

Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law

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Executive Summary

This report identifies that civil liability in the English courts for human rights violations by corporate actors still presents significant obstacles for victims and the probable reasons why there have been no criminal prosecutions for extraterritorial human rights violations by companies. It concludes that a dedicated regulatory body could add value to the enforcement of the proposed human rights due diligence law by increasing the likelihood of UK companies being held accountable for cross-border human rights abuses and providing specialist advice relating to cross-border corporate human rights abuses.

It assesses how such a regulatory body could best be designed to achieve the stated goals by suggesting what can be learned from existing regulatory bodies in the UK and internationally, and by analysing possible resourcing models.

- The regulator should be legally separate from the executive, with a robust internal governance framework.
- The set-up of the regulator will require principled methods of sharing the burden of costs between the Treasury and regulated entities, to ensure the necessary resources.
- The regulator should develop the necessary expertise to publish expert compliance and best practice guidance on mandatory due diligence guidelines and the failure to prevent adverse human rights and environmental impacts offence in order to build compliance through a programme of education and engagement.
- The regulator should have the power to monitor human rights due diligence and should have powers up to and including criminal sanction for companies that fail to conduct due diligence.
- There should be power to investigate allegations of failure to prevent adverse human rights and environmental impacts and to impose civil penalties where the harm is proven.
- These civil penalties will be a complement to, not an alternative to, civil liability in the courts, meaning that civil litigation will take place in parallel with or in the alternative to regulatory investigation and enforcement.
- In circumstances of failure to prevent serious human rights and environmental impacts, and subject to the conditions listed in the report, criminal investigation and prosecution should occur, with the most serious cases being referred outside the regulator to one of the established prosecuting authorities, most likely the Crown Prosecution Service and/or Environment Agency.
- The development of the regulator will need to take account of parallel international and domestic developments in this sphere, including existing in relation to corporate reporting.

I Introduction

The proposed law

1. In March 2020, a coalition of UK civil society organisations produced a document (“the Principal Elements Document”) providing an overview of the elements that they would like to see included in new human rights due diligence legislation (Appendix A). The Principal Elements Document was supplemented by a second document which sets out the commentary to those principles (“the Commentary”) (Appendix B).

Scope of instruction

2. This research project has been split into two parts:

Part 1: Analysing how a dedicated regulatory body could add value to the enforcement of the proposed law by:

- a. Increasing the likelihood of UK companies being held accountable for cross-border human rights abuses.
- b. Providing specialist advice relating to cross-border corporate human rights abuses.

Part 2: Assessing how such an enforcement body could best be designed to achieve those goals by:

- a. Suggesting what can be learned from existing regulatory bodies in the UK and internationally.
- b. Analysing possible resourcing models.
- c. Proposing the powers, resources and methods of operating that a regulator would need to be effective.

The proposed law referred to in Part 1 is set out in the Principal Elements Document. This document was the foundation for the research project.

3. Our terms of reference limit the scope of the project to cross-border human rights abuses. There is no reason in principle why the business and human rights regulator (“BHR regulator”) should be concerned with transnational violations only. It is important to note, however, that different considerations apply to accountability for domestic human rights violations because there is existing legislation in place to protect people, e.g. health and safety law, the corporate manslaughter offence, environmental law, employment law etc. There are regulators working in effect on domestic human rights violations including the Health and Safety Executive and the Equality and Human Rights Commission.

Methodology

4. In brief, the methodology adopted by the research team was first to conduct a full literature review. The index to this report sets out the documents studied. We then

interviewed a number of key authorities on the subject, dividing them into those with Part 1 expertise, and those with Part 2 expertise. Approximately 15 interviews were conducted, each lasting approximately an hour. We also held conversations with senior lawyers at Kingsley Napley, which is one of the main UK law firms working on and with regulators. A consultation workshop was held in July 2020 in which many of the key stakeholder NGOs participated and gave comment on an earlier draft of this report. We extend our sincere thanks to everyone who contributed their time and knowledge to the research project.

II Analysis of ambit of proposed law and key definitions

Summary of proposed law

5. In summary, the Principal Elements document proposes the following:
 - a. A duty on commercial and other organisations to prevent adverse human rights and environmental impacts of their domestic and international operations, products, and services including in their supply and value chains;
 - b. A duty on commercial and other organisations to develop and implement reasonable and appropriate due diligence procedures to prevent adverse human rights and environmental impacts; and
 - c. A duty on commercial and other organisations to publish a forward-looking plan describing procedures to be adopted in the forthcoming financial year, and an assessment of the effectiveness of actions taken in the previous financial year.
6. In terms of liability the Principal Elements also propose that:
 - a. Commercial and other organisations and their senior managers shall be subject to a civil penalty if they fail to develop, implement and publish a due diligence plan, or publish a misleading or inadequate plan, within a reasonable time;
 - b. Commercial and other organisations shall be liable for harm, loss, and damage arising from their failure to prevent adverse human rights and environmental impacts from their domestic and international operations, products, and services including in their supply and value chains;
 - c. It shall be a defence from liability for damage or loss, unless otherwise specified, for commercial and other organisations to prove that they acted with due care to prevent human rights and environmental impacts; and
 - d. Commercial and other organisations and their senior managers shall be subject to a criminal penalty if they fail to prevent serious human rights or environmental impacts.

Key definitions

Human rights

7. The United Nations Guiding Principles on Business and Human Rights Principle 12 (“UNGP 12”) requires business enterprises to respect “internationally recognised human rights”. This includes, at a minimum, the Universal Declaration of Human

Rights together with the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), as well as the eight core conventions from the International Labour Organization (“ILO”). The guidance to UNGP 12 provides that, in addition to these rights, and depending on circumstances, businesses “should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them”.¹ Examples of this might include the rights of indigenous people, women, national or ethnic, religious or linguistic minorities, children, persons with disabilities and migrant workers and their families. Finally, UNGP 12 states that in situations of armed conflict enterprises should respect the standards of international humanitarian law. There is an argument to be made that other key human rights instruments should also be explicitly referenced in the human rights due diligence law.

Environmental impacts

8. We understand the environmental impacts, referred to in the Principal Elements document, include environmental harms which both have direct human rights impacts and those which do not. Consideration will need to be given to how environmental impacts are defined by reference to key international standards, conventions and declarations.²

Adverse human rights or environmental impacts

9. An adverse human rights impact occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.³ The UNGPs refer to “cause” “contribute” and “linked to” – with different requirements made of business in respect of “linked to”.

Serious human rights or environmental impacts

10. The Principal Elements document distinguishes between a failure to prevent “adverse” human rights and environmental impacts and a failure to prevent those impacts that are “serious”. The latter leading to a criminal, as opposed to a civil, penalty. Consideration will need to be given as to what constitutes a “serious human rights and environmental impact” and whether or not the proposed law would require the criminalisation of predicate conduct that was not already deemed to be criminal under the law of England and Wales (the second point is picked up at paragraph 28 below).

¹ UNGP 12.

² “The development of any standard or guidance relating to risk of environmental harm or human rights abuses should take into account a number of key international standards, binding conventions and declarations. This should include the internationally legally binding treaties such as: Convention on Biological Diversity (CBD) 1992 and the Indigenous and Tribal Peoples Convention 1989; international human rights instruments such as the UN Declaration on the Rights of Indigenous Peoples 2007 as well as non-legally binding guidelines like the voluntary guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests 2012 and the United Nations Guiding Principles on Business and Human Rights.” See Client Earth, “Global Witness, Strengthening Corporate Responsibility: The case for mandatory due diligence in the EU to protect people and the planet” 13, available at <https://www.documents.clientearth.org/library/download-info/strengthening-corporate-responsibility/>.

³ OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide 2012*, HR/PUB/12/02, available at https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf 5.

III Current obstacles to access to remedy

11. We divide the ‘obstacles to remedy’ into the civil liability and criminal prosecution of companies. There are some obstacles that cut across both and some themes that are also relevant to both; as the specifics of these issues tend to differ, they are addressed separately.

Civil liability: Obstacles

12. Although it is, in this context, a relatively more successful route to access to remedy than criminal prosecutions, civil liability for human rights violations by corporate actors still presents significant obstacles for victims.
 - a. Attributing liability of the parent or lead company when the harm has ostensibly occurred at the hands of the subsidiary or supplier. This challenge is particularly pronounced when, as is frequently the case with multinationals, there are complex corporate structures. One case has been won at trial on the question of direct liability of the parent company (*Chandler v Cape*⁴) and the Supreme Court has recently widened the test for direct liability a little by asking whether the parent company had “undertaken a sufficiently close intervention into the operation of the [activities of the subsidiary] to attract the requisite duty of care” (*Lungowe v Vedanta*).⁵ However, establishing a sufficiently close intervention remains a major hurdle for victims. Companies take steps to distance themselves from the operations of their subsidiaries to avoid liability.
 - b. Suing the foreign subsidiary or supplier in the English courts by persuading the court to take jurisdiction over a foreign domiciled defendant. *Lungowe v Vedanta* makes this more difficult, even when there is an “anchor defendant” (UK parent company) present and correctly sued in the jurisdiction, because the Supreme Court held that the courts retained the discretion to stay a claim on case management grounds in “rare or compelling circumstances”.
 - c. *Disclosure*. The claimants will likely to need to establish a preliminary case before disclosure takes place. It is difficult to evidence the “sufficiently close intervention” into the operation of the subsidiary without internal company documents. That said *Lungowe v Vedanta* does open the possibility of relying on group-wide policies to evidence the level of intervention on the parent’s part (real or promised).
 - d. *Evidence gathering overseas*. This is expensive and may be challenging. Sometimes obstacles are put up by the host state such as refusal of visas for lawyers to enter the country.
 - e. *Funding litigation*. There is a funding model in place entailing conditional fee arrangements and litigation insurance. However, there are gaps for instance in low value claims or claims with low claimant numbers. Such cases are not financially viable for law firms to take on. This situation is exacerbated by the paucity of claimant law firms taking on business and human rights cases.

⁴ David Brian Chandler v Cape plc [2012] EWCA Civ 525.

⁵ Lungowe v Vedanta Resources plc [2019] UKSC 20 para. 59. Note that the outcome of the appeal to the Supreme Court in a second direct liability case, Okpabi v Shell case ID: UKSC 2018/0068, is awaited.

- f. *Suitability of civil liability through tort litigation to claims in question.* Civil liability through tort claim litigation is not well-suited to cases where the business in question contributes a small proportion to an extraordinary harm e.g. companies contributing to climate change. Not all human rights have a corresponding cause of action in tort law, in particular economic, social and cultural rights frequently do not.
- g. *Standing.* In civil claims, it can be difficult to get those with sufficient standing to bring the case. Pressure groups such as NGOs do not have standing to bring claims on behalf of victims.
- h. *Aggregation of claims.* A group litigation order is available to claimants, but this is an opt-in system that requires each claimant to prove his/her loss.
- i. *Applicable law.* Under the relevant European law – the Rome II Regulation – the applicable law is the law of the state where the harm occurred. Until now it has not been problematic to prove liability, or at least a preliminary case for liability, using foreign law. In most cases the foreign law is the law of a common law state, which looks to English precedent on novel points of law. Proving liability may be more difficult when the foreign law is not the law of a common law state. Also problematic is quantum. This was considered in *Kalma v African Metals*,⁶ where the parties agreed that, by the application of the Rome II Regulation, the court was required to assess damages on the same basis as would a Sierra Leonean court applying Sierra Leonean law. This was likely to be substantially lower than comparative damages under English law.

Remedy in civil lawsuits

- 13. Civil lawsuits provide monetary compensation to claimants. Victims of corporate human rights violations often seek different forms of remedy in addition, or in the alternative, to monetary compensation. Different forms of remedy include the company stopping the harmful activity, remediating the harm and apologising to the victims. If a civil lawsuit is settled, then the settlement agreement can specify actions such as a clean-up of the environment (e.g. *Bodo Community v Shell*⁷) which allow for the case to be reopened in the event that the specified action does not occur.

Discussion

- 14. There is a role for the regulator as investigator and adjudicator of civil law disputes. Interaction between regulator-found liability and civil claims is addressed below in Section V, paragraph 91.

Criminal prosecution: Obstacles

- 15. As far as is known, at the time of writing, no companies have been prosecuted in the courts of England and Wales for their role in conduct of the kind in issue here, amounting to serious human rights impacts and/or environmental harm abroad.⁸

⁶ *Kadie Kalma & Others v African Minerals Limited, African Mineral (SL) Limited and Tonkolili Iron Ore (SL) Limited* [2018] EWHC 3506 (QB).

⁷ *The Bodo Community and Others v. Shell Petroleum Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).

⁸ For the purposes of this paper, offences of bribery and corruption, whilst closely linked to human rights violations, are not considered to be conduct amounting to human rights abuses and environmental impacts.

This is probably because despite the fact that under existing legislation it might be possible to prosecute a company either as the principal or as an accessory for a number of offences where the underlying conduct took place abroad and where that conduct would or could amount to serious human rights abuse or serious environmental harm, such prosecutions present extremely complex legal and practical challenges.⁹

16. It is important to note that in considering the obstacles to criminal prosecution this section does not take violations of international human rights law or crimes under international law as its starting point. The reason for this is that in England and Wales for an action to be criminal, it must be defined as such by statute or the common law. Currently, therefore, violations of these international laws are not criminal and a person cannot be prosecuted for them unless and until the violations have been criminalised by domestic legislation.
17. The obstacles to the criminal prosecution of companies for the harm in issue are well documented.¹⁰ They include legal, practical and systemic concerns a number of which are addressed below:
 - a. The difficulty in establishing corporate liability under the identification principle, in particular in relation to large and complex corporate structures. The identification principle is the means through which the mental elements of crimes are attributed to companies. In order to secure the conviction of the company, the prosecutor must demonstrate that at the time the relevant acts took place, someone who can be said to have been part of the “directing mind and will” of the company¹¹ or “an embodiment of the company”¹² had the requisite criminal state of mind. This model of attributing liability has long been

⁹ In relation to the most serious crimes see for example those statutes which give the courts of England and Wales power to prosecute crimes of universal jurisdiction such as torture (s.134 Criminal Justice Act 1988) and in relation to grave breaches of the Geneva Conventions (s.1 of the Geneva Conventions Act 1957). In relation to other types of conduct giving rise to harm abroad, there are circumstances in which statutory provisions may provide jurisdiction for the criminal courts of England and Wales, provided there is a sufficient nexus (see the example of conspiracy to commit Environmental Protection Act offences abroad given by Amnesty International in their petition to the Environment Agency in 2014 in respect of the dumping of toxic waste in the Cote d’Ivoire by Trafigura: <https://www.amnesty.org/en/latest/news/2014/11/uk-threat-high-court-action-spurs-review-corporate-conspiracy-claim/>) but this will depend on the particular facts of the case and the detail of the UK connection.

¹⁰ See, for example, UN Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse*, Report of the United Nations High Commissioner for Human Rights, A/HRC/32/19, 10 May 2016, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/093/78/PDF/G1609378.pdf?OpenElement>, and the associated guidance, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*, A/HRC/32/19/Add.1, 12 May 2016, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/095/88/PDF/G1609588.pdf?OpenElement>. See also Jennifer Zerk, “Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies: A report prepared for the Office of the High Commissioner for Human Rights”, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf 31 – 39 and Amnesty International, *The Corporate Crimes Principles: Advancing investigations and prosecutions in human rights cases* October 2016, available at <https://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf>.

¹¹ *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

¹² *Tesco Supermarkets Ltd v Nattress* [1972] AC 153, 170E.

the subject of criticism by some of those who seek to hold companies criminally accountable,¹³ particularly in the context of economic crimes such as bribery.¹⁴

- b. *The difficulty in establishing individual liability of senior managers because of complex corporate structures.* In order for an individual to be liable for an offence, the prosecutor has to show both that the individual in question was a party to the commission of the act in question or an accessory to that act, and that they had the requisite state of mind.¹⁵ In cases where the individual in question is a director or senior manager of a large, multinational company with a complex corporate structure, establishing these two things can be challenging.
- c. *Legal and political limitations to assertion of jurisdiction over overseas criminal conduct.* As a general rule, save in circumstances of crimes of universal jurisdiction,¹⁶ the criminal courts of England and Wales have jurisdiction where one or more of the relevant events that constitute an offence took place within¹⁷ the territory. Parliament has provided a number of statutory exceptions to this basic position, each of which is justified by one or more of the following

¹³ The identification principle was cited by the CPS as the reason they did not pursue the investigation into News Group Newspapers in relation to the phone-hacking scandal, see <https://www.bbc.co.uk/news/uk-35070715>.

¹⁴ See, for example, Alun Milford, General Counsel of the SFO's speech at the Cambridge Symposium on Economic Crime 2016, where he stated: "...Our traditional model of attributing criminal liability to corporates is through the words and actions of a small group of people who make up the controlling mind and will of the organisation. Who precisely is capable of doing so is a fact-specific question to be determined by taking into account both the structure of the company and the purpose of the criminal statute said to have been breached. At its narrowest, it attributes criminal liability to a corporation through the actions of its directors. At its most expansive, no-one really knows. [...] The identification principle is an inadequate model for attribution to a corporate of criminal liability. It is unfair in its application, unhelpful in its impact and it underpins a law of corporate liability that is unprincipled in scope. On the other hand, the control model of liability meets each of these criticisms." Available at <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/>. See also reports of the current Director of the SFO, Lisa Osofsky's interview with the BBC in February 2020 where she described the difficulties of the identification principle in the following way, "In fraud cases I've got to have the controlling mind of a company before I can get a corporate in the dock. That's a standard from the 1800s, when Mom and Pop ran companies. That's not at all reflective of today's world." Available at <https://www.lawgazette.co.uk/news/antiquated-fraud-laws-thwarting-justice-says-sfo-director/5102972.article>.

¹⁵ Some statutes create a form of accessory liability by which company officers commit an offence where they have consented or connived in the corporate's criminal conduct (see for example s.14 Bribery Act 2010) or where the criminality is attributable to their neglect. This kind of liability is most frequently used in the context of what might be described as regulatory offences, although as the Bribery Act example demonstrates, this is not always the case. It should be noted that of the existing failure to prevent offences none of them provide individual liability on this basis. There is no requirement that the company itself be prosecuted, provided the offence can be proved against it. Any prosecution of the relevant senior person would have to establish, to the satisfaction of a jury, that the company had committed the offence in question.

¹⁶ Such as torture (s.134 Criminal Justice Act 1988) or grave breaches of the Geneva Conventions (s.1 Geneva Conventions Act 1957).

¹⁷ As to when a crime is committed within the territory of England and Wales, see D. Ormerod QC (Hon) & David Perry (eds), *Blackstone's Criminal Practice 2020* (Oxford University Press 2019) A8.5: "An offence may be committed within England and Wales even where some elements or consequences occur abroad. This is undoubtedly the case where the last essential constituent element of the offence takes place (i.e. the offence is completed) within England and Wales (Harden [1963] 1 QB 8; Treacy v DPP [1971] AC 537). In Smith (Wallace Duncan) (No. 4) [2004] EWCA Crim 631, [2004] QB 1418, however, the Court of Appeal held that a crime may be regarded as committed within the jurisdiction if 'a substantial part of the offence' was committed in England and Wales, even if the last constituent element took place abroad. This 'inclusive' approach eschews the petty legal technicalities that dogged the terminatory approach and, although initially hard to justify on the basis of precedent, it was endorsed (obiter) by Lord Hope in R (Purdy) v DPP [2009] UKHL 45, [2010] 1 AC 345 and has consistently been endorsed or applied by the Court of Appeal, notably in Sheppard [2010] EWCA Crim 65, [2010] 2 All ER 850; AIL [2016] EWCA Crim 2, [2016] QB 763 and Burns [2017] EWCA Crim 1466."

stipulations: a requirement for some other nexus with the UK;¹⁸ a requirement of dual criminality (i.e. the need to establish that the conduct in question was also unlawful in the country in which it occurred); and a limitation to offences with a particular degree of gravity.¹⁹ In addition, recognising the requirements of international comity, the right to bring extraterritorial prosecutions may be dependent upon the consent of the Attorney General.²⁰

- d. Concerns about the influence of corporate actors on state authorities and regulators and the way in which these relationships affect the priority given to the investigation of corporate crime.²¹ Those we spoke to in the course of our research reiterated this point, explaining the close ties that some of the largest multinationals have to government.
- e. *A lack of sufficient experience in serious cross-border investigations.* This is particularly applicable for cases involving large scale human rights abuses or environmental harm²² and/or complex corporate structures and the associated difficulties that this lack of experience will bring with it, including in the identification and analysis of relevant evidence.²³
- f. *Practical difficulties in the obtaining of evidence from abroad.* These problems are particularly apparent in cases where there is involvement of the host state authorities in the underlying conduct and where much of the evidence is under the control of the relevant corporate actor and/or reluctant state. Those we spoke to in the course of our research explained that mutual legal assistance (the formal legal mechanism through which evidence is obtained from other countries) is

¹⁸ See, for example, s.12 Bribery Act 2010 (Offences under this act: territorial application) which, in the absence of conduct taking place within the UK requires a “close connection” with the UK and s.51 The International Criminal Court Act 2001 (Genocide, Crimes against humanity and war crimes) which, in the absence of conduct taking place within England and Wales requires either that the person who committed the conduct is a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction (a person subject to service law, or a civilian subject to service discipline, within the meaning of the Armed Forces Act 2006). These methods of asserting jurisdiction over conduct abroad is known as an assertion of either “nationality” or “territorial” jurisdiction.

¹⁹ See, for example, s.1A Criminal Law Act 1977 (Conspiracy to commit offences outside England and Wales) which requires that for the conspiracy to commit acts outside England and Wales to be criminal the actions intended to take place in another country or territory must be an offence under the law of that country or territory as well as being an offence under the law of England and Wales. See also ss. 327 -329 Proceeds of Crime Act 2002 and s.240 Proceeds of Crime Act 2002. Notably the Bribery Act 2010 does not require dual criminality to be established.

²⁰ See, for example, s.53 International Criminal Court Statute 2001, s.1A(3) Geneva Conventions Act 1957, s.135 Criminal Justice Act 1988, s. 4(5) Criminal Law Act 1977, s. 53 Serious Crime Act 2007.

²¹ See, for example, *The Corporate Crime Principles*, above note 10, at p.23, which sets out the background to the BAE scandal, explaining that: “In 2004, the SFO began an investigation into bribery allegations concerning a 1985 arms-for-oil deal between the UK and Saudi Arabian governments under which UK defence company BAE Systems was the key contractor. In December 2006, the SFO, a prosecuting authority that is independent of the government, decided to stop the investigation following representations by BAE, the UK government (including then-Prime Minister Tony Blair) and the Saudi government that the continuation of the investigation would negatively affect the United Kingdom’s national security. That month, according to newspaper reports, the Saudi government had given the United Kingdom ten days to halt the investigation or lose a key contract to supply fighter jets worth US\$10 billion. In March 2007, the OECD expressed “serious concerns” about the decision to discontinue the investigation and whether it was consistent with the OECD Convention, as well as about shortcomings in the UK’s anti-bribery legislation.”

²² Report of the Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, January 2017, paragraphs 195-196, available at <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44302.htm>.

²³ Corporate Crime Principle 4, above note 10, 29 – 31.

often only a “coalition of the willing” and that sometimes it is only after a change in the regime that requests for assistance with an investigation will be progressed.²⁴

- g. *A lack of sufficient resources.* It is often the case that prosecuting authorities are under-resourced and struggle to meet the costs of a complex investigation.²⁵ These challenges can be exaggerated in cases where those authorities are investigating large corporate actors capable of investing significant resources in defending any criminal action.²⁶
- h. *A lack of political will* to finance individual prosecutions in the absence of any prospect of financial settlement of the kind available via a Deferred Prosecution Agreement (“DPA” – these are discussed in paragraph 21, below).
- i. *A lack of risk appetite within prosecuting authorities.* Prosecuting authorities rely on central government for their funding. The negative publicity that can come with failed prosecutions can make prosecuting authorities unwilling to take on challenging investigations.
- j. *Perceived lack of jury sympathy.* Prosecutorial concern that a jury will not be sufficiently sympathetic to certain kinds of extraterritorial harm can be a reason that some prosecuting authorities are reluctant to take on certain cases. There may be a perception that juries will consider domestic criminality to be more pressing than something that happened in another country and in an unfamiliar context.
- k. *Difficulties experienced by NGOs in accessing the justice system.* In their submission to the Joint Committee on Human Rights’ inquiry into Human Rights and Business, Amnesty International outlined the difficulty that they had in persuading the authorities to consider their criminal allegations against Trafigura.²⁷ This was something referred to in the course of our interviews, where participants explained that it could be easier to get attention from a prosecuting authority if you could present a victim in person to the authority in question.

