Act 2001, ss 1317E and 1317G; arts. 209(1)3 and 211 of

To elaborate on the above, as discussed in the previous chapters, such a department would be empowered to enter into DPAs (deferred prosecution agreements), akin to those entered in pursuant to the Bribery Act, 2010[785], with the company in default and either settle the enforcement action or require the company to pay up partial fine and serve the remaining sentence by undertaking certain activities such as due diligence process and their implementation in its business operations.[786] This would also involve, due to the expertise of the said department in this area, the department engaging in an interactive dialogue with the company and helping them strengthen their procedures so that abusive labour practices such as modern slavery could be detected and prevented. Any such body must be properly empowered to take action where needed, including – where appropriate – taking action against members of the company's board members specifically to facilitate board-level accountability too.[787] It is trite to say that English law is not unfamiliar with sanctioning individual directors.[788] It can be said that company directors are ultimately responsible (and causative of) socially-irresponsible behaviour done in the name of companies.[789] So that they are held accountable for their actions, legislation should be reformed to ensure this can take place – such as the liberalisation of the derivative action to permit a derivative action petition to be brought by a non-shareholder in Canada and Singapore.[790]

6.1.4.4. Threshold

All companies, except small-sized companies, should be required to comply with these requirements. To counterbalance any possible "regulatory over-reach", the exemption granted under Para. 2 of Article 1 of the FDV (group vigilance plan and implementation report) must also be incorporated in the UK law.

Albanian Company Act.

[785] *Director of Serious Fraud Office v. Airbus SE* (unreported) Southwark Crown Court, 31 January 2020 and *Director of Serious Fraud Office v. Airline Services Ltd.* [2021] Lloyd's Reports FC Plus 1.

[786] John Braithwaite and Christine Parker, 'Conclusion' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004), 269.

[787] Keay and Zhao (n 630) 676.

[788] See*,* for example, Company Directors Disqualification Act 1986, s 1(1).

[789] Jingchen Zhao and Shuangge Wen 'Corporate Social Accountability' (2022) 58 Stanford Journal of International Law 63, 102.

[790] ibid 105.

Further, companies incorporated outside of the UK but doing business in the UK must also be required to produce a strategic report which contains all the information as aforesaid. It is noted that such a power is already granted to the Secretary of the State under s1049 of the CA; however, no regulations have been made thereunder to this effect. This power ought to be utilised to further good corporate governance through board accountability: the strategic report ultimately has to be signed off by the directors.

6.2. Application: S54 Statement under the MSA

As previously considered, only certain types of companies, i.e., those supplying goods or services and having a global turnover of not less £36 million[791] are required to prepare[792] and publish on their website[793] a "*slavery and human trafficking statement*" ("**s54 statement**"). It is also recalled that the companies are only required to publish this statement on their website and the s54 statement is not required to be made part of any statutory annual reports. Such is the context that must be noted when considering possible measures to strengthen the effectiveness of the s54 statement.

It is further recalled that failure to fulfil the obligations under s54 exposes the company to an injunction for compliance, which proceedings are initiated by the Secretary of State.[794] Such proceedings for injunctive relief can only be initiated by the Secretary of State, and unlike the FDV and its "*persons with standing*", no other person has the *locus standi* to initiate these proceedings. Although under the s54 regime, there is no provision for imposition of a fine or something akin to the "*periodic penalty payment*" under the FDV, it is noted that the injunctive relief may itself be deemed to be sufficient as failure to comply with a court order is a criminal offence carrying custodial sentence.[795] There is a practical and philosophical question to be answered when examining whether or not such

[791] MSA 2015, s 54(2); see generally Chapter 4 at Section 4.1.6.
[792] MSA 2015, s 54(1); see generally Chapter 4 at Section 4.1.6.
[793] MSA 2015, s54(7); see generally Chapter 4 at Section 4.1.6.
[794] MSA 2015, s 54(11); see generally Chapter 4 at Section 4.1.6.
[795] *Official Receiver v Brown* [2017] EWHC 2762 (Ch) [56].

measures are appropriately and efficiently calibrated.[796]

The interplay between s54 of the MSA and the s172(1) statement of the CA must be noted. The s172(1) statement is a long(er)-standing general accountability / corporate governance mechanism that falls more squarely within the scope of "orthodox" Anglo-American shareholder primacy jurisprudence.[797]

While the requirement to have a stand-alone statement dedicated to "*slavery and human trafficking*" issues is likely to attract more attention than a few paragraphs hidden away in the strategic report (if amended, as argued above), it is submitted that the strategic report regime has in place for some time, it has matured and its enforcement mechanisms are more established than the enforcement mechanism under s54 of the MSA[798], such that incorporating the s54 statement as a part of the strategic report, to the effect that like the s172(1) statement summarily explains how the directors have done their s172 duty even though the whole object of the strategic report itself is to comply with s172 duties[799], similarly the s. 54 statement within the strategic report (if amended as argued directly above) would also summarily explain how they have complied with their antislavery and human trafficking obligations even though they are elaborated in more detail within the content of the strategic report itself (if amended, as argued directly above). Good regulation comes at a cost.

This would make the s54 statement a part of the annual report of the company, which would be monitored by the Companies House itself. Moreover, like the requirement to publish the s172(1) statement on the company's website, the requirement to publish the s54 statement on the company's website would be retained. It is envisioned that its publicity will not be constrained by s430 of the CA, which only requires quoted / listed companies to publish their annual reports on their websites, and not unquoted / unlisted companies.

---

[796] Khanna (n 642) 1505.
[797] Keay and Zhao (n 630) 676.
[798] Dalia Palombo, "The Future of the Corporation: The Avenues for Legal Change" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 2 November 2023.
[799] CA 2006, s 414C(1).

This will also broaden the scope of application of s54 such that all companies required to prepare a strategic report with mandatory content as argued above in this same Section will be required to prepare a s54 statement, and not only the companies which provide "*goods and services*" which have a global turnover of £36 million.

It is recalled that the obligation to prepare and publish a s54 statement is placed on all companies and certain other types of body corporates which "[carry] *on a business, or part of a business, in any part of the United Kingdom*"[800]. In this way, this obligation is not restricted to the companies incorporated in the UK: there ought to be multiple ways in which a relevant UK nexus can be invoked for regulatory purposes.

If the strategic report regime is amended as argued in section 5.1.4.4 above, then companies not incorporated in the UK but doing business in the UK will also be required to prepare a strategic report and the s54 statement could be a part of that. However, if the suggestions contained in 5.1.4.4 are not implemented, then this requirement could be adhered to by overseas companies as a stand-alone statement on their website and not as a part of their annual return, i.e., the law would apply as it currently does.

Moreover, the provision states that the s54 statement could either explain the steps the company has taken to ensure that slavery and human trafficking is not taking place in its business operations and in its supply chains which "*may include*" information such as its policies, due diligence processes, associated risks, steps taken to assess and manage those risks and the effectiveness of such steps, or a statement that the company has taken no such steps.[801]

To the extent the former obligation is concerned, it is argued that the content of the s. 54 statement as required herein is exactly that argued to be made part of the

[800] MSA 2015, s 54(12).
[801] MSA 2015, s 54(4).

strategic report in section 5.1.4.1 above, based on the model of s414CB(2) of CA (contents of a non-financial information statement) and Para. 5 of Article 1 (mandatory content of the vigilance plan).[802] Given that such an information will already be a part of the strategic report (if amended, as argued directly above), the s54 statement like the s172(1) statement could merely summarise all this information.

To the extent the latter obligation is concerned, it is submitted that, in line with the suggestion made in section 5.1.4.2 with regards to the strategic report, this part of the law must be amended so that there must be a mandatory content to the s. 54 statement and tick-box or boiler-plate report to the effect of "*the organisation has taken no such steps*" must not only be discouraged but abolished. It is recalled that this recommendation was also made by the Home Office in its consultation report published on the 22 May 2019 – and there ought to be real sanctions for non-compliance so as to strengthen the effectiveness of transparency-based regulation and board-level accountability.[803]

That being said, this thesis will discuss both the options. The first option being amendments to s. 54 of the MSA without making the s. 54 statement a part of a statutory return, and the second option being *vice-versa*.

6.2.1. First Option – Retaining the S. 54 Statement as a stand-alone statement and the amendments in law thereto

If the s. 54 statement is retained as a stand-alone statement outside the purview of the annual reports and returns of the company to the Companies House, there are a number of problems that it encounters.

Enforcement is central to any successful regulatory strategy: while the application of sanctions alone is not sufficient to ensure good regulatory outcomes, it is

[802] Dalia Palombo, "The Future of the Corporation: The Avenues for Legal Change" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 2 November 2023.
[803] Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 6.

necessary.[804] Indeed, Rouas has commented that mandatory human rights due diligence instruments are necessary but not sufficient to ensure that businesses respect human rights – particularly, "robust enforcement mechanisms" are needed to ensure that such legislation is not rendered a "dead letter".[805] Taken together with other appropriate measures (at the domestic and international levels), mandatory human rights due diligence instruments would help to ensure that there is a clear shift away from "a 'business as usual' ideology".[806] First, in terms of enforcement, there is currently no dedicated state service that monitors compliance with s54 by in-scope companies.[807] There is no database identifying the companies that fulfil the criterion for being a "*commercial organisation*" under s54 and therefore liable for producing a s54 statement. Although there is now a voluntary database set up by the UK[808], the enforcement mechanism under s54, i.e., only an injunction by the Secretary of State, means that, in practice, the companies will rarely face enforcement proceedings unless the Secretary of State notices this contravention of the law, which is not likely to happen often.

Secondly, in terms of threshold, the law as it currently stands only applies to companies that supply goods or services and have a global turnover of £36 million. Self-evidently, companies with much lower turnovers could also contribute to supply-chain abuses and modern slavery. In fact, studies have shown that small and medium-sized enterprises, due to their low budgets and short-termism, are more likely to contribute to supply chain abuses than large enterprises that can afford to carry extensive due diligence against suppliers and others and can also afford to halt business activities to investigate abusive labour practices.[809] Accordingly, as alluded to previously, certain smaller entities – including many small and medium-sized enterprises, ought to be brought within the scope of the

[804] Khanna (n 642) 1492.
[805] Virginie Rouas, 'Achieving Access to Justice in a Business and Human Rights Context' (University of London Press 2022) 377.
[806] ibid 378.
[807] *See*, for example, Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 5.
[808] UK Government, 'Modern Slavery Statement Registry' (11 March 2021) <https://modern-slavery-statement-registry.service.gov.uk/> accessed 2 November 2023.
[809] Clerc (n 484) ; Julia Black, 'Decentring Regulation: Understanding The Role Of Regulation And Self-Regulation In A Post-Regulatory World' (2001) 54 Current Legal Problems 103.

s54 statement.[810] Further, this must also be contrasted with the FDV where the threshold of the total number of employees is applied to determine who is liable to produce a vigilance plan and its implementation report.[811]

Thirdly, as argued above, in terms of impact, the fact that the organisation can simply make a statement that it has taken "*no such steps*" simply means that s54 is devoid of any merit such that a company can simply make this statement and, save for a reputational crisis (if any), it will be in compliance of the law even if it is unashamedly contributing to modern slavery in the developing countries.

It is also noted that the mandatory content of the s. 54 statement as stated in sub-section (5) of s54 is qualified by the word "*may include*" such an information. The effect of this is that if the organisation choses to include information about its policies in the books and identifies its risks with a bird's eye view, but does not include information about the success of those policies in practice or about the criteria used to identify and assess the risks and their mitigation, it will still be in complete compliance of the law.

Fourthly, in terms of the content of the s54 statement, the information required to be included must relate to the company's "*supply chains*" and "*its own business*"[812], and not to the business operations of its subsidiaries and controlled companies. In contrast, the FDV requires the company to include in its vigilance plan information related not only to its own operations, but also of the operations of its subsidiaries and controlled companies as well as its subcontractors and suppliers.[813]

In light of the discussion above, several recommendations are made in respect of enforcement measures, and the scope and content of the s54 statement.

---

[810] John Morrison, Phil Bloomer and Camille Le Pors, 'Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards' (*Business-humanrights.org* 3 March 2021); <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 2 November 2023.
[811] Law No. 2017-399, art 1 para 1.
[812] MSA 2015, s 54(4)(a).
[813] Law No. 2017-399, art 1 para 3.

In terms of enforcement measures. A specialised department must be given the responsibility for ensuring compliance with s54 of the MSA. One such possible candidate would be Companies House, which in recent years has started to see itself as playing a crucial role in global law enforcement – rather than existing purely as a registry.[814] It is noted, however, that the investigative expertise required for this duty might be more aligned with that of the SFO, for example. Regardless, this department must also be responsible for preparing a database identifying the companies either incorporated in the UK or carrying out business herein that fulfil the criteria of a commercial organisation under the law, and for bringing about injunctive proceedings against them if they fulfil the criteria but do not prepare such a statement, and /or to impose a civil penalty on them (if the law is amended as argued in section 5.2.1 below).

Similarly, such a department should also be tasked with monitoring general compliance with the law, i.e., are the disclosures, policies and their implementations mentioned in the s54 statement adequate to address the specific risks associated with the business of the company, as well as to specifically prosecute negligent directors for the criminal offences (if the law is amended as argued in section 5.2.1 below)?

The department must also be empowered to enter into DPAs (deferred prosecution agreements) with the company in default and either settle the enforcement action or require the company to pay a partial fine and discharge the remaining sentence by undertaking certain activities such as due diligence processes and their implementation in its business operations. This would also involve, due to the expertise of the said department in this area, the department's engaging in an interactive dialogue with the company and helping them strengthen their procedures so that abusive labour practices such as modern slavery could be

[814] See, for example: Louise Smyth and Martin Swain 'What the Economic Crime (Transparency and Enforcement) Bill and the corporate transparency and register reform white paper means for Companies House' (Companies House, 3 March 2022): <https://companieshouse.blog.gov.uk/2022/03/03/what-the-economic-crime-transparency-and-enforcement-bill-and-the-corporate-transparency-and-register-reform-white-paper-means-for-companies-house/> accessed 2 November 2023.

detected and prevented.

The law as it currently stands has only one enforcement mechanism in place, i.e., the injunction by the Secretary of State. To supplement and complement the investigative powers of the specialised department mentioned above, the *locus standi* to bring injunction proceedings must be broadened, in light of the FDV experience, such that a "*person with standing*" which will include victims and interest groups, as well as shareholders (especially institutional investors) can also initiate such proceedings in addition to the Secretary of State.[815]

Likewise, another deterrent for compliance must be introduced carrying individual and collective responsibility of the directors as discussed in Section 6.1.4.2 above. Such that the directors "*in default*" (which would be all the directors in light of s. 1121(3) of the CA) must be liable to a maximum penalty of level 3 on the standard scale,[816] and the specific director responsible for "*filing accounts and reports*"[817] must be liable to a maximum penalty of level 5 on the standard scale (i.e., an unlimited fine in light of s. 122 of the Sentencing Act, 2020[818] and s. 85 of the Legal Aid, Sentencing and Punishment of Offenders Act, 2012[819]) for failure to prepare the s54 statement and for failure to prepare the s54 statement with its mandatory content. Moreover, the *locus standi* to initiate these proceedings must not only result with the registrar (as with a penalty under s. 453 of the CA) or with the prosecutorial services (as with the criminal fines discussed in Section 6.1.4.3 above), but with any "*person with standing*".

To this end, the collective responsibility of the board is recommended in light of s54(6) of the MSA that states that the slavery and human trafficking statement "*if*

[815] See*,* for example, Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021)16.
[816] See generally, CA 2006, s 423 read with s 425.
[817] See generally, CA 2006, s 414A (5) and (6).
[818] This sets out the "standard scale" – which prescribes a maximal "Level 5" fine of £5000 for offences committed on or after 1 October 1992; this cap is disapplied in certain situations by virtue of s 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[819] This is fairly lengthy, but most pertinent is s 85(1): "*Where, on the commencement day, a relevant offence would, apart from this subsection, be punishable on summary conviction by a fine or maximum fine of £5,000 or more (however expressed), the offence is punishable on summary conviction on or after that day by a fine of any amount*."

the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent).”[820]

It is further recommended that, drawing from the experience of the anticompetition regime in the UK, such an unlimited fine must also be imposed on the company itself which must be proportionate to the profits made by the company, i.e., it must correspond to a percentage of the total turnover of the company, in so far as such profits are attributable to the profit maximisation schemes resulting in abusive labour practices.[821]

Finally, to complement the proposed expansion of *locus standi* and in line with the FDV Article 2, a specific tortious cause of action must be introduced for failure to prepare the s54 statement and implement it adequately which failure results in harm to another in the UK or abroad. It is clarified that for the purposes of this thesis, we are not seeking to broaden the scope of such a liability beyond that contemplated in the FDV such that the relevant duty on the company would be an *obligation de moyens* (to take all steps in their power to reach a certain result) and not an *obligation de résultat* (actual attainment of that result), only a party with a *locus standi* would be able to bring this claim and the “*but for*” test of causation will be applied.[822]

As for the scope and content of the s54 statement, the gateway qualification for a “*commercial organisation*” insofar as it relates to the supply of goods and services must be removed. This is because in light of the relevant FDV statistics, utility providers such as petroleum companies, that would not otherwise qualify as a supplier of goods or services, are more likely to be involved in supply-chain abuses than a company that, for example, manufactures apparel, as in the Rana Plaza

---

[820] See generally, Chapter 4 at Section 4.1.6.
[821] See, for example, Genevieve LeBaron and others, ‘Forced Labour Evidence Brief: Due Diligence and Transparency Legislation’ (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 5. Upholding labour rights generally, via protecting unions, trade laws and anti-trust laws are complimentary, and, indeed, necessary strategies in this regard.
[822] See, for example, Genevieve LeBaron and others, ‘Forced Labour Evidence Brief: Due Diligence and Transparency Legislation’ (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021)16.

tragedy.[823] Similarly, the qualification for a "*commercial organisation*" insofar as it relates to the global turnover of £36 million must be relaxed such that a company with a global turnover of £5 million, if there exists a risk of modern slavery and human trafficking in its operations, must also be required to prepare such a statement. As discussed above in Section 3.3.2, smaller businesses can sometimes pose a greater human trafficking / modern slavery risk than larger organisations.[824]

Further, s54(4)(b), which provides for "*a statement that the organisation has taken no such steps*", must be omitted such that the s54 statement must have a mandatory content. Similarly, the words "*may include*" in subsection (5) of this provision must be substituted with "*must include*" to further strengthen the mandatory content.

