



## Policy brief:

# Effectiveness of mandatory human rights and environmental due diligence

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Modern Slavery PEC Policy Brief 2022-1

This Modern Slavery PEC Policy Brief is the second in a series of Policy Briefs to assess the evidence base on the **effectiveness** of different regulatory interventions to address modern slavery in global supply chains, a key research priority for the Modern Slavery PEC, as set out in our [Strategy](#). This Brief assesses the evidence base on the effectiveness of **mandatory human rights and environmental due diligence** legislation, with a specific focus on the implications of such legislation for addressing modern slavery.<sup>2</sup>

There is an ongoing interest from businesses and civil society in the possibilities of mandatory human rights and environmental due diligence (mHREDD) legislation in the UK in light of such laws recently being adopted in France,<sup>3</sup> Germany,<sup>4</sup> and Norway,<sup>5</sup> and proposed, in February 2022, at the European Union level.<sup>6</sup> This Policy Brief considers the existing evidence on the background to these developments and their relevance in relation to the UK modern slavery legal framework. It draws on an evidence review which considered academic literature, as well as reports produced by NGOs, governments, and international organisations.

All emerging mHREDD laws create a legal duty that requires business enterprises to identify, prevent, mitigate, and account for human rights and environmental harms in their operations and supply chains. All such laws contain reporting requirements similar to section 54 of the UK Modern Slavery Act, but go further by requiring companies to undertake human rights due diligence (HRDD) and attach some form of legal liability for failure to meet these requirements. The laws are aimed at businesses, and do not generally impose duties on public bodies.<sup>7</sup>

Under the UN Guiding Principles on Business and Human Rights (UNGPs, the most widely accepted HRDD standards), HRDD consists of four steps:<sup>8</sup>

1. Identifying and assessing actual or potential adverse impacts;
2. Taking integrated action to address these impacts;
3. Tracking responses; and
4. Communicating how impacts are addressed.

1. With thanks to Lise Smit and Irene Pietropaoli, from the Bingham Centre for the Rule of Law, who carried out the evidence review underpinning this Policy Brief. The Bingham Centre is part of the British Institute of International and Comparative Law (BIICL), which is the independent research organisation that hosts the Modern Slavery PEC. The Bingham Centre leads a work strand for the Modern Slavery PEC focused on supply chains, business models and worker voice.

2. The first Policy Brief in the series focused on the [effectiveness of forced labour import bans](#).

3. Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (the 'Duty of Vigilance' law).

4. Lieferkettensorgfaltspflichtengesetz - LkSG of 16 July 2022. The German Federal Ministry of Labour and Social Affairs provides an English translation of the Act that can be accessed here: [https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?3bjsessionid=CD0566A73AB32BD8B75B2154D5F226AF.delivery1-replication?\\_\\_blob=publicationFile&v=2..](https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?3bjsessionid=CD0566A73AB32BD8B75B2154D5F226AF.delivery1-replication?__blob=publicationFile&v=2..)

5. Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act) (19 June 2021). For an comparative overviews of these laws, see European Coalition for Corporate Justice, 'Comparative Table: Corporate due diligence laws and legislative proposals in Europe', (14 June 2021); Business and Human Rights Resource Centre, 'National & regional movements for mandatory human rights & environmental due diligence in Europe'.

6. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, (23 February 2022) ('EC Draft Directive'), and its Annex.

7. Some of these laws, such as the German law, have public procurement implications for non-compliant companies. A future Modern Slavery PEC Policy Brief in this series will examine the effectiveness of public procurement as a lever to address forced labour in supply chains.

8. UNGPs (below n 15) 17

## Key findings

- There are multiple reports and case studies pointing to how HRDD can be effective at addressing modern slavery risks in practice, across a range of sectors. Evidence also suggests that there is a low level of voluntary implementation of HRDD by companies in the absence of regulation.
- There is limited evidence on the *actual* effectiveness of mHREDD laws, apart from the French Duty of Vigilance law 2017, which is the only one of these laws to have taken effect so far.<sup>9</sup>
  - Around 260 companies are subject to the French law.<sup>10</sup> In the financial year after its introduction, 70% of companies started or revised their human rights and environmental risk mapping,<sup>11</sup> and 65% of companies had dedicated human rights impacts identification processes (compared to 30% before the law).<sup>12</sup>
  - A study by PWC and others on the French law found that 80% of SMEs (small and medium enterprises) are being required to take various steps to comply with human rights obligations by the large actors in their value chains, without receiving accompanying support (financial or otherwise) for such compliance.<sup>13</sup>
  - In 2019 the first litigation commenced in terms of the Act, in cases where civil society actors have sought injunctions against individual companies for alleged non-compliance with the legislation. Although several preliminary hearings have taken place, to date there are no judgments on the merits.
- There has been extensive pre-legislative investigation into the anticipated impacts of mHREDD laws, including survey evidence reporting the views of businesses and other stakeholders.
  - Reported anticipated benefits include: levelling the playing field, improving legal certainty, facilitating leverage with third party business partners and improving regulatory harmonisation. Businesses report a preference for regulation that applies to all human rights to allow them to prioritise and respond to the most severe risks.