Remedy in criminal prosecutions

18. Whilst not an obstacle to criminal prosecution, an important factor in considering the putative role of any regulator is the fact that the criminal process is not designed to provide a remedy for victims of complex categories of harm or loss. The criminal

²⁴ Note that there are recommendations for countries on enhancing mutual legal assistance in the Office of the High Commissioner for Human Rights documents, n. 10 above and the draft treaty. The Revised Draft of the Binding Treaty on Business and Human Rights (2019) covers mutual legal assistance. States shall “afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial and other proceedings” (Art. 10 (1)) and “provide legal assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations” (Art. 10(8)).

²⁵ Ibid. [22].

²⁶ See, Amnesty International, *Too toxic to touch? The UK’s response to Amnesty International’s call for a criminal investigation into Trafigura Ltd*, July 2015, available at <https://www.amnesty.org/download/Documents/EUR4521012015ENGLISH.PDF> where the Environment Agency are reported as citing resourcing concerns, in particular the amount of resources Trafigura were likely to invest in defending the case as a reason for not pursuing the prosecution.

²⁷ See, Amnesty International’s written submission to the Joint Committee on Human Rights inquiry into Human Rights and Business 2017, paragraph 41, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/34914.html>.

law is concerned with protection of the public from conduct deemed to be harmful or antisocial; it regulates the conduct of private actors with a view to preventing, punishing and deterring such behaviour and that is, or has traditionally been, very much its focus. Even if a company were to be prosecuted and convicted under existing legislation for its role in offences of the kind in issue here, the available remedies are unlikely, when compared with potential civil remedies, to offer sufficient reparation.²⁸ By way of example, when considering the possibility of payment of financial compensation, in addition to any fine imposed, judges sitting in criminal courts are encouraged not to stray into the complicated assessment of damages of the kind likely to be required in a case of serious human rights abuse or environmental damage.²⁹ Instead, in such cases, victims are likely to be encouraged to pursue their remedies before a civil court, for example by using the criminal conviction to pursue a separate civil damages claim. An exception to the courts' reluctance to enter into these kinds of assessments might be the Slavery and Trafficking Reparation Orders in the Modern Slavery Act 2015,³⁰ although, at the time of writing there is little available information on how these have been used in practice.³¹

Directors Disqualification and Deferred Prosecution Agreements

19. The Directors Disqualification process and the Deferred Prosecution Agreement (DPA) model are also relevant to a consideration of the new BHR regulator in so far as they provide distinct models of sanctioning relevant criminal conduct, and, in the case of the latter might provide an alternative approach to remedy over and above those outlined above at paragraph 18.
20. Following conviction³² of certain offences in connection with the management of a company³³ the Crown Court may make an order against an offender (including a

²⁸ Existing available "remedies" include a compensation order under s.148 of the Powers of Criminal Courts (Sentencing) Act 2000 and a restitution order under s.130 of the PCC(S)A. See *Blackstone's Criminal Practice 2020* *ibid* [17] at E17.1: "A restitution order is designed to restore to a person entitled to them goods which have been stolen or otherwise unlawfully removed from him, or to restore to him a sum of money representing the proceeds of the goods, out of money found in the offender's possession on apprehension." And E17.2, it "should not be made where the question of title to goods is unclear."

²⁹ See *Blackstone's Criminal Practice 2020* *ibid* [17] at E16.5: "The court should, however, hesitate to embark on a complex inquiry into the scale of loss, since compensation orders are designed to be used only in clear, straightforward cases" and at E16.14 citing *Eveleigh LJ In Donovan (1981) 3 Cr App R (S) 192* that: 'A compensation order is designed for the simple, straightforward case where the amount of the compensation can be readily and easily ascertained.' Whilst there is some suggestion that as "criminal courts had now developed more expertise in financial assessment [...]" and that it might be that the very cautious approach adopted in the earlier authorities to the making of compensation orders needed some modification" it is extremely unlikely to change the position with respect to our conclusions above.

³⁰ S.8-10 Modern Slavery Act 2015.

³¹ See the *Independent Review of the Modern Slavery Act 2015: Final Report*, paragraph 27, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803554/Independent_review_of_the_Modern_Slavery_Act_-_final_report_print.pdf.

³² S.5A Company Directors Disqualification Act 1986 (CDDA 1986) provides for disqualification under the civil regime for relevant convictions abroad which relate to the promotion, formation, management, liquidation or striking off of a company, the receivership of a company's property or a person being an administrative receiver where the offence corresponds to an indictable offence in England and Wales.

³³ Specifically, per s.2 CDDA 1986 in order for a disqualification order to be imposed the conviction must be in connection with the promotion, formation, management or liquidation or striking off of a company or in connection with the receivership or management of a company's property a court. In relation to the management

corporate offender) disqualifying them from acting in the promotion, formation or management of a company for a period of time up to a maximum of 15 years;³⁴ this practice is commonly known as director's disqualification.³⁵ The object of the director's disqualification process is to ensure that only competent, responsible and honest people act as company directors and to ensure that those who deal with companies can be protected from possible fraud, incompetence and regulatory failings by people who are supposedly directing companies.³⁶ Where the sentencing judge makes a Director Disqualification Order ("DDO") the prosecutor must inform Companies House using a DDO notification form.³⁷ The Companies House records are then searchable online.³⁸

21. Schedule 17 of the Crime and Courts Act 2013 introduced Deferred Prosecution Agreements (DPA) as an alternative to corporate prosecution. A DPA involves an agreement between the accused and prosecution under which, if the accused abides by specified conditions during the currency of the agreement and, for example, pays an agreed sum in compensation, the prosecution will be suspended and ultimately avoided.³⁹ A DPA cannot be entered into without the agreement of the Crown Court that the draft DPA is likely to be in the interests of justice and that its terms are "fair, reasonable and proportionate".⁴⁰ Thereafter, once the terms are agreed between the parties the court must again be asked for a declaration to the same effect.⁴¹ If the accused is later found by the Crown Court to be in breach of the DPA the court can either invite the prosecution to suggest a remedy or terminate the DPA.⁴² DPAs may only be entered into for certain offences,⁴³ predominantly economic offences. Interview respondents had differing views about the potential role of DPAs in the resolution of serious human rights / environmental harm cases. Respondents were anxious that the DPA model allowed companies and company directors to negotiate their way out of criminal liability scapegoating other less senior personnel who would be required to stand trial; concerns were also raised that they were unlikely to be appropriate in the context of the most serious cases. At the same time interviewees identified the degree of flexibility the DPA model could provide, in terms of compensation, the management and improvement of future corporate conduct (on pain of prosecution) and, potentially, reparations more broadly.⁴⁴ To ensure that DPAs were only available in appropriate circumstances, the regulator could be empowered to consult on the kinds of cases in respect of which a DPA might be an

of the company, the test requires that the indictable offence must have some relevant factual connection with the management of the company (see *R v Creggy* [2008] EWCA Crim 394).

³⁴ S.2 CDDA 1986.

³⁵ See s.1 and s.5A CDDA 1986.

³⁶ *R v Seager* [2010] 1 W.L.R. 815 at [67].

³⁷ Companies (Disqualification Orders) Regulations 2009/2471.

³⁸ See <https://beta.companieshouse.gov.uk/register-of-disqualifications/A>.

³⁹ *Blackstone's Criminal Practice 2020* *ibid* [17] at D12.106.

⁴⁰ Schedule 17, para 7 Crime and Courts Act 2013; Crime and Courts Act and Deferred Prosecution Agreements Code of Practice, para 10, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf>. See also *Blackstone's Criminal Practice 2020* *ibid* [17] at D12.106.

⁴¹ Schedule 17, para 8 Crime and Courts Act 2013; Crime and Courts Act and Deferred Prosecution Agreements Code of Practice, para 11, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf>.

⁴² Schedule 17, para 9 Crime and Courts Act 2013.

⁴³ Schedule 17, Part 2 Crime and Courts Act 2013.

⁴⁴ See *Blackstone's Criminal Practice 2020* *ibid* [17] at D12.106.

appropriate disposal, and to produce a policy upon which such decisions would be based.

22. Despite the limitations discussed above, in certain complex cases where economic harm has been suffered abroad⁴⁵ and there has been sufficient political and prosecutorial will, measures have been taken to ensure that compensation is made available to victims abroad in an effective and targeted way. Specifically, in June 2018 in order to address the difficulties of adequately compensating victims abroad, in particular where members of the government of the victims' home State were alleged to have been complicit in the sanctioned criminal conduct, the Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) established the "*General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases*". This is a common framework set up "*to identify cases where compensation is appropriate and act swiftly in those cases to return funds to the affected countries, companies or people*"⁴⁶ and sees the various Departments undertake to "*work collaboratively with the Department for International Development (DFID), Foreign and Commonwealth Office (FCO), Home Office (HO) and HM Treasury (HMT)*".

Alternative routes to criminal liability

23. There are also alternative routes to criminal liability which ought to be considered as part of the process of designing a new BHR regulatory framework.
24. The Proceeds of Crime Act (POCA) 2002 provides a range of criminal and civil law options for action that target the financial benefit generated by offences carried out in England and Wales and abroad. A money laundering prosecution may, where the proceeds of foreign offending are enjoyed in England and Wales, provide a solution to the problem of jurisdiction identified above at paragraph 17(c).⁴⁷ In the civil arena a similar approach would involve civil recovery of the proceeds of crime under Part 5 POCA 2002,⁴⁸ although such an approach, may not be an appropriate alternative to prosecution for the most serious offences.⁴⁹ At the time of writing, as far as is known,

⁴⁵ See Serious Fraud Office, *New joint principles published to compensate victims of economic crime overseas*, available at <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>.

⁴⁶ Ibid.

⁴⁷ See s.329(2A) Proceeds of Crime Act 2002 (Acquisition, use and possession).

⁴⁸ As of 31 January 2018, the POCA 2002 enables the requisite enforcement authority to forfeit, in civil recovery proceedings, the proceeds of conduct taking place overseas which "constitutes" or is "connected with" a gross human rights abuse or violation. The definition of a "gross human rights abuse" contained within s.241A POCA 2002 is particularly limited providing that in order to meet the definition there are three conditions all of which need to be met that: (1) the conduct must involve the torture or cruel, inhuman or degrading treatment or punishment of a person who sought to either (a) expose illegal activities involving public officials, or (b) "obtain, exercise, defend or promote human rights and fundamental freedoms"; (2) the conduct must have been carried out in consequence of the person having sought to either expose such illegality, or obtain, exercise, defend or promote human rights; (3) the conduct must have been carried out by a public official or a person acting in, or purported performance of, an official capacity. For the purposes of the Act conduct is "connected with" if it involves profiting from or materially assisting the activities in question, amongst other things. At the time of writing no such cases have been brought.

⁴⁹ Per Thomas LJ in *R v Innospec Ltd* [2010] 3 WLUK 784 at paragraph 38: "However there is a more important general principle. Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for

these routes have not yet been used by the various prosecuting or regulatory authorities to sanction companies or their senior directors for their role in serious human rights impacts or environmental harm abroad.⁵⁰

25. Efforts have been made by NGOs to use the sanctions regime to target companies known to be breaching sanctions and in so doing contributing to adverse human rights impacts abroad. The new sanctions regime set out in the Sanctions and Anti-Money Laundering Act 2018 enables a Minister to make sanction regulations including in circumstances where that Minister considers it appropriate to (A) “provide accountability for or be a deterrent to gross violations of human rights, or otherwise promote (i) compliance with international human rights law, or (ii) respect for human rights” and (B) “promote compliance with international humanitarian law”. The term “gross violations of human rights” is defined narrowly but includes conduct which constitutes or is connected with said abuse or violation; this includes profiting from, or materially assisting human rights abuses. The Act expressly provides for the potential application of sanctions to “a body of persons corporate or unincorporate, any organisation and any association or combination of persons”.⁵¹ In terms of who is required to comply with any sanctions imposed, the government’s guidance explains that “the prohibitions and requirements arising [...] apply within the United Kingdom and in relation to the conduct of all UK persons wherever they are in the world. UK persons include British nationals, as well as all bodies incorporated or constituted under the law of any part of the UK. Accordingly, the prohibitions and requirements imposed by these Regulations apply to all companies established in any part of the UK, and they also apply to branches of UK companies operating overseas”.⁵²

IV Criminal liability – Important Considerations

26. In light of the obstacles above, prosecutions for a new offence of failing to prevent serious human rights violations could form an integral part of the proposed new BHR regulatory framework. Important aspects of the proposed offence which dispense with the need to identify the directing mind and will of the company per the identification principle outlined above are considered in this section, in advance of our wider consideration of the proposed key features of a BHR regulator in section V.

criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of cooperation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.”

⁵⁰ This is to be contrasted with the use of civil recovery powers in connection with offences of bribery and corruption which up until the advent of DPAs were regularly used by the SFO as a means by which to tackle corporate criminality, including in the case of *Mabey v Johnson* where the SFO sought to recover the dividends paid to a shareholder in the convicted company, see <https://www.telegraph.co.uk/finance/financial-crime/9011796/SFO-targets-criminal-companies-dividends.html>.

⁵¹ S. 9 Sanctions and Anti-Money Laundering Act 2018.

⁵² See the government’s published guidance in relation to the Global Sanctions Regulations 2020, available at: <https://www.gov.uk/government/publications/global-human-rights-sanctions-guidance/global-human-rights-sanctions-guidance>. See also s. 21 Sanctions and Anti-Money Laundering Act 2018.



Key considerations

27. In the context of criminal prosecutions, the new BHR regulatory framework must engage with and resolve key issues.
28. *What conduct calls for criminal prosecution?* In the interests of certainty, the conduct which attracts criminal liability must be clearly defined. Whilst it is beyond the scope of this report to suggest what conduct should be classified as “serious”, so as to merit criminal prosecution according to the Principal Elements document, there are certain matters relevant to the drafting of the proposed legislation that are identified here. Firstly, under existing UK *failure to prevent* laws, for a company to be liable to prosecution the underlying or predicate conduct (i.e. the conduct that the company in question failed to prevent) must be criminal according to domestic law.⁵³ We consider this to be a necessary limitation. That conduct must be clearly defined describing not only the criminal act but also the necessary accompanying state of mind for the person committing said act.⁵⁴ In order to ensure focus on the most serious cases, we would suggest the legislation provide that the *failure to prevent* offence should apply only in relation to predicate criminal offences carrying a maximum sentence of imprisonment of a specified period of time or more.⁵⁵ Where some or all of the conduct complained of has taken place abroad consideration will also have to be given as to the basis upon which that conduct becomes justiciable in the UK, including whether or not there should be a dual criminality requirement (a requirement that the conduct is criminal not only in the UK but also in the state in which the conduct occurred). Finally, there is a general prohibition in English criminal law, just as there is in Article 7(1) European Convention on Human Rights, on the retroactive application of criminal laws so as to penalise conduct which was not criminal at the time when the relevant act or omission occurred. The BHR regulator should act consistently with the requirements of Article 7 ECHR.⁵⁶

⁵³ This means that just as it would be a criminal offence under domestic law for a company to fail to prevent a defined human rights abuse it would also be a criminal offence under domestic law to carry out that abuse as a principal or accessory. This is to prevent the perverse situation where it would be a criminal offence to fail to prevent an act that you could not be prosecuted for committing as a principal or accessory. What this means in terms of violations of human rights law is that where a given violation would not ordinarily be criminal under existing domestic law or where the existing law’s application to corporate actors is unclear this would need to be remedied in order for the failure to prevent offence to bite in relation to that conduct or violation. This would involve amending existing legislation or creating new offences which criminalised the conduct complained of. These new and amended offences, in addition to any existing offences, would then need to be clearly incorporated into the legislation setting out the failure to prevent offence. See also s. 7 Bribery Act 2010 and s. 45 and 46 Criminal Finances Act 2017.

⁵⁴ By way of example the necessary state of mind for the person (corporate or otherwise) committing the predicate conduct (i.e. the conduct the company failed to prevent) is clearly spelt out in s.7 (1) Bribery Act 2010 which requires that the briber “bribes” intending: (a) to obtain or retain business for the company in question, or (b) to obtain or retain an advantage in the conduct of business for the company in question. “Bribes” is defined in s.1 and s.6 of the Act where the necessary state of mind for the commission of the plain offences is set out.

⁵⁵ See, for example, article 2 Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006/1070 which removes the need for dual criminality in cases where (with a few minor exceptions) the predicate conduct was not unlawful under the law of the foreign country in which it occurred but where it would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the UK if it occurred there.

⁵⁶ Article 7 states: “(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (2) This article shall not prejudice the trial and punishment of any person for any act or omission

29. *What conduct should expose a person to individual criminal liability?* The Principal Elements document envisages individual criminal liability for a failure by a senior manager to prevent serious human rights / environmental impacts. As noted elsewhere, none of the existing UK failure to prevent offences make provision for the prosecution of individuals for their part in the company's failure. There are clear difficulties in attributing individual responsibility for corporate omissions, particularly in the context of complex corporate structures or a large board or management structure. By contrast, in anti-money laundering legislation a particular role has been created for a nominated officer (conventionally the money laundering reporting officer) who, having been so identified, can more easily be held accountable for omissions.⁵⁷
30. *Jurisdictional scope: who should the regulator be able to regulate?* As outlined above, establishing jurisdiction over conduct that takes place abroad can be difficult. In general, some kind of nexus with the UK is required, in the context of criminal law that is either that a relevant element of the conduct took place in England and Wales or the UK or that the suspect has a sufficient personal link to the UK, normally by being a UK national. These limitations exist because to allow the UK Courts jurisdiction over conduct anywhere in the world by anyone, even in the absence of a sufficient nexus to the UK, would risk infringing the sovereignty of other States and would run counter to international comity. In the context of the regulator then, the question of who falls within scope is a particularly important one. Even if, as Zerk notes,⁵⁸ the focus is on the parent company and jurisdiction is established either through its place of incorporation or by the fact that it is carrying on a business in the UK there are still important questions to be answered concerning which companies and relationships a parent company ought to be responsible for, taking into account UNGP 13.⁵⁹ UNGP 13 extends business enterprises' sphere of responsibility to include those adverse human rights impacts it causes or contributes to through its own activities and those adverse human rights impacts which are directly linked to its operations, products or services by its business relationship, even it has not contributed to those impacts. These questions will need to be answered in any enacting legislation or guidance.⁶⁰

which at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

⁵⁷ See ss. 331 and 332 Proceeds of Crime Act 2002. The Dutch Child Labour Due Diligence Act (2019) has similar powers. Where a company's child labour due diligence compliance officer breaches their obligations, such as by a violation of implementation of a due diligence process that causes serious bodily harm, the compliance officer themselves incur personal criminal liability. This can be punishment of a maximum of 2 years' imprisonment and a €20,500 fine. See Appendix D for more information about the Dutch law.

⁵⁸ Dr. Jennifer Zerk of The Corporate Responsibility (CORE) Coalition Ltd, *Filling the Gap: a new body to investigate, sanction and provide remedies for abuses committed by UK companies abroad*, December 2008, available at https://corporate-responsibility.org/wp-content/uploads/2014/07/Core_Filling-the-Gap_deco8.pdf. Illustrating her point, Zerk gives the example of a parent company that has invested in a joint venture in another country and considers the level of shareholding or involvement by the UK parent that will bring the joint venture within the scope of UK management standards (and therefore within the scope of a complaints mechanism).

⁵⁹ UNGP 13 provides 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 area directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts.”

⁶⁰ See ss. 7 and 8 Bribery Act 2010 and ss. 44 - 46 Criminal Finances Act 2017.

31. *Adequacy of remedy.* The current sentencing powers of the criminal courts are not best suited to providing reparations to victims of serious human rights abuse or environmental harm and whilst the Deferred Prosecution Agreement (DPA) model discussed above might offer more flexibility in this regard, a DPA will not be the appropriate result in every case, and particularly not in some of the most serious cases, and cannot be forced upon a defendant company. The model set out in the Joint Principles document agreed between the SFO, CPS and NCA in the context of bribery, corruption and economic crimes is indicative of the potential of both collaboration between prosecuting agencies and diplomatic involvement in reparations, but reveals the difficulties of ensuring that any compensation reaches the appropriate people, particularly in cases where there has been state involvement in the criminal conduct in question. It is recognised that such an approach is vulnerable to criticism. The flexibility offered by civil sanctions is considered below in section V and we anticipate that suitability of remedy will be an important feature of the BHR regulatory framework.
32. *Cross border evidence gathering.* As is outlined above, gathering evidence and information in cross-border cases can be challenging, particularly in cases where the interests of the host state are not aligned with those of the entity seeking the evidence / information. The availability of evidence gathering and sharing is considered in more detail below in section V.
33. *How does the regulator’s monitoring of a company’s due diligence processes affect a statutory defence of “acting with due care to prevent human rights abuses etc”?* ⁶¹Interview respondents expressed concern that a finding by the regulator that a company’s due diligence processes were in line with statutory requirements might protect that company from future civil or criminal liability where a statutory defence of “adequate due diligence” or similar existed. This is a concern that has implications not only for the design of the monitoring function of the regulator and whether or not it outsources aspects of that function⁶² but also for the relationship between the regulator’s compliance role and its enforcement role.
34. This is not straightforward. The BHR regulator will have to confront the fact that if it is to actively assess the adequacy of a company’s due diligence processes as part of its monitoring function (i.e. outside of a regulatory action / prosecution for failing to prevent human rights abuses) that assessment will impact on the feasibility of any future regulatory action / prosecution for a failing to prevent human rights abuses offence with an adequate due diligence style defence. The nature of that impact and whether or not it will or should prevent the regulatory action / prosecution in question will depend on the specific facts of the case, in particular when the abuse complained of occurred, when the regulator’s assessment of any due diligence process took place and the nature of the latter’s finding.⁶³

⁶¹ This is the defence suggested in the Principal Elements document.

⁶² See, for example, the Financial Conduct Authority’s skilled persons regime which gives the regulator (the FCA) the power to obtain a view from a third party (a ‘skilled person’) about aspects of a regulated firm’s activities if it is concerned or wants further analysis. See <https://www.fca.org.uk/about/supervision/skilled-persons-reviews>; see also the FCA Handbook, SUP 5.3 Policy on the use of Skilled Persons available at <https://www.handbook.fca.org.uk/handbook/SUP/5/3.html>.

⁶³ In his paper, *Towards Mandatory Due Diligence in Global Supply Chains* (2020) Olivier De Schutter argues “even where such monitoring exists, the fact that a company has adequately discharged its human rights due

35. In the course of our research it was suggested that a way to deal with these concerns might be to empower the regulator to prioritise issuing best practice guidance, as opposed to assessing the due diligence processes of large numbers of companies in furtherance of its monitoring function. There are a number of advantages with this approach: it would enable the regulator to focus its resources on those assessments it did do; it would incentivise companies to meet the requirements of best practice guidance; and it would provide a standard against which any due diligence processes being assessed in the context of a regulatory action / prosecution for failing to prevent human rights abuses could be judged. These advantages have to be balanced against the potential significant disadvantages of not assessing due diligence processes more widely, including the risk that human rights abuses / environmental damage that could be prevented by robust due diligence processes are not therefore prevented.
36. *Overlap between existing environmental regulation and any new offence.* Consideration will also need to be given to the relationship between existing environmental regulation which provides for criminal prosecution and/or civil penalties and any new due diligence requirement / failure to prevent offence. Environmental protection is a particularly complex area of regulation and this overlap⁶⁴ is an area which will require additional research. This is all the more important given the current status of a new Environment Bill.⁶⁵ By way of illustration, at present, environmental harms in the UK are regulated by a number of intersecting regimes and regulators.⁶⁶ The principal regulatory authority in England, the Environment Agency (EA), regulates a range of business sectors and activities,⁶⁷ and is responsible for setting environmental standards, monitoring/investigating compliance with such standards, and, where necessary, taking enforcement and prosecution action for non-compliance.⁶⁸ Its regulatory scope includes responding to serious pollution incidents (illegal waste activities, containment and control failures, discharges of sewage effluent), waste crime (large-scale illegal dumping, illegal waste shipments and exports, hazardous waste), and industrial emissions/pollution.⁶⁹ While it is supported by a number of other regulators and law enforcement,⁷⁰ over 90 per cent of all English non-local authority prosecutions for environmental crime are

diligence obligation should not lead to grant it immunity from civil liability claims by victims.” De Schutter’s point which relates to civil claims (i.e those brought by victims against a company) as opposed to regulatory action / prosecution is distinguishable from the context here.

