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The way ahead: shaping our impact on a changing world

Business and Human Rights in Impact Investment
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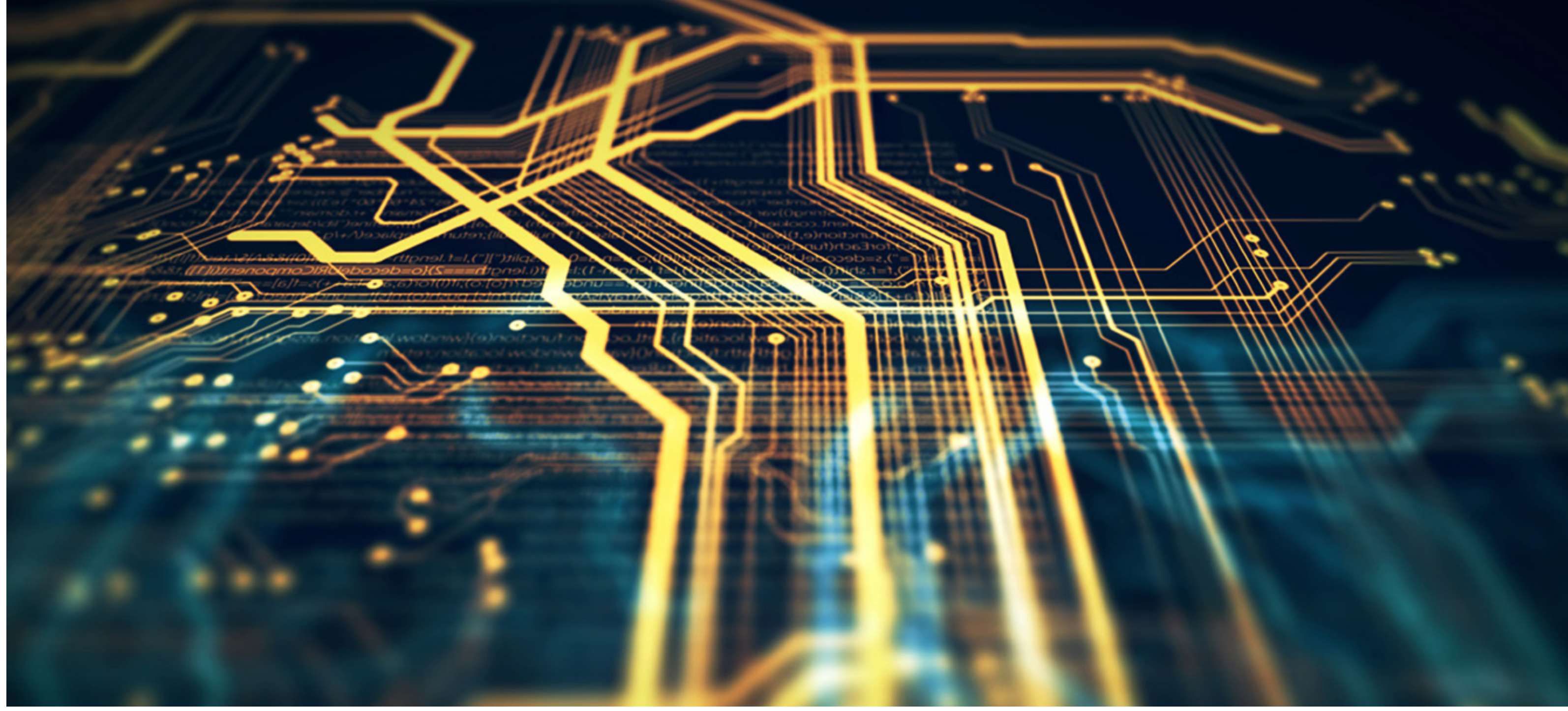
Foreword



Gareth Price
Managing Partner, Allen & Overy LLP

2020 has been a year of immense change, as the Covid-19 pandemic has swept across the world. The effects of the pandemic have stretched far beyond the lives of its immediate victims. The resulting economic and social stress has brought many human rights issues to the fore, exacerbating systemic issues and generating new challenges. Sadly, the pandemic and associated supply chain disruptions will drive many into poverty and inappropriate working environments. Yet the pandemic has also demonstrated our capacity for structural change on a global level – in a matter of months, firmly embedded behavioural patterns have been dramatically altered, with striking results. As the world moves towards rebuilding economies and planning for the future, we are presented with a unique opportunity to consider the role of human rights in shaping this next era.

One of the first to seize this opportunity was the European Commissioner for Justice, who announced that the European Commission will develop legislation, to be introduced in 2021, to require all businesses in the European Union to undertake mandatory human rights and environmental due diligence. On **page 16**, Lise Smit of the British Institute of International and Comparative Law and Robert McCorquodale of Brick Court Chambers and the University of Nottingham, summarise the findings of their study on due diligence requirements in supply chains, which was commissioned by the European Commission. A key finding was that a strong majority of the wide-ranging businesses surveyed supported the introduction of a single EU-wide standard, to replace an existing mosaic of domestic and industry-level measures.

The EU is not alone in this endeavour. On **page 45**, Sarah Morreau of Allen & Overy explains that due diligence requirements are also developing on a domestic level in the Netherlands, Switzerland and Germany, and are being contemplated on an inter-state level in the second revised draft of the International Treaty on Business and Human Rights. This year has also seen a number of high-profile cases across several jurisdictions, some of which have recognised potential corporate liability for human rights violations, while others have declined to extend corporate responsibility for human rights violations committed abroad.

Against this background, investors have faced increasing pressure to use environmental, social and governance (**ESG**) factors – including human rights – to make investment decisions. On **page 9**, Fiona Reynolds, the CEO of the Principles for Responsible Investment, discusses the growing momentum towards impact investment, which widens the focus beyond risk and return to encompass positive impact. One key takeaway is that, since the pandemic began, there have been record levels of investor engagement with ESG issues. As the global economy reopens, many investors are taking the opportunity to work towards ensuring supply chain management is in line with best practice.

The need to protect vulnerable workers, and particular the elimination of child labour, has also been brought firmly into the spotlight. In many countries, schools have closed without a viable remote alternative, and as adult wages have fallen, children are more vulnerable to exploitation. On **page 17**, Silvia Possenti of the International Labour Organisation's *'Accelerating Action for the Elimination of Child Labour in Supply Chains in Africa'* project discusses the key drivers of child labour and modern slavery, and what businesses and other stakeholders can do to protect human rights within global supply chains, including through the use of digital technologies and artificial intelligence.

Many responsible corporate citizens are considering opportunities to drive meaningful change, both within and beyond their own businesses. On **page 31**, Théo Jaekel of Ericsson provides insight into navigating human rights due diligence in the technology sector and the particularities attendant to new and emerging technologies. Greater collaboration between industry players is another route to effect change, but one which requires careful consideration. On **page 23**, John Roberti and Puja Patel of Allen & Overy discuss the potential for industry-wide agreements to create antitrust liability, even if they are motivated by doing good, and suggest ways to mitigate these risks.

While technology can be a powerful tool for businesses in identifying and preventing breaches of human rights, it comes with its own set of risks and limitations. On **page 25**, Marija Manojlovic, Trang Ho Morton and Serena Tommasino of the Global Partnership to End Violence Against Children, discuss the role of businesses in preventing and tackling online child sexual exploitation and abuse. On **page 41**, Simon Chesterman, Dean of the Faculty of Law at the National University of Singapore, discusses the opacity of artificial intelligence-driven systems, and the responsibilities that businesses could bear when relying on decisions made by such systems.

Against a complex landscape and in turbulent times, we hope that this publication continues to provide an important platform for diverse perspectives on these developments and what the future may hold.

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Business and Human Rights in Impact Investment

Interview with Fiona Reynolds, CEO, Principles for Responsible Investment

The BHRR had the opportunity to interview Fiona Reynolds, the CEO of the Principles for Responsible Investment (PRI). The PRI, which is supported by the United Nations, is the world's leading proponent of responsible investment. The interview provides insight into the rise of responsible and impact investment and the wider framework in which these strategies operate.