The content of such a s54 statement must include, in addition to all the information mentioned in s54(5), the following two things from the FDV:

(a) "*regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping*"[825]; and

(b) "*an alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the representative trade union organisations within the company.*"[826]

[823] Anne Duthilleul and Matthias de Jouvenel, 'Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' (Rapport à Monsieur le ministre de l'économie et des finances 2020) 27 <https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf> accessed 2 November 2023.
[824] John Morrison, Phil Bloomer and Camille Le Pors, 'Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards' (*Business-humanrights.org* 3 March 2021); <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 2 November 2023.
[825] See generally, Law No. 2017-399, art 1 para 5(2).
[826] See generally, Law No. 2017-399, art 1 para 5(4).

The test of objectivity / reasonableness, in line with the FDV, must be incorporated in s54 to ensure that the policies, due diligence process, risk assessment, risk identification as well as designated performance indicators[827] are reasonable.

Similar to the suggestion made in Section 6.1.4.2 above, s54(4)(a) should be amended to the effect that, drawing from the FDV experience discussed in Chapter 5, the company must include information related to the operations of its subsidiaries and the companies that it controls, as well as its sub-contractors and suppliers with which it has an "*established commercial relationship*". For the purpose of this thesis, the meanings given to these terms in France and discussed in Chapter 5 (i.e., tier 1, tier 2 suppliers etc.) are reasonable and should be introduced in UK domestic law. Therefore, in this vein, the exemption granted under Para. 2 of Article 1 of the FDV (group vigilance plan and implementation report) must also be incorporated in the UK law in relation to the s54 statement.

6.2.2. Second Option – Making the s54 statement a part of the Strategic Report and the amendments in law thereto

Whether or not the (amended) s54 statement is to be retained as a standalone statement or it is to be incorporated into the Strategic Report is, in part, a question of form rather than substance – to the extent that standards are raised, prosecutions for breaches of the law are effected and human rights are upheld, either approach could be satisfactory. One could say that, for the legislature, good legislation is an *obligation de résultat* (actual attainment of the result). However, there are clear differences between the two approaches. As explained above, the interplay between s54 of the MSA and the s172(1) statement of the CA must be noted. Ultimately, the first option would be a cleaner solution that would facilitate better enforcement but which would require more radical change while the second option might represent greater continuity with existing structures and principles while representing a "clunkier" solution.

Broadly speaking, if the s54 statement is made part of the strategic report (if

[827] See generally, MSA 2015, s 54(5).

amended as proposed above), then it would merely contain a summary of the non-financial information[828] relating to slavery and human trafficking that is already mentioned elsewhere in the strategic report (if amended as proposed above).

Moreover, in addition to it being a part of the strategic report and having broad circulation such as filing with the registrar under s441, circulation to the members, debenture-holders and other relevant stakeholders under s423 and publication on the website for quoted companies under s430, such a s54 statement would also be published on the company's website, with a link at a prominent page on the websites' homepage, in line with s54(7) of the MSA.

Further, the enforcement mechanism for this statement would be strengthened if it is made a part of the strategic report. Such that instead of merely being subjected to an injunction at the whim of the Secretary of State, the company will now be exposed to a civil penalty by Companies House (it is noted that empirical evidence suggests that Companies House is very likely to notice failure to file annual returns due to its software and algorithms[829] such that this penalty is highly likely), a court order at the instance of the members, creditors and the registrar (i.e., Companies House) and, if the law is amended as argued in section 5.1.4.3 above, myriad other persons with standing will also be able to initiate these proceedings for a court order, which may carry an imposition of a daily default fine as well. Additionally, the company and its directors will also be exposed to the corporate offences mentioned generally in Section 6.1.1above.

It is argued that in adhering to the second option, the scope of application of the s54 statement will also need to be broaden such that, in line with the discussion in section 5.2.1 above, companies with a global turnover of £5 million, if there exists a risk of modern slavery and human trafficking in their operations, must also be required to prepare such a statement[830], and further the qualification of

[828] Reference is made to section 5.1.4(vii) above.

[829] Tom Williams, T, 'Directors and officers beware – criminal offences under the Companies Act 2006' (Harrison Clark Rickerbys Solicitors, 23 May 2017); <https://www.hcrlaw.com/blog/directors-officers-beware-criminal-offences-companies-act-2006/>, accessed 2 November 2023.

[830] Further and in any event, size alone is not a proximate measure of risk – consider, for example, the case of a smaller enterprise operating in a higher risk sector: Chiara Macchi and Laura Íñigo Álvarez (eds), 'Decent Work and Migrant Workers: the EU Directive on Mandatory Human Rights and Environmental Due Diligence' (CEDIS, January 2022):
<https://novaresearch.unl.pt/en/publications/decent-work-and-migrant-workers-the-eu-directive-on-

"*goods and services*" in the definition of a commercial organisation must be removed.

In light of the discussion above, if the s54 statement is to be made a part of the strategic report, then in addition to the recommendations for amendments to the strategic report made in Section 6.1.4.1 above, the law will need to be amended to transpose the s54 provisions into the rules surrounding the strategic report; some further consequential amendments would similarly be required.

Accordingly, firstly, another provision of law must be introduced in chapter 4A (strategic report) of the CA, such that s54 of the MSA will be reproduced in it verbatim, save as otherwise provided hereinafter. Consequently, the proviso to s414C(2) will also need to be amended to the effect that in addition to the ordinary content of the strategic report, it must also contain, in certain circumstances, the s172(1) statement, the non-financial information statement and the slavery and human trafficking statement.

Then, the definition of a commercial organisation will also need to be amended to remove the qualification of "*goods and services*" and lower the global turnover threshold to £5 million. Additionally, s54(4)(b) must be omitted such that the s54 statement must have a mandatory content. Similarly, the words "*may include*" in sub-section (5) of this provision must be substituted with "*must include*" to further strengthen the mandatory content.

6.3. The Corporate Governance Code, the Wates Principles and the Stewardship Code

It is recalled that certain types of companies are compulsorily required to make a statement in their annual returns elaborating on how they have complied in their business operations with the CGC or the Wates Principles, as applicable.[831] In this way, while the CGC and the Wates Principles are compulsory codes for certain types of companies, the Stewardship Code is merely a voluntary code for

mandatory-hum/> accessed 2 November 2023.

[831] See generally, Chapter 4 at Sections 4.2.2. and 4.2.3.

institutional investors which lays down the principles that they should follow in ensuring that the companies they invest in adhere to certain ethical standards. For the purposes of this chapter, the discussion of proposed amendments to the law is restricted to the former two codes. From a theoretical perspective, hard and soft law can act hand-in-hand, playing complimentary functions in incentivising socially-desirable outcomes on different levels.[832]

The companies that are required to produce a corporate governance statement (the "**CG Statement**") are quoted companies, not unquoted companies, which have a "*premium listing*", and not a standard listing, on the UK stock exchange.[833]

The companies that are required to produce a statement concerning the Wates Principles (the "**Wates Statement**") are all the companies that are first, neither smallsized companies[834], community interest companies[835], charitable companies[836] nor are companies otherwise required to produce a CG Statement,[837] and secondly, that fulfil the "*qualifying conditions*" listed in clause 23 of the Schedule 7 to the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, i.e., they have "*more than 2000 employees*", and / or "*a turnover of more than £200 million*" and "*a balance sheet total of more than £2 billion*."

Consequently, only a very small number of companies are required to produce the CG Statement, and only some companies are required to produce the Wates Statement.

The very restrictive scope of application of the CGC does not negatively impact the case of protection against modern slavery as its grossly deficit substantive

[832] Consider the dicta in *Nerijus Antuzis & ors v DJ Houghton Catching Services Ltd & ors* [2019] EWHC 843 (QB). Also see generally, Claire Bright, 'Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers MWP 2020/01 , 2-3; and Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021) 4; Khanna (n 642) 1505.

[833] FCA Handbook (n 441) Rule 9.1.1 (R) read with Rule 9.8.6 (R) (6).

[834] The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, reg 2(4).

[835] Companies (Audit, Investigations and Community Enterprise) Act 2004, Pt 2.

[836] Charities Act 2011, s 193.

[837] That is, they are not quoted / listed companies. The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, Sch 7, cl 22.

content is more embarrassing than its restrictive scope of application. As already discussed in detail in Chapter 4, the content of the CGC does not expressly require the companies to disclose information related to modern slavery in its business operations or supply chains, or even to disclose information related to abusive labour practices or human rights concerns. The closest that the CGC comes to the rescue of modern slavery is encouraging, not even requiring, the companies to pursue "*long-term sustainable success of the company*" that is "*contributing to wider society*."[838]

Moreover, the CGC is based on a "*comply or explain*" model such that if a company has not complied with any of these provisions, it is merely required to set out:

> *(iii) those provisions, if any it has not complied with;*
>
> > *(ii) in the case of provisions whose requirements are of a continuing nature, the period within which, if any, it did not comply with some or all of those provisions; and*
>
> *(iv) the company's reasons for non-compliance;*[839]

All in all, the CGC operates on a "*Name and Shame policy*", as the CG Statement is among the annual returns and reports that a quoted / listed company is required to publish on its website,[840] and it has no other deterrent for ensuring compliance with the law.

It is argued that in light of the (relatively) hard law of strategic report (if amended as argued above), this soft law of the CGC has little to no importance in so far as the case for protection against modern slavery is concerned[841] as transforming it to anything of substance would require so many amendments that it would be much easier to just rewrite the whole code from scratch.

However, if the Strategic Report is not amended as argued above, the CGC and the CG Statement should be retained as two soft law regimes (i.e., current version

[838] CGC, Principle A.
[839] FCA Handbook (n 441), Listing Rules, Rule 9.8.6 (R) (6) (b).
[840] CA 2006, s 430 read with s 447.
[841] Bright, Marx, Pineau, and Wouters argue that corporate responsibility to respect human rights is progressively turning into a legal duty for companies to respect human rights in value chains: Claire Bright and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business and Politics 667.

of the strategic report regime and the CGC regime) are better than one soft law regime (i.e., only the current version of the strategic report regime). Even so, a new Principle must be introduced in the CGC encouraging companies to put in place anti-slavery and human trafficking policies and measures in their business operations, and to monitor their implementation.[842]

It is recalled that, barring its restrictive scope of application, the best model for the case of protection against modern slavery, as the law currently stands, is the "*non-financial information statement*"[843] save for the back door it gives the companies to escape from (i.e., give a clear and reasoned explanation for non-compliance). Now it will be argued that, barring its restrictive scope of application as mentioned above, the second-best model for the case of protection against modern slavery, as the law currently stands, is the Wates Statement, save for the cat door (discussed below) that it gives the companies to escape from.

According to Principle 4 of the Wates Principles, the companies are required to identify and mitigate the possible risks to its intangible assets such as "*social matters…workplace relationships, supply-chains and ethical considerations.*"[844]Moreover, the Wates Principles proceed on an "*apply or explain*" basis such that, unlike the CGC, the companies are not only require to state which principles they have complied with[845], but to state "*how the company applied*" and "*if the company departed from any [such principles]…the respects in which it did so, and its reasons for so departing*."[846]

Therefore, insofar as its substantive content is concerned, the Wates Statement does cover information related to modern slavery, however, the criterion of objectivity and reasonableness, and carrying out due diligence, formulating

---

[842] Reference is made to Section 4.2.2.3 of Chapter 4.
[843] CA 2006, s 414CA.
[844] Financial Reporting Council, 'Wates Corporate Governance Principles' (December 2018) 4; <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf#:~:text=The%20Wates%20Principles%20introduce%20an,arrangements%2C%20without%20being%20unduly%20prescriptive/> accessed 2 November 2023.
[845] FCA Handbook (n 441), Listing Rules, Rule 9.1.1 (R) read with Rule 9.8.6 (R) (6) (a).
[846] The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, Sch 7, cl 26.

policies and reporting their implementation is missing in it, i.e., the company is merely required "*to identify and mitigate*" modern slavery. Moreover, in so far as its mandatory content is concerned, the Wates Principles also suffer from the common defect discussed in numerous places throughout this thesis, i.e., so long as the company identifies the principles it does not comply with and further gives a reason for such noncompliance, it is in complete harmony with the law. As discussed above in Section 4.2.3, the scope of application of the Wates Principles is also restrictive.

Moreover, the Wates Statement is also required to be published on the company's website[847] failing which[848] an offence is committed by every officer who is "*in default*"[849] and they are liable on summary conviction to a fine not exceeding level 3 on the standard scale.

In light of the discussion above, if the strategic report is not amended as suggested, it would be prudent to retain the Wates Statement in the law, albeit as a soft law, and to make certain changes within it. However, if the strategic report is amended as set out above, the Wates Statement could be changed to a voluntary code as all the material information, i.e., the disclosures, the policies and their implementations, would already be covered in the strategic report. In the latter scenario, the Wates Statement would be retained as a sort of external quality validation for the companies to display on their website and merchandise.

In the former case, the Wates Principles would need to be amended in terms of its scope, requirements and enforcement mechanisms.

Turning to the scope of application of the Wates Statement, this must cover both quoted and unquoted companies, i.e., the CGC Statement must be dispensed with. This is because the CGC Statement, as it stands, does not do more than adhere to the California Transparency Model and merely require audits and certification and

[847] The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, Sch 7, cl 27.
[848] It is noted that a failure to publish a Wates Statement on the website would also arguably include the failure to prepare such a statement.
[849] CA 2006, s 1121(3).

does not require substantive disclosures and policies. In this regard, clauses 22(a) and 27(1)(b) of Schedule 7 to the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, that restrict the application of a Wates Statement to unquoted companies, will need to be deleted. Similarly, the "*qualifying conditions*" for the company that is required to produce a Wates Statement will need to be relaxed such that the company that has more than 500 employees, and / or a turnover of more than £50 million and a balance sheet of £500 million, should be required to produce the Wates Statement.[850]

As for the substantive requirements of the Wates Statement, the mandatory content of the Wates Statement must be retained such that clauses 26(1)(c) and 26(2) of the Schedule 7 to the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations, 2008 that provide for "*reasons for so departing*" must be omitted. Further, mandatory content in line with the recommendations made in Section 6.1.4 (vii) above must also be introduced. Additionally, the test of objectivity / reasonableness must also be introduced in the Wates Statement.

Similar to the suggestion made in Section 6.1.4 (v) above, the Wates Principles should be amended to the effect that, drawing from the FDV experience, the company must include in its Wates Statement information related to the operations of its subsidiaries and the companies that it controls, as well as its subcontractors and suppliers with which it has an "*established commercial relationship*". For the purpose of this thesis, the meanings given to these terms in France and discussed in Chapter 6 (i.e., tier 1, tier 2 suppliers etc.) are reasonable and ought to be introduced in the domestic law.

Finally, in terms of expanding the net of enforcement, a provision must be introduced in the law that allows a "*person with standing*" to bring injunctive proceedings for compliance with the law, inspired from s452 of the CA and s54 of

[850] See for example the proposed EU Directive on Mandatory Human Rights and Environmental Due Diligence that would bring certain smaller enterprises into scope where they are either listed or operate in higher risk sectors – size alone is a blunt measure of approximating risk:
Chiara Macchi and Laura Íñigo Álvarez (eds), 'Decent Work and Migrant Workers: the EU Directive on Mandatory Human Rights and Environmental Due Diligence' (CEDIS, January 2022): <https://novaresearch.unl.pt/en/publications/decent-work-and-migrant-workers-the-eu-directive-on-mandatory-hum/> accessed 2 November 2023.

the MSA. It is recalled that failure to adhere to such a court order would expose the company to a fine for contempt of court, as argued in section 5.2 above.

It is clarified that as the corporate governance codes are soft law, the tortious cause of action and criminal offences committed by the directors, argued elsewhere in this chapter, have intentionally not been recommended in this section. It is further clarified that this thesis specifically argues for reform of the strategic report regime to reflect anti-modern slavery procedures, and the major reforms to the s54 of the MSA or the Wates Statement is only argued in the alternate, in that order of priority.

6.4. Directors' Duties

As a preliminary point, it is recalled that the directors' duties are owed only to the company and are enforceable by the company (s170(1) of the CA), albeit shareholders can enforce such duties on behalf of the company in the form of derivative claims under s260 of the CA. The observation of Dignam and Lowry in this regard is also noted –as many environmental groups and employees hold shares in their respective companies, they can enforce such directors' duties, and the ambit of s170(1) is not as restrictive as might appear.[851] However, both institutional and retail investors often hold their investments indirectly for regulatory or tax reasons – and would have to convince a judge that they ought to be permitted to bring a derivative claim under the cumbersome common law approach.[852] If directors duties cease to be seen as a private contract between the company, the directors and the shareholders[853] and a general tortious cause of action is introduced (see Section 6.1.4.3 above), such issues can be avoided.

For the purpose of this thesis, the duty under consideration is the s172 duty, i.e., the duty to promote the success of the company and to have regard to matters

[851] Alan Dignam and John Lowry, *Company Law* (10th edn, Oxford University Press 2018) 419; Mia Wallace, 'How can companies prepare for a surge in climate-activism-related claims?' (*Insurance Business UK*, 11 August 2022) <https://www.insurancebusinessmag.com/uk/news/professional-liability/how-can-companies-prepare-for-a-surge-in-climateactivismrelated-claims-416446.aspx/> accessed 2 November 2023.
[852] *Universal Project Management Services Ltd v Fort Gilkicker Ltd & ors* [2013] All Er (D) 313
[853] CA 2006, s 33.

concerning employees, suppliers, community, environment etc. It is also recalled that the exercise of this duty must be done with "*reasonable care, skill and diligence*" in line with the directors' duties laid down in s174, i.e., the exercise of s172 duty must be measured against an objective floor, subjective ceiling standard.[854]

In light of the discussion in this chapter, it is now argued that s172 of the CA must be amended so that while having regard to the various matters for the purposes of promoting the success of the company, the directors must also have a duty to ensure that the strategic report, which it is noted is itself an expression of the exercise of duty under s172,[855] is prepared, circulated, filed, published and implemented in accordance with the requirements of the CA (if amended as argued directly above),[856] and that the contents of such a strategic report contained "*reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company*", its subsidiaries, it controlled companies and its sub-contractors and suppliers with which it has an "*established commercial relationship*".[857] In this regard, one might note with interest recent developments in the EU – while the proposed EU directive on mandatory human rights and environmental due diligence[858] will not (as such) become part of the UK's domestic legal systems, many EU businesses (which may have UK operations) and UK businesses with EU operations will soon be obliged to map their entire supply chains and, on that basis, identify potential human rights and environmental risks in their operations and take effective measures to mitigate any such harm.[859] Disclosure of a business' entire supply

---

[854] *Norman v Theodore Goddard* [1991] BCC 14.
[855] CA 2006, s 414C (1).
[856] It is recalled that this is already a criminal offence committed by the directors under CA 2006, s 414D.
[857] See generally, Law No. 2017-399, art 1 para 3.
[858] European Commission, 'Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains' (23 February 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 2 November 2023 (the draft "Corporate Sustainability Due Diligence Directive" or the "Directive").
[859] Chiara Macchi and Laura Íñigo Álvarez (eds), 'Decent Work and Migrant Workers: the EU Directive on Mandatory Human Rights and Environmental Due Diligence' (CEDIS, January 2022): <https://novaresearch.unl.pt/en/publications/decent-work-and-migrant-workers-the-eu-directive-on-mandatory-hum/> accessed 2 November 2023.

chain enhances the transparency model by allowing interested parties to meaningfully comment on the conclusions advanced in the reports prepared by these companies themselves.