⁶⁴ Often Environment Act offence will be much easier to prosecute as they are effectively strict liability offences and provide specific provision for the liability of company officers etc.

⁶⁵ See <https://services.parliament.uk/bills/2019-21/environment.html>.

⁶⁶ Environment regulation involves a wide range of legal instruments including EU Directives, UK Acts and statutory instruments, as well as byelaws.

⁶⁷ Examples include waste management (waste storage, treatment, incineration and biowaste), industry (chemicals, metals, refineries and fuels, paper and textiles, cement and minerals, construction and mining), radioactive substances (use, storage and disposal), water companies (discharges from sewage treatment works, abstraction of surface and groundwater), and onshore oil and gas.

⁶⁸ It also works closely with other UK environmental bodies, namely Natural Resource Wales, the Scottish Environment Protection Agency, and Northern Ireland Environment Agency.

⁶⁹ See further Environment Agency, *Regulating for people, the environment and growth*, 2013, p.11, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/312703/LIT_9902.pdf.

⁷⁰ Prosecution of environment matters may also be undertaken by other public authorities, including Natural England, the Drinking Water Inspectorate, the Forestry Commission, the Health and Safety Executive, HM Customs and Excise, the National Wildlife Crime Unit, or local authorities.

brought by the EA.⁷¹ It exercises a number of enforcement powers, including issuing enforcement notices, revoking permits, imposing fines, and making referrals to criminal prosecution.⁷²

37. In addition, there are a number of existing transnational mechanisms regulating liability for corporate environmental harm which will need to be factored into the scope of the role of the BHR regulator.⁷³ The EU Environmental Liability Directive (ELD), for example, establishes “a framework of environmental liability based on the ‘polluter pays’ principle to prevent and remedy environmental damage”.⁷⁴ Liability under the ELD is broader than the existing national environmental liability systems, and is distinct from tort law or civil liability. It requires operators to carry out necessary preventative measures where there is an imminent threat of environmental damage from the operator’s activities. If environmental harm occurs, it imposes a duty on the operator to remedy the damage and bear the financial costs of remediation and restoration.⁷⁵ Such damage is not confined to the effects of pollutants, but extends also to damaged habitats or biodiversity.⁷⁶

V Key Features of a BHR Regulator

Introduction and section methodology

38. In this section we review features of cross-sectoral regulators tasked with preventing harm, addressing human rights violations and providing consumer redress through the regulation of competition, and consider potential key features of the BHR

⁷¹ Valsamis Mitsilegas, Malgosia Fitzmaurice, Elena Fasoli, “Fighting Environmental Crime in the UK: A Country Report”, (Study in the framework of the EFFACE research project), 2015, pp 61-62, available at https://efface.eu/sites/default/files/EFFACE_Fighting%20Environmental%20Crime%20in%20the%20UK.pdf.

⁷² See further ‘Environment Agency enforcement and sanctions policy’, available at <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy>.

⁷³ See for example: Directive 2004/35/CE (Environmental Liability Directive), Directive 2008/99/EC (Environmental Crime Directive), and Directive 2009/123/EC (Ship-source Pollution Directive).

⁷⁴ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56, recital 2. The framework for implementation of the ELD in the UK is relatively devolved. For example, in England, the competent authorities are the Environment Agency (for damage from Environment Agency-regulated activities, all water damage, and biodiversity damage in inland waters), Natural England (for biodiversity damage on land), local authorities (for land damage plus damage from local authority-regulated activities), and the Marine Management Organisation (for biodiversity damage in marine waters): see further Environmental Liability Directive 2004/35/EC- UK report to the European Commission on the experience gained in the application of the Directive, available at https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/UK.pdf. The ELD came into force in April 2004, and has been implemented in the UK by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (SI 2015/810) in England, and by the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (2009/995) in Wales. Following Brexit, the Environment (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/458) (‘the 2019 Regulations’) were made on 27 February 2019, which come into force at the end of the transition period under the UK-EU withdrawal agreement (i.e. 31 December 2020). The 2019 Regulations were made under the EUWA, and make technical amendments to the 2015 Regulations to ensure that they remain operable after Brexit.

⁷⁵ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56, article 5(1).

⁷⁶ Valerie Fogleman, “The duty to prevent environmental damage in the environmental liability directive; a catalyst for halting the deterioration of water and wildlife” (2020), ERA Forum, pp 707-721, available at <https://link.springer.com/article/10.1007/s12027-019-00586-6>.

regulator, within the context of risk based outcomes focussed regulation in the UK.⁷⁷ We do this considering the issues raised above in the context of both criminal and civil liability, and noting that the purpose of the BHR regulator is to prevent harm and to provide access to a remedy.

39. A regulator is an entity with powers conferred by statute to use legal tools to achieve policy objectives. Regulators now play a much bigger role in delivering social as well as economic objectives and are increasingly tasked with regulating more complex situations.⁷⁸ They deliver significant social benefits to individuals, wider society, as well as to business through increased consumer confidence.
40. Like the Health and Safety Executive (HSE), Environment Agency (EA) and Equality and Human Rights Commission (EHRC), the BHR regulator will reach across sectors to protect people from harm and regulate a broad spectrum of business entities, ranging from those with high levels of corporate responsibility and human rights engagement, to those who turn a blind eye or wilfully engage in bad practice or criminal activity. Importantly, it will be explicitly concerned with activities in foreign jurisdictions.
41. A question for consideration, beyond the scope of this research project, is whether the duties set out in the human rights due diligence law will be placed on public sector bodies, as well as companies. Such bodies are required to report under the Australian Modern Slavery Act (2018) for instance.
42. The setup of a regulator – in particular its design and structure – is critical to its effectiveness. The BHR regulator will need a variety of compliance and enforcement tools and below we consider key potential attributes.
 - a. Institutional framework, governance, capacity and resources
 - b. Guidance and capacity building
 - c. Complaint handling and investigation
 - d. Inspection and monitoring
 - e. Adjudication
 - f. Enforcement

Institutional framework

43. Typically, regulators may be part of the executive branch of government, or independent of it. An independent statutory regulator is legally separate from the executive and has its own internal governance framework and employees, and carries out its activities without seeking permission or approval from a sponsoring government department. Examples include the UK's financial and sectoral regulators,⁷⁹ who are considered to have built up a respected level of independence.

⁷⁷ See, for example, Cabinet Office, *Regulatory Futures Review*, January 2017; The Regulatory Enforcement and Sanctions Act 2008; Department for Business, Energy & Industrial Strategy, *Better Regulation Framework (Interim Guidance)*, March 2020; Better Regulation Delivery Office, *Regulator's Code*, April 2014.

⁷⁸ OECD, *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy (2014), p.15

⁷⁹ For example Ofgem, Ofcom and Ofwat.

Where new regulation is required to address rapid market changes in an established sector, an existing regulator may establish a subsidiary. For instance, the Payment Systems Regulator was established as a subsidiary of the Financial Conduct Authority.

44. The BHR regulator will break new ground in seeking to prevent human rights abuses by business at the same time as driving forward compliance with mandatory human rights due diligence guidelines. The regulation of this activity is far from established, and the BHR regulator will require strong monitoring, investigation and enforcement powers, which will likely focus on international activities. A high level of independence will be crucial to all stakeholders, and we recommend that the BHR regulator is legally separate from the executive, and has a robust internal governance framework. Strong leadership will be key and those occupying prominent positions should be recruited through the public appointments process: it will be essential that they have a strong regulatory background or substantial experience gained from working at a major regulator which exercises a significant enforcement function.

Funding

45. The funding arrangements of the BHR regulator will be critical to its success. The scope of the regulator's responsibilities and powers will ultimately determine the level of funding required. Appendix C provides a good indication of the budget required: it is self-evident that robust inspection and enforcement mechanisms must be sufficiently resourced to fulfil an effective high quality service.⁸⁰
46. The source of funding also requires careful consideration: as the OECD recognises, "It should not influence the regulatory decisions and the regulator should be enabled to be impartial and efficient to achieve its objectives."⁸¹
47. A levy on regulated entities may be used to generate funding.⁸² This has the attraction of reducing the burden on the Treasury and potentially promoting business engagement through links to incentives to improve the conduct of regulated entities; however, funding by a charge or levy may potentially undermine the perceived independence of the BHR regulator.
48. A significant number of UK regulatory entities are funded by government grant. National Audit Office figures for 2015 – 2016 indicate the combined total expenditure of the 90 or so UK regulators to be more than 4 billion.⁸³ With this in mind, the funding of regulatory entities has been closely reviewed in recent years and will need to demonstrate value for money.⁸⁴
49. The set-up of the BHR regulator will require principled⁸⁵ methods of sharing the burden of costs between the Treasury and regulated entities. One way of doing this is

⁸⁰ Principle 6, OECD Best Practice Principles for the Governance of Regulators.

⁸¹ Principle 6, OECD Best Practice Principles for the Governance of Regulators.

⁸² The Financial Conduct Authority, The Payment Systems Regulator, The Financial Service Ombudsman, The Fundraising Regulator.

⁸³ National Audit Office, *A Short guide to Regulation*, September 2017.

⁸⁴ Regulatory Futures Review, above note 77.

⁸⁵ In this context 'principled' refers to the relevant Nolan principles: integrity, objectivity, accountability, and transparency.

to ensure revenue from fines and penalties is retained as a partial source of funding: for example, the Payment Systems Regulator retains a portion of revenue collected from financial penalties to cover certain enforcement costs.⁸⁶ Consideration may also be given to the use of self-assurance schemes – alongside robust enforcement mechanisms – which are used to reduce the costs burden in lower risk sectors where there is a high level of compliance.

Guidance and capacity building

50. Regulators provide extensive published guidance to those they regulate, including practical advice and guidance on how regulated entities should adhere to legislation and how enforcement mechanisms operate.⁸⁷ The development and publication of this material plays an integral role, including:
- a. Establishing the regulator’s expertise, competency and reputation;
 - b. Achieving greater compliance from regulated entities already committed to good practice;
 - c. Raising awareness amongst other stakeholders and the public about what is expected;
 - d. Producing organisation specific guidance aimed at companies and investors, tailored to specific sectors;
 - e. Informing stakeholders and the public about how to make a complaint;
 - f. Setting a benchmark for investigation and enforcement, where failure to adhere to guidance may be used in evidence, or may extinguish reliance on a particular defence.⁸⁸
51. It is important to state – as identified by Jennifer Zerk⁸⁹ – that voluntary or statutory guidance alone will not deter bad behaviour. Instead it must be recognised as *one* of the building blocks in the enforcement system.
52. Interview respondents considered it would be important for the BHR regulator to work with regulated entities to build their capacity. This would include providing guidance to all levels of regulated entities on the existence of the mandatory due diligence duty and failure to prevent offence, as well as *what* entities should be doing to achieve compliance. Research by regulators⁹⁰ and the OECD⁹¹ indicates that *one* significant reason for a lack of compliance by regulated entities is a lack of knowledge and understanding of what they are required to do. In terms of capacity building

⁸⁶ One key recommendation of the Regulatory Futures Review was to allow the Treasury to allow regulators greater freedom to recover enforcement costs through charges, rather than covering costs from grant in aid.

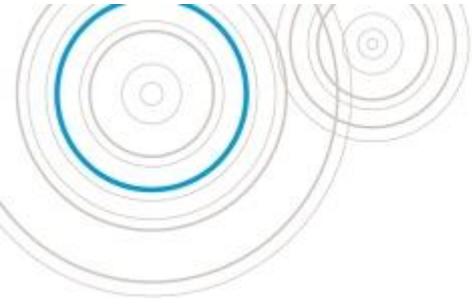
⁸⁷ See section 27 of the Regulatory Enforcement and Sanctions Act 2008.

⁸⁸ For example, failure to follow the FSA’s voluntary ‘Meat Industry Guide’ (or a suitable alternative) may prevent a food business operator from being able to rely upon a statutory due diligence defence if the non-compliance resulted in a prosecution.

⁸⁹ Dr Jennifer Zerk, “Corporate liability for gross human rights abuses: Towards a fairer more effective system of domestic law remedies, A report prepared for the Office of the UN High Commissioner for Human Rights”, (2013), available at <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

⁹⁰ OECD, *Best Practice Principles for Regulatory Policy, Regulatory Enforcement and Inspections* (2014).

⁹¹ OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (2000).



more generally, interview respondents also considered that it would be helpful, at an appropriate stage in its development, for the BHR regulator to work with the relevant authorities in other jurisdictions in order to facilitate evidence gathering and information sharing.

53. During the consultation phase, we were asked whether the BHR regulator would play a part in determining and setting out definitions of whether entities are “causing, contributing or linked to” breaches of due diligence or failure to prevent requirements. One option would be for the BHR regulator to issue guidance explaining that activities causing, contributing or linked to breaches will be caught by the relevant offences. The underlying statute governing the due diligence requirements and failure to prevent offence will need to make clear that “causing, contributing or linked to” is also captured.
54. At present, the Equality and Human Rights Commission provides some guidance to companies on human rights and business issues.⁹² We recommend that a BHR regulator develops the necessary expertise to publish expert compliance guidance on mandatory due diligence guidelines and the failure to prevent offence, in order to build compliance through a programme of education and engagement. This is in line with an outcomes based risk focussed approach to regulation.⁹³ However it is vital that the BHR regulator is provided with standard yet robust civil sanctions and the power to refer cases for criminal prosecution for non-compliance.

Internal quality assurance

55. Increasingly, regulatory frameworks make substantial use of the internal quality assurance by regulated entities.⁹⁴ This is driven by costs benefits, but importantly, it seeks to lessen “creative compliance”, where regulated entities seek to exploit legal loopholes to get round due diligence, rather than taking ownership of their responsibility to change corporate behaviour.
56. So-called ‘earned recognition’ schemes are a relatively new approach to internal quality assurance and are used by a number of regulators including the FSA, and others such as the Drinking Water Inspectorate and the Driver and Vehicle Standards Agency. Examples of international schemes focusing on business and human rights include the Rainforest Alliance 2020 Certification Program and the linked UTZ certification program. The domestic examples are voluntary schemes open to regulated entities who can demonstrate a strong track record of compliance and adherence to standards, with robust systems and processes in place. The schemes are then linked to statutory regulation because those with a strong track record then benefit from a reduced burden of enforcement. An important part of this system is that the converse is true for regulated entities who do not “do the right thing” – enforcement powers are concentrated on taking action against these high-risk businesses. However, there must be sufficient confidence in regulated entities before earned recognitions schemes are appropriate. We consider that the regulation of business and human rights may need to mature before such schemes can be properly considered by the BHR regulator. Standalone ‘self-certification’ is not recommended:

⁹² See <https://www.equalityhumanrights.com/en/advice-and-guidance/human-rights-and-business>.

⁹³ Reference *Regulatory Futures Review* above note 77.

⁹⁴ Reference *Regulatory Futures Review* above note 77.

it can play a role in a mature regulatory framework, but only alongside criminal and civil sanctions as a way of helping regulators target enforcement action.

Enforcement – introduction

57. The Regulatory Enforcement and Sanctions Act 2008 gave “qualifying regulators” new powers to impose civil penalties and sanctions to respond to acts or omissions by regulated persons and to secure compliance with restrictions, requirements or conditions, in the event of breach, and to respond to relevant acts or omissions. As demonstrated by the table in Appendix C, civil sanctions are broad and flexible, covering financial penalties, but also for example – in the context of the environment – include actions for the clean-up and restoration of environmental damage. We anticipate that alongside the criminal prosecution and penalties discussed, civil sanctions will play a key role in tool kit of the BHR regulator.

Complaint and concern handling

58. The ability to receive and investigate complaints and concerns about the conduct of regulated entities is a trigger for some forms of enforcement action. We anticipate that the BHR regulator will be able to take action following the receipt of relevant information (including through its own investigations), but that complaints will be an important route to investigation. In Appendix E we include a case study illustrating how the mechanism described below may work in practice.
59. We suggest that the BHR regulator has the same broad powers as other regulators to receive and investigate complaints and concerns.⁹⁵ *Any person* who suspects that an entity has failed in its due diligence procedures or failed to prevent adverse human right / environmental impacts can complain to the BHR regulator and ask it to investigate. Complaints might be made by members of the public, victims, civil society organisations, the police or other regulators, employees of the regulated entity or other regulated entities.
60. In line with other domestic regulatory models, the BHR regulator should be able to act on information it receives from any source that may suggest a breach of due diligence or failure to prevent requirements. This should alleviate the burden on rights holders who are afraid to speak up, or do not know how to, thus helping to mitigate access to justice concerns
61. The BHR regulator will need to set a complaints handling procedure, capable of advising a complainant whether the matter complained about is within its remit and provide details on how to submit a complaint and of the legal threshold to be met before a complaint can be investigated. The specific access to justice concerned referred to immediately above should be built into the procedure. The threshold should be low and may take into whether the complaint:
- a. Related to a regulated entity;
 - b. Relates to a suspected breach of a due diligence or failure to prevent requirement.

⁹⁵ For example, the CMA.

62. In recent years a number of regulators including the CMA and the Independent Office for Police Conduct (IOPC) have been conferred powers to consider “super complaints”. For example, under the Enterprise Act 2002, “designated consumer bodies” have the power to make a “super-complaint” about features, or a combination of features of a market that appear to be significantly harming the interests of consumers.⁹⁶ The market in question may be regional, national or supranational, although the CMA can only consider the effects within the UK.
63. We recommend that careful consideration is given to whether a super complaint scheme could be operated by the BHR regulator: we anticipate that relevant NGOs, civil society organisations and global and national union federations could make super-complaints about features of business activities which are causing significant and widespread human rights abuses. In appropriate cases, a super complaints mechanism is likely to provide a high profile, swift investigation into serious human rights breaches, with a range of enforcement options available. For clarity, only in the context of “super complaints” might it be necessary to place a limitation on who brings a complaint.
64. The regulators referred to in Appendix C all receive – and to varying degrees promote – complaints from whistleblowers from businesses about competitors, and employees about their employer. We anticipate the BHR regulator will receive complaints from whistleblowers and will need to provide guidance to ensure disclosures are protected by the Public Interest Disclosure Act 1998. The receipt of complaints from whistleblowers will help to further mitigate obstacles to access to justice from rightsholders, which was raised as a concern by those who took part in the consultation exercise.
65. The Groceries Code Adjudicator provides a good example of a regulator which encourages a wide range of sources – suppliers, trade associations and other representative bodies – to provide information to assist in its regulatory activities.

Inspection and monitoring

66. The proposed investigatory powers of the BHR regulator are discussed in more detail immediately below. As noted above at paragraph 33, inspection and monitoring (and related approval of the activities of regulated entities) may inhibit criminal prosecutions in certain circumstances. Nonetheless we recommend that a BHR regulator is given inspection and monitoring powers as part of its toolkit.
67. The BHR regulator should have inspection and monitoring powers permitting it to assess, on a regular and on-going basis, whether regulated firms remain in compliance with BHR guidelines. These supervisory powers serve both preventative and remedial objectives. They assist in uncovering noncompliant processes or potential risks before they crystallise into actual violations, but also serve to prevent further escalation of harm in cases where risks have already crystallised.⁹⁷

⁹⁶ *Regulatory Futures Review*, above note 7777.

⁹⁷ This is similar to the Financial Conduct Authority’s (FCA) approach to supervision and monitoring. See further FCA Supervision Handbook, SUP 1A.4.2.

68. It is essential that the supervisory powers of the BHR regulator be sufficiently broad and flexible to cater for the wide-ranging nature of businesses regulated, the complexities associated with differing firm sizes, and the different countries, contexts and degrees of risk in which firms operate. Accordingly, we set out below possible supervisory and monitoring powers and tools for the BHR regulator (which may be used in conjunction with its investigatory powers below).⁹⁸
- a. *Regular reporting requirements* – there should be a power to compel periodic filing of corporate due diligence reports consistent with the BHR regulator’s guidelines, as well as regular certifications by regulated firms that they are complying with those guidelines.⁹⁹
 - b. *Compliance visits / On-site inspections* – in-person visits provide an opportunity for the BHR regulator to understand the applications of the guidelines in practice, and increase the awareness of sector or industry-specific risks. Compliance visits should generally include a pre-visit questionnaire to assist in forming a preliminary view and delineating the parameters of the visit, a review of the firm’s due diligence and training procedures, as well as a meeting with the nominated officer or other employee tasked with ensuring BHR compliance at the firm.
 - c. *Desk-based reviews* – these reviews mirror the processes of an on-site compliance visit, but are conducted off-site. Specific examples of such reviews include targeted questionnaires, telephone interviews and analysis of any proactive, self-referred information by regulated firms to ascertain compliance and/or the need for intervention.
 - d. *Thematic reviews / Systematic sampling* – there should be regular thematic reviews structured around current or emerging risks in certain industries or operating contexts. This permits the regulator to ensure resources are efficiently expended on targeted and relevant risk areas.¹⁰⁰ Such reviews may be carried out via compliance visits, desk-based reviews, or a combination of both.
 - e. *Use of third party investigators or auditors* – where compliance monitoring requires specific industry or geographic expertise, the regulator should have the

⁹⁸ These proposed powers are drawn from a number of comparable supervisory powers available to other regulators, including the Financial Conduct Authority, the Treasury (via its Financial Action Task Force, charged with monitoring the Anti-Money Laundering and Counter Terrorist Financing (AML/CTF) regime, and the Gambling Commission). See further: <https://www.gov.uk/government/publications/anti-money-laundering-and-counter-terrorist-finance-supervision-reports/anti-money-laundering-and-counter-terrorist-finance-supervision-report-2013-14>.

⁹⁹ As noted in Principles 17 and 18 of the UN Guiding Principles, undertaking corporate due diligence “should be on-going throughout the life of an activity, include all internationally recognised human rights as a reference point, and extend to the company’s suppliers”. It is proposed that the substance of such reports and certifications be consistent with Principle 21, namely that they should: (a) be of a form and frequency that reflect an enterprise’s human rights impacts, (b) provide sufficient information to evaluate the adequacy of the enterprise’s response to the particular human rights impact involved, and (c) not pose risks to affected stakeholders, personnel, or legitimate requirements of commercial confidentiality.

¹⁰⁰ Further analysis may be undertaken in respect of the processes by which the FCA selects and undertakes thematic reviews for high-risk areas, as well as how the HSE undertakes systematic sampling of particularly dangerous activities, processes or areas.

power to appoint third party investigators or auditors to assist it in information gathering and assessing the degree of compliance.¹⁰¹

Investigatory powers

69. If upon receipt of a complaint, a regulator considers there is “a case to answer” an investigation takes place. Appendix C illustrates the broad range of investigatory powers that are available, including the powers to request that any person provide information relevant to an investigation, and the powers to enter premises with a warrant in order to seize relevant material.
70. The scope of regulators’ powers depends on a number of factors, including the seriousness of the conduct / harm which is the subject of investigation, and the difficulty of obtaining evidence through other sources. The evidence of interview respondents is that the BHR regulator is likely to receive and investigate complaints involving serious criminal conduct causing widespread harm, where it is difficult to gather evidence. We therefore recommend that the BHR regulator has the following powers, which must be exercised reasonably and proportionately taking into account the nature of the matter under investigation:
- a. The power to require any person (not just a person suspected of a breach of a prohibition) to provide any document or information that it considers “relates to any matter relevant to the investigation”;
 - b. The power to require any individual to answer questions or otherwise furnish information on any matter relevant to the investigation;
 - c. The power to enter premises (without forced entry) to request material relevant to the investigation;
 - d. The power to enter premises with a warrant (with forced entry) and to seize and or copy material relevant to the investigation;
 - e. The power to prosecute or fine any person who fails, without reasonable excuse, to comply with a request of the kind set out at a. and b. above; and
 - f. The power to prosecute any person who intentionally, or recklessly, makes a statement in response to a formal information request of the kind set out at a. and b. above which is false or misleading in a material particular. Consideration should also be given to making it a criminal offence to falsify, destroy or otherwise dispose of documents (or to cause or permit these things to happen) which the individual in question knows or suspects are, or would be relevant to the investigation.
71. Efforts should be made to ensure that where there is a sufficient nexus to the jurisdiction, these powers (70 a. and b. above) are applicable to those operating overseas.¹⁰² In terms of enforcing these powers, where, for example a company fails

¹⁰¹ For example, the FCA has powers to appoint a Skilled Person to provide a report into a firm’s activities(s 166, Financial Services and Markets Act 2000). The Skilled Person should be nominated and approved by the FCA, and have the skills necessary to report on the matter concerned. The FCA also has powers to appoint investigators in general and specific cases (sections 167 and 170, FSMA 2000).