9. Above n 3.

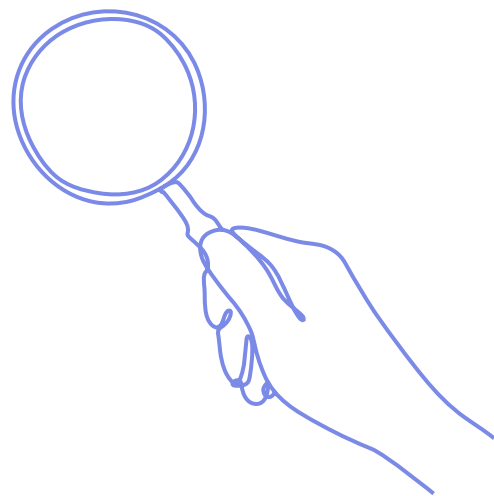
10. CCFD-Terre Solidaire and Sherpa 'Third edition of the Duty of Vigilance Radar' (7 July 2021).

11. Entreprises pour les droits de l'Homme (EDH), 'Application de la loi sur le devoir de vigilance: Plans de vigilance 2018-2019', (14 June 2019), at 7 and 12.

12. Ibid, at 5. For further studies on the implementation of the French Due Diligence Law see also EDH 'Etude: Application de la Loi sur le Devoir de Vigilance: Plans de Vigilance Parus En 2019-2020', (2020); Duthilleul and De Jouvenel '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' (2020), *Rapport à Monsieur le ministre de l'économie et des finances*; and the summary of the sources that consider the implementation of the French law in Bright, 'Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains' in Delautre, Echeverria Manrique and Fenwick (Eds), *Decent work in globalised economy: Lessons from public and private initiatives*, ILO, (2021).

13. PWC and others 'Résultats de l'enquête "RSE: La parole aux fournisseurs!"', (January 2020).

- Reported anticipated negative impacts on business include a potential cost burden of complying with mHREDD legislation. An economic impact assessment carried out to inform the European Commission draft legislative proposal found that surveyed businesses did not expect the costs of implementing mHREDD to be significant relative to overall revenue, but that these costs could differ considerably between businesses (e.g. due to different business models, sectors and market characteristics).<sup>14</sup>
- Potential wider impacts that have been raised include businesses considering divestment from high-risk source regions or suppliers, or exiting supplier relationships in response to identified issues. However, the accepted standards for HRDD require companies to exercise and increase leverage, and only terminate relationships as a last resort.
- mHREDD legislation may (depending on design) overlap to some extent with legislation in related areas such as forced labour import bans or supply chain transparency. Further thought needs to be given to how a “smart mix” of these related regulatory tools may appropriately complement one another.
- There has been limited research on the impacts of mHREDD laws on directly affected individuals (such as people with lived experience of modern slavery), and around the involvement of those individuals in the design of such laws.



14. Smit, Bright, McCorquodale, Bauer, Deringer, Baeza-Breinbauer, Torres-Cortés, Alleweldt, Kara and Salinier and Tejero Tobed for the European Commission DG Justice and Consumers, *Study on due diligence requirements through the supply chain: Final Report* (24 February 2020), ('the EC study'). This study was carried out for the European Commission by BIICL, Civic Consulting and LSE Consulting. EC Study Final Report at pp. 390 onwards and Part I: Synthesis Report at p. 66.

## Analysis: how effective is mandatory human rights and environmental due diligence?

We considered the following seven questions, rating the quality of the evidence base against questions 1-6, according to the criteria in Box 1:

1. What is mandatory human rights and environmental due diligence (mHREDD), and how is it relevant to modern slavery?
2. How has existing and emerging mHREDD legislation been developed and implemented globally?
3. What does the evidence show about the effectiveness of mHREDD legislation for addressing modern slavery?
4. What does the evidence show about actual or potential impacts of mHREDD legislation on business?
5. What does the evidence show about any connections between mHREDD and related policy areas, such as responses to state-sponsored forced labour or emerging legislation prohibiting the import of goods produced using forced labour?
6. What does the evidence show about any actual or potential wider consequences of mHREDD?
7. Priorities for further research.

### Box 1: Evidence quality assessment – description of ratings

#### Green

There is a well-established body of evidence on this issue; the overall landscape and evidence gaps are well understood; evidence is grounded in rigorous and peer reviewed research.

#### Amber

There are some rigorous and peer reviewed research studies on this issue; evidence base is growing but there remain gaps in understanding.

#### Red

There are no or very few rigorous research studies on this issue; evidence base is anecdotal; data sources are very limited.

## 1. What is mandatory human rights and environmental due diligence (mHREDD), and how is it relevant to modern slavery?

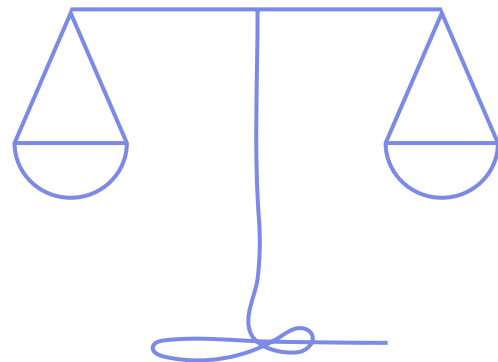
Green

### What is mHREDD?

The underlying basis of mHREDD laws is the concept of human rights due diligence (HRDD) contained in the UN Guiding Principles on Business and Human Rights (UNGPs),<sup>15</sup> and also incorporated into the OECD Guidelines for Multinational Enterprises, which extended the concept expressly to include environmental impacts.<sup>16</sup> The UNGPs define the corporate responsibility to respect human rights as a 'global standard of expected conduct',<sup>17</sup> and require companies to carry out HRDD which is defined as a process to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts.'<sup>18</sup> It applies to the companies' own operations and those of their business relationships in their (global) value chains.<sup>19</sup>

The UNGPs refer to 'value chain', as does the draft EC Directive, in contrast to the German law, which (like the UK Modern Slavery Act) refers to 'supply chain'.<sup>20</sup> We have generally referred to 'supply chain' in this brief as it is the term most commonly used and referred to in the UK. This difference may have implications for what due diligence is required under each law, depending on the exact definitions of 'value chain' or 'supply chain' that are employed.