Such that, if the s172 duty is amended as reformulated below, and a new sub-section (1) (g) would need to be inserted therein which would read as follows:

> (h) A director of a company must act in the way that ~~he considers, in good faith,~~ would be most likely to promote the success of the company for the benefit of its **stakeholders** ~~members~~ as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees ***and value chain workers***
I the need to foster the comp'ny's business relationships with suppliers, customers and others,
(d) the impact of the comp'ny's operations on the community and the environmenII the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.
(g) the strategic report of the company is prepared in accordance with the requirements of this Act, and contains reasonable vigilance measures adequate to identify risks and to prevent adverse/severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the direct and indirect activities of the company.[860]

In this way, the responsibility to adhere to an objective criterion while preparing the strategic report, and specifically for our purposes while preparing the vigilance plans for prevention of modern slavery and implementing them, not only the

[860] To supplement this new s 172 (1) (g), non-statutory guidance should be published to clarify that "*prepared*" encompasses all preliminary investigations, planning and drafting, as well as circulation, filing, publication and implementation. Further, such guidance should specify that – in this context – the "*indirect*" activities of the company should be interpreted to encompass the activities of its subsidiaries, its controlled companies, sub-contractors and suppliers with which it has an established commercial relationship.

directors of the company would be held liable for criminal offences[861], which, as already discussed above, are rarely prosecuted - but the shareholders themselves, which may include interest groups and victims such as employees – or indeed value chain workers, could bring action against the directors for failing to discharge their directors' duties owed to the company and expose them to a disqualification order, an injunction or damages. Such an expanded approach is not unknown in the common law world, as the success of Canada's oppression claim attests.[862] Fundamentally, company law in the UK is principles-based – shareholder primacy continues to fall away and there is an opportunity for legislative change to ensure that all relevant stakeholders have an appropriate say in corporate governance and ensuring board accountability.[863]

In this manner, the directors' duty under s172 and the strategic report regime would be circular. The strategic report is broadly for the benefit of the s172 duty *("[t]he purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company*"[864]), and one of the limbs of the s. 172 duty would be to ensure that the strategic report is in accordance with the CA, and that its contents are "*reasonable*" and "*adequate*" in circumstances. With directors facing further, personal bright line responsibility for the Strategic Report within their well-established s. 172 duty, this will promote board accountability by emphasising their individual duties towards the company and wider stakeholders.[865]

The wisdom behind this proposed amendment to include further, personal bright-line responsibility for the Strategic Report within the s. 172 duty is, among others, the thesis of David Attenborough discussed in Chapter 4 previously which concerned "*the duty to respect, protect and fulfil*". Attenborough argues that the burden of bearing this duty must not be on the corporations' shoulders, but on the

[861] CA 2006, s 414D.
[862] Canada Business Corporation Act 1975, s.238; *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560.
[863] Davies (n 349); Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563.
[864] CA 2006, s 414C(1).
[865] Keay and Zhao (n 630) 679.

shoulders of the people who run it, i.e., the directors.[866]Such that, while the company has the duty to prepare and implement a vigilance plan, it is the directors who should be saddled with the responsibility to see this through, such obligation being an *obligation de moyens* (to take all steps in their power to reach a certain result) and not an *obligation de résultat* (actual attainment of that result).

Accordingly, if this step is taken, it is hoped that the complimentary effect of twinning hard law with soft law would lead to good regulatory outcomes.[867] Ultimately, while both options of retaining the s54 statement as a standalone statement and incorporating it into the Strategic Report are viable, it is the former that would appear to be more effective in the long-run.

---

[866] Attenborough (n 355) 6.

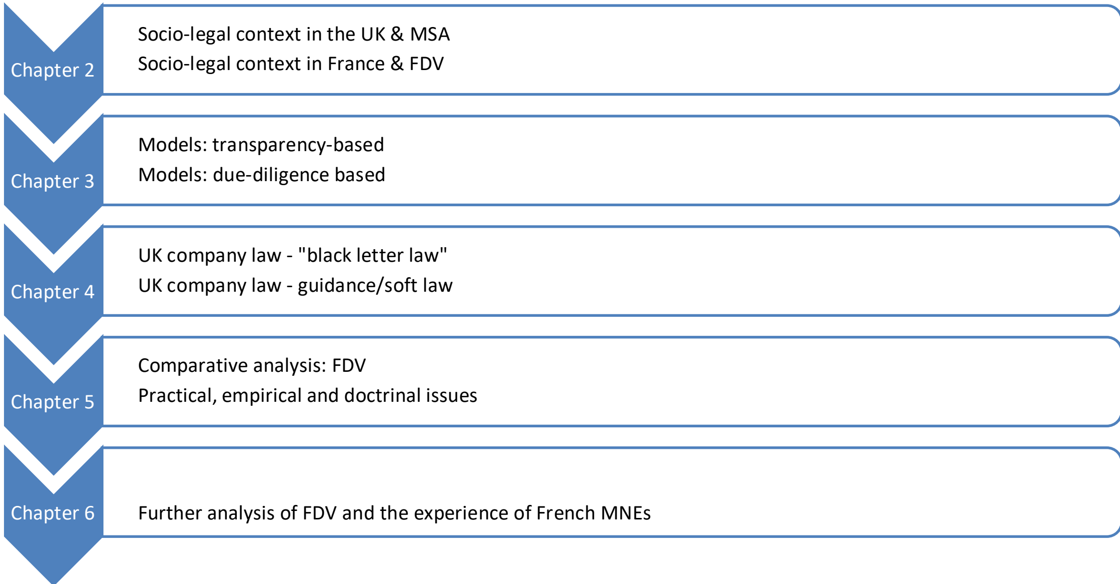
[867] See generally, Claire Bright, 'Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers MWP 2020/01, 2-3; and Lise KE Hsin and others 'Effectiveness of Section 54 of the Modern Slavery Act' (Modern Slavery Policy and Evidence Centre, February 2021) 4; Khanna (n 642) 1505.

Chapter 7: Conclusions

It is true that to assert that a high level of corporate accountability, especially in a case where directors need to consider a variety of stakeholders' interests, may slow down the efficiency of decision-making and blur the focus of the management team. However, without implementable external monitoring from affected stakeholders, companies may not be responsible for their externalities - Min Yan and Daoning Zhang[868]

[868] Min Yan and Daoning Zhang, '*From Corporate Responsibility to Corporate Accountability*' (2020) 16(1) Hastings Business Law Journal 43, 63.

Having analysed the FDV and MSA in depth in previous chapters, this final chapter seeks to draw together the different strands previously considered, and serves as an opportunity for some final reflections and observations. In this thesis, the overall socio-legal context of the modern slavery legislative and regulatory landscape in the UK and in France has been set out – as, principally, embodied by the MSA and the FDV in Chapter 2. In Chapter 3, the regulatory models at large were then considered, particularly focussing on the movement from transparency-based models to due diligence-based models in various jurisdictions. Next, in Chapter 4, this thesis analysed UK company law, both in the CA and elsewhere, including various non-binding but highly influential codes of practice – and argued the case for the integration of a FDV-style due diligence obligation within the CA. Chapter 5 then looked into the comparative jurisprudence of the FDV – examining, in particular, practical, empirical and doctrinal issues and experiences of France in utilising the FDV to combat the scourge of modern slavery effectively and boldly. Finally, Chapter 6, on the basis of the preceding chapters, set out certain potential recommendations on how a FDV-style duty could be best put in place in the UK context, drawing upon the experiences of France in successfully rolling out the FDV in respect of a range of French-linked MNEs while being cognisant of key sociocultural and legal differences that exist as between France and the UK. These are summarised as shown in Figure 1 below:



Lastly, this concluding chapter will comprise a whistle-stop tour of these previous chapters before spending some time considering some very recent developments and

giving additional thought to the possible future direction of travel in this important and dynamic field.

7.1 Overall Approach and Existing Scholarship on the FDV and MSA

In Chapter 1, the author set out the aims, scope and likely trajectory of this thesis. At this juncture, it is worth pausing to reflect on how these objectives were either fulfilled or evolved. At the outset, it was intended that this thesis focused on promoting corporate sustainability as its core, proposing reforms to directors' duties under s172 and s174 of the CA. Furthermore, particular emphasis was to be placed on analysing s54 of the MSA. Issues like corporate sustainability were indeed be addressed by both regulatory and governance strategies, rather than simply mandatory rules.[869] It became apparent that non-mandatory, but highly-influential codes of practice like the CGC were an important piece of the puzzle in understanding the UK corporate governance landscape as a cohesive whole (discussed in Chapter 4). This thesis therefore proceeded on the assumption that legislative reform (in the broadest sense, although a general preference for mandatory rules has been expressed in this thesis, reflecting growing global norms[870]) is a suitable method of furthering such goals.

Similarly, it was asserted that the reformulation of directors' duties would lead to the creation of an additional internal buffer,[871] instilling a change to boardroom 'culture' when it comes to compliance with issues pertaining to modern slavery and human rights. The objective was, and continued to be, to undertake a comparative analysis of the UK and France, with particular emphasis on the FDV. As several jurisdictions move towards mandatory human rights due diligence,[872] it was said that the FDV is

[869] John Armour, Henry Hansmann and Reinier Kraakman, 'Agency Problems, Legal Strategies and Enforcement' (2009) Harvard Law School Discussion Paper No. 664, 4.

[870] Bright (n 43) 3.

[871] See for example the input of external stakeholders noted in 'Transparency in Supply Chains Consultation' (Submission by CORE Coalition, Anti-Slavery International, Amnesty International, Business and Human Rights Resource Centre, Christian Aid, Environmental Justice Foundation, Fairtrade Foundation, FLEX, Freedom Fund, Freedom United, Traidcraft Exchange, TUC, UNICEF and UNISON, 16 September 2019) <https://www.antislavery.org/wp-content/uploads/2019/09/TISC-Consultation-Response_FINAL_160919.pdf> accessed 2 November 2023.

[872] Louise Elridge, 'Mandatory Human Rights Due Diligence Is the Direction of Travel' (*Corporatejusticecoalition.org*, 23 October 2018) <https://corporatejusticecoalition.org/uncategorised/mandatory-human-rights-due-diligence-direction-travel/ /> accessed 2 November 2023; Owain Johnstone and Olivia Hesketh, 'Effectiveness of Mandatory Human Rights and Environmental Due Diligence' (Modern Slavery Policy and Evidence

arguably the most advanced and comprehensive substantive and extraterritorial legislation. This is the primary reason for its selection for the purposes of this thesis' comparative analysis, notwithstanding the legal and cultural differences between the two jurisdictions. After all, there are already common law jurisdictions with due diligence-type legislative models in place, such as the CTSCA in California.[873] However, the transparency-based ethos of UK corporate governance meant that penalties for non-compliance with applicable rules were sometimes weaker than might be the norm in other jurisdictions.[874] Nevertheless, despite this, and other, significant differences between the French and UK legislative frameworks, it still was useful to consider the experiences of France in enacting and enforcing the FDV – which is one of the most forward-looking and ambitious anti-modern slavery regimes globally.[875] Indeed, early empirical data indicates that the FDV has been effective in resulting in a strong uptick in French MNEs carrying out human rights risk mapping.[876]

In terms of research methods, as expected, a key point of focus was black letter law doctrinal research – considering the details and technicalities of the applicable legislative contexts and associated case law.[877] However, in a comparative context, it was critical to note the influence of path dependency in shaping the scope of applicable legislation and guidance in the UK and France.[878] To supplement this orthodox approach, given the relative youth of anti-modern slavery legislation as compared to, for example company law more generally, it was useful to supplement this understanding with various case studies (rather than the reported judgments of decided cases – which, in any case, would not be binding as such in civil law jurisdictions). Additionally, it was important to consider these findings through the lens of socio-cultural comparative analysis. As expected, the exercise of directors' duties' "in good

---

Centre, Modern Slavery PEC Policy Brief 2022-1) 1.

[873] California Transparency in Supply Chains Act 2010; See generally: Adam S Chilton and Galit Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' (2016) 53 Stanford Journal of International Law 1.

[874] Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 6.

[875] As discussed in Chapter 1. See, for example: Adam S Chilton and Galit Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' (2016) 53 Stanford Journal of International Law 1.

[876] Owain Johnstone and Olivia Hesketh, 'Effectiveness of Mandatory Human Rights and Environmental Due Diligence' (Modern Slavery Policy and Evidence Centre, Modern Slavery PEC Policy Brief 2022-1) 10.

[877] As discussed in Chapter 4 at Sections 4.1.2 to 4.21.5.

[878] As discussed in Chapter 1 at Section 1.2.1.

faith" proved to be a potential area for cultural exposition, with significant variation existing even within common law jurisdictions.[879] An exposition on what the concept of exercising directorial duties "in good faith" means and whether this mandatorily includes the consideration of environmental, social, and governmental concerns in line with "a healthy infusion of communitarian values", as suggested by Brownsword.[880] While there appears to be some level of international convergence in business practices brought about by the forces of globalisation[881], noting these issues of path dependency and the necessity of considering wider perspectives (rather than just black letter law) was crucial in shaping the analysis of this thesis.

Chapter 1 further comprised an overview of the available literature on the FDV and the MSA. While it is not necessary to repeat this again here, it is worth once again noting that the FDV – although a not-inconsiderable obligation of wide extraterritorial application and with vigorous and multi-pronged enforcement mechanisms, is – ultimately – an *obligation de moyens* and not an *obligation de résultat.* In contrast, much of UK corporate governance has been characterised by a risk of short-termism and the framework of the MSA does not go far enough to push back against the inherent risk of "tick box" compliance (see Section 1.4.1.3 of Chapter 1). It is not only the MSA which has been accused of applying a "tick box" approach – this has been said in respect of certain aspects of the EU's proposed human rights due diligence directive.[882] To an extent, such weaknesses have been mitigated by the judiciary in their interpretation of the extent and scope of directors' duties.[883] Judiciary-led changes to company law can be effective.[884] However, the courts lack the democratic pedigree of Parliament and so, ultimately, reform would have to be led by Westminster.

---

[879] Sean Vanderpol and Edward J Waitzer, 'Addressing the Te'nsion between Directors' Duties –and Shareholder Rights - A Tale of Two Regimes' (2012) 50(1) Osgoode Hall Law Journal 177, 208.
[880] Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 Journal of Contract Law 197.
[881] See for example, Johnstone and Hesketh (n 824) 1.
[882] Anti-Slavery, 'The EU Proposal for Mandatory Due Diligence: Our Initial Review' (*Antislavery.org*), <https://www.antislavery.org/the-eu-proposal-for-mandatory-due-diligence-our-initial-review/> accessed 2 November 2023.
[883] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] UKPC 3, 835; *Westpac Banking Corporation v The Bell Group Ltd (In Liquidation) (No 2)* [2012] WASCA 157; Robert McCorquodale and Stuart Neely, 'Directors Duties and Human Rights Impacts: A Comparative Approach' (2022) 21(2) Journal of Corporate Law Studies 1, 19.
[884] George Shepherd, 'Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders' (2021) 23(3) University of Pennsylvania Journal of Business Law 823, 856.

At the beginning of this thesis, several critical issues were identified that undermine the effectiveness of the MSA in regulating supply chain ethics. Specifically, the absence of a mandatory diligence requirement, the option for companies to abstain from action by merely issuing a non-compliance statement, and a lack of directorial incentives aligned with MSA compliance all hinder effective governance at both the board and corporate levels. These shortcomings compromise the UK's ability to effectively combat modern slavery violations.[885] The potential solution which was to be explored – and now has been explored – by this thesis is the FDV, the main purpose of which has been to embed human rights, environmental, health and safety and security issues into company priorities leading to corporate sustainability.[886] An analogous "failure to prevent" model does have precedent in the UK in the form of the Bribery Act 2010 was initially considered as a potential basis for the UK's modern slavery legislation by the UK Joint Committee on Human Rights.[887] It was thought that such an approach would be a significant improvement on the current approach as embodied by s54 of the MSA. This appears to have largely held true. It might be suggested that such an approach integrates board and corporate accountability – while "the company" as a legal person may be the entity that is deemed responsible for a wrong, there ought to be certain sanctions directed at the "*directing mind and will*" of the company – being, collectively, the directors, i.e. the board of the company.[888]

7.2 Regulatory Models Generally

In terms of comparing the MSA and the FDV, it was necessary to take a step back and look at regulatory models in general. In this regard, it has been observed that States are "expected to adopt a mix of measures, whether voluntary, mandatory, national, or

---

[885] Bistra Boeva, 'Corporate Governance and Global Supply Chains: How Self-Regulation Replaces the Lack of Regulatory Initiatives or Do Regulatory Initiatives Add Value to Corporate Governance' 4 Economic Alternatives 5, 6; Keay and Zhao (n 630) 676.
[886] Madeleine Cuff, 'France Duty of Vigilance Law One Year on: What's Changed for French Corporates>' (*Business Green* 13 March 2018). <https://www.businessgreen.com/bg/feature/3028217/france-duty-of-vigilance-law-one-year-on-whats-changed-for-french-corporates> accessed 2 November 2023.
[887] Johnstone and Hesketh (n 824) 9.
[888] *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685; Andrew Keay, *Board Accountability in Corporate Governance* (Routledge, 2015).

international, to foster business respect for human rights in practice."[889] Various strategies may be employed, each potentially valid, but their effectiveness hinges on both the specific regulatory subject matter and the socio-cultural and legal contexts of the given jurisdiction. Further, that must be a "smart mix" of measures.[890] In the case of the fight against modern slavery – and CSR generally – the global trend is towards the use of legislation.[891] Increasingly, this means mandatory rules, as in the case of the FDV or the Californian CTSCA (as discussed in Chapter 3).[892]

In comparing the FDV and MSA, the former imposes a rigorous obligation for organisations to develop and disclose due diligence plans, while the latter adopts a softer approach, primarily centered on transparency. From either a board-level or corporate vantage point, the notion of duty and accountability in these laws encompasses multiple facets, including responsibility and transparency.[893] Making a choice between different legislative strategies is a patently political choice – but there is a practical dimension to this too: regulators face difficulty in designing strategies to monitor, detect, and achieve compliance due to a confluence of factors including but not limited to "resource constraints, conflicting institutional pressures, unclear objectives, and changes in the regulatory environment."[894]

In terms of cutting through these difficulties, it has been proposed that compliance would be more likely when regulators responsively utilised an enforcement pyramid with a range of sanctions, starting as the first degree of severity at persuasion, followed by warnings, civil penalties, criminal penalties, license suspensions, and license revocations.[895] Judged through this prism, it can be said that the MSA regime is lacking

---

[889] John G Ruggie, 'UN Guiding Principles, Principle 3 and Commentary, Letter of Response to a Public Letter by Swiss Business Associations Regarding Their Position on the Swiss Responsible Business Initiative' ; <https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 2 November 2023.