¹⁰² See *R(KBR) v Director of the SFO* [2018] EWHC 2368 (Admin) in the context of the Serious Fraud Office’s request for documents held abroad by a non-UK parent company with a UK subsidiary. The court held that the request (the s.2(3) CJA 1989 notice) which had been served on the non-UK parent could operate extraterritorially

to comply and then remains outside the jurisdiction the BHR regulator is likely to have to rely on existing mutual legal assistance (the formal legal mechanism through which evidence is obtained from other countries) arrangements with the host State.

Market investigations

72. As well as investigating specific infringements, consideration should be given to whether the BHR regulator should be given powers to conduct market investigations. As referred to in Appendix C, the CMA has the power to conduct a “market investigation” which is an in-depth investigation of a whole market sector which does not appear to be working satisfactorily. These investigations focus on industry wide behaviours and practices rather than the workings of individual companies. Significant remedies are available to the CMA, including structural remedies such as the forced sale of certain parts of companies, behaviour remedies such as point of sale prohibitions or price controls, or measures aimed at improving customer information, as well as the power to make recommendations to government for changes to policy/regulation. CMA market studies are long and detailed; however, this is necessary in view of the far reaching structural remedies which the CMA may use, for example, ordering the sale by BAA of certain airports; ordering sale of hospitals by private health care companies; and implementing point of sale prohibitions in the PPI market. The apparent effectiveness of this tool in the realm of competition law has led the European Commission to very recently consider an EU version of the UK’s market investigation regime.¹⁰³ The European Commission has labelled their proposed regime the ‘New Competition Tool’ (“NCT”). It has been presented as an additional helpful mechanism to deal with structural competition issues across markets (both the structural risks for competition and the structural lack of competition) that cannot be effectively addressed by existing competition law tools. Like the CMA, the NCT would permit EU authorities to initiate market investigations without any prior findings of competition rule infringements, and to proactively impose structural/behavioural remedies where it determines there to be ineffective competition.
73. We consider that a “market investigation” power is likely to prove an essential tool for the BHR regulator. Human rights abuses often become endemic in particular sectors, with a myriad of behaviours and practices by a range of actors contributing to widespread abuse. The equivalent of a BHR market investigation has the potential to gain an in depth understanding of how human rights abuses are perpetuated within specific sectors, and opens the door to the use of a number of targeted remedies; however, detailed consideration will be required in terms of the appropriateness and transferability of the market investigations regime to the BHR context. There are clearly advantages: for example, such a tool may be helpful in pre-emptively

as there was a sufficient connection between the company and the jurisdiction. The relevant factors were: payments central to the SFO’s investigation of the UK subsidiary had required the claimant’s approval and been paid by the claimant; the approvals involved high-ranking employees; it was impossible to distance the claimant from the transactions central to the SFO investigation; the claimant’s corporate officer had previously been based in a UK office. However, some factors were not relevant: the mere fact that the claimant was a UK company’s parent company; the claimant’s previous cooperation with the SFO investigation; the fact that the claimant’s employee attended the meeting. Voluntary cooperation should not be discouraged by giving rise to a risk of accepting extraterritorial jurisdiction. This case is currently pending appeal before the Supreme Court.

¹⁰³ The European Commission has published an Inception Impact Assessment, and is in the process of open public consultations (to close on 8 September 2020). See further <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>.

addressing structural risks and systemic failures that would otherwise be difficult to prove or remedy under traditional legal duties and theories of harm (as discussed above). Further, this focus on *ex ante* regulation is particularly germane in the context of human rights and environmental abuses, where the nature of such violations may mean that restoration or rectification of wrongs are difficult to implement or quantify (or are indeed irreversible in some cases). From the perspective of victims at least, *ex ante* regulatory prevention may be more desirable than the cure of *after the event* regulatory remedies.

Adjudication and penalties

74. At the conclusion of an investigation regulatory bodies decide what action to take. There are a number of possible outcomes:
- a. Adjudication by the regulator and the imposition of a civil sanction, a failure to comply with this civil sanction could lead to criminal prosecution;
 - b. Referral for criminal prosecution;
 - c. No further action.

Adjudication in the context of civil sanctions

75. The decision to find that an infringement has occurred is usually made by a specialist adjudication team (see Appendix C).
76. Adjudication in the context of civil sanctions is based on the regulator's consideration of the evidence gathered without recourse to lengthy and expensive oral hearings or court procedures. The decision is made "on the papers" following a formal adjudication procedure,¹⁰⁴ during which an adjudication team will decide whether the legal test for establishing an infringement is met together with the appropriate penalty. Some regulators (for example the CMA) make provision for oral hearings, and we anticipate that this will be an issue to be explored with stakeholders during the setting up of the BHR regulator's overarching framework.¹⁰⁵

Penalties

77. As mentioned above, civil sanctions provide an opportunity for regulators to take action where criminal prosecution is either disproportionate, or where no effective sanction is otherwise available.
78. The columns referring to the EA and HSE in Appendix C provide illustrations of the civil penalties used by regulators, and we recommend that detailed consideration is given to conferring those powers to the BHR regulator:
- a. Variable financial penalties of up to 10% of turnover on an entity found to have infringed the failure to prevent offence;

¹⁰⁴ This procedure will include provision for warning notices, inspection of documents, and the right to respond in writing before the final determination.

¹⁰⁵ Fairness is context dependent, and an oral hearing is not essential in context of civil sanctions.

- b. Acceptance of *enforcement undertakings* (EUs) from regulated entities to encourage corrective behaviour where an entity has failed to comply with due diligence guidelines;
 - c. Acceptance of *third party undertakings* where an entity must promise to compensate those affected by human rights violations;
 - d. The issue of *compliance notices* requiring steps are taken within a stated period to ensure that an offence or breach does not continue or happen again;
 - e. The issue of *restoration notices* requiring specified steps within a stated period to secure restitution of the early position, as far as this is possible; and
 - f. The issue of *stop notices* which will prevent a person from carrying on an activity until it is undertaken properly.
79. The regulatory scheme will need to incorporate criminal prosecution for failure to comply with a civil sanction, which would include a potential criminal prosecution for failing to comply with an order to undertake adequate due diligence.
80. Further detailed research and consideration should be undertaken in connection with *restoration* and *stop/prohibition notices*, which will only be binding on the entity incorporated in England and Wales. The latter might be applied in range of circumstances: requiring an entity to immediately stop an activity which is causing human rights abuses (via a stop notice); preventing an entity engaging with a supplier who is causing human rights abuses; requiring an entity to investigate or due diligence check the funding of certain activity preventing the funding of certain activities. A restoration notice may require a parent company to ensure its subsidiary restores the circumstances that existed before the breach occurred (e.g. returning land where it has been illegally appropriated; cleaning up after pollution and re-establishing biodiversity). In this regard, consideration will also need to be given to the nature of the relationships between parent companies and subsidiaries.
81. During consultation the extent to which the BHR regulator could order a regulated entity to take action abroad was questioned, in particular in connection with clean-up / environmental restoration, compensation or restitution to victims, cessation of a given activity or disengagement with a given supplier, and how these orders would be monitored and enforced.
82. Whilst it is a novel approach, we consider that the BHR regulator can fairly, reasonably and lawfully be given statutory power to prohibit certain business activities taking place in the UK *until* the regulator is satisfied that its foreign subsidiaries have complied with requirements requiring clean-up, environmental restoration, compensation or restitution to victims.
83. To illustrate by way of example, in circumstances where parent company A (within the jurisdiction of the BHR regulator) is liable in connection with illegal land appropriation of subsidiary B (out of the jurisdiction), by virtue of its purchase of a controlling amount of voting stock a restoration order could state:
- a. Company A must not exercise any shareholder voting rights in respect of subsidiary B, until the latter has provided compensation or restitution of property to the victims of the illegal land appropriation.

- b. A failure of Company A to comply with a. will result in criminal prosecution or a fine.
84. Where a parent company exercises managerial control, a restitution notice may prohibit company A from exercising managerial activity until subsidiary B has provided restitution.
85. During our consultation it was also suggested the BHR regulator should have the power to order the regulated entity to suspend purchasing (or other activities) until remediation has been achieved. Along the lines suggested above this could be achieved using a restoration notice, with a clause requiring the entity to stop specified activities in England and Wales, until remediation has been achieved in the relevant transnational jurisdiction.
86. Where restitution of land is no longer possible, during consultation it was mentioned that “basket funding” could be ordered, where a parent and/or subsidiary is required to put money into a shared pot, managed by relevant victim representatives to be used as required/useful by the affected community. This could be included in a restitution order: the BHR regulator would need to ensure it considered appropriate evidence on the funding mechanism to ensure among other things that it was not capable of misuse.
87. In considering the imposition of civil sanctions for parent-subsidiary structures spanning multiple jurisdictions, it is essential that the nature of the relationship between the parent and subsidiary (or other foreign entity in the supply chain) also be examined. As discussed above, whether the parent company and subsidiary are to be treated as separate legal entities in respect of liability for the harm caused, or indeed whether civil sanctions imposed on parent companies have the desired consequences for the offending subsidiary, will largely depend on the relationship, connection, and/or degree of control the parent company has over the subsidiary, and this will need to be reflected in formulating stop/restitution and prohibition notices.
88. Where the liability of a parent company for the actions of its subsidiary has already been established, as indicated immediately above, civil sanctions imposed on a parent company will be focused on compelling a foreign subsidiary to take action overseas. To take notices a step further, in the case of a compliance notice issued to a UK-domiciled parent company, the BHR regulator could also mandate specific steps to be taken, on a group-wide basis, to minimise the risk of the violation recurring. More specifically, this may also include:
- a. imposing management commitments (reviewing in detail the BHR regulator’s guidelines for compliance, promoting a culture of compliance, ring-fencing adequate resources to fund the proposed changes);
 - b. conducting both group-wide and entity-specific risk assessments that review the systemic or root causes of apparent violations;
 - c. implementing internal control mechanisms and training (designing written policies and procedures for BHR compliance, with escalation channels clearly communicated to all staff, together with regular training for such policies); and

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- d. ensuring audit mechanisms exist that are accountable to the board of the parent company.
89. When considering the appropriate penalties or orders to be imposed, it will be important that the BHR regulator carefully consider the evidence of victims and rights holders, either through consideration of the evidence heard during the case, or through a specific victim impact statement.
90. As discussed above, in serious cases, where a director of a company is guilty of an offence the BHR regulator should also be given the powers to apply to the court for an order under section 1 of the CDDA 1986 to have them disqualified as a director for up to 15 years. We anticipate that the effect would be the same as the competition disqualification order described Appendix C.¹⁰⁶ In the consultation phase, we were asked about liability of procurement directors. Once the BHR regulator has established its regulator priorities, including analysing the role of those responsible for procurement and the extent to which this impacts on abuses, it should carefully assess whether to introduce the equivalent to the Senior Managers and Certification Regime (SMCR) operated by the FCA and PRA, which is aimed at deterring financial misconduct by improving individual accountability and awareness of conduct issues.

Follow on damages claims

91. Interview respondents considered the ability to bring civil damages claims against corporate entities for human rights violations plays a vital role in achieving redress as well as having a deterrent effect. The Principal Elements document provides a powerful new basis of claim for civil damages for failure to prevent adverse human rights and environmental impacts of companies' domestic and international operations, products and services including in their supply and value chains, and will facilitate standalone damages claims capable of issue without regulatory findings or proceedings. We also anticipate that enabling legislation setting up the BHR regulator would make provision for an infringement finding by the BHR to be admissible in civil proceedings, thereby facilitating "follow on damages" claims which would substantially reduce the fact finding burden on claimants.

Referral to criminal prosecution

92. As noted above in Section III, powers of criminal investigation and prosecution are reserved for the most serious regulatory breaches and it is vitally important that regulatory bodies use their criminal powers to combat serious and wilful conduct. Criminal prosecutions frequently play an important part of the enforcement work of the majority of regulatory bodies under review, including the HSE, EA, the CMA and FSA (see Appendix C).
93. The pursuit of a criminal prosecution requires significant resources and expert knowledge of the rules of criminal evidence and criminal procedure. Of the regulators examined the HSE, EA and FSA have dedicated criminal enforcement units. We consider that a unit within the BHR regulator may be given that mandate, but that it would be sensible to ensure an established prosecution agency (most likely the CPS)

¹⁰⁶ We have not included "winding up petitions" because they are not a civil sanction, rather they are a means of a creditor seeking to close a company to liquidate assets to pay a debt.

has concurrent prosecution powers (governed by a formal concurrency agreement) to enable the inevitable capacity building needed by the BHR regulator.

94. It is our view that the regulator should not itself undertake criminal prosecutions for the most serious instances of the failure to prevent offence, but should instead have the ability to refer conduct that meets that threshold to the appropriate prosecuting authority which might be the Crown Prosecution Service, or depending on the harm, the Environment Agency. This approach is dependent however on the enhancement of the CPS / EA with employees with specific business and human rights training and/or expertise. Referrals by the BHR regulator and follow-on prosecutions by the CPS / EA should be governed by a formal concurrency framework (discussed above).

Mediation

95. Regulators in the UK do not typically engage in mediation or alternative dispute resolution (ADR) processes. For example, in the financial services industry, the Financial Conduct Authority co-exists with the Financial Ombudsman Service (FOS),¹⁰⁷ in energy, Ofgem refers consumers to the Energy Ombudsman,¹⁰⁸ and for communications, Ofcom directs complaints to the Communication and Internet Services Adjudication Scheme (CISAS) or Ombudsman Services.¹⁰⁹ This reluctance to be involved as mediator between complainants and regulated entities appears to stem from the perceived incompatibility of their dual roles as both complaints handler and regulatory enforcer.¹¹⁰
96. As part of wider efforts to encourage ADR, the UK implemented the European Alternative Dispute Resolution (ADR) Directive in 2015. The UK Regulations implementing the EU Directive establish ‘competent authorities’, which are generally the relevant regulators in the respective regulated industries (e.g. the FCA, Ofgem and CAA).¹¹¹ These ‘competent authorities’ are empowered to assess, designate and certify independent, third party ADR providers to undertake domestic and cross-border mediation and ADR services between complainants and the regulated

¹⁰⁷ See Memorandum of Understanding between FCA and FOS (18 December 2015).

¹⁰⁸ See Memorandum of Understanding between Ofgem and the Energy Ombudsman (updated July 2017).

¹⁰⁹ See e.g., Ofcom, *Review of Alternative Dispute Resolution Schemes* (31 March 2017), https://www.ofcom.org.uk/data/assets/pdf_file/0034/99664/adr-review-call-inputs-2017.pdf.

¹¹⁰ For example, the Civil Aviation Authority (CAA) historically engaged in mediation services between the aggrieved consumer and the regulated airline concerning issues such as flight delays, cancellation, and compensation. However, in a 2017 review of complaint handling processes, the CAA noted that its role as enforcer of consumer protection legislation required consideration of wider systemic and structural issues of non-compliance. In contrast, its complaints handling role required application of the law to a “myriad of different individual circumstances and in which, often, the facts of the case were not clear or there was legitimate uncertainty in the application of the law to a specific set of facts”. The “confusion between these two roles in the eyes of the public” lead to an expectation that the CAA would naturally take enforcement action against the airline where it had (albeit in its complaints handling role) found against that airline. Other issues also arose, including that the costs incurred in complaints handling were generally not being passed onto airlines (and even if they were, UK airlines would be disproportionately prejudiced, distorting incentives and giving non-UK airlines a ‘free ride’). See further Civil Aviation Authority, *ADR in the aviation sector – a first review (CAP 1602)*, 2017, at pp 9-11, https://publicapps.caa.co.uk/docs/33/CAP1602_ADR%20in%20the%20aviation%20sector%20%E2%80%93%20a%20first%20review.pdf.

¹¹¹ Schedule 1, The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.

entities.¹¹² An important question for further consideration is whether the existing National Contact Point (NCP) could be so designated, or whether an alternative provider would be needed given the limitations of the NCP model.

97. In the context of business human rights, mediation provides a feasible alternative to the often cost-prohibitive and complex litigation process, especially given that most victims are generally disadvantaged in terms of financial capacity and technical expertise, and usually encounter issues with jurisdictional standing. While the BHR regulator should be designated a ‘competent authority’ under Schedule 1 of the Regulations, we recommend that the ADR process for BHR violations go further than the Directive’s obligations, and adopt a similar framework to ADR as set out in the Memorandum of Understanding between the FCA and the FOS.¹¹³ Accordingly, it is suggested that the BHR regulator and a designated ADR provider (possibly the NCP) should possess the following characteristics:
- a. The designated ADR provider should operate a scheme that resolves disputes between complainants and BHR-regulated entities efficiently and with less formality, as an alternative to the civil courts;¹¹⁴
 - b. The BHR regulator should produce and publish the designated ADR provider’s official rules and complaints-handling processes, and appoint its chairman and board of non-executive directors;¹¹⁵
 - c. The designated ADR provider should investigate individual complaints, but should be operationally independent from the BHR regulator;¹¹⁶
 - d. The designated ADR provider should share information, trends and common issues encountered with the BHR regulator to assist in the BHR regulator’s future approach and priorities;¹¹⁷ and
 - e. The designated ADR provider should be funded by an annual levy on BHR-regulated entities, together with individual case fees paid for by corporate entities, thereby making the service free for complainants.¹¹⁸

Appeal against civil sanctions

98. The BHR regulator will require an independent appeal mechanism. This may consist of an independent panel or tribunal with relevant powers to consider appeals against regulatory enforcement decisions and penalties. Criminal convictions will continue to

¹¹² See The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 and The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (‘the Regulations’).

¹¹³ Memorandum of Understanding between FCA and FOS (18 December 2015). The relationship between the FCA and FOS is governed by both paragraph 3A(2) of Schedule 17 of the Financial Services and Markets Act 2000, as well as by the Alternative Dispute Resolution (ADR) Directive (and the various UK regulations implementing the Directive).

¹¹⁴ Memorandum of Understanding between FCA and FOS (18 December 2015), at paragraph 6(b).

¹¹⁵ Memorandum of Understanding between FCA and FOS (18 December 2015), at paragraphs 7-10.

¹¹⁶ Memorandum of Understanding between FCA and FOS (18 December 2015), at paragraph 6(d).

¹¹⁷ Memorandum of Understanding between FCA and FOS (18 December 2015), at paragraphs 17-19.

¹¹⁸ See further Financial Ombudsman Service website, ‘Governance and Funding’, <https://www.financial-ombudsman.org.uk/who-we-are/governance-funding>.

fall under the jurisdiction of the Crown Court (for summary only offences) or the Criminal Court of Appeal. As a matter of law, decisions of the BHR regulator will also be amenable to judicial review.

Publication of information

99. As referred to above, a key part of the role of the BHR regulator will be to raise the public profile of its work. This will be achieved by a publication scheme which may include:
- a. Publishing guidance so that all stakeholders, including regulated entities, victims and survivors, civil society organisations and other regulators know what standards are expected;
 - b. Publishing a list of all regulatory / criminal findings on a specially designated section of its website, including details of the breaches and penalties;
 - c. Possible publication of a specific list of all those regulated entities with adverse findings;
 - d. Consultees suggested publication of a “no go” list of suppliers with adverse findings;
 - e. Publication of annual report synthesising the data on the cases it has investigated, and illustrating trends and key areas of concern.
100. During the consultation process it was felt that the benefit of a publication scheme is that as well as “naming and shaming” it would also have a positive ripple effect.

National co-operation

101. Co-operation between regulatory bodies plays a significant role in achieving policy objectives. Co-operation may be formal, such as where regulators have “concurrent powers” to enforce powers to limit certain behaviours. For example, the CMA has joint responsibility for enforcing the Competition Act 1998 with the UK’s sector regulators¹¹⁹ with specific concurrency arrangements setting out a framework for co-operation. One of the key benefits of the arrangements is the combining of expertise, for example the CMA’s experience of the procedural and substantive issues involved in bringing cases and economy wide perspective, and the sector regulators’ detailed knowledge and technical understanding of their sectors.
102. The Regulatory Futures Review also recognised that there was significant untapped scope for improved information and data sharing between regulators.¹²⁰ In recent years a number of initiatives have developed, particularly in the connection with online services. A good example is the recently set up Digital Regulation Cooperation Forum (DRCF) established by the CMA, the ICO and Ofcom to support regulatory

¹¹⁹ The Civil Aviation Authority (CAA), Office of Communications (Ofcom), Gas and Electricity Markets Authority (Ofgem), Financial Conduct Authority (FCA), Payment Systems Regulator (PSR), NHS Improvement (NHSI), Office of Rail and Road (ORR), Water Services Regulation Authority (Ofwat), Northern Ireland Authority for Utility Regulation (NIAUR).

¹²⁰ Regulatory Futures Review above note 77, p.4.

coordination in online services, aimed at harnessing collective expertise on the cross over between data, privacy, competition, communication, and content.

103. We anticipate that the BHR regulator will have formal concurrency arrangements with prosecuting authorities, and it will be important to ensure those arrangements allow for the sharing of relevant expertise, possibly within the context of a statutory guidance. Similarly we consider that the BHR regulator will wish to coordinate its coordinate regulatory activities with the EHRC, the EA, and the Office for Product Safety and Standards (OPSS)¹²¹ and the Financial Reporting Council (which currently has limited oversight of human rights disclosures).¹²²

Supranational cooperation

104. National level regulators play an essential role in building expertise and sharing it to build capacity on an international scale. The FSA leads on many committees within DEFRA dealing with food hygiene, food additives, and contaminants. In turn, DEFRA is lead UK government department for the Codex Alimentarius Commission (CAC) which was established by the Food and Agriculture Organisation of the United Nations (FAO) and the World Health Organization (WHO) to develop international food standards, guidelines and codes of practice.
105. It is strongly anticipated that the national regulation of business and human rights will lead to capacity building among international regulators, which can be fed back into supranational business and human rights organisations, for example, the UN Working Group on Business and Human Rights; the UN Human Rights Council, which will in turn helps the development of international standards; but also investigation tools and sector expertise.
106. A further area for research and development is the extent to which it may be possible for national business and human rights regulators to develop an alert system, which enables information sharing about developing human rights violations in which businesses may be implicated. This might facilitate urgent notifications and early preventative measures by the UK's BHR regulator. Further consideration might be given to the European-wide Rapid Alert System for Food and Feed (RASFF) which enables information concerning possible food and feed safety issues to be shared between members and ensures that urgent notifications are sent, received and responded to collectively. In the context of the BHR regulator, warnings might lead to the regulator issuing relevant guidance to companies, or sending warning letters to business or relevant NGOs.
107. As set out above at paragraph 32, cross-border evidence gathering can encounter obstacles, particularly in contentious cases, and relies on strong relationships with overseas regulators / prosecuting authorities / local law enforcement. We envisage the capacity building efforts set out at paragraph 50 would be vital in enabling cross-

¹²¹ The OPSS is part of the department for Business, Energy and Industrial Strategy (BEIS), it is the Competent Authority (CA) for the Timber Regulation and enforces the Regulation on behalf of the Department for Environment, Food and Rural Affairs (DEFRA). The OPSS will also be responsible for the enforcement of the EU Conflict Minerals Regulation.

¹²² On 11 March 2019, the Business Secretary announced that the Financial Reporting Council will be abolished and replaced by a new regulator, the Audit, Reporting and Governance Authority.

border evidence gathering in addition to further consideration as to how the BHR regulator might fit within the existing, formal, Mutual Legal Assistance framework.

Future development of the BHR regulator

108. It should be recognised that regulators must have the ability to adapt the way they regulate to ever changing social and economic situations, as well as the opportunity to expand their operations as their expertise and competence grows. Regulators frequently lobby Parliament for changes to the scope of their powers. We recommend that the enabling legislation for the BHR regulator should include a formal power which permits it to ask the Secretary of State for changes to the scope of its regulation, to allow it to expand its powers to fit changing and ever more complex behaviours.