The UNGPs are not legally binding but have become the 'global authoritative standard',<sup>21</sup> and the various mHREDD legislative instruments expressly refer to the UNGPs concepts. Experts highlight that 'HRDD is now at the crossroads as it begins to become part of legislation, which will firmly test its potential to contribute substantively to the prevention of human rights abuses.'<sup>22</sup>



15. UN Office of the High Commissioner for Human Rights 'Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework' (UNGPs), HR/PUB/11/04, 2011.

16. OECD Guidelines on Multinational Enterprises, 2011.

17. Commentary to UNGPs 11.

18. UNGPs 17. There is a multitude of guidance available on implementation of the UNGPs; see for example Smit, 'Practical Guide for Business: Implementing the UN Guiding Principles on Business and Human Rights (UNGPs)', Nova School of Law, (February 2022) and the resources of the Business and Human Rights Resource Centre.

19. UNGPs 13.

20. UNGPs 13 & 17; EC Draft Directive (above n 6), Articles 1(a) & 3(f); Lieferkettensorgfaltspflichtengesetz - LkSG of 16 July 2022 (above n 4) at Section 2 (5); Modern Slavery Act 2015 at Section 54.

21. International Bar Association, 'IBA Practical Guide on Business and Human Rights for Business Lawyers' (28 May 2016), at p.13.

22. McCorquodale and Nolan 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses', Netherlands International Law Review (9 November 2021).

Underlying these legislative initiatives is an assumption that HRDD is an effective way for businesses to address potential and actual human rights harms in their operations and supply chains. Although surveys in Europe,<sup>23</sup> Germany,<sup>24</sup> Portugal<sup>25</sup> and more globally<sup>26</sup> have found that there is a low level of voluntary implementation of HRDD by companies in the absence of regulation, there are reports and case studies pointing to how HRDD can be effective at addressing modern slavery risks in practice, across a range of sectors.<sup>27</sup>

Although each is framed differently, the emerging mHREDD laws all create a legal duty that requires business enterprises to identify, prevent, mitigate, and account for human rights and environmental harms<sup>28</sup> in their own operations and supply chains. The duty is met if the company has exercised the required level of due diligence, for example by undertaking 'appropriate measures',<sup>29</sup> or 'reasonable vigilance measures'.<sup>30</sup> Although the general principles that comprise mHREDD are clear and there is good evidence as to their inclusion in each piece of emerging legislation, there is as yet limited evidence as to what would be considered reasonable or sufficient mHREDD in practice under particular legislation.

As the fourth component of HRDD is 'communicating how impacts are addressed',<sup>31</sup> mHREDD laws all contain reporting requirements akin to section 54 of the UK Modern Slavery Act (which itself builds on the UK Government's commitment to implement the UNGPs)<sup>32</sup> by expecting companies to *report on* the due diligence steps they are taking. However, mHREDD laws go further by imposing additional legal duties that require companies to undertake due diligence (rather than merely reporting on it).

23. The EC Study above found for example at p. 16 that '[j]ust over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts, and a further one-third undertake due diligence limited to certain areas' Also, 'the majority of business respondents which are undertaking due diligence include first tier suppliers only.'

24. The 2016 German National Action Plan on business and human rights committed to introduce mHREDD legislation if a survey showed less than 50% of companies with over 500 employees implemented HRDD by 2020. Its 2020 survey showed that only 13%-17% of companies implemented HRDD, leading to the adoption in 2021 of the German Supply Chain Due Diligence Act above n 4. Report by Ernst & Young et al for the German Foreign Ministry, 'Zwischenbericht Erhebungsphase 2020', (2020) at IV; 'Many German firms ignore partners' human rights abuses', *Deutsche Welle*, (12 August 2020)

25. Center for Administration and Public Policies of the Higher Institute of Social and Political Sciences of the University of Lisbon in partnership with the Directorate-General for Economic Activities of the Ministry of Economy 'Resultados do 1º Inquérito Nacional sobre Conduta Empresarial Responsável e Direitos Humanos' (Jan 2019),

26. A 2015 global survey by BIICL and Norton Rose Fulbright of 152 companies across sectors found that almost half had 'never undertaken dedicated HRDD or a human rights impact assessment'. McCorquodale, Smit, Neely and Brooks 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' BHRJ (2017) Vol 2(2), 195-224.

27. For example, see the Danish Institute of Human Rights' work with Nestlé, 'Talking the Human Rights Walk Nestlé's Experience Assessing Human Rights Impacts in its Business Activities', and 'Labour rights assessment: Nestlé's palm oil supply chain in Indonesia' (2018); NYU Stern's work in the Qatar Construction sector, NYU Stern Centre for Business and Human Rights, 'Less than One Percent: Low-Cost, Responsible Recruitment in Qatar's Construction Sector', (June 2019); Know the Chain, 'Addressing Forced Labor Risks in Lower Tiers of Electronics Supply Chains - Examples of Company Practice.'

28. In the Norwegian law above n 54 only those environmental harms that 'simultaneously represent an infringement of human rights' are included within scope. Section 3(e) defines 'decent work' as 'work that respects fundamental human rights, protects health, safety and the environment in the workplace and provides a living wage'.