[890] Johnstone and Hesketh (n 824) 14.

[891] Bright (n 43) 3.

[892] California Transparency in Supply Chains Act 2010; See generally: Adam S Chilton and Galit Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' (2016) 53 Stanford Journal of International Law 1.

[893] Keay and Zhao (n 630) 679.

[894] Robert Baldwin and Julia Black, "Really Responsive Regulation" (2008) 71 Modern Law Review 59.

[895] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1995), as discussed in Chapter 3.

– it focusses on nudging companies towards ethical behaviour through "comply-or-explain"-type reputational sanctions – meaning technical compliance can be achieved by major UK-linked businesses even where they have taken minimal tangible action in practice.[896] This is not to say that businesses do not care about their reputations.[897] However, for the law in this area to be effective, there needs to be a way to pin liability on directors directly, and for there to be effective remedies for victims.[898] In addition to having a range of enforcement mechanisms available to the regulator, it has also been observed that the use of regulatory strategies must be tailored to the applicable business and social context.[899] In this sense, the MSA regime could be said to be reflective of the UK's (comparatively) *laissez-faire* approach to corporate regulation – but such an approach is not defensible where the human rights of vulnerable workers around the world are implicated, and so a harder-edged legislative approach could be justified as a way to cut across such cultural factors.[900] While some would say that regulatory intervention is a blunt instrument[901], some form of mandatory intervention is needed where voluntary compliance is unlikely.[902] While "softer" measures can have a meaningful effect, there is a qualitative difference between the two.[903]

While a transparency-based mechanism like the MSA is not inherently flawed, therefore, it is nevertheless evident that the legislation must be given more heft to be

[896] See, for example: Greene King, 'Modern Slavery Statement' (June 2020) <https://www.greeneking.co.uk/modern-slavery-statement/> accessed 2 November 2023.
[897] Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 2 November 2023.
[898] Robert McCorquodale and Stuart Neely, 'Directors Duties and Human Rights Impacts: A Comparative Approach' (2022) 21(2) Journal of Corporate Law Studies 1, 32.
[899] Doreen McBarnet, 'Corporate Social Responsibility Behond Law, Through Law, For Law: the New Corporate Accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009) 39.
[900] Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human RightsViolations in the Global South?' (2021) 22 Human Rights Review 109, 111.
[901] Sean Vanderpol and Edward J Waitzer, 'Addressing the Te'nsion between Directors' Duties –and Shareholder Rights - A Tale of Two Regimes' (2012) 50(1) Osgoode Hall Law Journal 177, 208.
[902] Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.
[903] Business and Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting' (*Business-humanrights.org*, February 2021) 2-3: <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 2 November 2023.

truly effective.[904] Indeed, as discussed in in Section 6.2.1, Rouas argues that mandatory human rights due diligence laws are essential but inadequate without strong enforcement mechanisms to prevent them from becoming ineffective.[905] Further, transparency-based approaches depend on some external party taking notice of the information disclosed and taking some form of tangible action in response to such information: the information disclosed must be “decipherable, useful and timely”.[906] Put another way, one must consider the actors involved and the meaningfulness, usefulness and quality of that information being disclosed.[907] Relevant actors would of course include NGOs[908]: they play a complicated role in each of these two pieces of legislation (the MSA and the FDV), and consulting such stakeholders has intrinsic and instrumental value.[909] On one hand, they can be powerful forces holding companies to account where public regulators may be unable to – due to strictures or legislation or administrative red-tape.[910] On the other hand, NGOs are, often, partisan towards certain causes and may come into conflict with each other, or stymie efforts to strengthen legislation. Many actors will have specific agendas, not all of which are readily discernible.

In its current form, it is therefore doubtful that the MSA is effective in achieving compliance as a transparency-based model.[911] There is no private right of action that might be brought in respect of scant or inaccurate disclosures.[912] Limited MSA

---

[904] Claire Bright and Lise Smit, ‘The new European Directive on Corporate Sustainability Due Diligence’ (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.
[905] Virginie Rouas, ‘Achieving Access to Justice in a Business and Human Rights Context’ (University of London Press 2022) 377.
[906] Robert L Laud and Donald H Schepers, ‘Beyond Transparency: Information Overload and a Model for Intelligibility’ (2009) 114(3) Business and Society Review 365.
[907] Mahmood Hosseini and others, ‘Four Reference Models for Transparency Requirements in Information Systems’ (2018) 23 Requirements Engineering 251.
[908] As discussed in Chapter 3 at Section 3.4; see, generally, George E Edwards, ‘Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs’ (2009) 18 Michigan State University College of Law Journal of International Law 165.
[909] Beate Sjåfjell, ‘How Company Law has Failed Human Rights – and What to Do About It’ (2020) 5(2) Business and Human Rights Journal 179, 196.
[910] Suggesting the desirability of a duty to consult NGOs in certain situations: George E Edwards, ‘Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs’ (2009) 18 Michigan State University College of Law Journal of International Law 165.
[911] As discussed in Chapter 3 at Section 3.2.
[912] Robert McCorquodale and Stuart Neely, ‘Directors Duties and Human Rights Impacts: A Comparative Approach’ (2022) 21(2) Journal of Corporate Law Studies 1.

disclosures are not unknown.[913] Further, governmental enforcement is relatively light. In contrast, due diligence-based models like the FDV – focussing on human rights risk assessments – have a proven track record.[914] Indeed, in the UK, recent case law in *Okpabi v Royal Dutch Shell*[915] and *AAA & Others v Unilver PLC and Unilever Tea Kenya Limited*[916] have led Bright, Marx, Pineau, and Wouters[917] to argue that corporate responsibility to respect human rights is progressively turning into a legal duty for lead companies to respect human rights in value chains where a lead company has a high level of control over its business partners.[918] Early empirical data indicates this is the case in France.[919] Global and domestic trends therefore point towards the suitability of the adoption of a FDV-like model in the UK.

As the preceding chapters of this thesis sought to show, such a transparency-based model is not incompatible with the UK's legal system and business environment – and could be integrated into existing company law frameworks including CA, CGC and other "soft law". Indeed, it has been suggested that respect for human rights is an implicit component of directors' duties in the UK.[920] In jurisdictions with strong institutions and the rule of law, such meta-regulation models (which can be seen as a form of guided self-regulation)[921] can be particularly effective when directed towards policy goals or values that companies can take responsibility (in the sense of overall corporate responsibility, not just board responsibility[922]) for, and not just end-result compliance with output rules.[923] It was noted that this was an area which was in flux globally. However, it has become clear that the FDV does nevertheless represent a stable and suitable regulatory model which is fit for purpose.

---

[913] ibid 17.
[914] Bright (n 43).
[915] *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191.
[916] *AAA & Others v Unilver PLC and Unilever Tea Kenya Limited [*2018] EWCA Civ 1532.
[917] Claire Bright and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business and Politics 667.
[918] *Vedanta Resources PLC and anor v Lungowe and others* [2019] UKSC 20.
[919] Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.
[920] McCorquodale and Neely (n 863) 34.
[921] As discussed in Chapter 3 at Section 3.2.6.
[922] As discussed in Chapter 6 at Section 6.4.
[923] John Braithwaite and Valerie Braithwaite, 'The politics of legalism: Rules versus standards in nursing home regulation' (1995) 4 *Social and Legal Studies* 307.

7.3 Integrating FDV-type obligations into the CA and CGC

As alluded to at Section 6.2 above, it is not only submitted that a "FDV-type" obligation should be introduced into UK company law, but it is further argued that such an obligation can be integrated into existing legislative frameworks – namely the CA, the CGC and / or various established "soft law" mechanisms like the Wates Corporate Governance Principles for Large Private Companies and the UK Stewardship Code.[924]

In terms of reform to the MSA, one must consider the overall legal / regulatory landscape.[925] While there are multiple models that seek to enunciate the means of effecting institutional behavioural change, as discussed throughout Chapter 4, the Topping approach is both clear and generally accepted as being the most comprehensive intellectual framework in this field. It is submitted that the Topping approach is analytically rigorous yet readily understandable. Therefore, proposed reforms to these other legislative and quasi-legislative instruments would facilitate holistic change.

Clear, standardised and comparable data is crucial for driving reform. It enables businesses and investors to identify weaknesses and take targeted actions, including legal recourse on human rights or environmental issues.[926] In this vein, shareholders have increasingly taken companies to court in relation to business and human rights / environmental issues.[927] The recent Shell litigation on cutting emissions is illustrative of this trend.[928] Such "activist" litigation faces various roadblocks inherent to the structure of English tort and company law (and indeed the rules of civil procedure).[929] Nevertheless, this is a development of growing prominence across a variety of jurisdictions.[930] To this end, this thesis has taken particular interest in empirical as well as doctrinal approaches in analysing these issues.

---

[924] McCorquodale and Neely (n 863) 34.
[925] Johnstone and Hesketh (n 824) 14.
[926] ibid.
[927] McCorquodale and Neely (n 863) 30.
[928] Camilla Hodgson and Tom Wilson, 'Climate Group Prepares Legal Action against Shell Directors' (*Financial Times*, 14 March 2022); <https://www.ft.com/content/d7feaa8a-7555-47ae-828b-274527c6f89c> accessed 2 November 2023.
[929] As discussed in Chapter 4 at Section 4.1.8.
[930] As discussed in Chapter 4 at Sections 4.1.5 and 4.1.6; *see,* generally Jingchen Zhao, 'The curious

Without wishing to recite chapter and verse on the development of and nature of directors' duties, it is recalled that this thesis takes a particular interest in the "duty to promote the success of the company" – which is generally considered to be measured against an objective-subjective standard.[931] Despite a degree of divergence at the EU level and internationally, it can be said that – in most legal systems – directors' duties are focussed on the success of the company rather than on the good of stakeholders generally.[932]However, the UK does appear to be on the more extreme side of the spectrum (compared to Germany or the Netherlands, for example)[933] – despite recent developments in this area, orthodoxy has repeatedly been upheld.[934] In particular, any attempt by an outsider to enforce compliance with directors' duties has been rebuffed by the UK judiciary. Since an outsider could not bring a claim for enforcement of directors' duties (as they are only owed to the company), a novel way around is by means of a judicial review, albeit that is only possible in cases involving state entities.[935] This undermines the effectiveness of the UK's purported ESV ethos. While some, notably Ruggie, would be against reforming directors' duties to reflect modern slavery issues, many such concerns are misplaced in the UK context.[936] These reforms are not just

---

case of shareholder primacy norm: calling for a more realistic theory' (2012) 15 International Trade and Business Law Review 1.

[931] *Charterbridge Corp Ltd. V Llyods Bank Ltd*[1969] 3 W.L.R. 122; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *Re HLC Environmental Projects Ltd* [2013] EWHC 2876; also see, for example, the Western Australian case of *Bell Group Ltd. (in liq) v Westpac Banking Corporation (No 9)*[2008] WASC 239. This decision built upon the foundational English case of *Barnes v Addy* (1874) LR 9 Ch App 244.

[932] McCorquodale and Neely (n 863) 5; EU Initiative on Sustainable Corporate Governance for Multinational Enterprises 2011 (OECD Guidelines) and the International Labour Organisation's Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy 2017; Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) Business and Human Rights Journal 179, 182.

[933] McCorquodale and Neely (n 863) 11.

[934] *Antuzis v DJ Houghton* [2019] EWHC 843 (QB), [124].

[935] *R (on the application of People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin); McCorquodale and Neely (n 863) 9 – but note the exceptional decision in *Antuzis v DJ Houghton* [2019] EWHC 843 (QB), at [120], [122] and [124].

[936] John G Ruggie, 'European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties' (February 2021) Harvard Kennedy School; <https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf/> accessed 2 November 2023; John Morrison, Phil Bloomer and Camille Le Pors, 'Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards' (*Business-humanrights.org* 3 March 2021); <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 2 November 2023.

desirable but necessary.[937]

If, then, directors' duties were to be reformed in this manner, what would be the nature and scope of such reforms? Palombo argues for three major solutions[938], other than the ESV, to address the "stake-holder interest" namely the "purpose objective", the "oppression claim" and "co-determination". These solutions were discussed in detail in Chapter 4. Approaching the issue from a different angle, Attenborough's critique of the rule of shareholder's primacy model and the stakeholder's interest model[939] is relevant too. Ideologically, shareholder primacy should have its status as the central organising principle of much of modern company law interrogated and challenged.[940] He also introduces his own theory, which can be termed as an alternate to the ESV, the EMV (also discussed in detail in Chapter 4).[941] Fundamentally, it could be said that a key consideration is the extent to which it might be feasible and/or desirable to change the underlying, historically-embedded ethos of English company law.

Using the EMV model in the context of modern slavery and Director's Duties, the phrase "give due consideration to" would entail a strict obligation to "protect and fulfil." This would make the duty objectively measurable, beyond just the director's subjective reasoning. In terms of the Strategic Report, directors would be obliged to report on due diligence and remedial actions taken, as well as justify any inaction.

In terms of the UK's "soft law" regime, it is recalled that, while the CGC contains obligations such as "pursue long-term gains", "employ corrective action in this pursuit" and "determine risk areas", there is no express mention of "social matters", "community matters", "supply-chain abuses" and "forms of human exploitation". Although there is a reference to the "interests of wider society", the current state of

---

937 Johnstone and Hesketh (n 824) 2.
938 Dalia Palombo, "The Future of the Corporation: The Avenues for Legal Change" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 2 November 2023.
939 Attenborough (n 355).
940 Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) Business and Human Rights Journal 179, 189.
941 Attenborough (n 355).

play makes an import of such an interpretation to the CGC, and therefore expecting the corporations to make a statement to this effect, at best, wishful thinking.[942] As a general point, it has been observed that transparency-based reporting obligations in the UK are often interpreted narrowly and technically.[943] It is likely that major international law firms draft many of these disclosures, especially for MNEs subject to disclosure rules in multiple jurisdictions. This could effectively "export" the UK's approach to common law Commonwealth jurisdictions that traditionally model their laws after English law.[944] It may even be the case that there is a lacuna in the law. In contrast, compared to the CGC (or even the Stewardship Code), the Wates Principles are more amenable to accommodating modern slavery due to the obligation within them to "*identify and mitigate risks*" related to "*supply-chain matters and other ethical considerations*".[945]

Therefore, the verdict is still out as to whether company law in the UK can evolve in such a way that responsibility remains with the top leadership without the insulation of corporate boards from decisions that have a large impact on modern slavery issues in their international supply chains, i.e. to instil board responsibility – not just corporate responsibility.[946] One of the crucial questions is, "How much board oversight is needed for effective management of a company's environmental and human rights risks?". While the FDV does not make board approval of corporate compliance statements necessary, the MSA does, this being one of its few strengths. Recent legislative developments in the EU are indicative of a global

[942] See for example Provisions 28 and 29 of the CGC.
[943] McCorquodale and Neely (n 863) 15.
[944] See for example, Lisa Ko-En Hsin, 'Hong Kong's Modern Slavery Journey So Far' (International Institute for Asian Studies, Newsletter 87, Autumn 2020): <https://www.iias.asia/the-newsletter/article/hong-kongs-modern-slavery-journey-so-far-businesses-must-now-take-lead> (accessed 2 November 2023, which noted that Hong Kong's legislature had considered passing a Modern Slavery Bill (Draft Bill 10) in 2018, which was drafted on very similar terms to the MSA 2015. Also see for example the *ZN v Secretary for Justice & Ors* [2019] HKCFA 53 decision where Fok PJ referred to the MSA 2015 at [7], [38] and [52] in considering various issues relating to modern slavery in Hong Kong.
[945] Financial Reporting Council, 'UK Stewardship Code' (2020); <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf/> accessed 2 November 2023; Financial Reporting Council, 'Wates Corporate Governance Principles' (December 2018) 4; <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf#:~:text=The%20Wates%20Principles%20introduce%20an,arrangements%2C%20without%20being%20unduly%20prescriptive/> accessed 2 November 2023.
[946] McCorquodale and Neely (n 863) 23.

shift towards a hard law-centric approach.[947] Change is, as ever, on the horizon.[948]

7.4 Comparative law reflections – the FDV

From the outset, this thesis posited that the FDV – as an established, advanced and effective modern slavery regulatory model that is worth emulating – had much to offer the UK by way of comparative jurisprudence. In this regard, this would be an opportune moment to spend some time reflecting on certain key points highlighted in Chapter 5.

As discussed, there are certain pressing systemic weaknesses in the MSA. The FDV, as an established and forward-looking piece of legislation, would be a suitable model for the UK in seeking to plug such gaps, as reflected in encouraging early empirical data in France.[949]

It is worthwhile recalling the wide scope of the FDV: as long as there is a relevant jurisdictional connection with France, the employees of "direct or indirect" subsidiaries (even when those subsidiaries' registered offices are outside of France) potentially contribute towards triggering the relevant headcount-based compliance thresholds.[950]

In terms of the nature of the vigilance plan, it is further recalled that it must be drawn up with the input of relevant stakeholders are the sectoral and territorial level.[951]

As for the content of the vigilance plan, the FDV is prescriptive in requiring a detailed

---

[947] Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.
[948] John Morrison, Phil Bloomer and Camille Le Pors, 'Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards' (*Business-humanrights.org* 3 March 2021); <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 2 November 2023.
[949] Johnstone and Hesketh (n 824) 10.
[950] Law No. 2017-399, art 1 para 1.
[951] Law No. 2017-399, art 1 para 5.

vigilance plan arrived upon via a rigorous decision-making process.[952]

While there has been some debate as to the precise definition of the phrases underlined above (analysed in depth in Chapter 5), these terms have been given relatively straightforward and sensible interpretations. This is reflected in the empirical data currently available, which gives a snapshot of how the FDV has been applied in practice.[953] From that perspective, perhaps it could be generally observed that non-common law jurisdictions are less prone to experience (real or imagined) difficulties in reconciling the interpretation of words and phrases in legislation with existing case law.[954]

As identified by Ibañez, Bayer, Xu and Cooper in 2020 (and as discussed in Section 5.4.1), whose report collected empirical data regarding compliance with the FDV, the majority of MNEs did in fact substantially meet their FDV obligations.[955]

On the ground, however, there is therefore still work to be done in helping MNEs to better understand their obligations – but this is not a weakness with the framework of the FDV as it stands. While costs might be a barrier to effective compliance, estimates indicate that, if a FDV-like duty were to be applied to SMEs across Europe, the typical cost of compliance would average 0.14% of revenue for such SMEs.[956]

In Chapter 5, consideration was given of various case studies involving well-known MNEs: Schneider Electric, Vinci Group, STMicroelectronics, BNP Paribas and Engie. From these examples, we can draw several lessons on the importance of: (i) tasking senior management with human rights compliance; (ii) implementing bespoke solutions to address human rights risks; and (iii) designing appropriate monitoring and audit mechanisms.