Prioritisation of resources

109. Appendix C provides illustration of the business planning cycles and strategy papers used by regulators to examine areas of high risk and to target regulatory action accordingly; notably, business planning plays a crucial part in directing the scope of regulatory activity. Stakeholders play a vital part of this process through participation in consultation processes. As a public body, the BHR regulator will be required to conduct fair and transparent consultations.¹²³ It would be open to civil society organisations to challenge an unfair consultation process in court through judicial review.
110. Extensive consultation will also be essential to the set up and on-going work of the BHR regulator. A number of interview respondents referred to the complexity of regulating business and human rights, given that a regulator would need to address activity across business sectors together with having to tackling wide-ranging human rights violations.
111. As noted, regulators tackle extremely complex behaviours, using a range of strategies, including through national and international co-operation. We consider that the NGO community will play a crucial role in helping to develop the strategy of the BHR regulator. The evidence gathered by NGOs provides vitally important information about sectors, businesses and practices which gives rise to significant cause for concern. This is likely to play a key role in policy-making and the development of the regulatory framework.
112. Engaging businesses will also be important: in particular, those entities seeking to comply with business and human rights norms will be able to provide regulators with information about existing internal standards, which will help them establish what is capable of being achieved, but also where there is room for improvement.
113. Engagement with all stakeholders will be needed to make the BHR regulator effective, and the information gathered during these processes will be coupled with complaint data, risk trend analysis and the findings from investigations to enable an understanding of key areas of risk and regulatory tasking.

¹²³ <https://www.gov.uk/government/publications/consultation-principles-guidance>.

Statutory Review Process

114. The BHR regulator should have clear review processes allowing its regulations and policies to be evaluated after their implementation. Like other regulators,¹²⁴ the BHR regulator should regularly engage in Post Implementation Reviews (PIRs). The PIRs will consider matters such as the original policy objectives, the extent to which the regulation / measure is achieving its intended effects, whether there are any unintended consequences (and if so, why), whether the regulation / measure is still required and remains the best option for those objectives, and whether improvements to reduce the burden on business and overall costs are possible. Stakeholder views and input (including those of regulated firms, government departments, business groups, and civil societies) regarding the effectiveness of the BHR regulation can feed into the review process in various ways – for example, stakeholder experiences can be used as part of the ‘evidence base’ for assessment of the regulatory policy, or data sets provided by stakeholders may add to the rigour of the review.
115. In addition, the BHR regulator, as with other UK regulators, should be subject to a statutory review mechanism for regulatory failure. This may be in circumstances where a significant human rights or environmental violation would not have occurred but for the BHR regulator’s acts or omissions. A comparable model to consider is the FCA regulatory failure regime. The FCA has a statutory duty to investigate and report on possible regulatory failure where there has been a significant failure to protect consumers, a significant adverse effect on the integrity of the UK financial system, or a significant adverse effect on effective competition, and the relevant events would not have occurred but for the regulatory failure.¹²⁵ Following the investigation, a report is prepared for the Treasury setting out the conclusions, any lessons learned, and further recommendations to reform that it considers appropriate, which is later published in full.¹²⁶

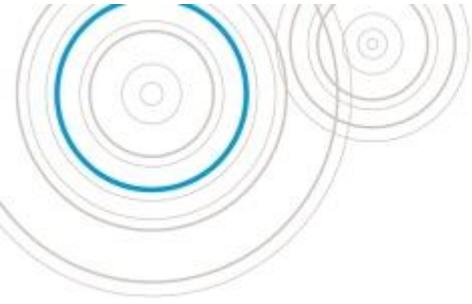
VI Conclusion

116. The report has explored the reasons why UK companies are rarely held accountable for cross-border human rights abuses. It has analysed how a dedicated, robust regulatory body with strong powers could add value to the enforcement of the proposed human rights due diligence law by introducing specialist expertise and advice relating to cross-border corporate human rights abuses and by increasing the likelihood of companies being held accountable for such abuses through dedicated enforcement procedures. It has put forward a number of proposals for how a regulatory body could best be designed to achieve the stated goals, informed by best practice from existing UK regulatory bodies. It has identified areas for further research. There is legitimate concern that introduction of statutory regulation of the human rights due diligence law without an appropriate investigatory and enforcement mechanism could act as a political fig leaf

¹²⁴ See e.g., the Department of Business Innovation and Skills, *Summary of BIS Regulatory Review Commitments* (dated March 2015), available at <https://www.gov.uk/government/publications/bis-regulatory-review-commitments>; see also the Health and Safety Executive PIR analysis, available at <https://www.hse.gov.uk/legislation/pir.htm>.

¹²⁵ Section 73, Financial Services Act 2012.

¹²⁶ See further Part 5, Financial Services Act 2012.



if only in the short-term; however, overall we consider a BHR regulator could act as the “champion” of the new due diligence regime as well as providing the essential framework for its enforcement, which is likely to be fragmented and slow to emerge if taken on by the existing agencies. With these factors in mind the next steps for the commissioning NGOs are to determine advocacy priorities going forward.

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APPENDIX A**Proposed UK Corporate Duty to Prevent Adverse
Human Rights and Environmental Impacts
Principal Elements
March 2020**

This document has been prepared by a coalition of UK civil society organisations who are working to strengthen corporate accountability for human rights abuses and environmental damage. It provides an overview of the principle elements that we would like to see included in new legislation. The document is a summary of our current position and is intended to facilitate dialogue with business, investors, lawyers, decision-makers and academics.

1. Commercial and other organisations have a duty to prevent adverse human rights and environmental impacts of their domestic and international operations, products and services including in their supply and value chains.
2. Commercial and other organisations must develop and implement reasonable and appropriate due diligence procedures to identify, prevent and mitigate adverse human rights and environmental impacts.
3. Commercial and other organisations must publish a forward-looking plan describing the procedures to be adopted in the forthcoming financial year, and an assessment of the effectiveness of actions taken in the previous financial year.
4. Commercial and other organisations, and their senior managers shall be subject to a civil penalty if they fail to develop, implement and publish a due diligence plan, or publish a misleading or inadequate plan, within a reasonable time.
5. Commercial and other organisations shall be liable for harm, loss and damage arising from their failure to prevent adverse human rights and environmental impacts of their domestic and international operations, products and services including in their supply and value chains.
6. It is a defence from liability for damage or loss, unless otherwise specified, for commercial and other organisations to prove that they acted with due care to prevent human rights and environmental impacts.
7. Commercial and other organisations, and their senior managers shall be subject to a criminal penalty if they fail to prevent serious human rights or environmental impacts.

APPENDIX B

January 2020

Corporate Duty to Prevent Adverse Human Rights and Environmental Impacts: Principal Elements and Commentary

Purposes

The purposes of this proposal in setting out the core elements of legislation for a corporate duty to prevent human rights and environmental impacts are threefold:

- To bring UK law more into line with the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Responsible Business Conduct (OECD)¹²⁷, as well as recent legislation and proposed legislation in other States, and to articulate a higher standard where possible;
- To encourage companies to consider and respond effectively to the impacts that their activities, and those in their value chain, may have on human rights and the environment; and
- To increase the accountability of companies for their human rights and environmental impacts, and assist alleged victims of these impacts to have clarity about their access to a remedy in the UK.

Existing health, safety and environmental standards in the UK should not be weakened or derogated from as a result of the proposed legislation.

This document has been written by CORE for UK NGOs and unions who are working together to develop an outline proposal for legislation in this area. This document is intended to form the basis of communication for engagement with any interested parties. There is scope for further development at a later stage where necessary, such as is indicated in the Commentary.

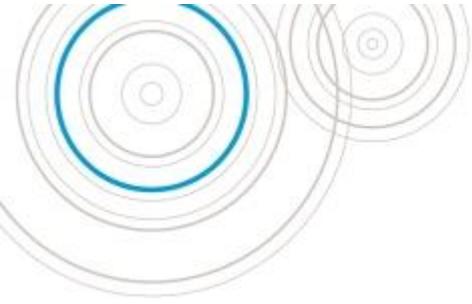
Principal Elements and Commentary

1. **Commercial and other organisations have a duty to prevent adverse human rights and environmental impacts of their domestic and international operations, products and services including in their supply and value chains.**

Commentary

- 1.1. The duty to prevent can be expressed as a failure to prevent adverse human rights or environmental impacts and includes a failure to prevent future impacts or to cease the continuation of a past impact, which is within the commercial or other

¹²⁷ UNGPs: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf;
OECD: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.



organisation's power to prevent, as well as including a failure to cease contributing to a human rights or environmental impact.

- 1.1.1. A duty to prevent human rights abuses was recommended by the Joint Committee on Human Rights in its Report: *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*.¹²⁸
 - 1.1.2. A duty to prevent exists in section 7 of the Bribery Act, so is familiar to commercial organisations and regulators.
 - 1.1.3. A duty to prevent is included in the 2019 draft of the Business and Human Rights Treaty (article 5)¹²⁹.
 - 1.1.4. The evidence from a number of companies before the Joint Committee on Human Rights in its Inquiry was that they would prefer clear legal guidance and sanctions in this area so that they operate in a more transparent market with best practices.
- 1.2. "Impacts" v "abuses" and "damages"
- 1.2.1. "Impacts" is the terminology used in the UN Guiding Principles on Business and Human Rights (UNGPs). This is defined by the UN's Interpretive Guide to the corporate responsibility to respect human rights as follows: "an 'adverse human rights impact' occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights."¹³⁰
 - 1.2.2. It could include impacts for which material damage may not have occurred, such as with some cultural and indigenous environmental impacts.
- 1.3. "Commercial organisations" is the terminology used in the Bribery Act and the Modern Slavery Act.
- 1.3.1. The definition of a "relevant commercial organisation" in section 7(5) of the Bribery Act is:
" (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
 (b) any other body corporate (wherever incorporated) which carries on a business, or part of business, in any part of the United Kingdom,
 (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
 (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
 and, for the purposes of this section, a trade or profession is a business."

¹²⁸ <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/686/686.pdf> (p.15).

¹²⁹ https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

¹³⁰ <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> (p.5).

1.3.2. This definition in the Bribery Act appears to be broad enough to include companies both incorporated and carrying on business in the UK.

- (a) It is not limited to domicile;
- (b) It is consistent with the Bribery Act and does not create a new definition of, for example, “corporate entity”;
- (c) The Dutch Child Labour Due Diligence Act applies to all companies trading in The Netherlands no matter their size or location of incorporation.

1.3.3. Any legislation or guidance might expressly include:

- (a) Financial organisations, including all investors, whether incorporated or not; and
- (b) Subsidiaries - as defined by reference to s.1162 of the Companies Act 2006.
- (c) It could be linked to the Stewardship Code, requiring investors to act in relation to environmental social and governance issues.¹³¹

1.3.4. The definition of “other organisations” could include, if expressly stated in the legislation or guidance:

- (a) Public sector bodies, including government departments, the NHS, local authorities, schools and higher education, and bodies such as export credit agencies and those undertaking public procurement, and all entities subject to the UK Human Rights Act. Government departments are expressly included in the Australian Modern Slavery Act;
- (b) Companies listed on UK stock exchanges;
- (c) Unincorporated trusts or other entities, such as some investors, which may not fall within this definition; and
- (d) Related corporations and joint ventures by the commercial organisation, which might not be included unless they were part of a supply or value chain.
- (e) Note that some charities and trade unions may be within the definition.

1.3.5. The UNGPs and OECD refer to all “business enterprises”, being broadly defined, within their scope. However, this is not a usual term in most of UK law.

¹³¹ <https://www.frc.org.uk/investors/uk-stewardship-code>.

- 1.4. There should be a threshold for which some commercial and other organisations are exempted from the obligations:
- 1.4.1. A threshold could exempt all or some small and medium-sized enterprises (SMEs).
- (a) The UNGPs note that human rights policies and processes may take different forms in small and medium-sized enterprises, which may have less capacity and more informal management structures than larger firms. The OECD Guidelines provide examples of how an organisation’s due diligence can be adapted to reflect its leverage and resources.¹³²
 - (b) The Bribery Act Guidance (p.6) provides that for “small or medium sized businesses the application of the [bribery] principles are likely to suggest procedures that are different from those that may be right for a large multinational organisation”.
 - (c) This could be set out in secondary legislation, as is provided for in the Bribery Act and Modern Slavery Act, or referred to directly in the legislation.
- 1.4.2. The threshold could be determined by number of employees **or** certain turnover **or** relevant sector.
- (a) This is done in the French Duty of Vigilance Law (based on employees), the proposed German Law on Human Rights Due Diligence (includes expressly the extractive sector) and the Modern Slavery Act (on turnover).
 - (b) If based on sectors, commercial organisations could be exempted or included on the basis of risks that their activities or operating location pose to human rights and the environment, such as the mining sector (as in the German proposed law).
 - (c) The threshold could alter over time, with the provision applying to larger firms initially with a view to expanding coverage at a later date (as happened with GDPR), though care is needed not to make it too limited in scope.
- 1.5. By focussing specifically on the supply and value chain, and not “business relationships”:
- 1.5.1. It avoids the need to define a “business relationship”, which is not defined in the UNGPs or the OECD.
- 1.5.2. It avoids any need to refer to “control” or any other defining terminology of a business relationship, and could leave this to the courts.

¹³² EU law refers to SMEs as being those with less than 250 employees or turnover of less than €50m: https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en.

- 1.5.3. The French Duty of Vigilance Law¹³³ uses the terminology of an “established business relationship” but this is not a term used in UK law.
- 1.6. A “value chain” is the terminology used in the UNGPs and OECD and the proposed German law.
- 1.6.1. A value chain is the full process or activities a company performs in order to add value to a good or service, including production, manufacturing, sale and marketing. In effect, it includes the sales of goods and services and not just the supply of them.
- 1.6.2. Although “value chain” includes “supply chain”, by referring to the supply chain specifically, it makes it clear that it is included.
- 1.6.3. The Modern Slavery Act does not define “supply chain”.
- 1.7. “Human rights” should be defined.
- 1.7.1. It could be defined as all international human rights treaties and instruments included in the UNGPs:
- (a) This includes all the international human rights treaties and instruments referred to directly and indirectly in the UNGPs (in the Commentary to Guiding Principle 12), so does not limit it to just the ICCPR, ICESCR and the ILO.
- (b) It is not limited to the rights included in international human rights treaties ratified by or other instruments supported by the UK, as the Commentary to Guiding Principle 11 notes that the corporate responsibility to respect human rights exists independently of a State’s fulfilment of its human rights obligations.
- 1.7.2. Reference for examples of corporate breaches of international human rights law are given in the UN Global Compact Report on Human Rights Translated.¹³⁴
- 1.8. “Environmental impacts” should be included and defined.
- 1.8.1. Environmental impacts are included in the French Duty of Vigilance Law, the proposed Swiss law and the draft German law.
- 1.8.2. Environmental impacts/damage often occur together with human rights impacts, such as in the *Vedanta* case.
- 1.8.3. A definition would encompass three elements:

¹³³ English summary at: https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf.

¹³⁴ https://www.unglobalcompact.org/docs/publications/HRT_final_web.pdf.

- (a) Breaches of environmental laws, regulations and administrative practices in the States in which the commercial organisations operate;
- (b) Acts contrary to relevant international environmental agreements, principles, objectives, and also standards identified in UK law; and
- (c) Impacts arising from commercial organisations' activities which contribute to climate change.

2. Commercial and other organisations must develop and implement reasonable and appropriate due diligence procedures to prevent adverse human rights and environmental impacts.

2.1. Definition of "Due diligence"

2.1.1. It needs to be defined in the legislation to ensure it is not confused with business due diligence (the latter occurs in a merger or acquisition).

2.1.2. To be consistent with the UNGPs and OECD, due diligence procedures should include:

- (a) Identifying and assessing actual and potential impacts on international human rights and the environment;
- (b) Taking appropriate measures to prevent, cease and remediate abuses;
- (c) Use leverage to mitigate any remaining impacts the organisation is unable to prevent;
- (d) Tracking implementation and effectiveness; and
- (e) Accounting for the actions taken.

2.1.3. It should be clarified that:

- (a) Due diligence should be proportionate to the severity and likelihood of the adverse impact on human rights and the environment;
- (b) Due diligence is ongoing and not one-off;
- (c) There may be a requirement to include operational grievance mechanisms in due diligence processes;
- (d) Reasonable and appropriate due diligence should be conducted with specific attention and consideration to groups or populations that may be at a heightened risk of vulnerability or marginalisation, such as children, women and indigenous people. Due diligence should be undertaken in a gender-responsive way, that takes account of the specific risks posed to women's right by corporate activities because of their gender, as well as taking account of vulnerable and marginalized groups such as children. Children can be disproportionately, severely and permanently impacted by business. As such human rights due

diligence by business should integrate children's rights. This is consistent with the UNGPs, as clarified by the UN Working Group on Business and Human Rights;

(e) When operating in, or where business relationships are operating in situations of armed conflict or post-conflict reconstruction, commercial organisations shall take account of international humanitarian law standards applicable during armed conflict; and

(f) This definition is not limited to the OECD in that there are other documents such as the UNGPs and the Equator Principles which are relevant, and the French Duty of Vigilance Law which refers to the UNGPs.

2.2. Reasonable and appropriate procedures should be developed and implemented in meaningful consultation with third-party stakeholders.

2.2.1. Third-party stakeholders include workers' organisations and social partners, where appropriate.

2.2.2. There is room for them not to be consulted where the company can demonstrate it would not be appropriate in all the circumstances.

2.2.3. The burden of proving this would be on the company.

2.2.4. This consultation process might be assisted by requiring the use of operational grievance mechanisms by companies.

3. Commercial and other organisations must publish a forward-looking plan describing the procedures to be adopted in the forthcoming financial year, and an assessment of the effectiveness of actions taken in the previous financial year.

3.1. Establishing a due diligence plan is consistent with:

3.1.1.s.172 and s414A-C of the Companies Act concerning a strategic report. Section 414C(7) requires that the strategic report of a quoted company must include information about "environmental matters (including the impact of the company's business on the environment)" and "social, community and human rights issues".

3.1.2. The UNGPs, OECD and the French Duty of Vigilance Law (which uses the word "plan", but "report" is normally used in UK law).

3.2. The due diligence plan to be published:

3.2.1. Is consistent with the Companies Act and the French Duty of Vigilance Law.

3.2.2. The Modern Slavery Act does not require any implementation as such, as it is a report on what the company has done.

3.2.3. It enables a company to include human rights and environmental impacts expressly as risk factors in their decision-making (with the primary risk to those who are impacted)

3.2.4. The plan should indicate not only the company's proposed procedures for the next year, but also explicitly indicate that it should include the risks they have identified and their assessment of them, to ensure oversight of their risk assessment process.

3.2.5. It could have other conditions:

- (a) Published on the commercial organisation's website and on a public website so designated;
- (b) Signed off by the directors; and
- (c) Have a compliance officer appointed to ensure this provision is complied with, as in the Dutch Child Labour Due Diligence Law and the German proposed law. This is the same effect as the Senior Managers regime in UK law.¹³⁵

4. Commercial and other organisations, and their senior managers shall be subject to a civil penalty if they fail to develop, implement and publish a due diligence plan, or publish a misleading or inadequate plan, within a reasonable time.

4.1. Introducing civil penalties for failure to undertake this duty to prevent:

4.1.1. Means that a company and senior director can be fined or if they do not develop, implement or publish a plan, or publish a misleading or inadequate plan.

- (a) Publishing a plan is not sufficient, as it has to be shown to be implemented.
- (b) The fine for a misleading report would not preclude other liability or other causes of action.

4.1.2. The civil sanctions could be extended, for example, to include an order to undertake the plan and implement it, and an injunction to cease an activity or remedy an impact.

4.1.3. The Modern Slavery Act is criticised for having no sanction for non-compliance.

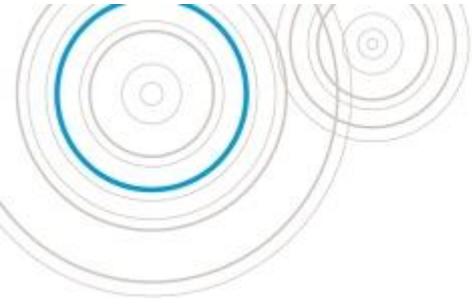
4.2. The time limits for compliance can be set out in legislation and can include a warning before action, as does the French Duty of Vigilance Law.

4.3. A designated independent regulator could be given the power to enforce these penalties requirement.

¹³⁵ <https://www.fca.org.uk/firms/senior-managers-certification-regime>.

- 4.3.1. The appointment of a regulator in this area is consistent with the Dutch Child Labour Due Diligence Act.
- 4.3.2. However, there is no existing regulator which might be appropriate.
- 4.3.3. A regulator would enable an independent reviewer to check compliance and to provide guidance:
 - (a) Legislation or guidance could specify that third parties can make representations directly to the commercial organisation regarding the adequacy or implementation of the due diligence plan;
 - (b) If the commercial organisation fails to respond satisfactorily, third parties could make complaints to the regulator;
 - (c) The designated regulator should be competent in business regulation and international human rights law and environmental standards; and
 - (d) The regulator must be independent of government.
- 4.4. As noted in Online Harms White Paper, in financial services, the introduction of the Senior Managers & Certification Regime has driven a culture change in risk management in the sector.¹³⁶
- 5. Commercial and other organisations shall be liable for harm, loss and damage arising from their failure to prevent adverse human rights and environmental impacts of their domestic and international operations, products and services including in their supply and value chains.**
- 5.1. This creates a civil liability model, where those harmed as a consequence of the company's failure to prevent impacts can bring a claim against the company.
 - 5.1.1. The issue of whether there has been a failure of the company's duty to prevent and whether reasonable and appropriate procedures have been put in place in all the circumstances of the case, is a matter of fact for the court to decide.
 - 5.1.2. This might include joint and several liability.
- 5.2. Jurisdiction
 - 5.2.1. UK civil liability law is likely only to extend to those companies domiciled in the UK.
 - 5.2.2. This is consistent with EU Brussels I Recast Regulation on Jurisdiction, which determines that a company is "domiciled" at the place where it has:
 - (a) Its registered office, or where there is no registered office or no such office anywhere, the place of incorporation or, where there is no such

¹³⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf



- place anywhere, the place under the law of which the formation took place;
- (b) Its central administration; or
 - (c) Its principal place of business.
- 5.2.3. It might include other companies in particular situations but would not automatically include any company which is simply doing business in the UK (in contrast with the general obligation in Element 1)
- 5.3. There is an issue as to whether investors and financial institutions could be subject to civil liability.
- 5.3.1. While they may not have “caused” the human rights or environmental impact, there could be a claim based on their contribution to the impacts through facilitating the ability of a company to undertake activities that caused the impacts or in their lack of using their leverage to mitigate their impacts.
 - 5.3.2. This is a developing area, with some shareholder action.¹³⁷
- 5.4. Consequences of liability:
- 5.4.1. There must be a remedy to the victims and not only action or penalties against the company.
 - 5.4.2. Injunctions and other preventative orders should be included.
 - 5.4.3. There may need to be a link to State-based mechanisms, such as restrictions on access to public procurement and export credit.
 - 5.4.4. There may be a disgorgement of profits, as with the Bribery Act.
 - 5.4.5. It might take into consideration the appropriate costs and benefits of the range of appropriate liability consequences that can be imposed on the public sector.
- 5.5. The terminologies of “cause”, “contribute” and “leverage” do not appear, though they are used by the UNGPs and the OECD.
- 5.5.1. These could be used in the guidance, rather than the legislation:
 - (a) In these circumstances it could include supervision/influence capable of being exercised over the policies and practices of the business partner on labour, human rights, and environmental issues (codes of conduct, mentoring, monitoring, sanctions)

¹³⁷ See also a recent OECD Report on Due Diligence for Responsible Corporate Lending and Securities Underwriting (October 2019); <https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-and-Securities-Underwriting.pdf>.

- (b) Market power of the commercial organisation; or
 - (c) Superior knowledge or practices of the commercial organisation on human rights and environmental issues;
- 5.5.2. “Materially benefit” might be included in the guidelines, as may “significant influence” (which has been terminology used in UK law for competition law) rather in the legislation, so as not to lead to definitional issues of control, etc., (as discussed above).
- 5.6. There is no direct provision for a company to be liable for loss and damage caused by their failure to undertake a reasonable and appropriate due diligence procedure.
- 5.6.1. This is provided for in the French Duty of Vigilance Law.
 - 5.6.2. It would, though, not usually enable any standing in UK law for a claim to be brought against a company.
 - 5.6.3. Enabling a civil liability claim, as provided here, would normally lead to the court concluding as to the reasonableness and appropriateness of any due diligence procedure.
- 6. It is a defence from liability for damage or loss, unless otherwise specified, for commercial and other organisations to prove that they developed and implemented reasonable and appropriate due diligence procedures designed to prevent human rights and environmental impacts.**
- 6.1. A defence is included:
- 6.1.1. This is consistent with the UK Bribery Act.
 - 6.1.2. Using “reasonable and appropriate” due diligence procedures was recommended by the Select Committee post-legislative inquiry into the Bribery Act.
 - 6.1.3. A defence provision is likely to have benefits for human rights and environmental protection:
 - (a) A defence can be an incentive for commercial organisations to undertake due diligence, as they are more likely to take due diligence seriously if they know that their procedures and actions can be used as a defence against a civil claim. This would, hopefully, reduce the number of failures to prevent human rights and environmental impacts, and so reduce the number of civil claims.
 - (b) The procedures must have been specifically directed at the particular harm at issue if they are going to provide a defence to liability.
 - (c) It would be made clear that a “tick-box” approach is not good enough.