29. EC Draft Directive above n 6 Articles 2(q), 6(1), 7(1) and 8(1), German Due Diligence Law above n 4.

30. Article 1 of the French Duty of Vigilance law above n 3.

31. UNGPs 17.

32. UK Government, 'UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020', (27 May 2020).

The mHREDD duty is an ongoing legal duty of care rather than strict liability or a formal procedural requirement – in the German context described as not being an ‘obligation to obtain a successful result’ (for example the elimination of all human rights harms) but rather an ‘obligation to make an effort’.<sup>33</sup> Accordingly, the legal test is not whether a human rights or environmental harm takes place in the company’s operations or supply chain, but instead what the company is doing to find out about it, assess its severity and address it, and whether these due diligence activities are deemed to be reasonable and sufficient for the particular circumstances.<sup>34</sup>

### Modern slavery and mHREDD

Modern slavery is a human rights issue that falls within the scope of HRDD and is covered by mHREDD legislation. The UNGPs state that HRDD should cover ‘all internationally recognised human rights’, which includes ‘at a minimum’ various listed international human rights instruments, including the ILO fundamental conventions which expressly relate to forced labour.<sup>35</sup> The EC Draft Directive<sup>36</sup> and the German Supply Chain Due Diligence Law<sup>37</sup> both expressly cover the prohibition of all forms of slavery and forced labour, and the Norwegian Transparency Act echoes the UNGPs’ list and refers to ‘decent working conditions’.<sup>38</sup> Not only is modern slavery included within HRDD, but studies on companies’ HRDD practices indicate that modern slavery and forced labour are the most frequently raised human rights concerns by business interviewees.<sup>39</sup>

There is also evidence that businesses and other stakeholders prefer regulation that applies to all human rights (in alignment with the UNGPs) to allow them to prioritise and respond to the most severe risks. In the EC Study, which formed the basis for the proposed EU Draft Directive, the majority of survey respondents ‘preferred regulation to apply across all issues’ rather than ‘regulation which focuses only on one issue such as modern slavery or child labour.’<sup>40</sup>

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33. ‘Erfolgspflicht’ and ‘Bemühungspflicht’ in ‘German Draft key points of a Federal law on strengthening corporate due diligence to prevent human rights violations in global value chains (Due Diligence Act)’, (July 2020), <https://www.rph1.rw.fau.de/files/2020/06/key-points-german-due-diligence-law.pdf>, at 1.b).

34. See EC study above n 13 *Final Report* at p.260 on ‘Due diligence as a legal standard of care: Clarification of a few common questions.’

35. ILO, [Forced Labour Convention](#), C29, 28 June 1930, C29. and [Abolition of Forced Labour Convention](#), C105, 25 June 1957, C105.

36. Above n 6, Annex Part I sections 1(12) and (13) respectively.

37. Above n4, Subsections 2(3) and (4) respectively.

38. Above n5, Section 3(c).

39. Smit, Holly, McCorquodale and Neely, ‘Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard’ *IJHR Vol 25 Issue 6 (2021)*, Section IV.2 ‘Overview of affected rights’. In the EC study (above n 13) ‘modern slavery’ appears 133 times, more than forced labour or child labour.

40. EC study *Final Report* (above n 13) at p. 127. See also European Commission [‘Impact Assessment Report’](#) accompanying the proposal for the EC Directive, SWD (2022) 42 final, (23 February 2022).



## 2. How has existing and emerging mHREDD legislation been developed and implemented globally? Green (on development)

### Red (on implementation)

Currently, the only mHREDD law that has come into force is the French law, so that while evidence about the regulatory gap and the likely benefits of such legislation exists, evidence on post-legislative implementation is still limited.<sup>41</sup>

Differences in the framing of mHREDD laws may have implications for their effectiveness. Similarly, mHREDD laws may be introduced along with accompanying measures, such as non-binding guidance, training and other support. These may differ between jurisdictions and may also have implications for the effectiveness of the laws they accompany.

### **French Duty of Vigilance Law**

The first example of a mHREDD law that applies across all sectors and human rights issues (as in the UNGPs) was the French Duty of Vigilance Law 2017.<sup>42</sup> The law requires large companies<sup>43</sup> to exercise “reasonable vigilance measures” as a standard of care<sup>44</sup> and to ‘put in place, disclose and implement a vigilance plan’<sup>45</sup> relating to human rights and environmental harms. It allows victims who suffered harm anywhere in the world (or their civil society representatives) to approach French courts for civil remedy, including preventative orders, as well as judicial oversight over the effectiveness and implementation of the company’s vigilance plan.

As this is the only mHREDD legislation currently in force, it provides the only available initial evidence around implementation (noting that only around 260 French companies are subject to the law).<sup>46</sup> In 2019 the first litigation commenced in terms of the Act, and although several preliminary hearings have taken place, to date there are no judgments on the merits. Cases that have begun so far have largely been brought by civil society actors seeking an injunction against individual companies for alleged non-compliance with their obligations under the law.<sup>47</sup>

### **German Due Diligence Supply Chain Act and Norwegian Transparency Act**

In 2021, both the **German Due Diligence Supply Chain Act** and the **Norwegian Transparency Act** relating to enterprises’ transparency and work on human rights and decent working conditions<sup>48</sup> were passed, but are not yet in effect. They follow different models: the German law sets out certain duties for large companies<sup>49</sup> with respect to their own area of business and their tier one suppliers specifically and provides for state-based administrative oversight and fines, but with no provisions on civil remedy for victims. Also, their second tier suppliers and above are only included if the company has ‘substantiated knowledge’ of a possible violation of a human rights- or environment-related obligation at a supplier. The Act will apply to companies with a central administration, headquarters, registered office or branch office in Germany, based on number of employees in Germany.<sup>50</sup> The Norwegian law requires large

41. The Dutch Child Labour Act of 2019 was not included in this briefing due to its exclusive focus on child labour only. It is also not yet in force.