Today's institutional investors are under growing regulatory and societal pressure to ensure that "environmental, social and governance" (ESG) – or sustainability – factors are embedded in their decision-making processes. The dominant view, with some notable objectors, is that integrating ESG criteria into decision-making leads to stronger, long-term financial performance.

"ESG investing" is often used as the umbrella term for a range of investment strategies, including responsible investment and impact investment. While "responsible investment" incorporates ESG factors into all investment analysis and management strategies, "impact investment" uses ESG criteria to make investment decisions with the primary purpose of achieving positive impact.

Traditionally, ESG investing has been associated with green bonds. Can you tell us about the wider picture, and how social matters are being taken into account by investors?

Green bonds have been an important part of ESG investing since the market began taking shape more than ten years ago. With climate issues topping the ESG agenda of many investors, it is no surprise that the green bond market has and continues to experience strong growth.

For years, social issues – the "S" in ESG – have taken a backseat, in part because social issues can be difficult to measure and quantify. Today, the tide is changing though, and social issues are firmly on the radar of global investors, especially in light of the Covid-19 crisis. On the regulatory side, we are beginning to see momentum from governments as they champion human rights and embed the expectations of investors into regulation. Around the world, leading investors are recognising that meeting international standards around human rights leads to better financial risk management and helps them to align their activities with the evolving demands of their beneficiaries, clients and regulators.

Green bonds are likely to remain an important part of ESG investing in years to come; however, forward-looking investors are now adopting a wider view. Responsible investment not only introduces such investors to a wider range of investment products, but it also enables them to explore other avenues of engaging with ESG issues.

Impact investing has recently gained momentum within the broader ESG rubric. Why do you think it has been the subject of increased attention lately?

In the wake of the Covid-19 crisis, the United Nations' Sustainable Development Goals (SDGs) have never been more important. They provide a kind of business plan for the world – a roadmap to build back better. The world, including investors, is finally beginning to understand that healthy people and a healthy planet are pre-conditions for a healthy economy. In line with this thinking, investors, with their many levers for change, are now widening their focus beyond risk and return to also consider positive impact.

Focusing on positive ESG outcomes and real-world impact helps investors to understand the potential financial risks and opportunities that are likely to exist in, and in the transition to, an SDG-aligned world. Impact investing also allows investors to:

- identify opportunities across supply chains and through new and expanded products and services;
- prepare for and respond to legal and regulatory developments, including those that may lead to asset stranding;
- protect their reputation and licence-to-operate, particularly in the event of negative outcomes from investments;
- meet institutional commitments to global goals, and communicate on progress towards meeting those objectives;
- consider materiality over longer-time horizons, to include transition risks, tail risks, financial system risks, etc.; and
- minimise the negative outcomes and increase the positive outcomes of investments.

At the PRI we have recently published a report, **Investing with SDG outcomes: a five part framework**, to guide investors who seek to shape outcomes in line with the SDGs.

Can you give a brief overview of the PRI and its role in promoting responsible investment?

Supported by the United Nations, the PRI began its mission back in 2006 with great ambitions and just a handful of institutions as founding members. Today, we have more than 3,000 signatories, who together represent over USD100 trillion in assets under management. This powerful collective of signatories now accounts for more than half of the world's institutionally managed assets.

At the PRI, we work closely with our international network of investor signatories to create a sustainable financial system which can ultimately deliver on our vision for a better future for all. We seek to understand the investment implications of ESG issues and to support our signatories in considering those issues when making their investment and ownership decisions. In implementing responsible investment, investors are better able to manage risk and generate sustainable, long-term returns as well as drive real-world impact.

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Some commentators say that the Covid-19 crisis has increased interest in responsible investing. Do you agree and are you seeing a greater focus on social issues as a result of the pandemic?

Since the pandemic began, investors, businesses and governments have engaged more with ESG issues, the "S" issues in particular. Despite predictions that responsible investing would fall to the wayside during the pandemic, at the PRI we have seen record levels of investor commitment and take-up of sustainability strategies. In many ways, the pandemic has provided the first real test, or proof point, for sustainability. For example, the **Financial Times** has reported that more than 88% of sustainable indices outperformed their parent benchmarks during this time of increased market uncertainty.

Social issues in particular have come to the fore as the unfolding crisis has served to highlight and, in many cases, exacerbate systemic social issues such as inequality, decent work, social protections, access to healthcare and working conditions. While the virus itself has not discriminated, it is clear that our social and economic systems have. Workers in the "gig economy" on zero-hour contracts faced serious consequences from lockdowns. Overnight, gig economy workers – many of whom support households, lack savings and have no access to a governmental social safety net – found themselves let go, often without wages or any severance. Equally, we have seen strong disruptions in supply chains having immediate consequences for workers.

As the global economy reopens, businesses, governments and investors have an opportunity to build back better. Specifically on social issues, investors have an opportunity to go beyond national and regional legal frameworks and ensure that supply chain management is in line with best practice. We are seeing a growing number of investors take up this opportunity to engage with policymakers and regulators to close the current gap in the protection of workers' rights globally. There is also increasing pressure on companies to improve how they factor in the true cost of labour, which is rising, and which may eventually trickle down to risks facing long-term investors. Overall, there is a strong sense that investors must contribute to a recovery that is fair and inclusive with respect for human rights at its core.

The **PRI's seven-part Framework** provides recommendations to investors on how to best approach and devise their engagement with policymakers and regulators.

Recently, the PRI commissioned a study with the United Nations Environment Programme Finance Initiative (UNEP FI) and The Generation Foundation, which looks at whether there are legal impediments to the consideration of sustainability impact in investment decision-making. Are you able to provide an overview of the project?

There is increasing recognition that in addition to adequate financial return, beneficiaries need and benefit from social, environmental and economic standards to provide for quality of life in retirement. This is very much aligned with the growing expectations from beneficiaries, governments and wider society on investors to consider sustainability impact (for example, in terms of how investors respond to the objectives of the Paris Agreement and the SDGs).

In response, the PRI and UNEP FI are undertaking a project to analyse whether and how legal frameworks across 11 jurisdictions allow investors to consider sustainability impact as part of regular, day-to-day investment decision-making. The project also has a reference group of experts to test and support the report throughout its development.

The research is now underway and will ultimately provide recommendations for policy change where analysis determines that there are legal impediments that restrict investors from seeking to incorporate sustainability impact in their investment decision-making. We will then work with PRI signatories, policymakers and other key stakeholders to build on the analysis, so that in the coming decade, considering sustainability impact becomes a core component of investment decision-making.

What are the key challenges that you think need to be overcome to make responsible investment mainstream?

Responsible investment has grown significantly over the past decade and has shifted from a niche activity toward the mainstream. However, there is a continued focus on the short term by investors, and in fact the wider financial system is holding responsible investment back from becoming fully mainstream. The lingering focus on shareholder primacy and viewing profit as king, rather than focusing on the needs of all stakeholders and real-world impacts, is also holding it back.

"The world, including investors, is finally beginning to understand that healthy people and a healthy planet are pre-conditions for a healthy economy. With their many levers for change, investors are now widening their focus beyond risk and return to also consider positive impact."

There are some promising examples of shifting perspectives on this though, such as the U.S. Business Round table's 2019 statement on the purpose of corporations, which highlights a commitment to all stakeholders.

There is a misconception that integrating ESG factors into investment decision-making and active ownership comes at a cost. However, there is a significant and growing body of academic evidence that supports the opposite. A meta-study from the University of Hamburg and DWS shows that out of 2,000-plus studies since 1970, 63% found a positive link between a company's ESG performance and its financial performance, and only 10% found a negative link.

What methodologies can be used to monitor and measure an investment's social impact? What metrics are commonly used?