---

[952] ibid.
[953] Johnstone and Hesketh (n 824) 10.
[954] Margaret Fordham, 'Comparative Legal Traditions – Introducing the Common Law to Civil Lawyers in Asia' (2005) Asian Journal of Comparative Law 1, 2: <https://law1.nus.edu.sg/asli/2nd_asli_conf/pdf/margaret2005_01.pdf> accessed 2 November 2023.
[955] Juan Ignacio Ibañez and others, 'Devoir de Vigilance: Reforming Corporate Risk Engagement' (iPoint-systems GmbH, 9 June 2020) 4, < https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 2 November 2023.
[956] Johnstone and Hesketh (n 824) 12.

Empirically, it has been observed that there is a "strong positive correlation between… companies assigning board responsibility for human rights… and responsibility and resources for day-to-day human rights functions".[957] In this vein, Schneider Electric was an illustrative example of an in-scope organisation thinking proactively about achieving meaningful compliance through the establishment of a FDV Working Group, or a "Duty of Vigilance Committee" – rather than simply delegating FDV compliance to a siloed function like their CSR or HR teams[958], FDV compliance is driven by a cross-function committee involving CSR, environment, purchasing, health and safety and other expertise.[959]

Then, there is the need to ensure that solutions must be tailored to the context. It is submitted that this reflects wider market practice of thoughtful, effective compliance (rather than a mere checkbox approach).[960] For example, Vinci Group has published and circulated its own Human Rights Guide, which sets out key risks for the sectors and jurisdictions where this leading construction firm operates; in the case of Qatar, a known higher-risk jurisdiction for labour rights issues, they have further put in place special measures with international trade union BWI to carry out monitoring and due diligence on their joint venture operations in that jurisdiction.[961] It can be observed that Vinci Group as a whole is acting effectively to ensure compliance with best practices through the adoption of targeted, bespoke measures.

In terms of effective monitoring, the example of STMicroelectronics is noteworthy. Due to the risks associated with the recruitment of Indonesian, Nepalese and Sri

---

[957] World Benchmarking Alliance, 'Elevating Human Rights Responsibilities to the Board and Senior Management' (World Benchmarking Alliance, 2022), <https://www.worldbenchmarkingalliance.org/publication/chrb/findings/elevating-human-rights-responsibilities-to-the-board-and-senior-management-level-appears-to-be-key-for-better-action-on-human-rights-due-diligence/ /> accessed 2 November 2023.
[958] Other organisations which have such committees might do this: Brabant, Michon and Savourey (n 81) 8-9.
[959] Schneider Electric, 'Human Rights Policy' (10 December 2022): <https://www.se.com/uk/en/download/document/Human_Rights_Policy/> accessed 2 November 2023.
[960] Anti-Slavery, 'The EU Proposal for Mandatory Due Diligence: Our Initial Review' (*Antislavery.org*), <https://www.antislavery.org/the-eu-proposal-for-mandatory-due-diligence-our-initial-review/> accessed 12 May 2022.
[961] Vinci, 'Vinci's Guide on Human Rights' (20 April 2017): <https://www.vinci.com/publi/manifeste/vinci-guide_on_human_rights-en.pdf> accessed 2 November 2023.

Lankan migrant workers in their significant Malaysian operations, they have implemented strict audit conditions on their recruitment agencies in those countries, cover the costs of such agencies so that these are not passed on to the workers as debts, requiring written employment contracts to be provided in the worker's native language and forbidding the retention of sensitive documents relating to those workers (e.g. passports).[962] As for BNP Paribas, as a leading global financial institution, they have adopted a "human rights criterion" into their client assessment tools in relation to credit facilities and other sectoral policies.[963] ENGIE is a noteworthy example of holistic compliance in requiring all of its business units and associated entities to provide annual reports on their compliance with international human rights norms, with a view towards facilitating ever-higher standards.[964] While such measures are ultimately taken in the name of the company as a corporate entity, ultimately, it has to be the directors – the natural persons running corporations – who should shoulder the burden of compliance.[965]

This thesis then looked into the seven formal notices (as of June 2021) which have been handed down to in-scope companies requiring them to remediate shortcomings in their FDV compliance. These were Total Energies (in respect of their Ugandan operations), Teleperformance (Colombia, Mexico and the Philippines), EDF (Mexico), Total Energies (global climate change obligations), Suez Group (South America), Casino Group (South America) and XPO Logistics (international outsourcing).[966] Just from the names and relevant jurisdictions, one can see that there are systemic weaknesses in certain sectors, such as the natural resources / energy and infrastructure sectors. Accordingly, it has been observed that compliance costs, in practice, will vary by sector, location and size of business.[967] In all these examples, civil proceedings are either ongoing or the relevant entities are subject to a binding and final decision to remedy the applicable shortcomings. However, it remains to be

---

[962] Brabant, Michon and Savourey (n 81) 11.
[963] BNP Paribas, 'Statement on Human Rights': <https://group.bnpparibas/uploads/file/uk_declaration_bnp_sur_droit_de_l_homme.pdf > accessed 2 November 2023.
[964] Brabant, Michon and Savourey (n 81)13.
[965] Attenborough (n 355) 6.
[966] Bommier Swann, Lucie Chatelain and Camille Loyer 'Duty of Vigilance Radar: Follow Up on Current Cases' (*Sherpa*, July 2021): <https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf> accessed 2 November 2023.
[967] Johnstone and Hesketh (n 824) 3.

seen how precisely they will cure these defects, and whether their internal compliance cultures would see systemic improvements.

As for the FDV itself, while it is an established regime, it is not perfect. The French Ministry of Economy and Finance has implicitly conceded that there remains work to be done in enhancing the effectiveness of the FDV law.[968] The recommendations suggest broadening the FDV's scope to include other corporate forms and changing its qualifying criteria to consider both employee count and annual turnover. They also propose a dedicated government department to identify organisations falling under the FDV and incorporating multi-stakeholder initiatives in public procurement. Additionally, there is advocacy for extending FDV-style obligations across the common market through an EU Directive.[969] Such a measure would promote fairer competition while raising standards across the EU.[970]

Having considered the mechanics of the FDV, both in terms of black letter law and empirical data on real-life compliance, it is admitted that gaps still exist – the number of in-scope companies is estimated at no more than 263 and compliance is not perfect.[971] While the FDV does have ripple effects that go beyond the large companies which it focusses on[972], it must be recognised that it is in fact SMEs which form the backbone of the economy.[973] Nevertheless, internationally, the FDV is the most

[968] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, 10-11: < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 2 November 2023.
[969] Clerc (n 484) 3-4. This directive has since been published: Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.
[970] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, 10 -11: < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 2 November 2023; McCorquodale and Neely (n 863).
[971] Bommier Swann, Lucie Chatelain and Camille Loyer 'Duty of Vigilance Radar: Follow Up on Current Cases*'* (*Sherpa*, July 2021): <https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf> accessed 2 November 2023; McCorquodale and Neely (n 863) 16.
[972] Johnstone and Hesketh (n 824) 2.
[973] Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2

advanced legislative regime which addresses extraterritorial human rights abuses caused as a direct and indirect result of MNEs and is a key precedent in arguing for similar modern slavery protection in the UK.[974] While there is always room for improvement in any piece of legislation, the FDV, it is submitted, is the most comprehensive and effective legislative scheme of its sort across the various jurisdictions of the world. Indeed (and additionally), although no longer of direct relevance to the UK, the EU's planned adoption of a FDV-like duty across all Member States is a notable development[975] – and indeed this is reflective of global legislative trends.[976]

7.5 Recommendations

As such, having considered regulatory models generally, the UK's existing MSA regime and the general structure of UK company law and France's experiences with the FDV, it was then possible to integrate these strands to recommend how legislative reform in the UK might be enacted to achieve higher standards of compliance in a way that better upholds international labour and human rights standards among MNEs which have a relevant nexus to this country. There is a need to have a "smart mix" of measures.[977] While change can be effected in multiple ways (via legislation, the judiciary or otherwise)[978], an FDV-like approach is evidenced as being capable of driving meaningful change.[979]

It is recalled that this thesis submitted that the best course of action would be to retain the s54 MSA Statement as a standalone statement while enacting complimentary reforms within company law generally. Such reforms would focus

November 2023.

[974] Johnstone and Hesketh (n 824) 10.

[975] EU Parliament Working Group on Responsible Business Conduct, 'Speech by Commissioner Reynders in RBC Webinar on Due Diligence' (30 April 2020), <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence//, accessed 15 April 2022; Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.

[976] McCorquodale and Neely (n 863).

[977] Johnstone and Hesketh (n 824) 14.

[978] George Shepherd, 'Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders' (2021) 23(3) University of Pennsylvania Journal of Business Law 823, 856.

[979] Johnstone and Hesketh (n 824) 2.

on the strengthening of enforcement mechanisms.

Most pertinently, these would comprise: the establishment of a specialised department such as Companies House must be given the responsibility for ensuring compliance with s54 of the MSA, which would be able to dedicate itself to shining a spotlight on MSA compliance; complimentary to this, the possibility of private enforcement should be introduced via the broadening of *locus standi* to bring injunction proceedings (which is the case with the FDV)[980]; an emphasis on personal liability for directors who (personally culpably) approve a defective s54 Statement (while this possibility does exist elsewhere, it is generally of narrow application; it has even been suggested that the conception of directors' duties internationally needs to be reformed to place more emphasis on personal responsibility)[981]; and the possibility of imposing an unlimited fine on the company – such practice would be in line with the UK's competition law regime.[982] Further, there should be a broadening of the scope of the MSA regime – the experience of the FDV indicates that potentially out-of-scope utility providers such as petroleum companies are more likely to be involved in supply-chain abuses; further, the turnover threshold of £36 million is so high that it would exclude many significant MNEs who might also pose a modern slavery risk – so the qualification for a "*commercial organisation*" should be amended accordingly.

In terms of lowering the turnover threshold, the original focus on larger MNEs assumes that these larger entities, with expansive global footprints, are more susceptible to issues of modern slavery or human rights violations within their supply chains. Additionally, the rationale suggests that these corporations, with their vast resources, are better positioned to enforce stringent due diligence measures. However, some scholars, including Worthington [983], argue that a regulatory focus solely on large corporations may create loopholes, as modern slavery and human rights abuses can also manifest in smaller, more localised supply chains.

---

[980] See, for example, Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 16.
[981] McCorquodale and Neely (n 863) 27 and 33.
[982] See, for example, Genevieve LeBaron and others, 'Forced Labour Evidence Brief: Due Diligence and Transparency Legislation' (*Re:Structure Lab*, Sheffield, Stanford and Yale Universities 2021) 5.
[983] S Worthington, 'Directors' Duties, Creditors' Rights and Shareholder Intervention' (1991) 18 Melbourne University Law Review 12.

Medium and small-sized enterprises contribute significantly to national and global economies and often engage more directly with local communities where labour abuses may be more prevalent due to weaker enforcement mechanisms. There is also concern that large corporations may evade legislation by outsourcing or structuring operations through smaller entities, leading to accountability gaps. However, the proposition of extending regulations to medium-sized enterprises presents challenges such as disproportionate financial and administrative burdens, potential for overregulation, and increased litigation risk. Therefore, a nuanced, balanced approach is vital, potentially involving phased implementations or state-supported compliance mechanisms to ensure both efficacy and fairness in addressing modern slavery and human rights infringements.

Additionally, the content of the s54 MSA Statement should be tightened – it is not acceptable that providing "*a statement that the organisation has taken no such steps*" could constitute compliance[984]; further, explicitly drawing on the FDV model, reporting on regular evaluation procedures and alert and complaint mechanisms would complement existing requirements.[985] Finally, in line with the FDV Article 2, a specific tortious cause of action should be introduced for failure to prepare the s54 statement and implement it adequately which failure results in harm to another in the UK or abroad. While breaches of directors' duties could amount to tortious conduct under the general law in theory, the need to prove causation is often an insurmountable hurdle.[986]While each of these measures, alone, might not prove to be effective, it is submitted that, as a package, they comprise an appropriate "smart mix" of measures.[987]

In the alternative, a workable (but not preferred) solution might be integrating the s54 statement into the Strategic Report (and making certain amendments in law thereto). Similar reforms as above would be required to ensure more rigorous compliance standards are achieved through broader enforcement mechanisms and expanding the criteria as to which entities are subject to such obligations. Many have commented that

---

[984] MSA 2015, s 54(4)(b).
[985] See generally, Law No. 2017-399, art 1 para 5(2).
[986] McCorquodale and Neely (n 863) 29; *Rainnham Chemical Works Ltd v Belvedere Fish Guano Co* [1921] 2 AC 265; *Antuzis v DJ Houghton* [2019] EWHC 843 (QB), [124].
[987] Johnstone and Hesketh (n 824) 14.

such a broader base of in-scope companies would be desirable in the case of the FDV[988], and in the case of the EU's proposed mandatory human rights and environmental due diligence directive.[989] This logic can be applied to the UK too. Notably, unlike the approach immediately above, as submission of the Strategic Report is something policed by Companies House (at least in terms of timely submissions), the need to establish a separate governmental body would be avoided but it is doubtful to what extent Companies House would in fact monitor the substance of the Strategic Report. In a way, this places the emphasis on the information-provision stage of (stakeholder-driven) accountability.[990] However, overall global regulatory trends in this space suggest that there is a real need for stronger measures which have the backing of governmental enforcement.[991]

Other alternative / complimentary measures might include the strengthening of the CGC, CG Statement and Wates Principles. However, as these are soft law mechanisms, the overall impact that such amendments would have is necessarily more limited. Another possibility is amending the scope of directors' duties. In particular, s172 of the CA should be amended so that while having regard to the various matters for the purposes of promoting the success of the company, the directors must also have a duty to ensure that the strategic report, which it is noted is itself an expression of the exercise of duty under s172,[992] is prepared, circulated, filed, published and implemented in accordance with the requirements of the CA (if amended as argued directly above),[993] and that the contents of such a strategic report contained "*reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company*", its

[988] Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, 10-11: < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 2 November 2023.
[989] Shift, 'EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's Analysis' (*Shiftproject.org* March 2022), 2 <https://shiftproject.org/resource/eu-csdd-proposal/shifts-analysis/> accessed 2 November 2023.
[990] Keay and Zhao (n 630) 679.
[991] Khanna (n 642) 1434.
[992] CA 2006, s 414C (1).
[993] It is recalled that this is already a criminal offence committed by the directors under CA 2006, s 414D.

subsidiaries, it controlled companies and its sub-contractors and suppliers with which it has an "*established commercial relationship*".[994] It has been suggested that directors duties and human rights due diligence are not diametrically opposed – and should, in fact, work in tandem.[995] It is the directors – the natural persons running corporations – who should shoulder the burden of compliance.[996] These reforms should not be seen as *à la carte* options: comprehensive, complimentary reform (ideally along the lines of the first solution proposed) would be most effective in bringing about meaningful change that would better uphold human rights in the UK.

7.6 Final Remarks

Having made the above proposals as to how the law surrounding the MSA might be reformed, it is worth now taking stock and making some final, concluding remarks.
As mentioned above, the proposed EU mandatory human rights and environmental due diligence directive is a notable development. This would represent the expansion of an FDV-like duty to the whole of the single market.[997] Perhaps, one ought to be asking more fundamental questions about the nature and role of the company in society today[998] – or about overhauling company law as a whole.[999] However, within the context of the prevailing economic system in a global world, and notwithstanding potential dangers of over-reliance on regulation and regulators[1000], it has been recognised that a FDV-like approach is both desirable and necessary – not just in the UK, but across global supply chains.[1001] Mandatory rules and a widely-defined

[994] See generally, Law No. 2017-399, art 1 para 3.
[995] McCorquodale and Neely (n 863) 34.
[996] Attenborough (n 355) 6.
[997] Claire Bright and Lise Smit, 'The new European Directive on Corporate Sustainability Due Diligence' (*BIICL Blog*, 23 February 2022); <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-diligence?cookiesset=1&ts=1652388538> accessed 2 November 2023.
[998] George Shepherd, 'Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders' (2021) 23(3) University of Pennsylvania Journal of Business Law 823, 858.
[999] Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) Business and Human Rights Journal 179, 189.
[1000] Sean Vanderpol and Edward J Waitzer, 'Addressing the Te'nsion between Directors' Duties –and Shareholder Rights - A Tale of Two Regimes' (2012) 50(1) Osgoode Hall Law Journal 177, 187.
[1001] Owain Johnstone and Olivia Hesketh, 'Effectiveness of Mandatory Human Rights and Environmental Due Diligence' (Modern Slavery Policy and Evidence Centre, Modern Slavery PEC Policy Brief 2022-1) 2; Anti-Slavery, 'The EU Proposal for Mandatory Due Diligence: Our Initial Review' (*Antislavery.org*), <https://www.antislavery.org/the-eu-proposal-for-mandatory-due-diligence-our-initial-review/> accessed 2 November 2023.

jurisdictional nexus would promote ethical behaviour and heightened transparency and accountability globally through the imposition of board and corporate liability for non-compliance.

Ultimately, one might say that compliance with international human rights obligations is the right thing to do for all stakeholders – not just in a normative, ethical way, but in terms of ensuring the long-term sustainable profitability of businesses.[1002] Going forward, it is hoped that this thesis could serve as a springboard for further comparative human rights due diligence research, from both doctrinal and empirical perspectives. In particular, it is hoped that research in this field, as indicated by the most recent data relating to supply chain worker exploitation[1003], would support the formulation of effective monitoring and compliance, supported by a legal regime which is attuned to the wider socio-legal context.

[1002] McCorquodale and Neely (n 863) 34.
[1003] 'Fashion brands paid Bangladesh factories less than cost – report' (*BBC News,* 8 January 2023) <https://www.bbc.co.uk/news/business-64204759/> accessed 2 November 2023.

Bibliography

Legislation (UK)

Bribery Act 2010.

Charities Act 2011.

Companies (Audit, Investigations and Community Enterprise) Act 2004.

Companies (Miscellaneous Reporting) Regulations 2018.

Companies Act 1985 (Operating and Financial Review) (Repeal) Regulations 2005.

Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

Companies Act 2006.

Company Directors Disqualification Act 1986.

Corporate Governance Code 2020.

Interpretation Act 1978.

Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008.

Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Modern Slavery Act 2015.

Sentencing Act 2020.

Small Companies (Micro Entities' Accounts) Regulations 2013.

Legislation (Non-UK)

Albania

Articles 209(1)3 and 211 of Albanian Company Act.

Australia

Corporations Act 2001.

Canada

Business Corporation Act 1975.

European Union

Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

Directive 2004/18/EC.