42. Above n 32.

43. Large French companies with at least 5,000 employees in France or 10,000 employees worldwide.

44. EC study Final Report (above n 13) at p. 15.

45. Bright ‘Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?’ EUI Working Papers, MWP 2020/01 (2020) at p.4.

46. CCFD-Terre Solidaire and Sherpa ‘Third edition of the Duty of Vigilance Radar’ (7 July 2021), referring to the [Duty of Vigilance Radar](#).

47. See CCFD-Terre Solidaire and Sherpa (above n 9).

48. Above n 4, 5.

49. Companies with central administration, headquarters or registered office (or branch office) in Germany, with as of 1 January 2023 over 3,000 employees in Germany, and as of 1 January 2024 over 1,000 employees in Germany.

50. As of 1 January 2023, it will apply to companies with over 3,000 employees and as of 1 January 2024 with companies over 1,000 employees in Germany.



companies (defined in accounting terms) that are resident in Norway or offer goods and services in Norway (and are liable for Norwegian tax) to carry out HRDD in accordance with the OECD Guidelines and provides for access to information and enforcement by the consumer authority. Accordingly, both the German and Norwegian laws would apply to UK companies that meet the relevant criteria.

### EU: Proposal for a Directive on corporate sustainability due diligence

On 23 February 2022, the European Commission published its **Proposal for a Directive on corporate sustainability due diligence**.<sup>51</sup> It follows the concepts of the UNGPs, by proposing to require relevant companies to 'conduct human rights and environmental due diligence' by carrying out 'appropriate measures' to identify, prevent, bring to an end or mitigate adverse human rights and environmental impacts. It would apply to large EU and non-EU companies with turnover of over €150 million, and after two years it would expand to companies with turnover above €40 million in specified 'high impact' sectors, including agriculture, garments, and extractives. It would also apply to specified finance sector companies. The due diligence duties would apply to companies' own operations and those of 'established relationships' in their value chain, which are defined as direct or indirect relationships which are 'expected to be lasting, in view of [their] intensity or duration'.<sup>52</sup> Some UK companies would accordingly be directly in scope of the Directive, while many more would be indirectly affected through its reach into the value chain. Businesses within scope of the Directive will have to publish an annual report (the content and scope of which is not yet defined) unless they already have to report under the existing Non-Financial Reporting Directive (NFRD).<sup>53</sup> There is likely to be significant overlap between the businesses in scope of the draft Directive and those covered by the NFRD. The reporting requirements of the NFRD are likely to be further refined and expanded by the proposed Corporate Sustainability Reporting Directive.<sup>54</sup> The proposed Directive on corporate sustainability due diligence would provide for both state-based oversight by supervisory authorities<sup>55</sup> and civil remedies.<sup>56</sup> Once the EU adopts its legislation, there will need to be Member State harmonisation (through transposition into domestic law), including in France and Germany (although individual Member States may choose to exceed the minimum requirements of any EU Directive, in which case there may not be complete harmonisation).

### UK 'failure to prevent' model

In 2017, the UK Joint Committee on Human Rights (JCHR) recommended that the 'failure to prevent' model that is already used in bribery and tax legislation should be utilised in the mHREDD context.<sup>57</sup> The model, which consists of a duty to prevent coupled with a 'due diligence defence', was considered to be 'particularly effective'<sup>58</sup> and proposed for extension to 'future legislation' on economic crimes by the House of Lords Select Committee.<sup>59</sup>

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51. Above n 6.

52. Article 3(f).

53. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

54. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting

55. Article 17.

56. Article 22.

57. UK Joint Committee on Human Rights (JCHR), *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, Sixth Report of Session 2016-17, (5 April 2017).

58. House of Lords Select Committee, *The Bribery Act 2010: post-legislative scrutiny*, (14 March 2019), at p.3. Neely 'UK Country Report' in EC Study: Part III Country Reports (above n 13) at p.319.

59. House of Lords Select Committee *ibid* at pp. 66-67. See also LeBaron and 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*, Global Policy 8(3) (May 2017)

### 3. What does the evidence show about the effectiveness of mHREDD legislation for addressing modern slavery? Amber / Red

#### Measuring effectiveness

Effectiveness in this context can be measured in at least three different ways:

- A. Effectiveness of the law at achieving compliance with its minimum requirements (what proportion of businesses in scope comply with the law);
- B. Effectiveness at meaningfully influencing corporate behavioural change (how effectively the law drives meaningful human rights and environmental due diligence);
- C. Effectiveness at addressing modern slavery (the number of cases of modern slavery prevented, mitigated or remediated).<sup>60</sup>

Due to the new and emerging nature of these laws, there is very little post-implementation evidence on the *actual* effectiveness of mHREDD laws measured against any of these criteria. Moreover, as HRDD does not itself require absolute prevention but instead requires companies to exercise due diligence, the impact on addressing modern slavery (measure c) above) will be indirect, and dependent on the effectiveness of the law to drive effective HRDD (measure b) above). Early evidence in relation to the French law (which is the only example of mHREDD currently in force), indicates that in the financial year after its introduction 70% of companies started or revised their human rights and environmental risk mapping,<sup>61</sup> and 65% of companies had dedicated human rights impacts identification processes (compared to 30% before the law).<sup>62</sup>

Below we discuss evidence of the anticipated impacts of mHREDD laws; the evidence reviewed considered these laws as a whole, without specific reference to impacts on modern slavery.