Measuring the social impact of investments currently poses a challenge, as there is a significant gap in measurement methodologies. Social indicators typically require qualitative measurements, which are more difficult to quantify and therefore harder to integrate into traditional investment strategies. In addition, the vocabulary used to describe social issues is sometimes confusing and fails to build on extensive human rights terminology. Indeed, for investors unfamiliar with it, human rights as a concept can be complex to grapple with, as it covers topics that range from labour rights to gender equality. Conversely, carbon emission metrics, for example, are simple and measurable.

However, despite the challenges, the responsibility of the private sector (including investors) was made clear in 2011, when the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs). All entities in the value chain can cause negative human rights outcomes, and therefore have a responsibility to respect human rights. For this to happen effectively throughout the chain, each entity must identify negative human rights outcomes, and communicate what action they are taking in response to those above them in the value chain, governments, business partners, clients and beneficiaries.

The PRI will be exploring these challenges further through our work on human rights and the role of investors.

Can you explain what steps the PRI is taking to support efforts to address social issues, such as human rights, working conditions and modern slavery?

Ensuring respect for human rights is central to achieving the PRI's ten-year blueprint for responsible investment. Based on the UNGPs and the OECD Guidelines for Multinational Enterprises, the PRI has set out an expectation that institutional investors respect human rights, including labour rights and freedom from forced labour, and our human rights programme will support signatories to meet this responsibility.

We have just launched our new report on **Why and how investors should act on human rights**. It sets out a three-part responsibility to ensure investors have a policy commitment to respect human rights, put in place a due diligence process and provide access to remedy. The policy and due diligence process should cover the human rights included in international legal instruments. The due diligence system is the backbone of day-to-day management of activities. Unlike investors' traditional risk management systems – which focus on business risk, operational risk or financial risk – the core component is a focus on the risk of negative outcomes for people.

Institutional investors should embed their human rights policy commitment into their investment governance framework. They can then use their investment decisions, stewardship of investees and dialogue with policymakers and other stakeholders to effectively implement the due diligence and access to remedy requirements, in line with the UNGPs.

"As the global economy reopens, businesses, governments and investors have an opportunity to build back better. Specifically on social issues, investors have an opportunity to go beyond national and regional legal frameworks and ensure that supply chain management is in line with best practice."

“Institutional investors should embed their human rights policy commitment into their investment governance framework. They can then use their investment decisions, stewardship of investees and dialogue with policymakers and other stakeholders to effectively implement the due diligence and access to remedy requirements, in line with the UNGPs.”

Can you provide an example of how businesses, investors and banks successfully incorporate human rights considerations into their strategies and decision-making processes?

The Liechtenstein Initiative’s Financial Sector Commission on Modern Slavery and Human Trafficking (the Commission), which I chaired, provides a great example. Although slavery is illegal, there are currently an estimated 40.3 million people in modern slavery or who are victims of human trafficking. That is around 1 in every 185 people.

In late 2018, the Foreign Ministers of Liechtenstein, Australia and latterly the Netherlands, working with Muhammad Yunus, convened the Commission. It brought together survivors of human trafficking and child slavery, leaders from hedge funds, commercial and retail banks, global regulatory authorities and global trade unions, a development finance institution, institutional investors, a United Nations mandate-holder and leaders in the fight against modern slavery and human trafficking.

The result was the 2019 **Blueprint for Mobilizing Finance Against Slavery and Trafficking** (the Blueprint) which sets out five Goals towards which financial sector actors can work both individually and collectively. These include:

- compliance with laws against modern slavery and human trafficking;
- knowing and showing modern slavery and human trafficking risks;
- using leverage creatively to mitigate and address modern slavery and human trafficking risks;
- providing and enabling effective remedy for modern slavery and human trafficking harms; and
- investment in innovation and prevention.

With recommended actions to take accompanying each Goal, the Blueprint provides a shared collective-action framework that different financial sector actors can implement in their own ways and at their own speeds

Conclusion

The pandemic has brought issues regarding social inequality and sustainability to the fore. In an economic climate where governments and institutions around the world are becoming increasingly focused on redirecting capital flows towards activities that help in the transition to an SDG-aligned economy and which create positive impact, responsible and impact investment are gathering momentum. Going forward, institutions and investors wishing to drive impact will look to cross-organisational guidance on all components of ESG in order to adopt a cohesive and collaborative approach to ESG investing. Those who do not, risk falling behind in fully grasping the opportunities to align their activities with the evolving demands of their beneficiaries, clients and regulators.

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Working Towards the Elimination of Child Labour in Supply Chains in Africa

An interview with Silvia Possenti of the International Labour Organization (ILO)

We speak to Silvia Possenti, Supply Chain and Enterprises Officer from ILO's 'Accelerating Action for the Elimination of Child Labour in Supply Chains in Africa' project (ACCEL Africa) about her insights into conducting business responsibly.

The views expressed herein are those of the author and do not necessarily reflect the views of the International Labour Organization.

With one in five children in child labour – and about 62 million children in child labour in agriculture – Africa currently represents the region with the highest prevalence of child labour in both absolute numbers and percentage.[1] Most of child labour is found into the lower tiers of global supply chains (GSCs) where decent work deficits such as informal and seasonal employment contracts, poor working conditions and low wages are prevalent, and where child labour can be difficult to detect and manage.

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Please could you tell us about ACCEL Africa, and the impetus behind the creation of this specialised project? What is the focus of the project, and how does it differ from other initiatives in this space?

As pioneer project funded by the Netherlands Government, the ACCEL Africa project has the overarching goal to accelerate the elimination of child labour through targeted actions in selected supply chains in Côte d'Ivoire (cocoa and gold), Egypt (cotton), Malawi (coffee and tea), Mali (cotton and gold), Nigeria (cocoa and gold), and Uganda (coffee and tea). To reach this aim, the project focuses on: a) public policy and good governance; b) empowerment and representation, and c) partnership and knowledge sharing among global supply chain actors working in Africa. In addition, all outcomes of the project address gender-strategic needs as a cross-cutting theme and support continuous research and identification of good practices from both the project implementation and other sources. Key to the project is also the enhancement of synergies and development of innovative solutions in contexts where more than one prominent driver of child labour coexist. In implementing such approach, the project engages with the private sector and with relevant industry bodies and fora as well as with global union federations to support the adoption and monitoring of responsible business conduct and transparency.

In your experience, what have you found to be key contributors that drive the use of child labour, forced labour and modern slavery in supply chains?

Evidence shows that key drivers towards the use of child labour, forced labour and modern slavery in supply chains are often linked to three main areas: (a) gaps in statutory legislation, enforcement of law and access to justice that can lead to non-compliance with international labour standards; (b) socio-economic constraints facing individuals and workers; and (c) business conduct and business environment.[2]

The first area relates to the responsibility of States to protect individuals and workers within their territory and/or jurisdiction by establishing and enforcing a legal framework for responsible business conduct. Despite efforts, significant gaps still remain as many countries lack adequate capacity to enforce both labour and criminal law, face budgetary constraints in terms of inspection mechanisms and lack coordination and coherent policy procedures across several government ministries.

The second area refers to multidimensional poverty, informality, lack of or limited access to social safety nets and labour protection, discrimination, precarious migration, abusive and fraudulent recruitment practices and debt bondage, limits on the ability of workers to organize and exercise their collective voice.

All these factors operate together to limit options for survival and sustainable livelihoods, making it more difficult for people to refuse or leave jobs that are abusive or have degrading conditions, and for families to avoid reliance on their children due to socio-economic pressures.

Finally, the third area relates to the business environment and the business responsibility to respect fundamental principles and rights at work. A high degree of informality, lack of awareness, capacity, policy commitment and action along with economic and commercial pressures around price, cost, speed and delivery time represent key driving factors for some businesses to use child labour, forced labour and human trafficking through global supply chains. Such challenges confront not only employers but also buyers, who may not be aware that child labour, forced labour or human trafficking exist along their supply chains and how to address these issues with suppliers with whom they may not hold direct buying relationships. Severe cost and price pressures can lead suppliers to lower labour costs while time pressures can often turn to overtime beyond legal limits, unauthorized outsourcing of production, as well as towards the use of informal labour contracting to deliver orders on time.