- (d) It may require a company to produce more documents so as to make its defence, which then puts those documents in the public domain.
 - (e) It may require the company to show what leverage, if any, it has exercised.
- 6.2. Once adverse human rights or environmental harm is proven by the claimants, the commercial and other organisations shall have the burden of proving that they have put in place and implemented reasonable and appropriate due diligence procedures to prevent human rights or environmental impacts.
- 6.3. The inclusion of “unless otherwise specified” as a limitation on a defence is because:
- 6.3.1. There could be certain circumstances where a due diligence defence may not be applicable. This may be, for example, where the company is operating in a conflict zone where enhanced due diligence is expected, or the company is complicit in a crime against humanity.
 - 6.3.2. It would not apply where there is a direct requirement on a company to act under other laws (such a product liability), where there are no defences.
- 6.4. This is for the court to determine on the facts.
- 7. Commercial and other organisations, and their senior managers shall be subject to a criminal penalty if they fail to prevent serious human rights or environmental impacts.**
- 7.1. Creating a criminal offence for failing to prevent a serious human rights or environmental impact.
- 7.1.1. It is consistent with the Bribery Act and the New South Wales Modern Slavery Act.
 - 7.1.2. It indicates the severity of an action.
 - 7.1.3. It would enable an action against a company where there is, for example, a serious environmental impact without an affected person as a claimant, such as deforestation.
 - 7.1.4. However, a criminal offence where there is a fine or imprisonment does not provide any remedy to the victims, so it should be linked to a remedy for the victims.
- 7.2. There would need to be a definition of what is a serious human rights or environmental impact.
- 7.2.1. This can be difficult, as for the persons affected any impact is serious.
 - 7.2.2. The Proceeds of Crime Act (s241A) provides for sanctions against companies for “gross violation of human rights” only, being mainly torture. This may be considered to be too limiting.

7.2.3. The UNGPs (GP 14 and 24) refer to “severe impact”, as measured in accordance with its scale, its scope and its irremediable character.

7.3. There may be other consequences of a criminal offence:

7.3.1. The Sanction and Anti-Money Laundering Act and the Proceeds of Crime Act provide that money generated from activities that breach human rights are treated as proceeds of crime.

7.3.2. A criminal offence could lead to additional responsibilities for individuals, such as under the Senior Managers Regime within the Financial Conduct Authority, where one consequence is the prohibition of being a director in future, and the Bribery Act includes offences for individuals and for directors of companies (section 14 (2)).

7.3.3. It reduces the risk of a “tick-box” approach.

END

APPENDIX C

(Regulator Comparison Table)

ARRANGEMENTS (Functions & Powers)	FOOD STANDARDS AGENCY	ENVIRONMENT AGENCY	HEALTH AND SAFETY EXECUTIVE	COMPETITION AND MARKETS AUTHORITY	EQUALITY AND HUMAN RIGHTS COMMISSION
Funding arrangements	<p>FSA accounts detail funding from Parliament (£98m in 2018/2019) and revenue from contracts with customers and taxpayers including the following:</p> <ul style="list-style-type: none"> Income for official controls charged to industry Income for meat hygiene work charges to other government departments Assessments and consultations on radioactive discharges Income from Joint Nutrition Projects Milk and Dairy Hygiene – sampling (totalling £32m in 2018/29) 	<p>Total income of £442m, including £394m from contracts with customers (abstraction charges, EPR water quality, EPR installations, EPR waste, fishing licence duties, flood risk levies, nuclear regulations etc).</p> <p>£25m from EU grants, other grants and other operating income.</p> <p>£22m from contributions to flood defence schemes, deferred grants released.</p> <p>DEFRA provides the surplus of the funding as a financing contribution (£850m).</p>	<p>Funding from taxpayer (£129m) plus income (about £97m) in 2019/2020.</p> <p>Sources of income include fees and charges arising from biocides and plant protection, control of major accident hazards, enforcement of offshore safety legislation, and intervention fees.</p> <p>Commercial income – £17m.</p> <p>Funding from DEFRA for Brexit – £3m.</p> <p>Prosecutions – £4m.</p>	<p>Funded by Government Spending Rounds – it has a 2020/2021 total budget of £91m (allocated as a Resource Departmental Expenditure Limit budget), and a capital budget of £1m.</p> <p>This includes almost £20m ring-fenced for Brexit in 2020/2021.</p>	<p>The Commission is sponsored by the Minister for Women and Equalities and is funded through Grant in Aid.</p> <p>Operating income of £289,000 in 2018/19.</p> <p>Net expenditure of £18.4m in 2018/2019.</p> <p>£18m grant in aid from sponsor department.</p>
Annual budget	£99m + £15m for Brexit (2019/2020)	Approximately £1.3 billion (2019/2020).	Approximately £226m (2019/2020).	The 2019 Spending Round (SR19) for 2020/21 was £91.78m.	EHRC's 2019/20 total budget was £18.551m.
Governance	FSA is a non-ministerial department, supported by 7 agencies and public bodies (Advisory Committee on Animal Feedingstuffs, Advisory Committee on Novel Foods and Processes, Advisory Committee on the	The EA is a non-departmental public body, governed by the board and team of directors. The board is directly responsible to government ministers for	The Health and Safety Executive (HSE) is Britain's national regulator for workplace health and safety. HSE is an executive non-departmental public body, sponsored by the Department for Work and	CMA is a non-ministerial government department and is the UK's lead competition and consumer authority. It was established under the Enterprise and Regulatory Reform Act 2013. It consists of a Chair, the CMA Board, and the CMA panel, all	EHRC is a statutory non-departmental public body (an organisation created by Parliament) established by the Equality Act 2006. It operates independently of the English, Scottish and Welsh governments.

Microbiological Safety of Food, Committee on Mutagenicity of Chemicals in Food, Consumer Products and the Environment, Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment, General Advisory Committee on Science, Social Science Research Committee)

FSA is headed by a Chair and Board, who are appointed to act in the public interest. The FSA is an independent national regulator and the central competent authority for food and feed legislation. Food Standards Act 1999 sets out the objectives and powers of FSA.

all aspects of organisation and performance (and is accountable to Parliament through ministers). The EA was created under the Environment Act 1995.

The Secretary of State gives guidance to the EA from time to time with respect to objectives the Secretary of State considers appropriate for the EA to pursue (s 4, Environment Act 1995).

Pensions. It is established under s 10 of the Health and Safety at Work Act 1974, as amended by the Legislative Reform (Health and Safety Executive) Order 2008. The Secretary of State for Work and Pensions is accountable to Parliament for matters relating to health and safety.

The HSE Board oversees all the activities of HSE, to ensure high standards of corporate governance and ways of working are maintained. The Board may appoint Committees to provide assurance in relation to the operation and business of HSE. The Board Committees are:

- The Audit and Risk Assurance Committee;
- People and Remuneration Committee; and
- Science, Engineering and Evidence Assurance Committee.

appointed by the Secretary of State.

The CMA Board comprises the Chair, Chief Executive, executive and non-executive directors, and members of the CMA panel. The Board which ensures the CMA fulfills its statutory duties, functions and principles of good governance, establishes strategic direction, and considers opinions and reports of the CMA Accounting Officer.

The CMA panel consists of members appointed by the Department for Business, Innovation and Skills for up to 8 years through open competition for their experience, ability and diversity of skills in competition economics, law, finance and business.

The Secretary of State for Business Innovation and Skills has designated a Chair of the CMA Panel and Deputy Chairs of the CMA Panel who are known as 'Inquiry Chairs' when they chair merger and market inquiries referred for phase 2 investigation by the CMA board, and regulatory appeals in relation to price controls, terms of licences or other regulatory arrangements.

There are various board sub committees (Audit and Risk Assurance, Remuneration Committee, EU Exit Committee etc).

The Board of Commissioners is the highest level decision-making body in the organisation, and is responsible for the strategic oversight of the EHRC. The [Board](#) consists of 10 members, who are public appointments made by the Minister for Women and Equalities. The latest round of appointments was announced in May 2018. The Board is not directly involved in operations but delegates this to the CEO and staff. It holds the CEO and the staff to account by monitoring performance against its strategic priorities and ensuring that resources are being used to good effect.

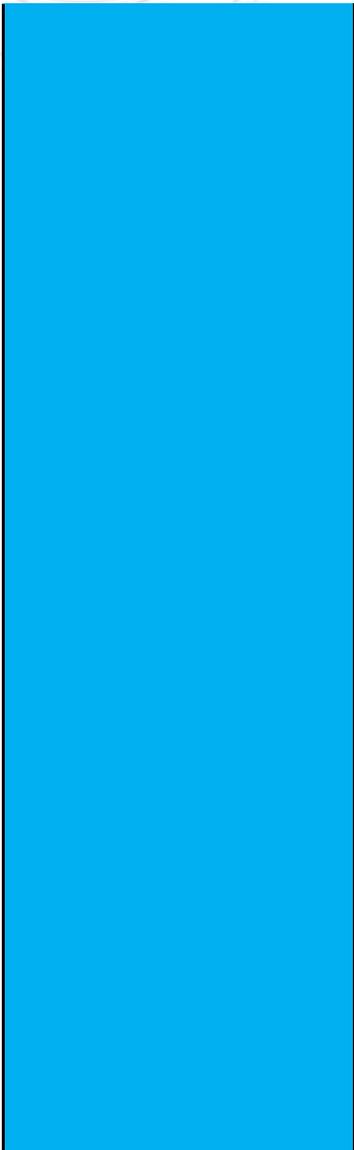
There are two statutory committees for Scotland and Wales. There are two additional non statutory committees for Audit and HR. There is also a Disability Advisory Committee.

The EHRC governance manual sets out the roles and responsibilities of the Board of Commissioners, its statutory and non-statutory committees, senior management and officers.

The Government-Commission framework document sets out the EHRC's relationship with government, and how the Commission operates as an independent arm's length

<p>Business planning/ prioritisation</p>	<p>Current strategy paper runs from 2015-2020. The strategy paper was the result of the collection of evidence and analysis of varied factors. Stakeholders consulted included</p> <ul style="list-style-type: none"> • consumers • consumer organisations • academia and the scientific community • industry representatives • trade bodies • local authorities • other Government departments • non-governmental organisations • colleagues across our organisation <p>Prior to drafting the strategy paper an online Harris Interactive survey of 2000 adults was conducted in 2014. Random members were engaged for market and opinion research.</p>	<p>Current strategy paper is from June 2018-2020.</p> <p>Accounts document from 2018/2019 state that EA has begun preparation for 25 Year Environment Plan and Clean Growth Strategy, as well as the Defra 2030 Vision. This work is to provide the foundation for the Future Funding Strategy. There are various proposals over different time scales eg. new charge proposals for water resources, Shared Prosperity Fund with Defra to replace EU funding etc.</p>	<p>The HSE has an overarching purpose to prevent work-related death, injury and ill health. Its business planning is structured around four key commitments:</p> <ul style="list-style-type: none"> • Lead and engage with others to improve workplace health and safety; • Provide an effective regulatory framework; • Secure effective management and control of risk; and • Reduce the likelihood of low-frequency, high-impact catastrophic incidents. 	<p>The CMA publishes its priorities annually. It is the responsibility of the board to establish the annual strategy which is presented to Parliament pursuant to the Enterprise and Regulatory Reform Act 2013 (which states that is must consult the public when publishing proposals). The 2020/2021 priorities include the following:</p> <ul style="list-style-type: none"> • Protecting consumers, including in particular those in vulnerable circumstances; • Improving trust in markets; • Tackling concerns in digital markets; • Enhancing productivity and economic growth; • Taking on new responsibilities as a result of the UK leaving the EU. <p>A one month long consultation period in anticipation of annual plan asks respondents to supply a summary of their interest or their organisation they represent with their comments in writing.</p> <p>For each Parliament, government issues a non-binding strategic steer to the CMA. The steer is intended to support the CMA in achieving its objectives and delivering benefits.</p> <p>Previous examples of consultation include asking for views on a government steer to CMA in</p>	<p>body.</p> <p>The EHRC sets out their strategic goals and priority aims for the three year-period in regular Strategic Plans, the current plan being for 2019-2022. These priorities are implemented through yearly Business Plans, which detail what is to be achieved in order to deliver those priorities.</p> <p>The Commission has a duty under the Equality Act 2006 to review and consult on the development of its Strategic Plan.</p> <p>In May 2018 the ERHC held workshops for staff, statutory committees and commissions to assess the previous plan. It took into account the ‘Is Britain Fairer?’ Commission report and regular human rights reports</p> <p>In developing a new Strategic Plan for 2019-22, the EHRC ran a public consultation from 2 November 2018 to 7 January 2019. It received around 1000 responses to the online survey. 62% were by individuals, 15% were from the voluntary sector, 15% were from public bodies and 6% were from other. In addition there were 55 narrative responses.</p>
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				relation to Consumer Markets (July 2019). 47 responses were received from mainly from trade bodies (10), consumer orgs (10) and businesses (10).	
Published guidance	Relatively extensive guidance for those it regulates provided on the FSA website including practical advice and how to adhere to legislation.	There is relatively extensive guidance available online, including for flood warnings and risks, environmental permits and exemptions, boating and waterways, as well as fisheries and rod licensing.	There is extensive guidance online, including guidelines for appointing a competent person, preparing a health and safety policy, first aid in work, and conducting workplace risk assessments. A separate website offers products and services to assist in dealing with specific health and safety challenges.	CMA publishes guidance on their jurisdiction, work, policy and approach. Guidelines are available in relation to: <ul style="list-style-type: none"> • General information (complaints handling, prioritisation principles, administrative penalties); • Competition Act 1998 and cartels; • Markets; • Mergers; and • Regulatory appeals and references. 	EHRC has powers to provide advice and guidance, publish information and undertake research. There are numerous accessible guidance documents on the website as well as codes of practice and technical guidance. Guidance documents provide advice for employers, workers, service providers, service users, education providers, and students.
Powers to receive a complaint	Consumers can report a food problem (limited to suspected food poisoning, food product, poor food safety and hygiene practices, product labelling and food crimes) following a step by step reporting website page on the FSA website. Step by step process gives various boxes to complete about the complaint eg, for food poisoning – where did it happen? What did you eat? When did you eat it? What are your symptoms? When did the symptoms start/finish? Have you visited your GP? Contact details. The	There is an incident hotline to report more severe environmental crimes. More minor issues such as waste, fly-tipping, burst water mains are to be dealt with by the local council of utility companies.	A complaint may be made online, or by calling a hotline. HSE will make a preliminary assessment within 24 hours whether to proceed with the complaint. It will notify the complainant within 21 days of the action that will be taken. In order for a concern to qualify as a complaint, it must fall within the HSE's definition of a 'complaint'. This is 'a concern, originating from outside HSE, in relation to a work activity for which HSE is the enforcing	A complainant can submit complaint to CMA or relevant sectoral regulator if applicable, and ask it to investigate. The complaint procedure depends on the type of conduct. Some things will be directed to FCA/Advertising Standards or industry regulators. While the CMA has no power to act on behalf of individual consumers and businesses (other than super-complaints from designated consumer bodies), it may receive information regarding: <ul style="list-style-type: none"> • Cartels (businesses agreeing not to compete with each 	Legal representatives and organisations can contact EHRC directly by email to ask it to use its legal powers. The request will be reviewed by the Legal Intelligence and Impact team. There is no specific format of a request but referrers are asked to provide their name, organisation and contact details, what they are asking the Commission to do, for example: fund strategic litigation, intervene in a case, bring proceedings in the EHRC's own name, or investigate an unlawful act. They should provide details of



complaint is sent to a local authority in the first instance, who deals with the complaint as per their complaint procedure.

Businesses can report a food safety incident or report a food crime in their corporation. The complaint procedure links to an [external website](#) where a log-in is required.

authority, that is sufficiently specific to enable identification of the issue and the duty holder and/or location and that either:

- has caused or has potential to cause significant harm, or alleges the denial of basic employee welfare facilities; or
- appears to constitute a significant breach of law for which HSE is the enforcing authority.'

other);

- Businesses abusing their dominant position;
- Problems in a market sector;
- Other anti-competitive activities (e.g. buying or selling jointly with competitors, agreeing with competitors to reduce production of something to raise its market value, agreeing with competitors not to sell to certain customers).

There is also a cartels online complaints website which follows a step-by-step reporting process, together with an informants reward policy. A complaint can be made by anyone anonymously using a non-name-based email account, a private masked phone number, by post or via a representative (such as a trade association).

Super-complaints

Section 11 of the Enterprise Act 2002 gives "designated consumer bodies" the power to make a "super-complaint" about features, or a combination of features of a market that appear to be significantly harming the interests of consumers. A "designated consumer body" is a body designated by the Secretary of State as appearing to the Secretary to represent the interests of consumers of any description eg.

the issue, including a short summary of the facts and any important deadlines, within which of the EHRC's priority aims or core aim the issue sits and why the Commission should use their powers on this issue (taking into account the criteria in this litigation and enforcement policy).

EHRC cannot directly advise individuals who are seeking its help on an issue. Instead, individuals should contact the Equality Advisory and Support Service (EASS). EASS receives calls from individuals. The service provides information, assistance and support (but not legal advice or representation) about discrimination and human rights issues. If the EASS thinks an issue may be of strategic interest to EHRC, it will refer it for consideration.

				Citizens Advice Bureau.	
<p>Investigation of allegations/investigatory powers</p>	<p>Investigations of small-scale violations are investigated by the local authority. The FSA have some oversight of how the LAs handle complaints.</p> <p>The National Food Crime Unit (NFCU) is a dedicated law enforcement function of the Food Standards Agency (FSA). It was established in 2015 to perform a criminal intelligence function. However, it is currently developing wider capabilities, including the addition of investigative and prevention functions (in March 2019).</p> <p>All types of communications data may be obtained by designated senior officers where it is necessary to obtain data for the purpose of preventing or detecting serious crime (s.61(7) Investigatory Powers Act 2016).</p>	<p>Under sections 108 to 110 of, and Schedule 18 to, the Environment Act 1995 the EA has the power of:</p> <ul style="list-style-type: none"> Of entry - generally at reasonable times and on reasonable notice. Forced entry is only permitted where there is an immediate risk of serious pollution that will cause serious harm. Otherwise a warrant must be obtained by the EA. Of examination and investigation. To take measurements and photographs. To take samples. To request information. To require production of documents or records. The officer may take copies of these records or of any part of them, but may not remove documents. <p>These powers may only be used by a suitable</p>	<p>Generally, in a work-related incident that has resulted in death, physical injury, occupational disease or dangerous occurrence, a decision is made whether to investigate. It is HSE policy to continue an investigation solely to the extent of meeting its regulatory functions and the legal requirements for criminal investigations. Therefore, managers and inspectors will justifiably decide to stop an investigation at the point where those objectives have been achieved.</p> <p>The requirement to answer questions is compulsory. Inspectors will usually interview employees, who should be given the opportunity to have someone with them while they are being questioned. Failure to comply with a request for information or to answer questions may result in summary prosecution and an unlimited fine (section 85, Legal Aid, Sentencing and Punishment of Offenders Act 2012) as this constitutes an offence under section 33(e) of the HSWA 1974.</p> <p>The power to obtain</p>	<p>Once the CMA has "reasonable grounds for suspecting" that one of the civil prohibitions under s 25 Competition Act 1998 has been infringed, it may conduct an investigation.</p> <p>In practice, the CMA may often proceed by informal requests for documents or information to which recipients are not obliged to respond (although they may be well advised to).</p> <p>It is an offence to supply false or misleading information in response even to an informal request (section 44, Competition Act). However, the CMA expects to rely mostly on formal, written requests for information to obtain information.</p> <p>The CMA can require any person (not just a person suspected of a breach of a prohibition) to provide any document or information that it considers "relates to any matter relevant to the investigation" (section 26, Competition Act). The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request.</p> <p>The ERRA introduced a formal power for the CMA to require any individual, who has a connection with a business which is a party to the investigation, to answer questions on any matter relevant to the investigation (section 26A</p>	<p>The Commission can carry out an investigation to discover whether an organisation may have carried out or is carrying out an act which is unlawful under the Equality Act 2010 if it suspects it is doing so.</p> <p>The steps of an investigation can include:</p> <ul style="list-style-type: none"> • providing written details of why an action may be unlawful; • providing an opportunity for a response; • publicising the final terms of reference; • requiring the organisation to provide information, documents or oral evidence; and/or • publish a final report stating whether the organisation has committed an unlawful act. <p>In seeking to gather evidence, EHRC might give an organisation notice (paragraph 9, schedule 2, Equality Act 2006), meaning that the organization must provide information and documents in its possession, or provide oral evidence. The organisation may apply to the county or sheriff court, under paragraph</p>

		<p>person whose powers have been authorised in writing.</p> <p>It is an offence to obstruct these investigations or fail/refuse to provide assistance or permit an inspection reasonably required.</p> <p>EA has general criminal investigation powers under the following:</p> <ul style="list-style-type: none"> • Police and Criminal Evidence Act 1984 (PACE). • Data Protection Act 1998. • Criminal Procedure and Investigations Act 1996. • Regulation of Investigatory Powers Act 2000. 	<p>answers under compulsion carries with it a protection against self-incrimination. Legal representatives of a company should be aware that the protection against self-incrimination is provided to the individual being questioned, not the duty holder or the company (for example, where it is an employee who is answering question).</p> <p>Under section 20(2) of the HSWA 1974, inspectors may enter any premises considered necessary to enter for the purposes of enforcing the HSWA 1974 and the relevant statutory provisions. The inspectors have the power to require the production of, inspect and take copies of relevant documents. (Section 20, HSWA 1974.)</p>	<p>(1), Competition Act).</p>	<p>11 schedule 2 of the Equality Act 2006, to have the notice set aside on the grounds that it is unnecessary or unreasonable.</p> <p>The EHRC may apply to the court for an order requiring it to take the steps necessary to comply with the notice. The organisation will commit an offence if it does not comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order and does not have a reasonable excuse for doing so.</p> <p>Those being investigated will be given a copy of the draft report before it is published and a minimum period of 28 days to provide written comments on the draft report to the Commission before it is published.</p>
<p>Adjudication of allegations</p>	<p>The FSA gives verbal advice, written advice and service of a formal notice to deal with non-compliance before considering prosecution.</p> <p>Where a decision to prosecute is made, an investigation may be carried out by a specially trained FSA Investigation Officer, who will collect evidence and interview suspects in accordance with procedures under the Police</p>	<p>Serving an enforcement or similar notice will usually follow EA engagement with those concerned with the breach. When a climate change or mercury civil penalty, or RES Act civil sanction (except a stop notice) is being imposed, the EA will:</p> <ul style="list-style-type: none"> • serve a notice of 	<p>HSE inspectors make enforcement decisions in line with its Enforcement Policy Statement. The Statement sets out the principles inspectors should apply when determining the enforcement action to take in response to breaches of health and safety legislation.</p> <p>Specifically, the Enforcement Management</p>	<p>The CMA case team will carry out their own analysis but will seek input from other areas of the CMA to assist them. The CMA will usually provide case updates to companies under investigation and formal complainants, either by phone or in writing.</p> <p>Before the CMA makes a decision on infringement it is required to give written notice to the parties to</p>	<p>By engaging in legal action, the method pursued will be through the relevant courts/tribunals to the subject matter.</p> <p>Where an issue relates to the EHRC's core aim or one of its five priority aims it will take the following into account when deciding whether to take action:</p> <ul style="list-style-type: none"> • The scale of the problem