#### Research into the anticipated impacts of mHREDD laws

The most comprehensive empirical study on the anticipated impacts of mHREDD laws was undertaken for the European Commission and published in February 2020 (the EC Study).<sup>63</sup> It contained evidence from 631 survey responses (334 business and 297 general stakeholders) across all sectors,<sup>64</sup> 50 interviews and informational calls, 10 company case studies and 12 country reports. As the UK was part of the European Union at the time, the study included evidence relating to the UK legal landscape and anticipated impacts on UK companies' global business operations gathered from UK business and general respondents and interviewees, as well as a UK Country Report.<sup>65</sup>

The EC study also set out an intervention logic which 'considers the underlying "theory" of the intervention (how it would be expected to work)',<sup>66</sup> as well as an economic and social impact assessment and cost-benefit analysis for companies and states in accordance with the EU Better Regulation Guidelines and Toolbox.<sup>67</sup> Some of the 'outputs/results' identified in the

60. This framework is based on Hsin, New, Pietropaoli and Smit 'Effectiveness of Section 54 of the Modern Slavery Act Evidence and comparative analysis', Modern Slavery and Human Rights Policy and Evidence Centre (February 2021).

61. Entreprises pour les droits de l'Homme (EDH), 'Application de la loi sur le devoir de vigilance: Plans de vigilance 2018-2019', (14 June 2019), at 7 and 12.

62. Ibid, at 5. For further studies on the implementation of the French Due Diligence Law see above n 11.

63. EC study (above n13).

64. EC Study ibid Part II Survey Results Statistics at p.9: The survey listed the following industry sectors, all of which were selected by both business and general respondents respectively: agriculture and agribusiness, automotive, chemicals, construction and real estate, consumer goods, education, energy production and utilities, entertainment, financial services, healthcare, IT and technology, pharmaceuticals and biotechnology, logistics and distribution, manufacturing, media and publishing, mining and quarrying, professional services, retailing, telecoms, transportation, and travel and tourism.

65. Neely (above n53).

66. EC Study Final Report (above n 13) at p. 236. See the graphic representation of the intervention logic on p.238 of the Final Report.

67. EU Better Regulation Guidelines and Toolbox.

intervention logic included that '[c]ompanies' due diligence obligations for human rights and the environment would be clarified' and that '[f]ragmentation of supply chain due diligence requirements across sectors of industry, Member States and area of application [would be] avoided'.<sup>68</sup> It considered a range of options, and found an overall stakeholder preference for a general cross-sectoral regulation, which considers the specificities of the sector, and the size of the company, in its application to specific cases. Under this option, some sub-options were also considered in relation to whether the law should apply to companies of all sizes including small and medium-sized enterprises (SMEs) or to certain large companies only, and the implications of two types of enforcement mechanisms: state-based oversight mechanisms and judicial remedies in court.

### Size of companies and the supply chain

The UNGPs state that all companies regardless of size have HRDD responsibilities, and yet each of the French, German, Norwegian and European Commission mHREDD laws only applies to certain large companies – using different turnover and employee number thresholds to determine which companies are within scope.

However, the evidence shows that despite the application to large companies only, mHREDD laws which cover the supply or value chain do in practice have implications for the activities of SMEs. A study by PWC and others on the French Duty of Vigilance Law found that 80% of SMEs are being required to take various steps to comply with human rights obligations by the large actors in their supply chains, without receiving accompanying support (financial or otherwise) for such compliance.<sup>69</sup> The EC proposed Directive would address this gap by requiring large companies to enter into 'fair, reasonable and non-discriminatory' contracts with their SME business partners,<sup>70</sup> provide 'targeted and proportionate support' especially where compliance with their code of conduct would 'jeopardise the viability of the SME'<sup>71</sup> and bear the cost of independent third party verifications which they require from SMEs.<sup>72</sup>

### Evidence on the effectiveness of the UK 'failure to prevent' model

As noted, there is evidence from within the UK on the success, clarity, and effectiveness of the failure to prevent model, which has already been in effect in the Bribery Act for over a decade. In the mHREDD context, this model would 'allow a company to avoid liability where it can show that it had in place a robust system of human rights due diligence'.<sup>73 74</sup>

### Impact on directly affected individuals

There has been very limited research on the impacts of mHREDD laws on directly affected individuals (such as people with lived experience of modern slavery), and around the involvement of those individuals in the design of such laws.

68. EC study (above n 13) intervention logic mentioned above n 61, at p.238.

69. PWC and others 'Résultats de l'enquête "RSE: La parole aux fournisseurs!"', (January 2020).

70. Art 7(4) and 8(5).

71. Art 7(2)(d) and 8(3)(e).

72. Art 7(4) and 8(5). Art 7(4) and 8(5). It is anticipated that the EC Draft Directive will indirectly cover the activities of many entities within value chains: Almost three quarters (73%) of business respondents in the EC study would fall under the new EC Directive, and overall business respondents indicated that they had over 1 billion suppliers in their upstream supply chains alone, not yet including other entities in the value chain, whose activities will be also caught by the due diligence duties in the EC Directive. See Bright and Smit Bright and Smit 'The new European Directive on Corporate Sustainability Due Diligence' (23 February 2022).