Directive 2014/95/EU.

France

Amendment No. 65 to the Text No. 2628, submitted on the first reading in the French National Assembly ("**AN**") on 26 March 2015.

AN, draft law no. 708, 23 March 2016, at p. 2. See also, AN, draft law no. 2578, 11 Feb. 2015.

AN, proposed law no. 2578, 11 Feb. 2015.

AN, rep. no 2628, 11 March 2015, spec.

AN, rep. no. 4242, prec.

AN, report no. 3582, 16 March 2016.

Civil Code 2016

Commercial Code Law No. 225-102

Draft reform of civil liability law, French Ministry of Justice, March 2017, article 1266-1.

Law No. 1334.

Law No. 2001-420.

Law No. 2010-788.

Law No. 2012-557.

Law No. 2016-1691.

Law No. 2017-399.

Law No. 233-16.

Law No. 233-3.

Law No. 442-6-5.

R. no. 225-104, 9 August 2017.

USA

California Transparency in Supply Chains Act 2010.

Cases (UK)

AAA & Others v Unilver PLC and Unilever Tea Kenya Limited [2018] EWCA Civ 1532.

Aberdeen Railway Co. v Blaikie Bros (1854) 1 Paterson 394.

Antuzis v DJ Houghton [2019] EWHC 843 (QB).

Barings plc and others (No. 5), Re; Secretary of State for Trade and Industry v Baker and others (1999) 1 BCLC 4433.

Barnes v Addy (1874) LR 9 Ch App 244.

Begum v Maran [2021] 3 WLUK 162.

BSB Holdings Ltd (No 2), Re [1996] 1 BCLC 155.

Caparo Industries PLC v Dickman [1990] UKHL 2.

Charterbridge Corp Ltd v Llyods Bank Ltd [1969] 3 W.L.R. 122.

City Equitable Fire Insurance Company Limited, Re [1925] Ch 407.

Davies v Ford [2020] EWHC 686 (Ch).

Director of Serious Fraud Office v. Airbus SE (unreported) Southwark Crown Court, 31 January 2022.

Director of Serious Fraud Office v. Airline Services Ltd. [2021] Lloyd's Reports FC Plus 1.

D'Jan of London Ltd, Re [1994] 1 BCLC 561.

Donoghue v Stevenson [1932] UKHL 100.

Dorchester Finance Co v Stebbing [1989] BCLC 498.

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360.

Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71.

El Ajou v Dollar Land Holdings [1994] 2 All ER 685, [1994] BCC 143.

Equitable Life Assurance Society v Bowley & Ors [2003] EWHC 2263.

Extrasure Travel Insurances Ltd v Scattergood [2003] 1 BCLC 598.

Fairford Water Ski Club v Cohoon [2021] EWCA Civ 143.

Foss v Harbottle (1843) 2 Hare 461.

Fulham Football Club Ltd v Cabra Estates plc [1994] 1 BCLC 363.

Gaiman v National Association for Mental Health [1970] 2 All ER 362.

Gilford Motor Co Ltd v Horne [1933] Ch 935.

HLC Environmental Projects Ltd, Re [2013] EWHC 2876.

Industrial Development Consultants Ltd v Cooley [1972] 1 WLR 443.

In Plus Group Ltd v Pyke [2002] 2 BCLC 201.
JJ Harrison (Properties) Ltd v Harrison [2002] BCC 729.
Jones v Lipman [1962] 1 WLR 832.
Kadie Kalma & Ors. v African Minerals Ltd & Ors [2020] EWCA Civ 144.
Keech v Sandford [1558-1774] All ER Rep 230.
Keyu & ors v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69.
Land's Allotment Co, Re [1894] 1 Ch 616.
Legal Costs Negotiators Ltd, Re [1999] 2 BCLC 171.
Lexi Holdings plc (in admin) v Luqman [2009] EWCA Civ 117.
London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd [1891] WN 165.
Lungowe v Vedanta Resources plc [2019] UKSC 20.
Macaura v Northern Assurance Co Ltd [1925] AC 619.
Madoff Securities International Ltd (In Liquidation) v Raven [2013] EWHC 3147 (Comm).
Multinational Gas and Petrochemical Company Limited v Multinational Gas and Petrochemical Services Limited [1983] Ch 258.
Municipio de Mariana v BHP Group plc and BHP Group Ltd [2020] EWHC 2930.
Norman v Theodore Goddard [1991] BCC 14.
Official Receiver v Brown [2017] EWHC 2762 (Ch).
Okpabi & ors v Royal Dutch Shell plc & anor [2021] UKSC 3.
Okpabi v Royal Dutch Shell [2018] EWCA Civ 191.
O'Neill v Phillips [1999] UKHL 24.
Percival v Wright [1902] 2 Ch 421.
Peskin v Anderson [2001] BCC 874.
R (on the application of Greenpeace Ltd) v Inspectorate of Pollution & Anor (No 2) [1994] 4 All ER 329.
R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213.
R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815.
R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [2003] EWHC 1 (Admin).
Regentcrest plc v Cohen [2001] 2 BCLC 80.
Royal British Bank v Turquand (1856) 6 E&B 327.

Salomon v Salomon and Co Ltd [1897] AC 22.
Smith & Fawcett Ltd, Re [1942] 1 All ER 542.
South Australia Asset Management Corporation v York Montague Ltd ("SAAMCO") [1996] UKHL 10.
Sweet v Parsley [1970] AC 132, [1969] 2 WLR 470.
Uber BV v Aslam [2021] UKSC 5.
Universal Project Management Ltd v Fort Gillicker Ltd [2013] Ch 551.
Vald Nielsen Holdings A/S v Baldorino [2019] EWHC 1926 (Comm).
Vedanta Resources PLC and anor v Lungowe and others [2019] UKSC 20.
Vickery, Re [1931] 1 Ch 572.
VTB Capital plc v Nutritek International Corporation [2013] UKSC 5.
Weavering Capital v Dabhia [2015] BCC 741.
West Mercia Safetywear Ltd v Dodd [1988] BCLC 250.

Cases (Non-UK)

Australia
Bell Group Ltd (In Liquidation) v Westpac Banking Corporation (No 9) [2008] WASC 239.
Howard Smith Ltd v Ampol Petroleum Ltd [1974] UKPC 3.

British Virgin Islands
Chu v Lau [2020] UKPC 24.

Canada
BCE Inc v 1976 Debentureholders [2008] 3 SCR 560.
Nevsun Resources Ltd v Araya & Others [2020] SCC 5.
People's Department Stores v Wise [2004] 3 S.C.R 461.

France
Constitutional Court Decision No. 2016-741 DC dated 8 December 2016.
Constitutional Court Decision No. 2017-750 DC dated 23 March 2017.
Decision of the Commercial, Financial and Economic Chamber dated 15 September

2009.

Hong Kong

ZN v Secretary for Justice & Ors [2019] HKCFA 53.

The Netherlands

Milieudefensie & Others v Shell Petroleum NV & Others (C/09/365482/HA ZA 10-1665).

New Zealand

James Hardie Industries Plc v White [2019] NZSC 39.

USA

Credit Lyonnais Bank Nederland NV v. Pathe Communications Corp 1991 Del Ch LEXIS 215.

Nike, Inc. et al v Marc Kasky [2003] USSC Case No 02-575.

<u>Other Authorities</u>

1. “Accountability as part of Mandatory Human Rights Due Diligence” (SHIFT October 6, 2020); <https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf> accessed 22 October 2020.
2. “An Analysis of the Efficacy of the Bribery Act 2010”; <https://www.abdn.ac.uk/law/documents/An_Analysis_of_the_Efficacy_of_the_Bribery_Act_2010.pdf> accessed 15 July 2020
3. “*Annex to the Report on the Proposed Law relating to the Duty of Vigilance of Parent Companies and Ordering Companies*” French National Assembly Parliamentary Report No. 4242 (23 November 2016).
4. “Battling Human Trafficking: A Scrutiny of Private Sector Obligations under the Modern Slavery Act” (Global Initiative, September 4, 2020); <https://globalinitiative.net/battling-human-trafficking-a-scrutiny-of-private-sector-obligations-under-the-modern-slavery-act/>; accessed 8 August 2020.

5. "Business & Human Rights Resource Centre" (*Clothing companies should publish information about factories making their products to eliminate labour abuses, say unions & NGOs*); <https://www.business-humanrights.org/en/latest-news/clothing-companies-should-publish-information-about-factories-making-their-products-to-eliminate-labour-abuses-say-unions-ngos/> accessed 10 October 2020.
6. "Business Human Rights Resource Centre" (14 cities & NGOs call on Total to comply with French Duty of Vigilance law - Business & Human Rights Resource Centre); <https://www.business-humanrights.org/en/latest-news/14-cities-ngos-call-on-total-to-comply-with-french-duty-of-vigilance-law/> accessed 13 October 2020.
7. "C029 - Forced Labour Convention, 1930 (No. 29)" (*Convention C029 - Forced Labour Convention, 1930 (No. 29).* <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029> accessed 24 April 2020.
8. "Company Scorecard" (*Behind the Brands*); <https://www.behindthebrands.org/company-scorecard/> accessed 3 October 2020.
9. "Corporate Law Reform: Briefing by Department of Trade and Industry" <https://pmg.org.za/committee-meeting/10369/> accessed 17 May 2020.
10. "Corporate Self-Reporting" (*Serious Fraud Office*, April 28, 2016); <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/> accessed 15 August 2020.
11. "Declaration of the Rights of Man – 1789" <http://hrlibrary.umn.edu/education/frdeclaration.html> accessed 26 April 2020.
12. "Due Diligence on Forest Risk Commodities" (Department for Environment, Food & Rural Affairs, August 2020) ;<https://consult.defra.gov.uk/eu/due-diligence-on-forest-risk-commodities/supporting_documents/duediligenceconsultationdocument.pdf>; accessed 25 August 2020.
13. "*Duty of Vigilance Radar: Follow Up on Current Cases"* published in July 2021, SHERPA: <https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf> accessed 1 September 2021.

14. “Enabling Environment for Sustainable Enterprises ... - Ilo.org”; <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/genericdocument/wcms_634222.pdf> accessed 25 August 2020.
15. “Exploring Human Rights Due Diligence” (Norton Rose Fulbright); <https://www.nortonrosefulbright.com/en/knowledge/publications/0a6e811f/exploring-human-rights-due-diligence> accessed 5 July 2020.
16. “Fair Labor Association” (*Supply Chain Traceability And Transparency | Fair Labor Association.* June 16, 2017); <https://www.fairlabor.org/blog/entry/supply-chain-traceability-and-transparency> accessed 15 June 2020.
17. ‘Fashion brands paid Bangladesh factories less than cost – report’ (BBC News, 8 January 2023) <https://www.bbc.co.uk/news/business-64204759/> accessed 11 January 2023.
18. “FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action” (Business & Human Rights Resource Centre) <https://www.business-humanrights.org/en/ftse-100-the-uk-modern-slavery-act-from-disclosure-to-action> accessed 1 June 2020.
19. “*Full minutes of the Session on Wednesday 23 March 2016*” French National Assembly, at p. 2393.
20. “Home Office Consultation on Modern Slavery Statements and Compliance Audit” (Lewis Silkin); <https://www.lewissilkin.com/en/insights/home-office-consultation-on-modern-slavery-statements-and-compliance-audit>; accessed 13 October 2020.
21. “How Does Third-Party Risk Impact Supply Chains?” (*Refinitiv Perspectives*, October 8, 2020); <https://www.refinitiv.com/perspectives/regulation-risk-compliance/how-does-third-party-risk-impact-supply-chains/> accessed October 26, 2020.
22. “ICC Anti-Corruption Third Party Due Diligence: A Guide for Small- and Medium-Sized Enterprises - ICC - International Chamber of Commerce” (ICC); <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/> accessed 10 September 2020.
23. “Independent Anti-Slavery Commissioner Annual Report 2015-16”; <http://www.antislaverycommissioner.co.uk/media/1097/annual-report-

2016.pdf> accessed 10 August 2020.

24. “Key Observations: Norton Rose Fulbright”; <https://human-rights-due-diligence.nortonrosefulbright.online/publications/2018/q2/key-observations> accessed 20 August 2020; Ruggie J, “UN Guiding Principles, Principle 3 and Commentary, Letter of Response to a Public Letter by Swiss Business Associations Regarding Their Position on the Swiss Responsible Business Initiative ”; https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 10 June 2020.
25. “Key Takeaways from the SMEs; IOE Workshop 2019” (Marythuo August 17, 2020); <https://www.marythuo.com/key-takeaways-from-the-ioe-workshop-discussion-2019/> accessed 16 September 2020.
26. “Know the Chain Benchmarks” (*Know the Chain*); <www.knowthechain.org/benchmarks/3/> accessed 5 October 2020.
27. “Legislative Train Schedule”, available online: https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-corporate-due-diligence accessed 14 October 2021.
28. “Mandatory Human Rights Due Diligence Is the Direction of Travel” (*CORE* February 12, 2020) <https://corporate-responsibility.org/mandatory-human-rights-due-diligence-direction-travel/> accessed 23 April 2020.
29. “Marine Stewardship Council: All Certification Schemes Have Their Limits” (*Reuters Events*); <https://www.reutersevents.com/sustainability/business-strategy/marine-stewardship-council-all-certification-schemes-have-their-limits/> accessed 18 June 2020.
30. “*Memo to Consolidated Accounts 2019*” Francis Lefebvre Edition at 2001.
31. “OECD Declaration on International Investment and Multinational Enterprises” <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm> accessed 5 May 2020.
32. “Press Corner” (European Commission - European Commission); <https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_323> accessed 3 July 2020.
33. “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011), Commentary on Principle 12 (UNGPs).

34. "*Report Done on behalf of the Law Commission Constitutional, Legislation and General Administration of the Republic on the Proposed Law (No. 2578), Relating to the Duty of Vigilance of Parent Companies and Ordering Companies*" French National Assembly Parliamentary Report No. 2628 (11 March 2015)
35. "Securing a Hybrid Environment for Research Preservation and Access", a non-governmental organisation with research capabilities and widespread influence in this sphere.
36. "The Bangladesh Accord on Fire and Building Safety" (*The Bangladesh Accord*) <https://bangladeshaccord.org/> accessed 27 April 2020.
37. "*The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance*" [2017] Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires, 50(93).
38. "UNDP Sustainable Development Goals" (*UNDP*) <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> accessed 5 May 2020.
39. "UNITED KINGDOM: PHASE - OECD" (October 2008); <http://www.oecd.org/unitedkingdom/41515077.pdf> accessed 15 July 2020
40. "World Bank SME Finance" (*World Bank*); <https://www.worldbank.org/en/topic/smefinance> accessed 25 August 2020.
41. Accountability as part of Mandatory Human Rights Due Diligence" (SHIFT October 6, 2020); <https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf> accessed 22 October 2020.
42. Allain J and others, "Forced Labour's Business Models and Supply Chains" (*JRF* July 9, 2018) <https://www.jrf.org.uk/report/forced-labour's-business-models-and-supply-chains> accessed 25 April 2020.
43. Anita Ramasastry, 'Mandate of the Working Group on the issue of human rights and transnational corporation and other business enterprises' (United Nations Human Rights Office of the High Commissioner, 22 October 2020); <https://www.ohchr.org/Documents/Issues/Business/EU_Directive_on_HR.pdf> accessed 28 October 2020.
44. Anti-Slavery, "The EU Proposal for Mandatory Due Diligence: Our Initial Review", <https://www.antislavery.org/the-eu-proposal-for-mandatory-due-

diligence-our-initial-review/> accessed 12 August 2022.

45. Armour J, Hansmann H & Kraakman R, 'Agency Problems, Legal Strategies and Enforcement' (2009) Harvard Law School Discussion Paper 664.
46. Asian Development Bank, "Infrastructure Regulation: Models for Developing Asia" (Asian Development Bank, July 22, 2020); <https://www.adb.org/publications/infrastructure-regulation-models-developing-asia-0> accessed 26 July 2020.
47. Attenborough D., "*Giving purpose to the corporate purpose debate: an equitable maximization and viability principle (Winner of the SLS Annual Conference Best Paper Prize 2011)*" 2012 Legal Studies 4.
48. Ayres I and Braithwaite J, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press 1995).
49. Baldwin R and Black J, "Really Responsive Regulation" (Wiley Online Library January 7, 2008); <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.2008.00681.x>; accessed 10 June 2020.
50. Baldwin R, Cave M and Lodge M, *The Oxford Handbook of Regulation* (Oxford University Press 2013).
51. Bartley T, Rules without Rights: Land, Labor, and Private Authority in the Global Economy (Oxford University Press 2020).
52. Belal AR, *Corporate Social Responsibility Reporting in Developing Countries: the Case of Bangladesh* (Routledge 2016).
53. Better Regulation Executive, "*Lightening the Load The Regulatory Impact on the UK's Smallest Businesses*" (November 2010, London), < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31614/10-1251-lightening-the-load-regulatory-impact-smallest-businesses.pdf> accessed 3 May 2022.
54. Black J, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 Modern Law Review 1037.
55. Black, J, "Decentring Regulation: Understanding The Role Of Regulation And Self-Regulation In A Post-Regulatory World" [2001] 54 Current Legal Problems 103.
56. BlackRock Sustainability, "Sustainability", (n.d.) <https://www.blackrock.com/corporate/sustainability> accessed 20 July 2020.

57. Boeva, B. (2015) "*Corporate Governance and Global Supply Chains: How Self-Regulation Replaces the Lack of Regulatory Initiatives or Do Regulatory Initiatives Add Value to Corporate Governance*" 4 Economic Alternatives 5.
58. Borrie J, Crowley M and Persbo A, "The Role of Non-Governmental Organizations in the Monitoring and Verification of International Arms Control and Disarmament Agreements," *Thinking outside the box in multilateral disarmament and arms control negotiations* (UNIDIR 2006).
59. Brabant S, Michon C and Savourey E, "The Vigilance Plan: Cornerstone of the Law on the Duty of Vigilance" (December 14, 2017) <https://www.business-humanrights.org/sites/default/files/documents/Law on the Corporate Duty of Vigilance - Vigilance Plan - Intl Rev.Compl_. & Bus. Ethics.pdf> accessed 20 May 2020.
60. Brabant, S. and Savourey, E., [2017] "*A Closer Look at the Penalties Faced by Companies*" Revue Internationale de la Compliance et de l'Éthique des Affaires.
61. Braithwaite J and Braithwaite V (1995), 'The politics of legalism: Rules versus standards in nursing home regulation', 4 *Social and Legal Studies* 307.
62. Braithwaite J, "Responsive Regulation and Developing Economies" (2006) 34 World Development 884.
63. Bright C and others, "Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?" [2020] Business and Politics 1.
64. Bright C, "Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?" (*SSRN* November 16, 2018). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262787> accessed 27 April 2020.
65. Bright, C, "Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers MWP 2020/01.
66. Bright C, "The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary" [2018] Business and Human Rights in Europe 212.
67. Bright, C. and Smit, L., "The new European Directive on Corporate Sustainability Due Diligence"; <https://www.biicl.org/blog/32/the-new-european-directive-on-corporate-sustainability-due-

diligence?cookiesset=1&ts=1652388538> accessed 12 May 2022.