	<p>and Criminal Evidence Act 1984.</p> <p>The results of the investigation are then sent to a prosecution lawyer at the FSA who will consider whether the case should proceed to prosecution, having applied both the Code for Crown Prosecutors and the FSA's Enforcement Policy (outlined at Annex 2 in Chapter 7 of the Manual for Official Controls) and the Regulator's Code.</p>	<p>intent;</p> <ul style="list-style-type: none"> • provide an opportunity to make representations in writing; • give the person 28 days to make representations; • consider the representations received before making the final decision on whether to serve the penalty or the amount; • notify the person of the final decision; and • give concise reasons for doing so. 	<p>Model (EMM) assists inspectors by providing a framework to guide the making of consistent enforcement decisions, and provides those directly affected by the decisions an understanding of the principles followed by HSE inspectors. It also allows inspectors to consider whether the proposed enforcement action meets the Enforcement Policy Statement, and the Code for Crown Prosecutors.</p> <p>For example, the EMM assists an inspector in selecting the appropriate notice to impose where there has been a contravention of the relevant statutory provisions. The inspector is required to consider various factors, including the degree of risk, the existence of relevant benchmark standards, and the ability to secure sustained compliance with the law.</p>	<p>the agreement or conduct in question, and give it an opportunity to make representations (s 35(3), Competition Act).</p> <p>The CMA must allow the recipient of a statement of objections "a reasonable opportunity to inspect" the documents in the CMA's file relating to the proposed decision. Businesses have the right to respond in writing.</p> <p>The CMA can provide for procedures for holding oral hearing as part of an investigation. After consideration of written and oral representations on the statement of objections, the CMA will provide a draft penalty statement to a party where an infringement decision and financial penalties are being considered. Parties have an opportunity to comment and to attend an oral hearing with the Case Decision Group, specifically on the proposed penalties and not on whether an infringement has been committed.</p> <p>The Case Decision Group is responsible for deciding whether the legal test for establishing an infringement is met and the level of financial penalty imposed.</p>	<p>– this includes the number of people affected, the seriousness of its effect on an individual or group, its persistence and its prevalence.</p> <ul style="list-style-type: none"> • The impact the EHRC will have – this will be identified by considering the overall change it wants to see, which of its powers could best achieve it, which of its powers would be the most effective and proportionate way to achieve it, and the extent to which using its legal powers will achieve it, taking into account action that may be taken by others. • The views of external stakeholders – these include United Nations treaty bodies, parliamentary committees and civil society organisations.
<p>Penalties</p>	<p>Criminal convictions</p> <p>Remedial action notices</p> <p>Voluntary closure</p>	<p>Penalties for obstructing an investigation include a warning, formal caution or prosecution. A variable monetary penalty may also be imposed as a civil</p>	<p>Fines or terms of imprisonment are imposed for breaches of duties under sections 2 to 6 HSWA, or commission of offences under s 33 HSWA. For an</p>	<p>The CMA has the power to impose penalties of up to 10% of turnover on an undertaking found to have infringed a prohibition.</p> <p>The CMA may also impose</p>	<p>The Commission will make recommendations based on the investigation findings. Failure to act on recommendations can lead to an unlawful act notice. The</p>

	<p>Seizure of food</p> <p>Suspension of licenses</p> <p>Hygiene prohibition order</p> <p>Simple caution</p> <p>Hygiene improvement notice</p>	<p>sanction.</p> <p>When deciding whether to use civil sanctions or to prosecute for an environmental offence, the EA will apply its Enforcement and Sanctions Policy (ESP). It includes following the Code for Crown Prosecutors when assessing whether its evidence is sufficient to proceed with an enforcement option.</p> <p>The EA has a range of civil sanctions available to use for many of the offences. They were introduced by the Regulatory Enforcement and Sanctions Act 2008 (RES Act), the Environmental Civil Sanctions (England) Order 2010, the Environmental Civil Sanctions (Miscellaneous Amendments) Regulations 2010 and the Control of Mercury (Enforcement) Regulations 2017.</p> <p>Civil sanctions vary depending on the offence and are available in areas such as fisheries, oil storage, packaging waste etc. The civil sanctions are:</p>	<p>offence of obstructing an inspector the maximum penalty is an unlimited fine or six months imprisonment or both.</p> <p>Compensation orders - Magistrates and the Crown Court have a discretionary power to make an order requiring a convicted defendant to pay compensation for any personal injury, loss or damage resulting from the offence.</p> <p>Community orders – the court may impose requirements on the offender (such as an unpaid work requirement).</p> <p>Disqualification orders - these are not necessarily limited to only directors, shadow directors or de facto directors of the liable company.</p> <p>Power of court to order remedial action – the Court may order the defendant to take steps to remedy matters which have caused a breach of the relevant statutory provision.</p> <p>Victim surcharge – where a fine is imposed, it must also order the convicted defendant to pay a surcharge for victims’ services.</p>	<p>administrative penalties for the failure to perform investigative requirements. These administrative penalties can be a fixed penalty (up to £30,000) and/or daily fine (of £15,000). Certain criminal offences can also apply for failure to adhere to administrative procedures which can trigger criminal liability (and prison time) and fines.</p> <p>Directors of a company who have infringed rules can be disqualified as a director for up to 15 years. Liability for fines can fall to a company and acts of an employee becoming attributed to the employer company. Liability for cartels can fall to parent companies as well as successor undertakings.</p> <p>It is an offence for anyone intentionally to obstruct an investigating officer by, for example, refusing to allow them into the premises (section 42(5)).</p> <p>Anyone required to produce a document commits an offence if they intentionally or recklessly destroys, conceals or falsifies it (section 43). It is also an offence knowingly or recklessly to provide false or misleading information to the CMA (section 44).</p> <p>There is a leniency policy for confession of cartel activities before investigations.</p>	<p>notice details the breach and can recommend any necessary action to avoid it being repeated or continued. It may also require an action plan to be prepared.</p> <p>If an organisation does not prepare a draft action plan, the EHRC can apply to the county court for an order requiring the organisation to provide an action plan within the time specified in the order.</p> <p>An organisation can appeal to the county court against the unlawful act notice within six weeks of the notice being issued on the basis that it denies it has committed an unlawful act, or that it contends the requirement to prepare an action plan is unreasonable. On appeal, the court may affirm, annul or vary a notice (or a requirement in the notice) and make an order for costs or expenses.</p> <p>If the notice has not been appealed and the organisation has prepared a draft plan, the EHRC may either approve it or issue a further notice stating that the action plan is inadequate, a revised draft is to be completed within a specified time. It may also make recommendations about the content of a revised draft.</p> <p>If an organisation does not comply with an action plan,</p>
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		<p>Fixed monetary penalties (FMPs) and variable monetary penalties (VMPs).</p> <p>Enforcement undertakings (EUs). An EU is a legally binding voluntary agreement offered by an individual, partnership or company to the regulator. Although these are not strictly a sanction, they are referred to as such in this note for ease of reference.</p> <p>Stop notices, compliance notices and restoration notices.</p>	<p>Publicity orders – the Court may, in corporate manslaughter cases, require an organisation to publish information about the offence and sentence.</p>		<p>EHRC can apply to the county court for an order requiring it to comply with it. An organisation will commit an offence if it does not comply with an order made against it and does not have a reasonable excuse for doing so. An organisation convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that it may be fined.</p>
<p>Other enforcement powers</p>	<p>The FSA enforcement division carries out focussed audits on local authorities and produces a nationwide framework to ensure uniformity.</p> <p>FSA inspectors have the power to issue hygiene improvement notices where there are reasonable grounds to believe that a food business operator is failing to comply with the Hygiene Regulations. Specified measures contained in the notice must be remedied in the specified time, with non-compliance being an offence.</p>	<p>The EA has enforcement options in relation to most environmental offences. Its first response is usually to give advice and guidance or issue a warning to bring an offender into compliance where possible.</p> <p>The EA can issue written warnings or issue a site warning (normally as a result of a compliance visit at a site with an environmental permit).</p> <p>Many of the regimes the</p>	<p>There are a range of enforcement options, including:</p> <ul style="list-style-type: none"> • providing information and advice face-to-face or in writing • serving notices on duty holders • withdrawing approvals • varying licences, conditions or exemptions • issuing simple cautions 	<p>Power to prevent the use of unfair terms in consumer to business contracts and unfair consumer notices issued by a business, by asking the court for an injunction to prevent it being used.</p> <p>Power to seek court orders against businesses that breach a range of specific laws, including the CPRs (Consumer Protection from Unfair Trading Regulations 2008) and CRA (Consumer Rights Act 2015).</p> <p>Authorities at both the UK and European level are attempting to encourage the private enforcement of competition law through the</p>	<p>The EHRC has a number of enforcement powers, set out in sections 20 to 32 of the Equality Act 2006 including investigations, unlawful act notices, action plans (as above), agreements, applications to court for injunctions, application to restrain unlawful advertising, conciliation, legal assistance (as detailed above), capacity to intervene or institute judicial reviews.</p> <p>The enforcement powers concern unlawful acts under Parts 3 (services and public</p>

		<p>EA enforces contain powers to serve specific enforcement notices. These generally require the recipient to stop offending or to restore or remediate the environment.</p>	<ul style="list-style-type: none"> prosecution 	<p>national courts.</p>	<p>functions), 4 (premises), 5 (work), 6 (education), and 7 (associations) in the Equality Act 2010.</p> <p>The Commission can take enforcement action if a person is merely "making arrangements to act in a particular way" (section 24A (3), Equality Act 2006).</p>
<p>Inspections</p>	<p><u>An Authorised Officer</u> (AO) of a food authority has a power to inspect food intended for human consumption which either:</p> <ul style="list-style-type: none"> Has been sold or is offered or exposed for sale. Is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale. Is otherwise placed on the market within the meaning of Regulation (EC) No 178/2002. <p>If on an inspection it appears that any food fails to comply with food safety requirements, an officer may seize the food and take it before a justice of the peace.</p> <p>Alternatively, as a temporary measure, s/he may serve a notice requiring the food not to be used for human</p>	<p>Under sections 108 to 110 of, and Schedule 18 to, the <u>Environment Act 1995</u> the EA has the power of examination and investigation.</p>	<p><u>Formal inspections</u> can take different forms, including:</p> <ul style="list-style-type: none"> Safety tours - general inspections of the workplace; Safety sampling - systematic sampling of particular dangerous activities, processes or areas; Safety surveys - general inspections of particular dangerous activities, processes or areas; or Incident inspections carried out after an accident causing a fatality, injury, or near miss, which could have resulted in an injury, or case of ill health and has been reported to the health and safety enforcing authority. 	<p><u>CMA</u> Competition Act provides for the power of inspections.</p> <p>Without a warrant, the IO has a number of powers (under s.27) once they have entered a business premises (without a warrant), including to take equipment, require people on the premises to produce documents or explain where they would be found, take copies, require production of information held on a computer, and/or take any steps to retain copies of documents.</p> <p>With a warrant an IO has far reaching powers, including the use of reasonable force to obtain entry, search the premises and take documents, preserve relevant documents, and/or copy documents.</p>	<p>The Commission supports the Human Rights Framework being used as a framework to guide the inspections of other complaints-handling bodies, inspectorates and regulatory bodies in relation to human rights practices.</p>

	<p>consumption and preventing its removal. If s/he is then satisfied that the food complies with food safety requirements, the notice must be withdrawn, otherwise the food must be seized.</p> <p>A magistrate then decides if the food fails to comply with food safety requirements.</p>				
<p>Monitoring</p>	<p>In relation to meat establishments, the FSA may make official visits (OVs) for the purposes of conducting a full audit, partial audit, and/or an unannounced inspection. Audits include both 'compliance audits' (a review and examination of the operator's records and activities to assess compliance with legislative requirements and established policies), as well as 'systems based audits' (a review and examination of whether the operator's controls are fit for purpose, and that effective systems and processes are in place to implement such controls).</p>	<p><u>The EA</u> is the principal regulator under the Environmental Permitting (EP) regime for England, which is the main regime for regulating the environmental impacts of industrial and waste activities. The EP regime requires those carrying on certain types of activity to hold an environmental permit. It provides operators with a "one-stop shop" for environmental permits, covering a wide range of activities that release emissions to land, air and water, or that involve waste.</p>	<p><u>Union-appointed</u> health and safety representatives can inspect the workplace. They must give reasonable notice in writing when they intend to carry out a formal inspection of the workplace, and have not inspected it in the previous three months. If there is substantial change in conditions of work or HSE publishes new information on hazards, the representatives are entitled to carry out inspections before three months have elapsed, or if it is by agreement.</p> <p>The frequency of inspections will depend on the nature of the work. Inspections may be less often, for example, if the work environment is low risk like in a predominantly administrative office. But if there are certain areas of a workplace or specific activities that are high risk or changing rapidly, more</p>	<p>CMA's functions include working with sector regulators which have concurrent competition law powers to enforce competition law in the regulated sectors and to promote competition for the benefit of consumers in the regulated sectors (gas, electricity, water, post, aviation, rail, communications, financial and healthcare services).</p>	<p>A Section 31 Assessment is a unique power given to the Commission as a regulator under the Equality Act 2006, in relation to ensuring public authorities comply with the public sector equality duties (PSED).</p> <p>The EHRC has compiled factsheets for various sectors based on the publication by public authorities of equality objectives, including colleges, government departments, local authorities, NHS Commissioners, Police, Probation Trusts, and universities.</p> <p>EHRC have the power to conduct inquiries concerning broad issues such as thematic inequality, sectorial inequality, or one or more named party. An inquiry may be into any matter which relates to sections 8 or 9 of the Equality Act. A breach of equality or human rights legislation is not required before an inquiry is</p>

			frequent inspection may be justified, for example on a construction project.		launched.
<p>Whistleblower complaints</p>	<p>The FSA is a prescribed person under the Public Interest Disclosure (Prescribed Persons) Order 2014. This means that employees, contractors, trainees or agency staff who are aware of wrongdoing within the food industry and choose to report it to the FSA are protected by the Public Interest Disclosure Act) if they follow a certain procedure.</p> <p>Once a qualifying disclosure is made, the FSA makes ‘every effort’ to protect to the identity of the whistleblower and anything that might lead to exposure of their identity.</p>	<p>The EA has an obligation to act on third party disclosures made about environmental malpractice that are in the public interest. It produces an anonymised annual report on whistleblowing and the action it has taken.</p>	<p>HSE is one of the bodies to which a ‘protected disclosure’ may be made. Anonymity is offered in accordance with the normal complaints handling procedures. However, the HSE has no arbitrating or enforcing role in respect of ‘whistleblowing’ legislation (this is the responsibility of the Employment Tribunals).</p>	<p>The CMA has specific whistleblowing blog page for people reporting cartels with an online reporting form, video explaining what to expect and next steps guidance. It encourages informants to come forward and assist in investigations, and have accordingly published a number of key documents, including:</p> <ul style="list-style-type: none"> • An updated campaign page explaining what cartels look like in practice; • An online reporting form that makes reporting a cartel quicker and easier; • Case studies of businesses operating cartels. <p>There is a separate website ‘cheating or competing’ to give guidance on whether your business is following the law.</p>	<p>There is an online form for whistleblowing allegations with a policy online. whistleblowers may disclose to the ECHR information about the employer and the concern. The ECHR makes a record of the complaint and decides whether to take any action on it, considering its litigation and enforcement policy.</p>
<p>Concurrent powers</p>	<p>Its powers overlap with local authorities but the FSA is overarching.</p> <p>LAs enforce the Food Safety and Hygiene (England) Regulations 2013 and investigate and prosecute offenders.</p>	<p>Some powers are devolved to LAs (small scale offences), for example, in monitoring ‘non-special’ sites for contaminated land, or developing strategies for local flood risk management.</p>	<p>Local authorities (LAs) are responsible for regulating health and safety in lower-risk workplaces, such as offices, shops, warehouses, consumer services. The Health and Safety (Enforcing Authority) Regulations set out the allocation of premises between HSE and LAs.</p> <p>Under the Control of Major</p>	<p>The sectoral regulators with concurrent powers are as follows:</p> <ul style="list-style-type: none"> • Ofcom = Communications, broadcasting and postal services. • The Gas and Electricity Markets Authority (OFGEM) Gas and Electricity (Great Britain) • The Water Services Regulation Authority (OFWAT) = Water 	<p>No concurrent powers</p> <p>The Commission will work in partnership with other businesses, organisations and other regulators.</p> <p>The Commission supports the Human Rights Framework being used as a level for regulators and inspectors to raise standards</p> <p>of service so there is an idea</p>

			<p>Hazards Regulations 2015 (COMAH) HSE regulates major hazards by working jointly, as a competent authority, with Environment Agency, Scottish Environment Protection Agency, and National Resources Wales.</p> <p>Offshore major hazard industries (oil and gas) are regulated jointly by HSE and the Department for Business, Energy and Industrial Strategy.</p> <p>HSE works with Office for Nuclear Regulation, Office of Road and Rail Regulation and DVSA.</p>	<p>(England and Wales)</p> <ul style="list-style-type: none"> • Office of Rail and Road (ORR) = Britain's railways and England's strategic road network. • Northern Ireland Authority for Utility Regulation (the Utility Regulator) = Gas, electricity, water and sewerage (Northern Ireland). • Civil Aviation Authority = Air traffic services and airport services. • Monitor = Health care services in England. • Financial Conduct Authority (FCA) = Financial markets. • Payment Services Regulator (PRA) = Payment systems. 	<p>that HR regulations are incorporated into other inspections.</p>
<p>Criminal prosecution referrals</p>	<p>Under s 21(d) Food Standards Act 1999, the FSA has the power to institute criminal proceedings in England and Wales and in Northern Ireland. The FSA Criminal Investigation Branch may accept referrals from the Operations Directorate for investigation with a view to prosecution.</p>	<p>If the Environment Agency decides to prosecute it will exercise prosecutorial independence and ensure any case put forward for prosecution meets the two-stage test in the Code for Crown Prosecutors. It may use FPNs (through the criminal system), formal cautions, prosecution, or orders imposed by the court ancillary to prosecution.</p>	<p>HSE investigations of possible health and safety offences are, in England and Wales, criminal investigations within the meaning of the Criminal Procedure and Investigations Act 1996. Investigation decisions are accordingly made with reference to the Enforcement Policy Statement and Code for Crown Prosecutors.</p>	<p>The CMA (as well as the SFO) may each bring prosecutions in respect of the criminal cartel offence. The prosecution decision will be made by applying Code for Crown Prosecutors, as well as the Cartel Offence Guidance.</p>	<p>While the ERHC does not bring prosecutions regarding human rights-related criminal offending, there is guidance for the appropriate channels to report such offending (e.g. reporting hate crime or disability harassment to Police or third-party reporting centres).</p>
<p>Appeals</p>	<p>In terms of appealing against an adverse decision made by a</p>	<p>Where a regulated entity disagrees with a</p>	<p>A statutory enforcement notice served by an HSE</p>	<p>The Competition Appeal Tribunal hears appeals against CMA</p>	<p>The process for appealing against prohibition</p>

local authority, the relevant council's procedure for complaints/appeals is to be followed in the first instance.

An independent business appeals panel (IBAP) was introduced in 2014, providing the opportunity to complain or appeal against advice given by local authorities about food safety and food standards that is allegedly incorrect or unlawful. The appeal right to the local authority must be exhausted before making an appeal to the IBAP. The panel does not consider appeals against formal enforcement action (for example, where a local authority has served a legal notice), Food Hygiene Rating Scheme ratings, or where there is a Primary Authority partnership in place.

regulatory decision made by the EA, it may write to the EA to ask for a review (typically within 14 days of the decision).

Writing to the EA to ask for a review does not limit statutory rights of appeal, judicial review rights, or the right to contact the relevant ombudsman (the Local Government Ombudsman for flood defence and land drainage issues, and the Parliamentary and Health Service Ombudsman for all other aspects of the EA's work).

inspector may be appealable to the Employment Tribunal within 21 days.

- An appeal against an improvement notice will serve to suspend the notice until the appeal is heard.
- An appeal against a prohibition does not suspend the notice, unless an application is made to have the notice lifted pending the appeal.

decisions.

The CAT also has jurisdiction to hear applications for judicial review of decisions by the CMA in mergers and market investigation cases, grant warrants for search and entry (from 1 April 2014), and to hear certain private actions for damages under UK and EU competition law.

CAT appeals can be in person at a tribunal.

An appeal from the CAT can be made to the Court of Appeal on a point of law or the amount of a penalty, and the leave of the CAT or the court appealed to must be obtained (section 49, Competition Act).

As so many provisions of the Competition Act are expressly designed to be interpreted in the light of EU law, many legal points that arise under the Act are also likely to be points of EU law. During the Brexit transition process, the UK will continue to apply EU law, and can make references to the European Court of Justice under Article 267 of the TFEU.

notice/action plans is detailed above.

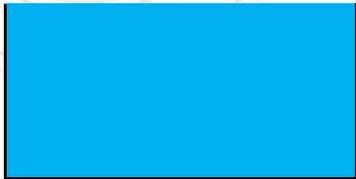
A decision by the Commission to take regulatory steps or action will only be eligible for a review if there is:

- (a) new and significant evidence or information that is material to the matter and has come to light since the Commission's decision was made (which was not originally obtainable with reasonable diligence, relevant, likely had an important influence on the EHRC's decision to grant legal assistance, and is apparently credible); and/or
- (b) there are reasons why the decision fails to satisfy one or more of the principles underlying the Commission's regulatory role, namely proportionality, accountability/transparency, and consistency.

To review a decision the applicant must put the request in writing within a month of the decision, giving full reasons and providing any new evidence or information that the Commission is being asked to consider. A senior lawyer in the Commission's legal team, not previously involved in the matter, will assess whether one or both of the review criteria are met. They will

					<p>contact the applicant within 20 working days of receiving the review request, or within 10 days of receiving any additional information (whichever is the later). If the senior lawyer decides that the conditions for a review have been met, he or she will draft a report and recommendation for the Chief Legal Officer and inform the applicant that this has happened, giving you an indicative date for a final response.</p> <p>The senior lawyer will write to inform the applicant of the outcome of the review.</p>
<p>Inter-relationships with “supra-national” bodies or regulatory frameworks</p>	<p>The FSA takes the lead in many vertical committees of DEFRA (dealing with food hygiene, food additives, food contaminants, imports etc...). DEFRA is the lead UK Government Department for Codex Alimentarius Commission (CAC) which was established by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) to develop international food standards, guidelines and codes of practice.</p> <p>FSA are science and evidence based so provide support for UK experts engaging in various scientific expert committees e.g. European</p>	<p>The UK is part of a number of existing transnational mechanisms regulating liability for environmental harm, including, for example, the EU Environmental Liability Directive, the Environmental Crime Directive, and the Ship-source Pollution Directive. The EA is one of a number of domestic authorities charged with implementing the various directives.</p>	<p>The HSE works with the European Agency for Safety and Health at Work (EU-OSHA) and other Member States to facilitate sharing of good practice and information (e.g. the-OSHA Healthy workplaces manage stress campaign).</p> <p>HSE supports the Department for Work and Pensions in discussions with the International Labour Organisation (ILO) on matters relating to occupational safety and health, such as proposals for ILO Conventions or Recommendations, and providing feedback on the implementation of existing ILO Conventions and other</p>	<p>On 28 January 2020, the CMA published guidance on its functions during the Transition Period. That guidance makes clear that during the Transition Period the CMA will function in much the same way that it did while the UK was still an EU Member State. Likewise, the Commission and the EU Courts will retain their respective roles.</p> <p>Regulation 1/2003 (the Modernisation Regulation) imposes obligations on CMA and the Commission to ensure that they cooperate closely with each other. This includes the notification of cases by the Commission and national competition agencies of the Member States (NCAs), case allocation between them, the</p>	<p>The Legal Working Group (LWG) of the European Network of National Human Rights Institutions' (ENNHRI) is made up of legal or policy officers drawn from the members, and is currently chaired by a senior legal officer at the Equality and Human Rights Commission. The main objectives of the LWG are to (inter alia) enhance coordination between NHRIs in order to operate coherently at a European level in human rights matters, as well as to enhance the activities of NHRIs at a national level.</p>

	<p>Food Safety Authority (EFSA) panel on Food Contact Material, Enzymes and Processing Aids and biannual World Health Organization (WHO) Joint Expert Committee on Food Additives (JECFA).</p>		<p>instruments.</p> <p>The International Association of Labour Inspection (IALI) is the global professional association for labour inspection. The UK is a member of IALI, represented by a senior official from HSE.</p> <p>HSE is also involved with the International Atomic Energy Agency's ionising radiation safety standards.</p>	<p>exchange of information between the Commission and NCAs (and between NCAs themselves), as well as the subsequent use of information exchanged.</p> <p>The CPC Regulation provides for cooperation between the enforcement authorities of member states of EU.</p>	
<p>Information sharing/international capacity building</p>	<p>The European Union Rapid Alert System for Food and Feed (RASFF) was created in 1979. The RASFF enables information concerning possible food and feed safety issues to be shared between EU members and ensures that urgent notifications are sent, received and responded to collectively.</p>	<p>The UK shares information with the European Commission on the implementation of the E Environmental Liability Directive (ELD), including instances of environmental damage and the status of proceedings relating to damage incidents.</p>	<p>REACH recognises the need for high levels of co-operation and exchange of information between the Member States, the European Chemicals Agency (ECHA) and the European Commission regarding enforcement. It sets up a Forum for Exchange of Information on Enforcement ("the Forum"), which is the principle mechanism for ensuring adequate co-operation, co-ordination, communication and information exchange across the European Union.</p> <p>The Forum is composed of representatives from all EU Member States and also the EEA-EFTA States (Iceland, Liechtenstein and Norway). Meetings occur typically 2-3 times a year at ECHA's premises in Helsinki,</p>	<p>The CMA is a member of various international organisations, including the OECD, International Competition Network (ICN), European Competition Network (ECN), and the EU Consumer Protection and Co-ordination Network. It may freely share general information about its work and experiences with overseas public authorities, but disclosure of specified information is only permissible if an information gateway is available under Part 9 of the Enterprise Act 2002.</p> <p>The CMA has powers to disclose specified information to overseas public authorities (OPAs) for the following purposes:</p> <ul style="list-style-type: none"> • Facilitating investigations by the overseas authority of legislation that is enforceable by civil proceedings • For the purposes of bringing 	<p>The Commission has the 'A' status of Great Britain's National Human Rights Institution (NHRI), which gives it a key role in engaging with the United Nations (UN) human rights system. As such, EHRC works in accordance with The Paris Principles which establish the minimum standards required for the independence and effective functioning of NHRIs. Only full 'A' status members of the international NHRI network may exercise voting rights in the ICC and full participation rights in international fora (for example, the UN Human Rights Council).</p> <p>The Commission is also a member of the European Network of National Human Rights Institutions (ENNHRI), which enables it to (inter alia) share information with other</p>



Finland. Stakeholders may be invited to observe meetings as appropriate, at the request of the Forum members.

civil proceedings to enforce such legislation

- For the investigation of crime or bringing of criminal proceedings

members, assist in member training and development, and help members in influencing important decision-making processes.