In this context, comprehensive and holistic policy responses are key to address child labour, forced labour and human trafficking in global supply chains.

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What should businesses be aware of as potential risk factors or indicators that their supply chains may involve or are likely to involve the use of child labour, forced labour and/or human trafficking?

Indicators of elevated risks can be geographic, such as operations in areas with a high prevalence of child and/or forced labour across various industries; socio-economic, such as a large informal economy and/or insufficient educational opportunities; or factors such as the cultivation of certain agricultural products which are known to often involve the use of child labour or forced labour.

In addition, despite the absence in some cases of direct commercial linkages with the entities that are causing child labour or forced labour, business stakeholders should be aware of potential adverse human rights impacts resulting from activities that could be linked to their operations, products or services by their business relationships.[3]

How should these risk factors or indicators be taken into consideration by businesses conducting due diligence into their supply chains? Are there any specific approaches, whether preventative or reactive, that you have seen to be particularly effective?

At its core, due diligence entails a full supply chain approach and is preventive in nature, aiming at avoiding to cause and contribute to child labour, forced labour and human trafficking.

While it is important for companies to operate under specific international frameworks such as the United Nations Guiding Principles on Business and Human Rights (UNGP), the ILO MNE Declaration, and the OECD Guidelines for Multinational Enterprises, some of the most recent and effective approaches to gain information on business partners and their compliance related to child labour, forced labour and human trafficking include the use of traceability – either individually or through multi-stakeholder initiatives – via online databases, self-disclosure information systems and distributed ledger technology (eg blockchain).

Continuous monitoring linked with training and awareness building, is also intended to complement supplier assessments and can help in identifying abuses on ongoing basis. Along with that, worker-driven social responsibility programmes, built on binding agreements between companies and workers' organisations which ensure workers are included in companies' policies and implementation activities, have been proved to be significant for strengthening human rights due diligence that is grounded in the central role of workers and their organisations.[4]

Overall, successful approaches in conducting due diligence should include social dialogue and multi-stakeholder collaboration by linking upstream and downstream segments of the supply chain. To be most effective, governments and business should work together with social partners and civil society to link and integrate the private sector into existing localized efforts promoted by governments and civil society organisations. Such a collaboration has the potential to support efforts to address the common set of root causes of child labour, forced labour and human trafficking.

What are some of the novel approaches that you are seeing being trialled by businesses to enhance the protection of human rights within their supply chains?

Artificial intelligence and digital technologies are being used as tools to increase the ability of companies to manage sustainability in an effective manner. In particular, distributed ledger technologies such as blockchains currently represent an important tool to manage complicated networks of suppliers due to a number of factors such as their resistance to modification of data, their greater efficiency for data analysis, cost efficiency and real-time data traceability, as well as a structure that enables greater trust between organisations linked across complex supply chains.

Blockchain initiatives have been progressively implemented to help address issues of traceability of goods and services, map supply chains actors and locations as well as pool and share information on risks related to child labour and forced labour. Some emerging initiatives have been applied, for instance, in the garment and footwear industry to increase interoperability through a technical standardized tool for full transparency and traceability to exchange data and information on compliance with due diligence requirements along the entire value chain (UNECE),[5] as well as in the agricultural sector, to promote financial inclusion of small-scale farmers through smart contracts that can foster cost reduction and efficiency gains together with reduced risk of non-compliant behaviour. In particular, through a partnership with BanQu – a blockchain-based platform aimed at fighting poverty among millions of smallholder farmers in corporate supply chains – AB InBev, the world's largest brewer company, has advanced its goal to build skills, connect and empower financially around 20,000 smallholder farmers in its direct supply chain by 2025. BanQu's platform allows to track the volume and quality of goods delivered and the price paid, by creating at the same time a decentralized digital ledger of each transaction for the produce bought on the platform and allowing each farmer to receive a digital payment through one of the major mobile money providers in the country.

In this regard, AB InBev played a significant role by partnering with the mobile phone company Airtel Africa and the mobile money service MTN in order to provide discounted phones and free Sim cards to farmers and booster the network connections in buying locations. Through this system, AB InBev has started its piloting initiatives in Zambia and Uganda targeting around 2,000 cassava farmers and 1,700 barley farmers respectively, and has planned to extend the use of the platform to its programs in Tanzania and Brazil, having now a full visibility about the crop, the different stakeholders involved and the price. Both agribusiness and farmers seem in fact to benefit from increased traceability and transparency in their supply chain.[6]

The first blockchains' applications have, however, also highlighted the importance for companies to ensure this technology can be accessed by vulnerable groups and informal supply chain actors (eg artisanal and small scale miners, migrant agricultural workers, and homeworkers) who could be excluded due to the context of low governance in which they operate. In addition to that, emerging blockchains' initiatives have emphasized the need for an accurate digital representation of production workflows to reliably connect physical inputs with physical outputs, and the relevance of developing a governance structure to define clear roles and responsibilities for the participants in the network. To overcome these and other challenges, it emerges as fundamental to place a focus on how due diligence could be best integrated in blockchain initiatives in a coherent way.[7]

What has been the impact of COVID-19 with respect to the incidence of child labour, forced labour and modern slavery in the region? How would you like to see businesses respond to this new environment?

It is not possible to draw some definitive and final observations on the subject as studies on the impact of COVID-19 are still ongoing. However, it can be said that the spread of the pandemic has started exacerbating the already precarious working and living conditions of poor households, increasing the risk to rely on negative coping mechanisms such as the use of child labour and forced labour. The health crisis and consequent disruption of global supply chains through both demand and supply side shocks following policy responses adopted by governments to halt the spread of the virus – such as lockdowns, close of businesses, cross-border and domestic restrictions of movements – have been reducing demand for workers and employment opportunities, thus generating a rise in poverty.

As one of the main drivers of informal and exploitative work, a decrease in wages and jobs opportunities for adults can push households to rely on child labour for financial support. During the current crisis, we have observed that the economic slowdown in the European Union (EU), United States (U.S.) and United Kingdom (UK) has caused a fall of 6% in cocoa prices since the start of 2020, threatening the livelihoods and socio-economic stability of West African countries that collectively supply two-thirds of the world's cocoa.[8] Similarly, the reduction of coffee prices in the major import markets such as the EU, U.S. and the UK together with risk of monetary devaluations of currencies in the countries of production, lockdown measures and a collapse in investments has been affecting vulnerable small-scale farmers in major coffee producing countries in the region including Ethiopia, Uganda and Kenya,[9] resulting in a reduced labour supply, a rise in labour costs, and a reduced profitability for farmers.[10]

These circumstances could lead to a corresponding increase in child labour, including its most hazardous forms as the crisis has also generated a growth in informal employment and family businesses, usually characterized by a higher exposure to health and safety concerns.[11] In particular, if not appropriately embanked, the disruption of food markets and employment opportunities in a region where the agricultural sector accounts on average for 15% of the total GDP and employs more than half of the total labour force,[12] could risk to trigger a dramatic rise in food insecurity, with a significant impact on the living standards of smallholder farmers, and informal rural and urban market traders and vendors.

Coupled with a decrease in wages and employment opportunities, the health impact of the pandemic on adults' infection and death could leave children without one or both parents or other caregivers, leading them to assume greater responsibility for family survival and consequently making them more vulnerable to child labour, trafficking and other forms of exploitation. Also, reductions of remittances from abroad and reduction in the availability of credit due to economic contractions in high-income countries could reduce household investments in schooling. In Egypt, for instance, where the remittances from family members abroad represented about 8.8 percent of the national GDP in 2020, rural households are estimated to lose between 11.5% and 14.4% of their average income from remittances, increasing the risk of child labour as alternative source of income. Similarly, travel restrictions and an estimated decline of global labour income by

10.7 per cent during the first three quarters of 2020 as a result of the pandemic,[13] could induce or have induced workers to take hazardous jobs and contract debts to survive or resort to informal labour brokerage networks, increasing the risk of debt bondage and human trafficking. Particularly vulnerable in this context are unaccompanied migrant children that are exposed to an extremely high risk of labour exploitation.[14]

An additional impact of the COVID-19 crisis on child labour and forced labour is the temporary closure of schools. In Nigeria, for example, it has been estimated that the closure of schools would affect close to 46 million students throughout the country. Extensive evidence of the negative interplay between working and schooling[15] suggests that children, especially girls, who belong to poor households and who are out of school for extended periods of time are much less likely to return when classrooms reopen, while children who had been previously removed from child labour are at heightened risk of relapsing.