73. Pietropaoli, Smit, Hughes-Jennett and Hood, A UK Failure to Prevent Mechanism for Corporate Human Rights Harms, (11 February 2020), <https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms> at p. 52.

74. A legal opinion by Timothy Otty QC and Naina Patel at Blackstone Chambers has found that if such a failure to prevent mHREDD law had been in place at the time, Boohoo 'could have been found liable for breaches' in relation to the labour abuses documented at its Leicester factory during 2020. Regarding the effectiveness of such a law to drive a change in corporate behaviour (effectiveness measure b) above) they add that while 'it is difficult to speculate' as to whether the company 'might have behaved differently had such legislation been in place...incentivisation of better practice simply underscores the value of such legislation'. (Otty QC and Patel, 'Opinion: In the matter of the findings of a review into the Boohoo Group PLC's Leicester supply chain and liability under a mandatory human rights due diligence / 'failure to prevent' law', (23 July 2021), at p.3).

## 4. What does the evidence show about actual or potential impacts of mHREDD legislation on business? Amber

There is limited evidence on the *actual* impacts of mHREDD laws on business, since, apart from the French Duty of Vigilance law, none of these laws have taken effect yet. However, there is evidence from research that has investigated the anticipated impacts of mHREDD laws.

### Survey evidence on anticipated benefits

The majority of business respondents in both the EC study and the UK failure to prevent study indicated that they expect mHREDD to benefit business by levelling the playing field (72% and 74% of business respondents, respectively),<sup>75</sup> improving legal certainty (66% and 82%), facilitating leverage with third party business partners through the introduction of a non-negotiable legal standard (61% and 75%), and – in the case of the EU survey – by providing a ‘single, harmonised EU-level standard (as opposed to a mosaic of different measures at domestic and industry level)’ (75%).<sup>76</sup> In general, industry association respondents agreed, but with a lower percentage of respondents agreeing and greater diversity of opinions between respondents.

Similar benefits were recorded by companies who had already experienced almost a decade under the UK Bribery Act: 65% found that it has provided legal certainty, 50% indicated that it has levelled the playing field, and 53% indicated that non-negotiable obligations in the Bribery Act have facilitated leverage with third party business partners.<sup>77</sup>

### Cost-benefit analysis

A cost-benefit analysis undertaken as part of the EC Study considered the existing evidence on the potential costs for business. The analysis reviewed literature estimating costs to business, including estimates relating to compliance with similar existing legislation (such as the US and EU Conflict Minerals laws and the US Dodd-Frank Act), as well as obtaining data from survey respondents. Survey respondents were asked to estimate person-day costs under different potential legislative scenarios. Analysis of those estimates found that ‘the cost of mandatory due diligence compared to the revenue of companies appears to be very low’ and that ‘additional recurrent company-level costs as percentages of companies’ revenues’ would on average amount to 0.009% for large companies (with over 1,000 employees) and 0.14% for SMEs.<sup>78</sup> However, these numbers were average estimates and the analysis also found that they ‘can vary considerably between businesses because of different business models and market characteristics.’<sup>79</sup> The EC Study analysis also noted that while it was not possible to quantify the economic benefits that survey respondents expect from mHREDD legislation, ‘these benefits may be significant, insofar as they could improve the costs relating to the [reputational] risks that are present in the current status quo’.<sup>80</sup>

75. For a comparison of these statistics see Smit, Bright, Pietropaoli, Hughes-Jennet and Hood, ‘Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies’, *BHRJ* 5 (2), (July 2020). Percentages in this briefing are rounded up or down to the closest full percentage.

76. EC study Final report (above n 13) at 142.

77. Pietropaoli et al above (n 68) at 16; Smit et al above n 46.

78. EC Study (above n 13) Part I: *Synthesis Report* at p. 66.

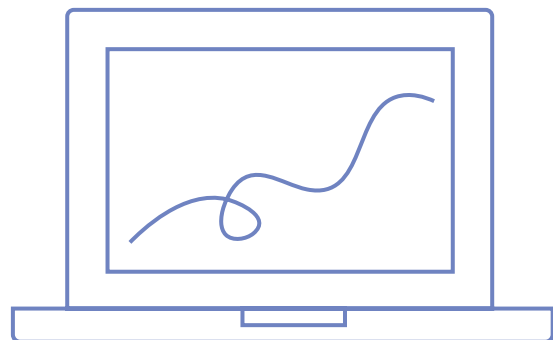
79. *Ibid.*

80. *Ibid.*

## Competitiveness and reputation

The economic impact assessment undertaken as part of the EC Study also considered the anticipated impacts of mHREDD legislation on the competitiveness and reputation of companies. It found that 'reputational risk' was the top incentive for business survey respondents to undertake due diligence, and noted that the evidence 'reflects the perception that companies with a good reputation may in fact be legally targeted on the basis of their public commitments'.<sup>81</sup> The economic impact assessment anticipated that 'existing and significant reputational risks may be reduced through the introduction of a general due diligence duty' and concluded: '[G]iven the significance which business stakeholders place on reputational risks, it is likely that the most significant reputational benefits from a mandatory due diligence requirement may result from a *reduction in existing reputational risks* rather than an enhancement of existing reputational benefits [original emphasis].'<sup>82</sup>

An EU mHREDD Directive would likely affect, whether directly or indirectly, businesses in all parts of the world. Most of the due diligence activity reported by respondents to the EC study focused on businesses operating outside of the EU.<sup>83</sup>



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81. For example, in the UK, in the absence of a statute creating civil liability, claimants need to found claims in common law, by demonstrating that a duty of care has been established between the company and the claimants. Perversely, this means claims may be more unlikely against companies that take no HRDD steps in their subsidiaries and supply chains (as no arguments can be made that a duty of care has been assumed). See Neely (above n53), and Pietropaoli (above n68).