68. Brownsword R, “Two Concepts of Good Faith” (1994) 7 Journal of Contract Law 197.
69. Bruch H and Vogel B, *Organisationale Energie* (Gabler 2009).
70. Bruyn ST, “The Moral Economy” (1999) 57 Review of Social Economy 25.
71. Bueno N and Bright C, “Implementing Human Rights Due Diligence through Corporate Civil Liability” (2020) 69 International and Comparative Law Quarterly 789.
72. Buhmann K, “Public Regulators and CSR: The ‘Social Licence to Operate’ in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR” (2015) 136 Journal of Business Ethics 699.
73. Busch L, “Performing the Economy, Performing Science: from Neoclassical to Supply Chain Models in the Agrifood Sector” (2007) 36 Economy and Society 437.
74. Business and Human Rights Resource Centre, “Modern Slavery Act: Five Years of Reporting” (February 2021): <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> accessed 8 March 2021.
75. Business and Human Rights Resource Centre, “*Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards”* (March 2021), <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards/> accessed 15 March 2021.
76. Business and Human Rights: Navigating a Changing Legal Landscape (*Clifford Chance* May 1, 2020) < https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/05/business-and-human-rights-navigating-a-changing-legal-landscape.pdf> accessed 10 May 2020.
77. Business compliance with BHR legislation: transparency and human rights due diligence, discussion held on 15 July 2021: <https://www.youtube.com/watch?v=zxHEQcHRlzE> accessed 10 September 2021.
78. Businesses Back Legislation to 'Upgrade Capitalist Operating System'” (*Bates*

Wells, London December 4, 2019) <https://bateswells.co.uk/2019/12/company-purpose-bill/> accessed 17 April 2020.

79. Cadbury Committee, "*The Financial Aspects of Corporate Governance*" (1 December 1992), <https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf> accessed 19 January 2021.
80. Castells, M, "The Network Enterprise: The Culture, Institutions, and organizations of the Information Economy", The Rise of the Network Society (2nd Ed), Castells, M, ed, 2009. Oxford University Press, Oxford.
81. Chambers R and Vastardis A, "Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability" (SSRN, December 19, 2019). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497421> accessed 15 June 2020(2019) 21(2) Chicago Journal of International Law 323
82. Chambers R, Kemp S and Tyler K, "*Report of Research into how a Regulator could Monitor and Enforce a Proposed UK Human Rights Due Diligence Law*" (London, Kingsley Napley LLP, 21 August 2020), p. 4, which would advocate allowing for a simplified civil penalties procedure where one simply needs to prove breach and damage to sue a company for modern slavery compliance failures.
83. Charnovitz S, "Nongovernmental Organizations and International Law" (2006) 100 American Journal of International Law 348.
84. Cheffins, "*Corporate Theory*" published in The Oxford Handbook of Legal Studies (Oxford, OUP, 2003).
85. Cheit R, *Setting Safety Standards: Regulation in the Public and Private Sectors* (University of California Press 2018).
86. Chilton AS and Sarfaty G, "The Limitations of Supply Chain Disclosure Regimes" (2016) 53 Stanford Journal of International Law 1.
87. Clarke B., "*Duty of Care, Skill and Diligence—From Warm Baths to Hot Water*" [2016] 56 Irish Jurist 139.
88. Clerc, C., "*The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains*" European Economic, Employment and Social Policy, ETUI Policy Brief No. 1/2021.

89. CLRSG, "Modern Company Law for a Competitive Economy: Developing the Framework*"* (London, DTI, March 2000).
90. Coglianese, C and Mendelson, E, "Chapter 8: Meta-Regulation and Self-Regulation" (2010), in *The Oxford Handbook On Regulation*, Cave, M, Baldwin, R and Lodge, M (Eds.) (Oxford Unversity Press, 2010).,
91. Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework, 1999, London, Department of Trade and Industry, para 5.1.12.
92. Conseil général de l'économie (January 2020), *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* ("Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies") – Report to the French Ministry of Economy and Finance, available online: < https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> accessed 8 July 2021
93. Crane A and others, "Governance Gaps in Eradicating Forced Labor: From Global to Domestic Supply Chains" (2017) 13 Regulation & Governance 86.
94. Cutler A and Dietz T, *The Politics of Private Transnational Governance by Contract* (Routledge 2018).
95. Cuzacq, N., "*Commentaire des propositions de loi relatives au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordr*e" ("*Commentary on the legislative proposals relating to the duty of vigilance of parent companies and ordering companies"*)Revue de droit du travail 2014.
96. Davies, P., "*The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?"* European Corporate Governance Institute – Law Working Paper 2020/506, < https://ecgi.global/sites/default/files/working_papers/documents/davies5062020final.pdf > accessed 31 May 2021.
97. Dignam A and Lowry J, *Company Law* (10th edn, 2018), Oxford University Press.
98. Dodd E., *"For whom are corporate managers trustees?"* (1932) 45 Harvard Law Review 1145.
99. DTI (2005), "Business Review Guidance";

<http://www.dti.gov.uk/cld/docs/Businessreviewguidance.doc> accessed 23 January 2021.

100. Du Plessis J and Low CK, *Corporate Governance Codes for the 21st Century International Perspectives and Critical Analyses* (Springer International Publishing 2018).

101. Duthilleul, A. and de Jouvenel, M., "*Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*" (Rapport à Monsieur le ministre de l'économie et des finances, 2020), < https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf> accessed 6 March 2022.

102. Edelman LB and Talesh SA, 'To comply or not to comply – that isn't the question: how organizations construct the meaning of compliance', Parker C and Nielsen VL, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar 2012).

103. Ederhardt-Toth, E., "Who Should be on a Board Corporate Social Resonibility Committee?" 140 [2017] Journal of Cleaner Production 1926.

104. Edwards GE, "Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs" (2009) 18 Michigan State University College of Law Journal of International Law 165.

105. Elisabeth Nadal, 'Multinationals and human rights abuses: are there any good news?' (Open Democracy, 27 October 2020) <https://www.opendemocracy.net/en/democraciaabierta/lmultinacionales-abusos-derechos-humanos-hay-alg%C3%BAn-avance-en/> accessed 29 October 2020.

106. *Entreprises pour les Droits de l'Homme* (EDH) and B&L Evolution, 'Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans', 25 April 2018 <https://www.e-dh.org/userfiles/Edh_2018_Etude_EN_V4.pdf> accessed 24 May 2020.

107. EU Initiative on Sustainable Corporate Governance for Multinational

Enterprises 2011 (OECD Guidelines) and the International Labour Organisation's Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy 2017

108. EU Parliament Working Group on Responsible Business Conduct, "*Speech by Commissioner Reynders in RBC Webinar on Due Diligence*" (30 April 2020), <https://responsiblebusiness.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/> accessed 15 April 2022

109. European Commission (published 12 July 2021), "Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in their Operations and Supply Chains": https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf accessed 12 September 2021.

110. European Commission Green Paper: The EU corporate governance framework, COM (2011) 164 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF > accessed 12 May 2020.

111. European Commission, "Competition Policy for the Digital Era", available online at: < https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (accessed 9 December 2020).

112. European Commission, *"Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains"* (February 2022), available online: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 5 March 2022.

113. Evans, A, "Hope for Reform: Strengthening Corporate Accountability in Global Supply Chains" (ECPR Regulation and Governance Conference, Lausanne, Switzerland, May 2018) < http://www.bhrinlaw.org/documents/hope-for-reform.-alice-c.-evans.pdf> accessed 26 May 2020.

114. Executive Summary: Global Slavery Index" (*Global Slavery Index*). <https://www.globalslaveryindex.org/2019/findings/executive-summary/> accessed 15 March 2020

115. FCA, “*FCA Handbook*” (2021): <https://www.handbook.fca.org.uk/handbook/LR/9/8.html#D506> accessed 9 February 2021.

116. Final Report of the Committee on Corporate Governance (London: Gee Publishing, January 1998) <https://ecgi.global/code/hampel-report-final> accessed 16 May 2020.

117. Financial Reporting Council, *“Guidance on the Strategic Report”* (2018) < https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf> accessed 5 March 2022, p. 57.

118. Financial Reporting Council, “*UK Corporate Governance Code*” (July 2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> accessed 7 February 2021.

119. Finch, V., “*Company Directors: Who Cares about Skill and Care*?” [2016] 55(2) Modern Law Review 179.

120. Finch, V., “*Company Directors: Who Cares about Skill and Care*?” [2016] 55(2) Modern Law Review 179

121. Forced Labour, Modern Slavery and Human Trafficking <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> accessed 15 March 2020.

122. Fordham, M., “*Comparative Legal Traditions – Introducing the Common Law to Civil Lawyers in Asia*” [2005] Asian Journal of Comparative Law 1: <https://law1.nus.edu.sg/asli/2nd_asli_conf/pdf/margaret2005_01.pdf> accessed 15 October 2022.

123. France Adopts New Corporate ‘Duty of Care’ Law” (*France adopts new corporate "duty of care" law | Ethical Trading Initiative*) <https://www.ethicaltrade.org/blog/france-adopts-new-corporate-duty-care-law> accessed 24 May 2020.

124. FRC, “*Guidance on Board Effectiveness*” (July 2018): https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF (accessed 8 February 2021).

125. FRC, "UK Stewardship Code" (2020): https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf (accessed 8 February 2021).

126. FRC, "*Wates Corporate Governance Principles*" (December 2018): https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf#:~:text=The%20Wates%20Principles%20introduce%20an,arrangements%2C%20without%20being%20unduly%20prescriptive (accessed 9 February 2021).

127. French Official Journal (JO), "*Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies*" 28 March 2017, text no. 5.

128. Freeman, R.E., *Strategic Management: A Stakeholder Approach* (Pitman Publishing, Boston 1984) 31.

129. Gardner, T. A. (2018). 'Transparency And Sustainability in Global Commodity Supply Chains.' 121 *World Development* 163.

130. Gereffi G, Humphrey J and Sturgeon T, "The Governance of Global Value Chains" (2005) 12 Review of International Political Economy 78.

131. Germain, M. and Périn, at p.L., "*SAS - The simplified joint stock company*" 6th edition, Business Practice collection, Joly edition, July 2016.

132. Gibbons, S. (2008). "A Modern Definition of Forced Labour". 14(4) *Journal of the International Centre for Trade Union Rights* 12.

133. Global EY, "How to Build Responsible and Resilient Supply Chains" (*EY* August 9, 2016) <https://www.ey.com/en_gl/assurance/how-to-build-responsible-and-resilient-supply-chains> accessed 22 May 2020.

134. *Glossary: UN Guiding Principles Reporting Framework*; <https://www.ungpreporting.org/resources/glossary/> accessed 20 September 2020.

135. Gordley J, "Comparison, Law and Culture: A Response to Pierre Legrand," (2017) 65 American Journal of Comparative Law (special issue) 133.

136. Greenbury R, "*Directors' Remuneration*" (17 July 1995), <https://ecgi.global/code/greenbury-report-study-group-directors-

remuneration> accessed 19 January 1995.

137. Greene King, “Modern Slavery Statement” (June 2020), available online: <Greene King | MODERN SLAVERY STATEMENT> accessed 8 December 2020.

138. Greene King, “Modern Slavery Statement” (June 2020): <Greene King | MODERN SLAVERY STATEMENT>, accessed 8 December 2020.

139. Groulx, E. D., Regan, M., and Parance, B., “*Business and Human Rights as a Galaxy of Norms (2019)*” Georgetown Journal of International Law, 50(2).

140. Gunningham N and Rees J, “Industry Self-Regulation: An Institutional Perspective” (2002) 19 Law & Policy 363.

141. Hale TN, “Transparency, Accountability, and Global Governance” (2008) 14 Global Governance: A Review of Multilateralism and International Organizations 73.

142. Hallitsija, “European Commission Promises Mandatory Due Diligence Legislation in 2021” (April 30, 2020); <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/> accessed 26 June 2020.

143. Hampel Committee, “*Final Report*” (January 1998), <https://ecgi.global/code/hampel-report-final> accessed 19 January 2021.

144. Hannoun, C., “*The duty of vigilance of parent companies and ordering companies after the law of March 27, 2017”* Dalloz soc. 2017.

145. Hansard, HC, vol 450, col 789 (17 October 2006).

146. Hansmann H, Kraakman R and Squire R, “*Law and the Rise of the Firm*” (2006) 119(5) Harvard Law Review 1333.

147. Héron, J. and Bars, T.L., “*Private judicial law*” Montchrestien, 2012, at p. 96 to 101 and “*Associations, Foundations, Congregations and Endowment Funds*” Mément o, Editions F. Lefebvre, 2016.

148. Hess D, “The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights” (2019) 56(1) American Business Law Journal 5.

149. Ho, V. E. (2010). 'Enlightened Shareholder Value': Corporate

Governance Beyond the Shareholder-Stakeholder Divide. SSRN Electronic Journal. <doi:10.2139/ssrn.1476116> accessed 11 December 2022.

150. Hodgson, C. and Wilson, T., "Climate Group Prepares Legal Action against Shell Directors"; <https://www.ft.com/content/d7feaa8a-7555-47ae-828b-274527c6f89c> accessed 12 May 2022.

151. Hood P, "Directors' Duties Under the Companies Act 2006: Clarity or Confusion?" (2013) 13(1) Journal of Corporate Law Studies 38.

152. Hosseini M, Shahri A, Phalp K, and Ali R, "Four Reference Models for Transparency Requirements in Information Systems" (2018) 23 Requirements Engineering, March 10, 2017); <https://link.springer.com/article/10.1007/s00766-017-0265-y> accessed 20 June 2020. 251.

153. Hsin LKE, New S, Pietropaoli I and Smit L, *"Effectiveness of Section 54 of the Modern Slavery Act*" (London, Modern Slavery & Human Rights Policy & Evidence Centre, February 2021).

154. Hsin LKE, New S, Pietropaoli I and Smit L, "*Effectiveness of Section 54 of the Modern Slavery Act*" (London, Modern Slavery & Human Rights Policy & Evidence Centre, February 2021).

155. Hsin, L., "*Hong Kong's Modern Slavery Journey So Far*" (Autumn 2020): <https://www.iias.asia/the-newsletter/article/hong-kongs-modern-slavery-journey-so-far-businesses-must-now-take-lead> accessed 26 November 2022.

156. Hsin, LKE, "Modern Slavery in Law: Towards Continuum of Exploitation" 26(1) Australian Journal of Human Rights 165.

157. Hughes-Jennett J, "Dutch Child Labour Due Diligence Law" (*Lexology* July 8, 2019) <https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3> accessed 25 April 2020.

158. Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Commentary on Principle 12 (UNGPs).

159. Human Rights Council, 'Report on the Special Representative of the Secretary-General on the issue of human rights and transnational corporations

and other business enterprises: human rights impact assessments – resolving key methodological questions', A/HRC/4/74 (4 February 2007).

160. Human Rights Guide, Vinci, published in April 2017: https://www.vinci.com/vinci/developpement_durable_2011.nsf/index/0805/$file/VINCI-Guide_on_Human_rights.pdf accessed 15 August 2021.

161. Human Rights Policy, Schneider Electric, published in June 2017: <https://www.schneiderelectric.com/en/download/document/Human_Rights> accessed 7 August 2021.

162. Ibañez, B., Bayer, C., Xu, J. and Cooper, A., "*Devoir de Vigilance: Reforming Corporate Risk Engagement*" (iPoint-systems GmbH, 9 June 2020), available online: < https://www.ipoint-systems.com/fileadmin/media/downloads/Devoir-de-Vigilance_Loi-2017-399_Study_2020.pdf> accessed 7 July 2021.

163. Indigenous and Tribal Peoples Convention, 1989: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Indigenous.aspx accessed 5 September 2021.

164. Introduction to Salient Human Rights Issues, Shrift, 2016: <https://shiftproject.org/resource/video-introduction-to-salient-human-rights-issues/> accessed 14 August 2021.

165. Iqbal, T., "*The Enlightened Shareholder Value Principle and Corporate Social Responsibility*" (Routledge, 2021).

166. ISO 26000, 2010: <https://www.iso.org/publication/PUB100258.html> accessed 10 August 2021.

167. Jack Dangermond, 'Our Planet As The Missing Stakeholder' (Forbes, 20 April 2020). <https://www.forbes.com/sites/esri/2020/04/20/earth-day-in-a-time-of-pandemic-our-planet-as-the-missing-stakeholder/?sh=323fc6946ad6> accessed 11 January 2022.

168. JD Wetherspoon plc, "Anti-Slavery and Human Trafficking Statement 2018/2019" (29 July 2018), <https://wikirate.s3.amazonaws.com/files/5398930/20688963.pdf/> >, accessed 8 December 2020.

169. Johnstone, O. and Hesketh, O., "*Effectiveness of Mandatory Human*

Rights and Environmental Due Diligence" Modern Slavery and Human Rights Policy and Evidence Centre Policy Brief 2022-1.

170. Joint civil society response to the Government's response to the Transparency in Supply Chains consultation" (CORE October 26, 2020); < https://corporate-responsibility.org/wp-content/uploads/2020/10/Civil-society-joint-response-to-Government-TISC-response_FINAL-261020.pdf> accessed 28 October 2020.

171. Kahn-Freund O, "On Uses and Misuses Of Comparative Law" (1974) 37 The Modern Law Review 1.

172. Kali R and Reyes J, "The Architecture of Globalization: A Network Approach to International Economic Integration" (2007) 38 International Business Studies 595.

173. Kaplan R, "Who Has Been Regulating Whom, Business or Society? The Mid-20th-Century Institutionalization of Corporate Responsibility in the USA" (2014) 13 Socio-Economic Review 125.

174. Karliner J, The Corporate Planet: Ecology and Politics in the Age of Globalization (Sierra Club Books 1997).

175. Kawakami, Mark MT., "Psychological Oversight: Why Bills Advocating for Transparency Could Do More Harm" (February 18, 2013). 2(1) Edinburgh Student Law Review, Vol 2, Issue 1 (2013). (SSRN, September 19, 2018). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242728> accessed 18 June 2020.

176. Keay A, "*Risk, Shareholder Pressure and Short-Termism in Financial Institutions: Does Enlightened Shareholder Value Offer a Panacea?*" (2011) 5 Law and Financial Markets Review 435.

177. Keay, A., "*Ascertaining the Corporate Objectives: An Entity Maximisation and Sustainability Model*" (2008) 71(5) Modern Law Review 663.