The closure of schools also implies the elimination of access to school-based nutrition programmes as an important form of social safety net which not only helps in reducing children's malnutrition but also acts as significant incentive to send children to schools reducing their engagement in child labour.[16] In this regard, previous experience shows that school closures during the Ebola outbreak in West Africa from 2014 to 2016 resulted in a major raise of child labour. In addition to that, although online learning platforms have been adopted as a tool to mitigate the closure of schools and the disruption of education, children living in rural communities, informal settlements and camps with limited infrastructure and limited access to internet, are unlikely to be able to continue their education through remote learning.

In this complex scenario, it will be important for companies to sustain their commitment to human rights by addressing the unique vulnerabilities of workers and children employed at the bottom of the supply chain. As part of due diligence processes, businesses should heighten their mechanisms to assess where risks are highest at both geographic and sectoral level in order to identify 'hot spots' and prioritize interventions, by making their prevention and remediation systems more resilient.

It will be important to strengthen ties with suppliers and honour any obligations arising from existing collective agreements, commercial contracts and codes the enterprises have committed to, while reviewing the impact of processes, operational changes/restructuring of business operations on outside business partners and their workers and communities. This should involve higher investments in local capacity building and the engagement in a meaningful dialogue with business partners in high-risk countries to understand their challenges and make sure that their policies provide adequate support to workers and their families at the commodity level (including sick and family leaves, health and safety protections, flexible working arrangements, access to credit or other financial services, temporary pandemic premiums) and abide by local laws and companies codes of conduct – even during times of crisis.
In this regard, social dialogue and cooperation with governments and workers' organisations can help enterprises contribute to the design of effective strategies and policies to mitigate the socio-economic consequences of the crisis: coordination of tripartite responses with strong commitment from all three parties is, in fact, a key element for a successful and inclusive impact.

Last but not least, participation in multi-stakeholder initiatives and the creation of emergency funds together with the provision of cash transfers can allow companies to provide direct support to civil society groups and social-services providers as well as producer organisations and cooperatives to channel resources towards vulnerable groups in the areas from which they source.

What have been your observations about involvement of social actors in policies of businesses?
What examples have you seen of effective collaboration between businesses and stakeholders – and what learnings would you share with businesses looking at integrating such collaboration within their processes?

Effective forms of collaboration include both collaboration between businesses to scale up, for example, effective solutions and to share learnings and experiences through common platforms as well as multi-stakeholders collaboration with government, social partners, and civil society to help ensure that company actions are integrated with existing government and community-based initiatives in reducing and preventing child labour and forced labour.

There are a number of multi-stakeholder initiatives that have proved to be effective. Among them, the ILO Better Work Programme - a partnership between the ILO and the International Finance Corporation of the World Bank aimed at improving compliance with labour standards and promoting decent work in the supply chains of the garment industry – brings together different stakeholders including governments, trade unions, global brands and factory owners. Through such collaboration, the programme has shown to have a direct impact on improving working conditions by reducing abusive practices including child labour and forced labour, excessive overtime and the gender pay gap.[17]

Similarly, the Fair Recruitment Initiative, launched by the ILO in 2014, is a multi-stakeholders initiative implemented in close collaboration with governments, representative of employers' and workers' organisations, the private sector and other key partners to help prevent human trafficking and forced labour, protect the rights of migrant workers and reduce the costs of labour migration. Based on a four-pronged approach with social dialogue at its centre, the initiative has been working on enhancing global knowledge on national and international recruitment practices; improving laws, policies and enforcement to promote fair recruitment; promoting fair business practices; and empowering and protecting workers.[18]

Along with that, emerging government-backed multi-stakeholder initiatives have been providing an effective platform for collaboration between national governments, businesses, trade unions and civil society organisations for the purpose of sharing best practices and implementing shared action to address human rights abuses in global supply chains.
For instance, in the Netherlands, the government has been developing the International Responsible Business Conduct (IRBC) agreements with businesses, unions and civil society to facilitate collaboration in addressing human rights violations including child labour, forced labour, human trafficking and environmental degradation in the context of Dutch companies' global supply chains.[19]

Also, inclusive global partnerships play a critical role in bringing stakeholders together to address human rights challenges in global supply chains. In this regard, the Alliance 8.7 Action Group on Supply Chains supports country level implementation by conducting research and coordinating advocacy, disseminating knowledge, developing tools and mobilising resources across stakeholders to address child labour, forced labour and human trafficking. Likewise, the Child Labour Platform – co-chaired by the International Organisation of Employers (IOE) and the International Trade Union Confederation (ITUC) – and the ILO Global Business Network on Forced Labour catalyse collective action by offering forums for collaboration where businesses and their networks can connect, innovate and share information towards the elimination of child labour and forced labour.

Another interesting example about the involvement and collaboration of different social actors is represented by the integrated area-based approach (IABA). Such approach promotes a programme of interventions based on the involvement of local communities and dialogue and cooperation among government entities, employers' and workers' organisations as well as civil society organisations. In this framework, the stakeholders are supported in identifying the root causes of child labour, promoting alternatives and changes in supply chains through policy coherence, institutional development and community level interventions to create zones that are free from child labour, forced labour and human trafficking.[20]

Overall, to help prevent the use of child labour and forced labour in their supply chain, it is important for businesses to make sure to implement a due diligence system which entails social dialogue with affected stakeholders, including workers, their unions and communities. To be effective, the measures put in place by the private sector require consultative and coordinated approaches that align with national objectives and public policies including social welfare, protection and assistance work done by both governments and civil society, so as to link victims of child labour, forced labour and human trafficking in their supply chains to the services they need and ensure more comprehensive and holistic interventions.

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When is the Social Good an Antitrust Bad?

By John Roberti and Puja Patel of Allen & Overy

As responsible corporate citizens look for opportunities to be socially responsible, they may consider industry-wide collaborations, which will naturally involve interactions with competitors. By their very nature, industry-wide agreements may create antitrust liability, even if they are motivated by doing good.

Consider the following hypothetical. Imagine that an environmental group releases a report that states that, under current lumber practices, a certain species of tree will risk extinction in 20 years. No one questions the science. The environmental group develops a public and government relations campaign. Local lumber companies agree that they will all cut production by 20 percent. They urge the furniture companies that use this wood to boycott any lumber companies that do not abide by the agreement to limit production. The furniture companies' trade association adopts an agreement among its members not to do business with any lumber company that does not abide by the production cut.

The industry players in the hypothetical may be well meaning, but they both also have created competition law risk for themselves. The lumber companies have agreed to a reduction in output; the furniture companies are engaging in a group boycott. And, unfortunately, there is no exemption from the antitrust law for good intentions.

This is not to say that companies that want to do good are prevented from doing so. There are a few principles that could help companies that want to do the socially responsible and right thing.

First, in general, corporations wishing to take socially responsible actions will enjoy relatively limited competition law risk if they act unilaterally and do not reach an agreement. In the above hypothetical, a furniture company's own, unilateral decision to choose not to purchase from companies who engage in irresponsible production is generally going to be lawful. Likewise, a lumber company's unilateral decision to cut production is going to be lawful.

In some industries, however, unilateral action may not be enough. One way to encourage industry-wide corporate social responsibility efforts is to establish standards, certifications or codes of conduct which are set and administered by groups of private firms, trade associations or other non-profit organisations. One example is the B Corp certification, awarded by a non-profit organization to firms that meet certain standards of social and environmental performance, public transparency, and legal accountability and pay an annual fee.