APPENDIX D

Examples of relevant European Union and European State laws and their enforcement provisions

Timber Regulations

The Timber and Timber Products (Placing on the Market) Regulations 2013 (“the 2013 Regulations”) introduced in 2013 to implement the EU Timber Regulation¹³⁸ (“the Timber Regulation”) and its associated Implementing Regulation¹³⁹ (together the EU Regulations) makes it an offence to place illegally harvested timber on the EU market and, amongst other things, requires those trading in timber and timber products to undertake due diligence to ensure that they originate from legal sources.¹⁴¹ The EU Regulations set out the steps of the due diligence process including the steps to be taken to evaluate and mitigate the risk.

In terms of enforcement the 2013 Regulations provide for an administrative sanction known as a Notice of Remedial Action (“NRA”) and criminal prosecution. In respect of the latter the 2013 Regulations create a number of criminal offences¹⁴² the most serious of which are punishable by an unlimited fine or two years imprisonment. These offences include the placing of illegally harvested timber on the EU market; a failure to exercise due diligence when placing timber products on the EU market¹⁴³; a failure to maintain and evaluate a due diligence system in that context¹⁴⁴ and a failure to identify throughout the supply chain where those timber or timber products have come from or are going to.¹⁴⁵ It is also a criminal offence to fail to comply with an NRA. It is a defence to the offences of placing of illegally

¹³⁸ 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

¹³⁹ Commission Implementing Regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0607&from=EN>

¹⁴⁰ See FN2, above

¹⁴¹ The Office for Product Safety and Standards (Safety & Standards), part of the department for Business, Energy and Industrial Strategy (BEIS), is the Competent Authority (CA) for the Timber Regulation and enforces the Regulation on behalf of Defra.

¹⁴² Section 4 of the 2013 Regulations.

¹⁴³ Regulation 4(2) states, “Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a ‘due diligence system’, as set out in Article 6”. Upon the commencement of the Timber and Timber Products and FLEGT (EU Exit) Regulations 2018/1025, as yet not in force, this will also become the UK market see Regulation 6 of the Timber and Timber Products and FLEGT (EU Exit) Regulation 2018/1025.

¹⁴⁴ Regulation 4(3) states: “Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation referred to in Article 8. Existing supervision systems under national legislation and any voluntary chain of custody mechanism which fulfil the requirements of this Regulation may be used as a basis for the due diligence system”.

¹⁴⁵ Regulation 5 states, Traders shall, throughout the supply chain, be able to identify: (a) the operators or the traders who have supplied the timber and timber products; and (b) where applicable, the traders to whom they have supplied timber and timber products. Traders shall keep the information referred to in the first paragraph for at least five years and shall provide that information to competent authorities if they so request.

harvested timber on the market and the failure to exercise due diligence when placing timber products on the market to show that proper use was made of a due diligence system.¹⁴⁶

A NRA is a notice issued by a relevant inspector who has reasonable grounds for believing that any person has either failed to exercise due diligence when placing timber products on the EU market¹⁴⁷ and / or failed to maintain and evaluate a due diligence system prior to placing those products on that market and which sets out the steps that person must take in order to secure compliance with the various obligations upon them and which requires the person to take those measures, or measures at least equivalent to them, within the period specified in the notice.¹⁴⁸

The 2018 Post implementation review¹⁴⁹ (the PIR) sets out the enforcement activity between the implementation of the 2013 Regulations and March 2018 explaining in that time period there have been only two prosecutions.¹⁵⁰ The PIR explains at p.7 that, *“currently the sanctions available to the CA include an administrative sanction, known as a Notice of Remedial Action (NRA), and criminal prosecution in court, where the business could receive an unlimited fine or up to two years imprisonment. One of the difficulties Safety & Standards found when trying to progress cases to court is that the jump from issuing an NRA to criminal prosecution in court is significant, and it can be a challenge to satisfy the public interest test. In the longer term, it might be feasible to put in place a regime of civil sanctions (including Stop Notices and Variable Monetary Penalties), which in the CA’s views would enable them to take a more flexible, proportionate and ultimately effective approach to dealing with non-compliances.”*¹⁵¹ The PIR also sets out efforts by the OPSS to engage stakeholders in the implementation of the regulations.

In addition to the available sanctions set out above the 2013 Regulations provide inspectors with powers of entry and inspection for the purpose of enforcing the EU Regulations, and where an inspector has reasonable grounds to believe that an offence contrary to regulation 4(a) (the prohibition on the placing of illegally harvested timber on the market) been committed she also have powers of seizure.

¹⁴⁶ S5 the 2013 Regulations.

¹⁴⁷ Regulation 4(2) states, “Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a ‘due diligence system’, as set out in Article 6.”

¹⁴⁸ Section 11 of the 2013 Regulations. The other criminal offences include a breach of Regulation 5 of the Timber Regulation which requires businesses trading in timber to be able to identify (a) the operators or the traders who have supplied the timber and timber products; and (b) where applicable, the trader to whom they have supplied timber and timber products.

¹⁴⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700711/timber-and-timber-products-post-implementation-review.pdf.

¹⁵⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700711/timber-and-timber-products-post-implementation-review.pdf p.7; In 2017 the furniture retailer Lombok was the first company to be convicted and fined for breaching the regulations <https://www.gov.uk/government/news/company-fined-for-failure-to-check-product-was-made-from-illegally-harvested-timber>.

¹⁵¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700711/timber-and-timber-products-post-implementation-review.pdf p.5.

The Conflict Minerals Regulation

In 2017, the European Union passed a law requiring supply chain due diligence for the use of conflict minerals.¹⁵² This is company law, laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. The Regulation will enter into force in 2021.¹⁵³ Nationally, implementing the Regulation depends on the “competent authorities” designated by Member States.¹⁵⁴ These authorities should conduct ex-post checks on how Union importers comply with the Conflict Minerals Regulation.¹⁵⁵ This includes audits of records as well as on-the-spot inspections.¹⁵⁶ The Regulation has been criticized for its lack of sanctions.¹⁵⁷ Member States set the rules that apply to infringements of the Regulation. When an infringement occurs, the competent authorities issue a notice of remedial action to be undertaken by the company.¹⁵⁸

French Law on the Corporate Duty of Vigilance

This law requires companies meeting the threshold requirements for size to create and implement an annual ‘vigilance plan’ aimed at identifying and preventing human rights violations in both their domestic and their international operations, including those associated with their subsidiaries and supply chain. The development and the publication of the plan and a report on its implementation are among the substantive obligations prescribed by the ‘duty of vigilance’. The law does not have a specific monitoring body but there are two modes of enforcement, for when the vigilance plans falls short and second for when harm occurs.

Compliance with the law is established through a court process whereby companies can be legally compelled, at the request of a party with standing, including an NGO or a trade union, to create and implement an adequate vigilance plan.¹⁵⁹ Prior to the initiation of a court process, companies will be given a three-month period to comply with the requirements of the law. Periodic penalties may be imposed by the court if companies are found to be failing their vigilance obligations. Up to date, a small number of notices have been served to

¹⁵² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 (the Conflict Minerals Regulation).

¹⁵³ We understand that the despite Brexit, the UK will enact law to put the Conflict Minerals Regulation into place in the UK.

¹⁵⁴ List of Member State competent authorities designated under Article 10(1) of Regulation (EU) 2017/821 at https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157843.pdf (last visited 25 June 2020).

¹⁵⁵ Articles 10-11, the Conflict Minerals Regulation.

¹⁵⁶ Lexology, The EU Conflict Minerals Regulation - *New due diligence requirements for importers*, 5 June 2020, at <https://www.lexology.com/library/detail.aspx?g=767728d7-ad5e-46ad-8746-40bde6d921ee> (last visited 25 June 2020).

¹⁵⁷ Global Mining Review, *The battle for stronger EU conflict minerals legislation*, 4 February 2020, at <https://www.globalminingreview.com/finance-business/04022020/the-battle-for-stronger-eu-conflict-minerals-legislation/> (last visited 25 June 2020).

¹⁵⁸ Article 16, the Conflict Minerals Regulation.

¹⁵⁹ French Law on the Corporate Duty of Vigilance: *Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, paras 7-9; Brabant and Savourey p.4.



companies on the basis of vigilance plans published being inadequate, and two of these have proceeded to the courts at the end of the three-month notice period.¹⁶⁰

There is civil liability under tort law where the company breaches its own vigilance obligations. The three conditions for civil liability applicable under French tort law - and for which the claimant has the burden of proof - are the existence of damage, a breach of or the failure to comply with the vigilance obligation, and a causal link between the damage and the breach.¹⁶¹ The more remote in the supply chain that the damage occurred, the harder it might be for the claimant to prove that the damage has occurred as a result of a breach of the vigilance obligations, that there is causal link between such a breach and the resulting damage, and that they are within the scope of the vigilance obligations. If the claimant is successful, then the court can order specific performance and compensation for actual harm.

The Dutch Child Labour Due Diligence Act (2019)

This law was approved by the Dutch Senate in 2019, and is yet to go into effect.¹⁶² It obliges all companies that supply goods or services to Dutch end-users to issue a declaration that due diligence is conducted to prevent child labour from being used in the production of goods and services. In order to make the requisite declaration, it is implicit that the company must conduct the necessary due diligence. Should the due diligence give the company a reasonable suspicion of child labour in the production of the company's goods or services, it must adopt and implement a plan of action to address this. Once the obligation is in place, a new regulator [*toezichthouder*] will be created that will publish the corporate human rights due diligence statements in an online public registry.¹⁶³ There will not be a formal list of companies that must comply with the law, however. Affected third parties such as victims cannot sue companies under the Act,¹⁶⁴ but they can submit complaints that may trigger enforcement by the regulator. Any individual or entity wishing to submit a complaint must first submit the complaint to the company itself. If the company's reaction is 'inadequate' according to the complainant, and on the basis of concrete evidence of non-compliance with

¹⁶⁰ Decisions on the substance of the complaints are pending at the time of writing; See, S Brabant and E Savourey "All eyes on France – France Vigilance Law First Enforcement Cases: Current Cases and Trends" Cambridge Core Blog 24 January 2020.

¹⁶¹ This information is taken from the study for the European Commission, *Study on Due Diligence Requirements Through the Supply Chain*, (2020) p. 210.

¹⁶² The expectation is that the Act will become effective sometime in 2022. The three-year period between the Act's approval and it going into effect would give the government time to prepare a General Administrative Order that appoints the regulator and fleshes out the obligations of companies under the Act in more detail, see Ropes and Gray, "Dutch Child Labour Due Diligence Act Approved by Senate – Implications for Global Companies", 5 June 2019, <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>.

¹⁶³ Article 3. See Anneloes Hoff, "Dutch child labour due diligence law: a step towards mandatory human rights due diligence", 10 June 2019 <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/>.

¹⁶⁴ European Commission, *Study on Due Diligence Requirements Through the Supply Chain* (2020) p. 211. Claimants under Dutch tort law, nevertheless, would still be able to rely indirectly on the Act if the violation of the Act by the company could be construed as an indication of an act contrary to a duty of care to society. Where the company's child labour due diligence compliance officer breaches their obligations, such as by a violation of the implementation of a due diligence process that causes serious bodily harm, the compliance officer themselves incur personal criminal liability. This can be punishment of a maximum of 2 years' imprisonment and a €20,500 fine.



the Act, a complaint can be filed with the regulator.¹⁶⁵ A company can be fined up to €8,200 for failing to submit a statement declaring that it exercises due diligence. If a company fails to carry out due diligence in accordance with the Act or to draw up a plan of action, or to comply with any further requirements that are established pertaining to due diligence and the plan of action, a fine of up to €870,000 or 10% of the worldwide annual turnover of the company can be imposed. Thus, this is the only BHR law that provides regulatory oversight. But the scheme still has gaps: in particular, the Dutch authorities will not actively enforce the law apart from when they do so in response to a third party complaint, meaning that the law relies on the watchdog role of civil society to ensure its effectiveness.¹⁶⁶

¹⁶⁵ Article 3.

¹⁶⁶ Chiara Macchi, Claire Bright, “Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation” in M. Buscemi, N. Lazzarini and L. Magi (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill, 2020) 12.

APPENDIX E

CASE STUDY

We set out below a case study, which may assist in illustrating the proposed BHR regulator's complaints handling, investigation and enforcement process in practice.

Company A is a UK-based trading company with a controlling shareholder stake of Subsidiary B – its Indonesian subsidiary which operates a number of logging enterprises in Northern Indonesia.

Local communities had, for a period of time, raised a number of concerns about loss of ancestral lands and associated rights and the pollution of water courses connected with the logging. NGOs have called on the Indonesian state and Company A and Subsidiary B to stop this activity and associated the pollution, asking for restoration of land rights or suitable alternative compensation, but to no avail.

In June 2014, members of the local community attempted to halt Subsidiary B's activities by removing some of its logging equipment. Subsidiary B called on and provided resources to offices, local law enforcement (LLE) to arrest and beat-up members of the local community. Charges were later dropped. The logging equipment was later retrieved.

Company A had not conducted any human rights risk assessment of the activities of Subsidiary B.

Application of proposed BHR regulator complaints process

There are a number of the difficulties (also identified in the report) associated with bringing a BHR claim through traditional avenues, especially in cases concerning subsidiaries of UK-based multinational corporations operating in host states with weak governance systems. The cost of bringing the claims, the lengthy disclosure process and limited access to key corporate documents, as well as difficulties associated with evidence gathering all typify the frequent power asymmetry between vulnerable victims of BHR abuses and their alleged corporate perpetrators. The challenge of attributing liability to the parent company is significant. Had the matter been referred to a BHR regulator, these difficulties would be reduced or overcome. We illustrate below how this may have taken place in practice according to the regulatory process suggested.

(1) Complaint filed

As discussed above, any person who suspects that an entity has failed its due diligence procedures, or failed to prevent adverse human rights / environmental impacts, may file a complaint with the BHR regulator. Moreover, the regulator could commence an investigation, based on any information it received which gave rise to such a suspicion. There should be no requirement that the complainant (the victims themselves or their representative organisations) be a UK citizen or UK based, provided that the company complained about falls within the regulator's scope, as a UK based company, we anticipate that Company A would fall within scope. This circumvents traditional issues with standing if

the claim was otherwise brought in a litigation context.

In the present case, it is most likely that the Indonesian citizens or their representatives would file a complaint with the BHR regulator, although that would not be necessary to trigger investigation. Because Company A as the parent company, is UK-based the BHR regulator would have jurisdiction to receive the complaint. The Indonesian citizens would complete the pro forma application form available on the BHR regulator's website (which provides an overview of the complaint), together with supporting evidence to allow for a preliminary assessment. Support for the citizens in making the complaint would be available if required. Supporting evidence might include, for example, statements from affected individuals (those injured photographs or recordings documenting the human rights or environmental violations (level of water pollution, photographs of injuries sustained from the alleged police violence, testimony of land ownership), medical reports, and/or other reports conducted by third-party organisations (NGO studies on various blood samples submitted, human rights observers). This information would be helpful but not essential – a cogent account should be sufficient, enabling the BHR regulator to request information from Company A in the first instance and then investigate further.

Once the complaint is submitted, the Complaints Division will conduct an initial assessment of the application and supporting evidence to determine whether there is a 'case to answer' and whether the complaint is to be treated as such. It will do this by reference to established, published criteria. It may request further evidence from the complainant(s) if required, or it may close the case if it considers there to be no basis for an investigation. Otherwise, the Complaints Division will refer the complaint to the Supervision/Investigation team to undertake further investigation.

(2) Investigation

If the Complaints Division considered that the complaint merited a referral, then the Supervision/Investigation Division would take carriage of the matter. At an appropriate time a formal Notice of Investigation would be issued to Company A, outlining the basis for the investigation, as well as the investigatory and information-gathering powers available to the BHR regulator to compel the provision of relevant information and evidence (which may be used without notice if there are reasonable grounds to do so).¹⁶⁷ Company A could be required to provide, for example, electronic or hardcopy correspondence surrounding the events, documents relating Company A and Subsidiary B, as well as documents relating to its risk assessment procedures, and internal measures undertaken to comply with BHR due diligence guidelines. Company A and B will be entitled to make representations.

Once the investigation into the complaint is concluded, the Investigation team will prepare a file and decide whether to refer to criminal prosecution or for civil adjudication and the imposition of civil sanction.

¹⁶⁷ See above at [70].

(3) *Enforcement*

In the case of referral to criminal prosecution the case will either be referred to one of the prosecuting agencies or, if appropriate to the criminal enforcement unit within the BHR Regulator itself. In the case of civil adjudication, the matter will be referred to the Specialist Adjudication Team (SAT) (within Enforcement). The Specialist Adjudication Team, following a formal adjudication procedure,¹⁶⁸ will determine whether an infringement has occurred, and if so, the appropriate civil penalty to be imposed.¹⁶⁹

The SAT will then make a determination of Company A's liability in connection with a breach of the due diligence/failure to prevent requirements. It will take into consideration such matters as the control Company A had over Subsidiary B and the measures taken on a group-wide basis to prevent the adverse human rights impacts/ environmental harm of Subsidiary B's logging projects on local communities, compliance with due diligence/failure to prevent requirements, as well as considering a "victim impact statement" recording the impact on local community. Where Company A is found to be in breach, the SAT could impose financial penalties for failing to prevent human rights abuses, issue a restoration notice to remedy the adverse effects of its human rights and environmental violations to the local communities, and/or impose a stop notice requiring cessation of all logging activities by Subsidiary B until the appropriate penalties were paid and the damage remedied.

Depending on the specific findings, a restoration notice might state:

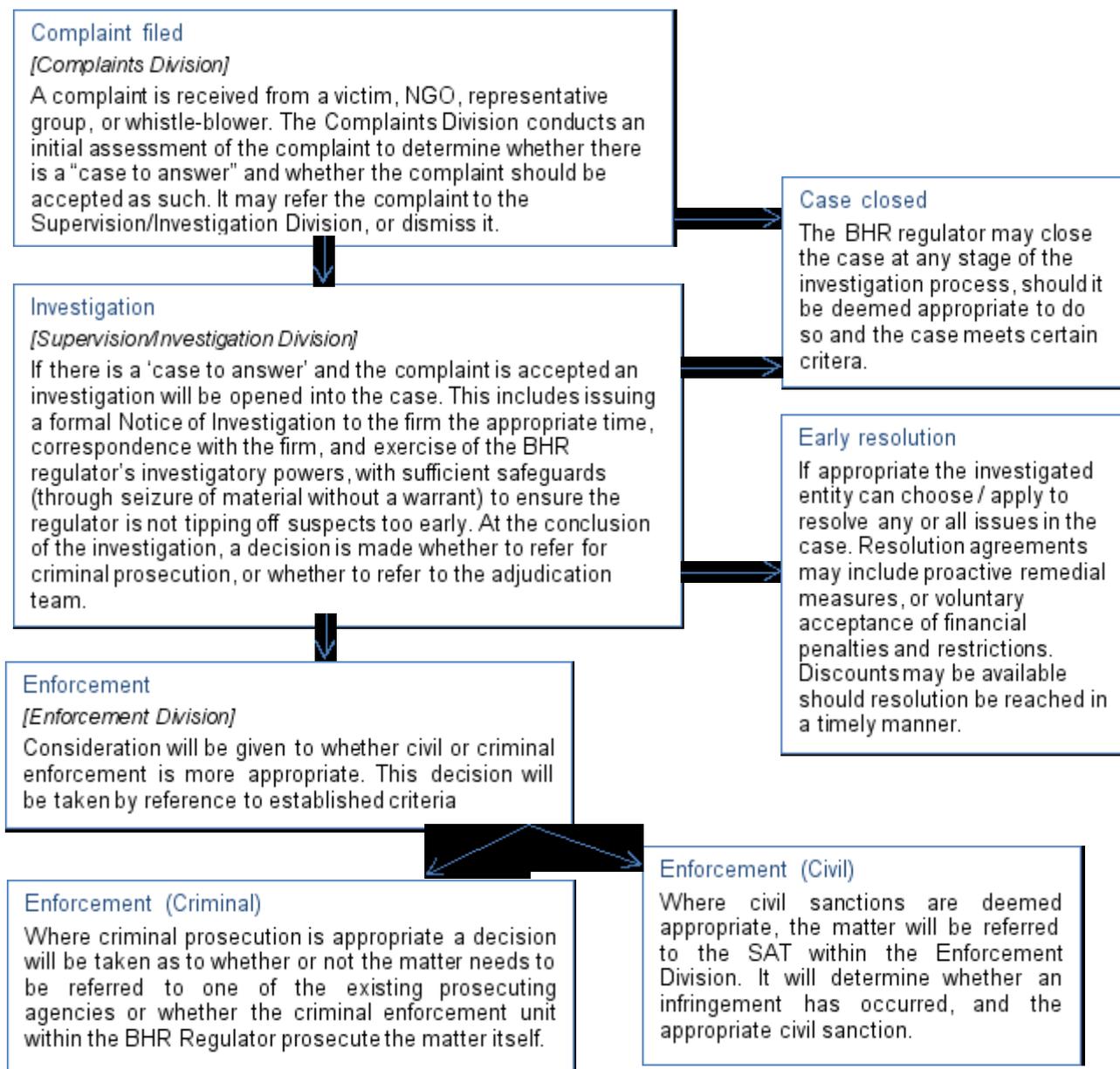
1. Company A must not exercise any shareholder voting rights in respect of subsidiary B, until:
 - a. Subsidiary B has ceased its illegal activities;
 - b. Subsidiary B has returned the ancestral land rights;
 - c. In the alternative to (ii) where ancestral land is unusable, Company A and Subsidiary B to provide banded funding of an appropriate sum to designated community fund;
 - d. Subsidiary B has taken substantial steps to restore the polluted water course (to the satisfaction of independent auditor C);
 - e. Subsidiary B has satisfied independent auditor C that its operations are compliant with business and human rights diligence guidelines, including appropriate protocols with local law enforcement agencies;
 - f. Company A and Subsidiary B to provide compensation to those beaten by local law enforcement.
2. Company A must pay a fine assessed at 3% of its annual turnover.
3. A failure of Company A to comply with this notice may result in criminal prosecution or a further fine.

¹⁶⁸ See above at [75].

¹⁶⁹ See above at [78].

Should Company A disagree with the SAT's determination, the BHR regulator will have an independent appeal mechanism, and all its decisions will be amenable to judicial review.¹⁷⁰

The following is a graphical summary of the proposed complaints handling, investigation and enforcement process for the BHR regulator.¹⁷¹



¹⁷⁰ See above at [98].

¹⁷¹ The process is similar to the Financial Conduct Authority's typical enforcement procedure for disciplinary cases. See further: FCA, *Enforcement Information Guide*, April 2017, at pp 5-6 <https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf>.