178. Keay, A., "Public Enforcement of Directors' Duties: A Normative Enquiry" (2014) 43 2 Common Law World Review 89.

179. Keay, A. and Zhao, J. (2016) "*Ascertaining the Notion of Board Accountability in Chinese Listed Companies*" 46 Hong Kong Law Journal 671.

180. Keay, A., "*Board Accountability in Corporate Governance*" (Routledge, 2015).

181. Kelly and Parkinson, "*The Conceptual Foundations of the Company: A Pluralist Approach"* published in Parkinson, Gamble and Kelly (eds) *The Political Economy of the Company* (Oxford, Hart Publishing, 2001).

182. Khanna, V. (1996), *"Corporate Criminal Liability: What Purpose Does it Serve?"* 109(7) Harvard Law Review 1477.

183. Khimji MF and Viner J, "*Oppression – Reducing Canadian Corporate Law to Muddy Default*" (2016) 86 Canadian Legal Information Institute Documents 123.

184. Koutalakis C, Buzogany A and Börzel TA, "When Soft Regulation Is Not Enough: The Integrated Pollution Prevention and Control Directive of the European Union" (2010) 4 Regulation & Governance 329.

185. Lafargue, M., "Law on the Duty of Vigilance of Parent Companies and Contracting Companies: Entering a New eEra?" JCP S 2017, 1169.

186. Laud R and Schepers D, "Beyond Transparency: Information Overload and a Model for Intelligibility" (2009) 114(3) Business and Society Review (365).

187. Law Commission and Scottish Law Commission (1998), "Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties" (Nos 261 and 173 respectively).

188. LeBaron G and Rühmkorf A, "Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance" (2017) 8 Global Policy 15.

189. LeBaron, G., Rühmkorf, A., Hunt, T. et al, "*Forced Labour Evidence Brief: Due Diligence and Transparency Legislation"* Re:Structure Lab (Sheffield, Stanford and Yale Universities, 2021).

190. Lee, I., 2017. Understanding Corporate Criminal Liability. In: Choudhury, B. and Petrin, M. eds. *Understanding the Company.* Cambridge: Cambridge University Press, pp. 185-212.

191. Legrand P, 'How to Compare Now' (1996) 16, Legal Studies 232.

192. Lim R-E, "Parting the Fog of the UK Bribery Act 2010: A Critical Discussion of What We Do Know about the Act and Why It Is in the Company's Interests to Comply with Its Provisions" (2017) 25 International Company and Commercial Law Review 1.

193. Lin, L. (2021), *"Mandatory Corporate Social Responsibility Around*

the World: Emergent Varieties and National Experiences" 23 Journal of Business Law 429.

194. Lindgren, J, "The Theory, History and Practice of the Bribery-Extortion Distinction" 141 University of Pennsylvania Law Review 1695.

195. Loménie, T. and Cossart, S., "*Duty of Vigilance: Stakeholders and the Duty of Vigilance*" [2017] Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires, 50(94).

196. Lund DS and Pullman E, "*The Corporate Governance Machine*" (2021) 121 Columbia Law Review: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775846> accessed 4 July 2021.

197. Lund, D. and Pollman, E., *"The Corporate Governance Machine"* (Law Working Paper No 564/2021, European Corporate Governance Institute, 2022).

198. Macchi, C, Nova BHRE, *"Decent Work and Migrant Workers: the EU Directive on Mandatory Human Rights and Environmental Due Diligence"*, available online: <Decent work and migrant workers: the EU Directive on mandatory human rights and environmental due diligence - (unl.pt)> accessed 6 February 2022.

199. Madeleine Cuff, "France Duty of Vigilance Law One Year on: What's Changed for French Corporates?" (Business Green 13 March 2018) <https://www.businessgreen.com/bg/feature/3028217/france-duty-of-vigilance-law-one-year-on-whats-changed-for-french-corporates> accessed 23 May 2020.

200. Mandatory Human Rights Due Diligence Is the Direction of Travel" (*CORE* February 12, 2020) <https://corporate-responsibility.org/mandatory-human-rights-due-diligence-direction-travel/> accessed 23 April 2020.

201. Mantouvalou V, "The UK Modern Slavery Act 2015 Three Years On" (2018) 81 The Modern Law Review 1017.

202. Mayer C, 'Prosperity: Better Business Makes the Greater Good', (Oxford University Press, 2018).

203. McBarnet DJ, Voiculescu A and Campbell T, The New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge

University Press 2009).

204. McCarthy DR and Fluck M, “The Concept of Transparency in International Relations: Towards a Critical Approach” (2016) 23 European Journal of International Relations 416.

205. McCorquodale, R. and Neely, S., “Directors Duties and Human Rights Impacts: A Comparative Approach” (2022) 21(2) Journal of Corporate Law Studies 1.Michael Goodwin QC MS, “Failing to Prevent Economic Crime” (*Law Gazette*, April 9, 2019); <https://www.lawgazette.co.uk/practice-points/failing-to-prevent-economic-crime/5069921.article> accessed 10 July 2020.

206. Millon D, “*Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law*” (2010) Washington & Lee Legal Studies: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750> accessed 23 January 2021.

207. Monciardini D, Bernaz N and Andhov A, “The Organizational Dynamics of Compliance With the UK Modern Slavery Act in the Food and Tobacco Sector” (2021) 60(2) Business & Society 288. Montesquieu, 1749, *De L'Espirt des Lois* (The Spirit of Laws), Livre I Gallimard, Paris, reprint, JP Mayer and AP Kerr (eds), (1970).

208. Murray J, “A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD” (2001) 30 Industrial Law Journal 255.

209. Nelson, C, “The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct” (2007) Corporate Social Responsibility Initiative Working Paper No 34.

210. Nelson, J. (2007). “The Operation of Non-Governmental Organizations (NGOs) in a World of Corporate and Other Codes of Conduct.” Corporate Social Responsibility Initiative, Working Paper No. 34. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

211. Nicholas B, “An Introduction to Roman Law” (Oxford University Press 1962).

212. Nolan J and Bott G, “Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices” (2018) 24 Australian Journal of Human Rights 44.

213. *Non-governmental Organizations*; <http://www.gdrc.org/ngo/wb-define.html> accessed 25 September 2020.

214. Nuryanah, S., & Islam, S. M. (2015). Implications of The Results for Sound Financial Management Strategies, Corporate Governance, and Managerial and Financial Accounting Perspectives. *Corporate Governance and Financial Management*, 217-236. doi:10.1057/9781137435613_7

215. OECD, "Guidelines for Multinational Enterprises 2011", available online: <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 25 July 2021.

216. Out-Law News, "*UK Legislation Proposed to Tackle Modern Slavery*" (22 June 2021), <https://www.pinsentmasons.com/out-law/news/uk-legislation-proposed-to-tackle-modern-slavery> accessed 4 July 2021.

217. Palombo D, "*The Future of the Corporation: The Avenues for Legal Change*" (2020) British Academy Working Paper; <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> accessed 23 January 2021.

218. Parker C and Nielsen VL, "Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation" (2011) 56 The Antitrust Bulletin 377.

219. Parker C, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility,' in McBarnet D, Voiculescu A and Campbell T, *New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007), 207 – 240.

220. Parker C, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2010).

221. Parliament, 'White Paper' (2002) < https://publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439ap07.htm> accessed 11 December 2022.

222. Paul J - Global Policy Forum (Panel of Eminent Persons on United Nations-Civil Society Relations (Cardoso Panel); <https://www.globalpolicy.org/empire/32340-panel-of-eminent-persons-on-united-nations-civil-society-relations-cardoso-panel.html> accessed 10 October, 2020

223. Personnel Today, "*Businesses are Resisting Worker Representation on*

Boards” (3 May 2019), <https://www.personneltoday.com/hr/businesses-resist-worker-representation-on-boards/> accessed 14 March 2021.

224. Policy Paper, UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights (*Foreign & Commonwealth Office* May 27, 2020). <https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020> accessed 27 May 2020.

225. Portadesign.cz, "NGOs Launch a New Tool to Track Companies Subject to the French Duty of Vigilance Law" (*NGOs launch a new tool to track companies subject to the French duty of vigilance law - European Coalition for Corporate Justice); <https://corporatejustice.org/news/16294-ngos-launch-a-new-tool-to-track*-companies-subject-to-the-french-duty-of-vigilance-law> accessed 14 October 2020.

226. Rahim M, "Harnessing SD and CSR within Corporate Self-Regulation of Weak Economies – a Meta Regulation Approach" (2013) 118 Business and Society Review.

227. Rees J, "Self Regulation: An Effective Alternative to Direct Regulation by OSHA?" (1988) 16(3) Policy Studies Journal 605.

228. Reisberg, A., "*The UK Stewardship Code: On the Road to Nowhere*?" [2015] 15(2) Journal of Corporate Law Studies 217.

229. RISK AVERSE? Company reporting on raw material and sector-specific risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015 <https://corporate-responsibility.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf> accessed 25 April 2020.

230. Rouas, V, "Achieving Access to Justice inn a Business and Human Rights Context" (University of London Press, 2022).

231. Ruggie J, "European Common Initiative on Mandatory Human Rights Due Diligence and Directors' Duties" (Cambridge (Massachusetts), Harvard Kennedy School, February 2021): <https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf >accessed 18 February 2021.

232. Ruggie J, "UN Guiding Principles, Principle 3 and Commentary, Letter of Response to a Public Letter by Swiss Business Associations Regarding Their Position on the Swiss Responsible Business Initiative "; https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 10 June 2020.

233. Russell C, "Column: Rio Tinto's Weak Response to Cave Blasts Will Trigger Stronger Reaction - Russell" (Reuters August 25, 2020); <https://www.reuters.com/article/us-column-russell-mining-rio-tinto/column-rio-tintos-weak-response-to-cave-blasts-will-trigger-stronger-reaction-russell-idUSKBN25L0JH>; accessed 24 June 2020.

234. Salcito K and Wielga M, "What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?" (2018) 3 Business and Human Rights Journal 113.

235. Schedler A and others, "Conceptualizing Accountability," *The Self-restraining state: power and accountability in new democracies* (Lynne Rienner 1999).

236. Schiller, S., "*Exegesis of the law relating to the duty of vigilance of parent companies and contracting companies*", La Semaine Juridique Entreprise et Affaires, 2017.

237. Schilling-Vacaflor, A., "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human RightsViolations in the Global South?" 22 (2021) Human Rights Review 109.Schutter O and others, "Human Rights Due Diligence: The Role of the State" <http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf> accessed 28 April 2020.

238. Schwartz M and Carroll A, "Corporate Social Responsibility: A Three-Domain Approach" 13 Business Ethics Quarterly 503.

239. Sealy, L.S., "*The Director as Trustee*" [1967] 25(1) Cambridge Law Journal 83.

240. Shamir R, "Mind the Gap: The Commodification of Corporate Social Responsibility" (2011) 28 Symbolic Interaction.

241. Sheehy B. and Feaver D., "*Anglo-American Directors' Legal Duties*

and CSR: Prohibited, Permitted or Prescribed?" [2014] 37(1) Dalhousie Law Journal 345.

242. Shelton, D (Ed), "Remedies in International Human Rights Law" (Oxford University Press, 2015).

243. Shepherd, G. [2021], "Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders" 23(3) University of Pennsylvania Journal of Business Law 823.

244. SHERPA, "Duty of Vigilance Radar" available online: <https://vigilance-plan.org/search/> accessed 17 July 2021.

245. Shift, "Shift's Analysis of the EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive" <https://shiftproject.org/resource/eu-csdd-proposal/shifts-analysis/> accessed 12 May 2022.

246. Shue H, "*Basic Rights: Subsistence, Affluence and US Foreign Policy*" Princeton: Princeton

247. Sjafell, B. (2020), "How Company Law has Failed Human Rights and What to Do About It" 5 Business and Human Rights Journal 179.

248. Sjafell, B. [2020], "How Company Law has Failed Human Rights and What to Do About It" 5 Business and Human Rights Journal 179.

249. Sjåfjell B and Bruner C, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2020).

250. Sjåfjell B, "How Company Law has Failed Human Rights – and What to Do About It" (2020) 5(2) Business and Human Rights Journal 179.

251. Sjåfjell Beate and Richardson BJ, *Company Law and Sustainability Legal Barriers and Opportunities* (Cambridge University Press 2015).

252. Skrivankova K, "Between Decent Work and Forced Labour: Examining the Continuum of Exploitation" (*JRF* November 13, 2017) <https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation> accessed 25 April 2020.

253. Smyth, L. and Swain, M. (Companies House), "*What the Economic Crime (Transparency and Enforcement) Bill and the corporate transparency and register reform white paper means for Companies House*" (3 March 2022): < https://companieshouse.blog.gov.uk/2022/03/03/what-the-economic-crime-transparency-and-enforcement-bill-and-the-corporate-transparency-and-

register-reform-white-paper-means-for-companies-house/> accessed 6 May 2022.

254. Statement on Human Rights, BNP Paribas: <https://group.bnpparibas/uploads/file/uk_declaration_bnp_sur_droit_de_l_homme.pdf> accessed 13 July 2021.

255. Sternberg E., *"Stakeholder theory exposed"* (1996) 2 Corporate Governance 4.

256. Sternberg E., "*The defects of stakeholder theory*" (1997) 5 Corporate Governance 3.

257. Stevenson M and Cole R, "Modern Slavery in Supply Chains: A Secondary Data Analysis of Detection, Remediation and Disclosure" (2018) 23 Supply Chain Management: An International Journal 81.

258. Teubner G, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies" (2003) 61 The Modern Law Review 11.

259. The Corporate Responsibility to Respect Human Rights – An Interpretative Guide, OHCHR, 2012: <https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf> accessed 13 August 2021

260. Themis International Services (2021), "*Preventing Modern Slavery and Human Trafficking: An Agenda for Action across the Financial Services Sector",* < https://themisservices.co.uk/msht > accessed 31 May 2021.

261. Topping, N., "How Does Sustainability Disclosure Drive Behavior Change?" Journal of Applied Corporate Finance, Vol. 24 No. 2 Spring 2012.

262. Total Sued Under France's New Duty of Vigilance Law" (*ENS RSS*) <https://ens-newswire.com/2019/10/23/total-sued-under-frances-new-duty-of-vigilance-law/> accessed 20 May 2020.

263. Transparency in Supply Chains Consultation – Government response" (*Home Office* September 22, 2020); <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf> accessed 2 October 2020.

264. Transparency in Supply Chains Consultation at Transparency in Supply Chains Consultation" <https://www.antislavery.org/wp-

content/uploads/2019/09/TISC-Consultation-Response_FINAL_160919.pdf> accessed 18 April 2020.

265. UK Corporate Governance Code (2018) <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> accessed 11 December 2022.

266. UN Guiding Principles on Business and Human Rights 2011, available online: <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 10 July 2021.

267. UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

268. UN Paris Agreement, 2015: <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed on 10 September 2021.

269. UN Sustainable Development Goals 2030: < https://sdgs.un.org/goals> accessed 9 Feb 2021.

270. United Nations Human Rights Committee Resolution 17/4 (UN Doc A/HRC/RES/17/4), adopted 16 June 2011.

271. Vanderpol, S. and Waitzer, E.J. [2012], "Addressing the Tension between Directors' Duties and Shareholder Rights - A Tale of Two Regimes" 50(1) Osgoode Hall Law Journal 177.

272. Villiers C, 2019, "Global supply chains and sustainability: the role of disclosure and due diligence laws" in: Sjåfjell B and Bruner C (Eds.) The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability. Cambridge University Press (2020).

273. Watson D, "Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability" 2 Manchester Student Law Review <http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_1(Watson).pdf >accessed 21 May 2020.

274. Weeran M., "*Fiduciary Duty and Social Responsibility: Implications of The Business Roundtable's Statement on The Fiduciary Duties of Boards of*

Directors to Corporate Stakeholders Other Than Shareholders”: <https://docplayer.net/202512426-Comment-megan-e-weeren.html>. accessed 9 Feb 2021.

275. Welch CE, “NGOs and the Universal Declaration of Human Rights: ‘A Curious Grapevine’, and: Activists Beyond Borders: Advocacy Networks in International Politics (Review)” (2000) 22 Human Rights Quarterly 298.
276. Wen S and Zhao J, “The Bumpy Road of Home States’ Regulation of Globalized Businesses - Legal and Institutional Disruptions to Supply Chain Disclosure under the Modern Slavery Act” (2020) 69 Catholic University Law Review.
277. Wilkinson, R (Ed), The Global Governance Reader (Routledge, 2005).
278. Willetts P, “From ‘Consultative Arrangements’ to ‘Partnership’: The Changing Status of NGOs in Diplomacy at the UN” (2000) 6 Global Governance: A Review of Multilateralism and International Organizations 191.
279. Williams R, “Enlightened Shareholder Value in UK Company Law” (2017) 35(1) UNSW Law Journal 360.
280. Williams R, “*Enlightened Shareholder Value in UK Company Law*” (2017) 35(1) UNSW Law Journal 360.
281. Williams, T, “*Directors and officers beware – criminal offences under the Companies Act 2006*” 23 May 2017; available online: https://www.hcrlaw.com/blog/directors-officers-beware-criminal-offences-companies-act-2006/, accessed 15 January 2022.
282. Woolridge F, “*Employee Participation in France and Germany*” (2000) 43 Amicus Curiae 26.
283. World Benchmarking Alliance (2022), “Elevating Human Rights”, https://www.worldbenchmarkingalliance.org/publication/chrb/findings/elevating-human-rights-responsibilities-to-the-board-and-senior-management-level-appears-to-be-key-for-better-action-on-human-rights-due-diligence, accessed 8 December 2022.
284. Yan, M. (2017) “The Corporate Objective Revisited: Part II” 38(2) Business Law Review 55–60.
285. Yan, M. and Zhang, D. (2020) “From Corporate Responsibility to Corporate Accountability” 16(1) Hastings Business Law Journal 43–64.

286. Yermack D, "Good Timing: CEO Stock Option Awards and Company News Announcements" The Journal of Finance (Volume LII, No. 2 June 1997).

287. Zarka YC, *Le Monde émergent* (A Colin 2010).

288. Zhao, J. (2012) "*The curious case of shareholder primacy norm: calling for a more realistic theory*" 15 International Trade and Business Law Review 1.

289. Zhao, J., 'Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability' in B. Sjåfjell & C. Bruner (Eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*. Cambridge: Cambridge University Press (2020) pp.29-42.

290. Zhao, J. (2021). "Reimagining corporate social responsibility in the era of COVID-19: embedding resilience and promoting corporate social competence", 13(12) Sustainability 6548.

291. Zhao, J. and Wen, S. (2022) "*Corporate Social Accountability*" 58 Stanford Journal of International Law 63.

292. Zweigert, K., &; Kötz, H. (1987). *Introduction to comparative law*. Oxford: Clarendon Press.