However, an industry initiative that requires real change may require more –it may be that, in order for the initiative to work, a critical mass is required. Under those circumstances, an agreement may be required. But there are still two potential fall-backs for companies in these circumstances.

First, competition risk can be limited if the government becomes involved. For example, if the government mandated a reduction in lumber production by 20 percent, there is very low antitrust risk in complying with that.

If the government were to adopt standards through regulation or legislation – even standards that are on their face anticompetitive – then companies abiding by those regulations would likely be immune from antitrust challenge. Under the state action doctrine, companies that abide by state and local government law or regulations may not be subject to antitrust laws, even if abiding by the regulations is anticompetitive. Even private organisations dominated by industry participants can be immunized if their acts are part of a clearly articulated state policy and the organization is actively supervised by the state.

> "If a company is considering an industry-wide initiative, it is important to remember that agreements are lawful as long as they are net pro-competitive."

Second, any effort to petition the government to establish laws or regulations is not actionable under the antitrust laws, even if the outcome is anticompetitive. This applies regardless of whether the petitioning activities are joint or unilateral, and covers legislative and administrative processes (such as rule-making and enforcement). Companies petitioning the government will be immune as long as any anticompetitive harm results from the petitioning activity or government activity. Conversely, if the anticompetitive harm derives from private action, the parties are not protected. For example, even though the lumber companies in our hypothetical would be immune from antitrust liability if they petitioned the government to mandate production cuts, they would not be immune if they petitioned private organisations such as trade associations or a private standard-setting association to do the same thing, even if governments typically adopt the standards set by those private associations. The immunity also does not apply to an agreement among competitors about how they will voluntarily apply or interpret rules or regulations.

Government regulation may prevent competition risk, but it comes with a cost. Any government regulation will consider political and regulatory goals and it is possible that they will not be ideal. Any change requires more government action and there is no opting out. This loss of control makes this route difficult.

If a company is considering an industry-wide initiative, it is important to remember that agreements are lawful as long as they are net pro-competitive. Certain agreements – such as price fixing or agreements to limit output – are found to be illegal per se. Most other agreements are analyzed by balancing the benefits and harms, and only will be illegal if the harms outweigh the benefits.

To that end, agreements where there is limited impact on pricing and output are safer. And, where there is a clear benefit to consumers such as useful information being more available, or cost savings, the agreements are less likely to be challenged. As a general matter, proving agreements are illegal under this type of analysis is difficult.

To limit antitrust risk, consider the following steps:

- Avoid the exchange of competitively sensitive information among competitors, something which could be viewed as facilitating a price-fixing agreement.
- Ensure that any process for setting an industry standard is objective and reasonable, and that the standards are voluntary, non-coercive, and applied in a non-discriminatory way.
- Avoid setting rules which decrease price competition.

Competition laws do not prevent companies from seeking social good, but companies seeking to collaborate on social responsibility initiatives should be aware of the risks.

Towards an EU Regulation on Human Rights and Environmental Due Diligence

Lise Smit, British Institute of International and Comparative Law and Robert McCorquodale, Brick Court Chambers and the University of Nottingham

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On 29 April 2020, the European Commissioner for Justice, Didier Reynders, announced that the European Commission will develop legislation, to be introduced in 2021, which would require **all businesses in the European Union to undertake mandatory human rights and environmental due diligence.**[1] In making this announcement, the European Commissioner expressly relied on a *Study on Due Diligence Requirements Through the Supply Chain* (the **Study**) commissioned by the European Commission, of which we were two of the authors.[2] In this article, we will summarise the key aspects of the Study and the responses from companies, business associations and industry organisations to the proposals made in the Study.

The concept of **human rights due diligence** is derived from the United Nations Guiding Principles on Business and Human Rights (**UNGPs**),[3] which were endorsed by the UN Human Rights Council in 2011. The UNGPs expect businesses to identify actual and potential human rights impacts (usually initially through a human rights impact assessment), integrate these findings into their operations, track and communicate their actions to address such impacts and then remediate any impacts. It is an ongoing process with a clear focus on the risks to all rightsholders, such as employees, communities and individuals (unlike traditional business due diligence which is one-off and focuses on the risk to the company).[4] This UNGPs standard of due diligence is applied to human rights as well as the environmental impacts of business activities by the OECD Due Diligence Guidance for Responsible Business Conduct.

Business Responses to Possible Human Rights and Environmental Due Diligence Regulation

334 businesses from a wide array of sectors and of varying sizes responded to the survey undertaken as part of the Study. The business respondents operate across the world, with 15.32% indicating that they operate only within the EU, and at least 40 respondents operating in each Member State. There were a further **297 general survey respondents**, including business associations and industry organisations, civil society, worker representations or trade unions, legal practitioners and government bodies. In addition, there were 50 interviews and informational clarifications, and ten company case studies.

In the survey, **a large majority (75.37%) of business respondents indicated that a due diligence requirement at EU level would benefit business** through providing a "*single, harmonised EU-level standard (as opposed to a mosaic of different measures at domestic and industry level)*".[5] Only 9.7% of business respondents disagreed with this proposition. That is a powerful response, which aligns with other empirical research in this area.[6]

A core reason why there is considerable business support for EU legislation on mandatory human rights and environmental due diligence (**mHREDD**) is that it could provide legal certainty, coherence and consistency for business, and what is often called (somewhat misleadingly) a "*level playing field*".[7] The business respondents to the Study made it clear that the current legal landscape does not provide companies with legal certainty about their human rights and environmental due diligence obligations, and is not perceived as efficient, coherent and effective. Another recent study indicated that businesses experienced similar benefits as a result of the introduction of the UK Bribery Act 2010 ten years ago.[8]

This dissatisfaction with the existing legal landscape may reflect the fact that there are various international standards and regulatory instruments (such as the OECD Guidelines on Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy) and national laws (such as the French Duty of Vigilance Act 2017, the Dutch Child Labour Due Diligence Act 2019 and, to some extent, the UK Modern Slavery Act 2015), which all take slightly different approaches to mHREDD and associated liability and enforcement issues. There are also current proposals or campaigns for mHREDD laws in 14 European countries, including 11 EU Member States.[9]

Interestingly, the Study showed that industry or business associations (a category of general survey respondent), which represent a wide sample of companies across sectors, were more opposed to regulation and preferred voluntary guidance. This suggests a potential opposition of views within business associations, most of which also represent the large multinational companies that tend to support new regulation in this area. As the legislative process develops, this potential contradiction may need to be addressed by industry associations and their members in order to feed coherently into the consultation process.

Costs and Benefits of EU Regulation

The Study also considered the possible impacts on business of complying with mHREDD legislation. The evidence showed that businesses estimated that **economic costs** would increase moderately if new regulations entailed more reporting requirements only, and increase more substantially with a shift towards mHREDD, although it was also considered that such a shift would likely reduce **reputational risks**.

However, the Study showed that there would be no significant distortions in terms of **competition and innovation**, even in comparison with non-EU business. Business survey respondents expected significant benefits or very significant benefits through decreased distortions, if the new EU mHREDD regulation created more equal standards for EU and non-EU business. Similarly, a previous study on the UK Bribery Act 2010 showed that the majority of businesses experienced no competitive disadvantage or disincentives for foreign investment as a result of this legislation.[10] Further, the majority of businesses considered that the new regulation would improve or facilitate leverage with third parties by introducing a non-negotiable standard, without reducing competitiveness or innovation. There was some acknowledgement of the value that new technologies could bring to assist in this area in the future, although most business respondents were not yet using them.[11]

Interestingly, a significant majority of respondents favoured a general, **cross-sectoral** standard applying to all business, rather than a mechanism which would apply to certain sectors or larger businesses only, although with the circumstances of each specific operating context (eg size, sector, country of operation and other considerations) taken into account. Business respondents supported a **legal duty** which would establish a context-specific **standard of care**, being a standard of expected conduct in similar terms as is used in the French Duty of Vigilance law. It was emphasised across the spectrum of stakeholders that the law should not operate as a procedural "tick-box" requirement, which would expect a company to focus on certain risks or activities that are identified by the regulation rather than through the company's own due diligence process, and so may be unrelated to the company's real risks and how it addresses them. Also, it was expressed that the duty should not operate as a strict liability where every harm that occurs in the company's supply or value chain would automatically lead to liability. Instead, the question will always need to be what the company did, what it knew or ought to have known, which steps it undertook on the facts, and whether these steps were reasonable given the specific circumstances. Indeed, a legal duty which is defined with reference to a due diligence standard implies the availability of a **due diligence defence**, in that a business alleged to have failed in its duty could show that it has actually undertaken the due diligence required in the circumstances.