82. EC Study *Part I: Synthesis Report* (above n 13) at p.68.

83. EC Study *Part II: Survey Results Statistics* (above n 13) at p.15.

## 5. What does the evidence show about any connections between mHREDD and related policy areas, such as responses to state-sponsored forced labour or emerging legislation prohibiting the import of goods produced using forced labour? Red

It is widely recognised that mHREDD legislation needs to be considered as part of a 'smart mix' of policy and regulatory measures, as described by the UNGPs.<sup>84</sup> For example, on the same day that it published its Draft Directive, the European Commission announced that it is preparing an instrument to ban products produced through forced labour.<sup>85</sup> Commentators have recognised the complementarity of mHREDD and forced labour import ban regimes.<sup>86</sup> For example, while import bans only relate to imported goods and therefore to harms that take place outside of the market territory, the proposed EC Directive will apply to all human rights harms in the supply chain, including those that take place within Europe.

There are potential risks and opportunities in relation to how mHREDD legislation might overlap with related policy areas. For example, systems of monitoring and enforcement may need to be carefully aligned to ensure consistency and clarity of business obligations. However, currently there is very limited evidence regarding exactly how mHREDD legislation does or should connect to related policy areas, or how such connections to other regulatory tools would affect the impacts on businesses.

mHREDD laws differ from laws that require due diligence regarding compliance with local laws, such as the proposed UK Environment Act aimed at 'tackl[ing] illegal deforestation in UK supply chains'<sup>87</sup> and the EU Timber Regulation.<sup>88</sup> This is because the UNGPs provide that HRDD applies 'over and above compliance with national laws and regulations',<sup>89</sup> thereby aiming to address the so-called governance gap where businesses do not apply the same standards of due diligence in all the jurisdictions where they operate.

84. Commentary to UNGP 3. Regarding overlap with existing laws, Art 1(2) of the EC Directive expressly states that its provisions will not 'constitute grounds for reducing the level of protection' afforded by existing human rights and environmental laws. Article 1(3) provides that if any of the Directive's provisions conflict with other laws that pursue the same objectives and provide for 'more extensive or more specific obligations' the more specific law will prevail 'to the extent of the conflict'.

85. European Commission 'Commission sets out strategy to promote decent work worldwide and prepares instrument for ban on forced labour products', (23 February 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1187](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1187).

86. 'Anti-Slavery International and European Center for Constitutional and Human Rights' position on import controls to address forced labour in supply chains', (June 2021), <https://www.antislavery.org/wp-content/uploads/2021/06/Anti-Slavery-International-ECCHR-Import-Controls-Position-Paper-1.pdf>.

87. Department for Environment, Food and Rural Affairs, Implementing due diligence on forest risk commodities, <https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/>.

88. Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

89. Commentary to UNGPs 11.

## 6. What does the evidence show about any actual or potential wider consequences of mHREDD? Amber

### Divestment

Concerns have been raised around the risk that mHREDD might incentivise companies to terminate risky relationships and exit from high-risk regions, thereby leading to divestment from regions that most need economic development. However, the UNGPs emphasise that HRDD requires companies to exercise and increase leverage, and only terminate relationships as a last resort. Even when companies decide to end a business relationship, they should exercise HRDD, recognising the potential human rights harms of doing so.<sup>90</sup> Similar requirements are included in model contract clauses for buying companies, such as those published by the American Bar Association.<sup>91</sup> The EC study found that 'where due diligence is currently undertaken, it only infrequently leads to such divestment, insofar as divestment is the least frequently utilised due diligence action.' It found that, although mHREDD 'may increase the likelihood' that companies would 'seek out more sustainable business partners, this is not expected to lead to negative impacts on EU business investment in non-EU countries, but instead to promote more sustainable relationships.'<sup>92</sup>

### Divergence

Evidence shows that UK multinational business respondents in particular are concerned about the existing regulatory gap.<sup>93</sup> The EC Draft Directive would introduce wide-ranging obligations, which would affect UK companies doing business in the single market, including financial services providers. These obligations would go far beyond the reporting requirements currently contained in the UK Modern Slavery Act by requiring due diligence (not just reporting) on all human rights and environmental harms (not just forced labour and modern slavery). This would create a stark contrast between the legal obligations applicable to UK companies with EU relationships and those that are only subject to the less onerous transparency provisions of the UK Modern Slavery Act. In the absence of similar mHREDD legislation being introduced in the UK, this is likely to escalate concerns documented in the evidence regarding fragmentation, legal uncertainty and lack of a level playing field amongst UK companies and generate potential distortion of trade with the European market.

## 7. Priorities for further research

Priority areas for further research on mHREDD include the following:

- The actual impact of different mHREDD laws, once implemented, both directly on businesses in scope and indirectly on entities within those businesses' supply chains;
- The impacts of mHREDD laws, once implemented, on directly affected individuals; and
- How mHREDD laws interact with and complement related laws and policies, such as legislation on forced labour import bans or transparency in supply chains.

90. Commentary to UNGPs 19.

91. See American Bar Association, RESPONSIBLE PURCHASING CODE OF CONDUCT: SCHEDULE Q Version 1.0, [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/contractual-clauses-project/scheduleq.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/scheduleq.pdf).

92. EC study *Part I: Synthesis Report* (above n 13) at p.67.

93. Pietropaoli (above n68).



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