As in other areas of civil law, demonstrating that it has met the legal standard could operate as a defence or mitigation to a claim against the company. This is particularly relevant in the wake of a series of cases around the world showing a move towards increasing the duty of care of parent companies to the third parties affected by the human rights and environmental impacts of their subsidiaries.[12]

Conclusions

The announcement by the European Commissioner for Justice and Consumers makes it clear that it **is now no longer a matter of *if* but rather *when* EU-wide legislation on mHREDD will come into effect.**[13] It is possible that the UK will follow suit. Such legislation is clearly supported by a wide range of businesses, and the coherently expressed business views on the deficiencies of the existing legal landscape can no longer be ignored. The review of possible increased costs and loss of competitiveness and innovation are generally reassuring to businesses concerned about the possible effects on them.

Accordingly, businesses would be well advised **to adopt strong management systems which include human rights and environmental due diligence** in advance of any EU legislation. Such due diligence should follow the framework of the UNGPs and the relevant OECD guidance and be sufficient to ensure that each business is aware of actual and potential human rights and environmental impacts arising from its own activities, including its subsidiaries, and from its business relationships, including suppliers.

This process should include a prioritisation of the most severe human rights and environmental risks and impacts, rather than a checklist of issues. Investors will also want to be well informed regarding the effectiveness of the steps being taken by the business to mitigate and remediate those impacts. Companies that have taken such steps would be well placed to show that they have met the required standard of care, and those who have not would put themselves at risk of liability under the new regulation.

"In the survey, a large majority (75.37%) of business respondents indicated that a due diligence requirement at EU level would benefit business through providing a 'single, harmonised EU-level standard (as opposed to a mosaic of different measures at domestic and industry level)'."

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Navigating Human Rights Due Diligence in the Technology Sector

An Interview with Théo Jaekel of Ericsson

Théo Jaekel is a Legal Counsel and Business and Human Rights expert at Ericsson, responsible for the company's human rights strategy and execution, including addressing risks throughout Ericsson's value chain. Théo has previously led the human rights practice group at Vinge Law Firm, advising corporate clients on human rights, and worked as a researcher at Swedwatch, conducting research on business impacts on human rights in high-risk contexts. Currently, Théo also holds a position as Lecturer in International Law at Stockholm University, teaching Business and Human Rights at the Faculty of Law, and is a Member of the Board of UN Global Compact Network Sweden.

What is Ericsson's approach to human rights, and what is the role played by human rights due diligence in your business?

Ericsson was one of the first companies to publicly endorse the UN Guiding Principles and the UN Global Compact, and has recently become a member of the Global Network Initiative (GNI), which strives to enable technology companies to best respect the right to privacy and freedom of expression. Our approach to human rights due diligence spans the entire value chain, from how we source to how we sell our product. We have a 'Three Horizons' human rights policy, which covers: internal operations; sale and supply; and the communities in which we operate.

On the sale-side, our customer due diligence structures have been in place for approximately ten years and have evolved over time. We constantly re-evaluate our process based on changing risks, new technologies, issues that impact the telecommunications industry, as well as heightened stakeholder involvement.

Are there specific human rights risks that are monitored by your due diligence?

The main focus in our sales process is on risks related to freedom of expression or the right to privacy. Risks related to labour rights are the priority when dealing with suppliers.

One sensitive issue in relation to the misuse of our technology is government surveillance. On a technical level, all telecom networks must process and store some personally identifiable information. One example is location data, which are necessary to optimise networks. We saw this used during the Covid-19 lockdowns, where the ability to identify the location of the network use traffic (eg at suburbs and not city-centres) assisted the network to correctly re-allocate capacity. The purpose of such data is not to be shared with authorities.
And yet, if that purpose is subverted and the data accessed wrongfully, it has the capacity for surveillance and suppression. This is where our product and purpose risk profiles and mitigation conditions prove valuable.

An example of a risk area is the right to 'lawful interception' – the legal right of governments for target-based surveillance. While lawful interception is primarily designed for legitimate purposes such as crime prevention, it can be misused. Ericsson does not provide actual surveillance technology; however our networks need to allow for lawful interception functionality in accordance with international standards. As such, our technologies and networks do include personally identifiable information similar to any other network, and can be misused.

Could you tell us about the human rights due diligence undertaken in your sales process?

Our sale-side human rights due diligence is called the 'Sensitive Business Framework', through which we assess all business engagements. Our internal 'opportunity owners', for example sales teams, are required to register each potential engagement and provide replies to built-in questions. This is an iterative process where further questions are raised if any initial replies generate red-flags. The opportunity is then given a risk rating.

The risk rating for each customer and opportunity is provided using four parameters: (1) country risk; (2) customer risk; (3) product risk; and (4) purpose risk.

Country risk is assessed using third party country-specific indices that consider, for example, a country's freedom of expression or privacy track-record.

Customer risk primarily looks to the ownership structure of the customer. The 'customer' here is the party that will use Ericsson's equipment and technology – often a mobile operator. A customer ultimately owned by a government entity in a high-risk jurisdiction would increase our risk classification. On the other hand, a global operator or an operator with robust human rights policies would lower our risk classification.

Product risk is assessed using our internal risk classification for that product. We conduct targeted risk assessments for specific products or technologies to address product risk, and to help us draft tailored red-flag queries. We consider whether there is an inherent risk in the product, to what extent the product processes personally identifiable information, and whether such information can be accessed and misused. We have previously conducted country-specific human risks impact assessments, and have product risk assessments in the pipeline as part of our development cycle. We are currently concluding our 5G impact assessment. Our initial findings will be published in January 2021. This is an on-going process and our risk assessment for 5G will be continuously updated and refined.

Finally, the purpose risk relates to the ultimate use of the technology. It is not enough to simply look at the product risk, as even low-risk products can be misused.
We therefore require information on the intended end-use, and consider whether that product can be used for other activities (either with or without additional products) that may encroach on human rights. An example is mobile positioning functionality. Mobile positioning for purposes such as transportation applications or emergency response are legitimate purposes. However, if not properly mitigated, the same technology could enable unrestricted government surveillance when connected to other products.

Does a specific Ericsson team review and advance the due diligence process?

We have a 'Sensitive Business' function dedicated to this process. The Sensitive Business Core Team encompasses representatives from different group functions and business areas. There are individuals from the legal team including human rights, the security team, as well as from specific geographical locations. The Core Team sits under the Sensitive Business Board, which is comprised of a similar make-up of individuals at the executive management level.

The Core Team meets fortnightly and reviews all new cases. If the information raises red-flags, the team will ask additional questions to the relevant sales team. If the replies are sufficient to make a decision, the team will choose to approve, approve with conditions or dismiss a case based on the risk profile. An approval with conditions will require certain mitigations prior to moving forward with the engagement. Cases can be dismissed where, for instance, the risk is simply too high, the risk is incapable of mitigation, or Ericsson has no leverage to effect any mitigation. Particularly difficult cases with significant business impact can be escalated to the Sensitive Business Board.

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Have the number of potential engagements that are dismissed following the due diligence process changed over time?

We are seeing fewer dismissals and instead a greater number of 'approved with conditions'. This has become the norm partly because of an increased internal awareness by sales teams of our processes, and partly because we have developed effective conditions and mitigations over time.

From a human rights perspective, it is important to use our leverage to implement effective conditions where possible. The reality is that the potential for human rights violations will not vanish simply because we rejected that business. Instead, the customer will most likely seek a different provider that may accept the business without any mitigations or conditions. We find that accepting with targeted mitigating stipulations is more effective in resolving underlying issues and safeguarding human rights and, in doing so, addressing our responsibility under the UN Guiding Principles.

What tends to be the nature of the conditions you apply to some customers in the sales process?

Our conditions can take two forms: contractual mitigations and/or technical mitigations.

Contractual mitigations are specific provisions used to reduce risk. We do not use boilerplate clauses. Instead, provisions are individually tailored – such as by making reference to the specific use scenario, the intended end-use, or to particular products – and take the form of legally binding confirmations or undertakings. The buyer will confirm, for instance, that the product will only be used for charging and billing, or that certain functionalities will only be used for emergency response. Any non-approved use will be a breach of contract that allows us to terminate. On termination, the customer may not receive the upgrades to technology or any products not yet supplied under the sale agreement. We could also revise and possibly terminate our entire business relationship with the customer.

Technical mitigations will usually entail removing certain functionalities from the product, particularly if that functionality is not required by the customer. That said, we are finding technical mitigation increasingly difficult given the interconnectivity of modern technology.

How do you identify when a breach of a contractual condition has occurred?

While we act on external reports such as those produced by NGOs to identify breaches, there are significant real-world hurdles here. Not only is it problematic to identify a non-approved use, but it is even trickier to prove such a claim. For example, some governments can circumvent the operator and directly access information in the network, so our contractual counterparty may itself be unaware of a non-sanctioned use. In other cases, some operators are legally prevented from disclosing government requests, and have the difficult task of balancing statutory obligations with contractual ones. Our membership in the Global Network Initiative (GNI) is very useful in this situation. It enables much closer dialogue with our customers, and allows us to discuss thorny issues in a safe space.

Additionally, we are looking at how to more efficiently verify conditions, through a demonstration of compliance if we have reason to believe that the conditions are not adhered to. When we deliver a mobile network to our customers we generally do not have insight into the network to see how and why data was accessed, because network management is handed over to the operator once the sale is concluded.

Is there a framework for updating any conditions where there is a continuing relationship with a buyer?

Our sale agreements tend to be long term – there is almost always a continuing relationship with a buyer. Often such a sustained relationship takes the form of supplying parts or upgrading functionality for that buyer. Every re-supply, upgrade, or additional service must be approved through our Sensitive Business Framework. This systematic update lets us continuously monitor human rights risk for that business. Misuse may trigger a contractual violation, which is addressed on a case-by-case basis. To complement this more established system, we also review human rights risk on an ad-hoc basis. We will consistently engage with the industry to ensure any red-flags associated with a particular buyer, jurisdiction or technology are immediately identified.

What works best, and what would you recommend to others?

Human rights due diligence is an integral part of the Ericsson sales process. If due diligence were to be standalone, it would be seen as an additional hurdle, and would likely be ineffective. We find that integrating the due diligence into the entire sales process helps with cross-function team buy-in and stakeholder engagement, and would recommend the same to others.

In terms of nascent technologies, our GNI membership provides a particularly helpful forum to discuss central due diligence issues. A wide range of stakeholders have GNI membership including buyers and operators, NGOs, interest groups, and investors, which ensures that different perspectives are considered and addressed up-front.

That said, companies will need to accept that some opportunities will be turned down as a result of effective due diligence. Ultimately, human rights due diligence in sectors developing modern technology is not just a box-ticking exercise.

"From a human rights perspective, it is important to use our leverage to implement effective conditions where possible. The reality is that the potential for human rights violations will not vanish simply because we rejected that business… We find that accepting with targeted mitigating stipulations is more effective in resolving underlying issues and safeguarding human rights and, in doing so, addressing our responsibility under the UN Guiding Principles."

Ensuring the Safety of Children in the Digital World

Marija Manojlovic, Trang Ho Morton and Serena Tommasino of the Global Partnership to End Violence Against Children.



Marija Manojlovic, Trang Ho Morton and Serena Tommasino are staff members with the Global Partnership to End Violence Against Children (**End Violence**) and lead its Safe Online initiative.

End Violence is a public-private partnership launched by the UN Secretary-General in 2016 to accelerate progress towards Sustainable Development Goal 16.2: ending all forms of violence against children by 2030. End Violence comprises over 500 partners, including governments, civil society organizations, UN agencies, the private sector and research institutions, and acts as a global platform for advocacy, evidence-based action, and investments to end all forms of violence against children.

Through its Safe Online work, End Violence provides funding, policy and advocacy guidance, and coalition-building to significantly advance national, regional and global efforts to prevent and respond to online child sexual exploitation and abuse. In 2020, End Violence's Safe Online investment portfolio reached USD45 million in grants to projects achieving tangible results in over 70 countries.

In 1989, the UN Convention on the Rights of the Child, which sets out the human rights of every person under 18 years old, was adopted by the UN General Assembly. The Convention affirms that all children have the right to be treated with dignity and respect, develop to their full potential, participate in society and be protected. Since then, 196 States have become parties to the Convention and, as a result, now have an obligation to protect children from violence, including online child sexual exploitation and abuse (**CSEA**).

All businesses also have a responsibility to respect human rights, including children's rights, in accordance with the UN Guiding Principles on Business and Human Rights (**UNGPs**).[1] The corporate responsibility to respect human rights exists independently of States' willingness to fulfil their own human rights obligations to prohibit CSEA. This means that businesses have a responsibility to avoid contributing to impacts on children's rights by, for example, allowing and failing to take adequate steps to prevent CSEA from appearing on their sites, even where domestic legal frameworks have yet to adequately address the problem.

Businesses are key to preventing and tackling online CSEA, and a growing number have made public commitments to doing so. Yet evidence and End Violence's experience and research suggest that much more can and should be done.

The pandemic of online child sexual exploitation and abuse

The Covid-19 pandemic has accelerated the adoption of digital technologies for work, online learning, socialising, games and keeping in touch with loved ones. In fact, digital connectivity has been labelled as 'the silent hero' of the pandemic. However, this increase in screen time and reliance on digital technologies has resulted in an explosion of online CSEA. With both children and sexual offenders confined at home and spending more time online, law enforcement authorities and reporting hotlines have seen a striking increase in the amount of child sexual abuse material (**CSAM**)[2] being shared online.[3] In April 2020 alone, the National Center for Missing and Exploited Children registered four million reports of suspected CSAM online compared to one million for the same period in 2019.

That said, digital harms to children are by no means a product of the Covid-19 pandemic. The spread of CSAM and child sex trafficking increased exponentially with the rise of the internet, digital technologies and online markets. A decade ago, there were 3,000 reports of suspected online CSEA registered by authorities. In 2019, that number climbed to nearly 17 million. Another trend is also becoming apparent: the victims are getting younger, with 89% of victims aged between three and 13.

By itself, voluntary action is not enough

While voluntary commitments are important and laudable, more accountability and action are needed to address the horrendous crimes of online CSEA. In this regard, businesses should be aware of evolving legislative frameworks that require more from digital platforms when it comes to protecting children online, including: (i) a newly adopted Age Appropriate Design Code in the UK; (ii) potential amendments to Section 230 of the Communications Decency Act in the US, which provides immunity for websites *vis-à-vis* third party content; and (iii) the forthcoming European Union Digital Services Act which will revise the rules that affect how intermediaries regulate user activity on their platforms.

A number of businesses and governments have endorsed voluntary frameworks like the Child Online Safety Universal Declaration adopted by the UN Broadband Commission for Sustainable Development[4] and the 11 Voluntary Principles to Counter Online CSEA, which have already been adopted by five governments and endorsed by Facebook, Google, Microsoft, Twitter, Snap, and Roblox, amongst other members of the Technology Coalition.[5]

These frameworks are designed to guide industry players to: (a) review existing safety processes; (b) understand the level and nature

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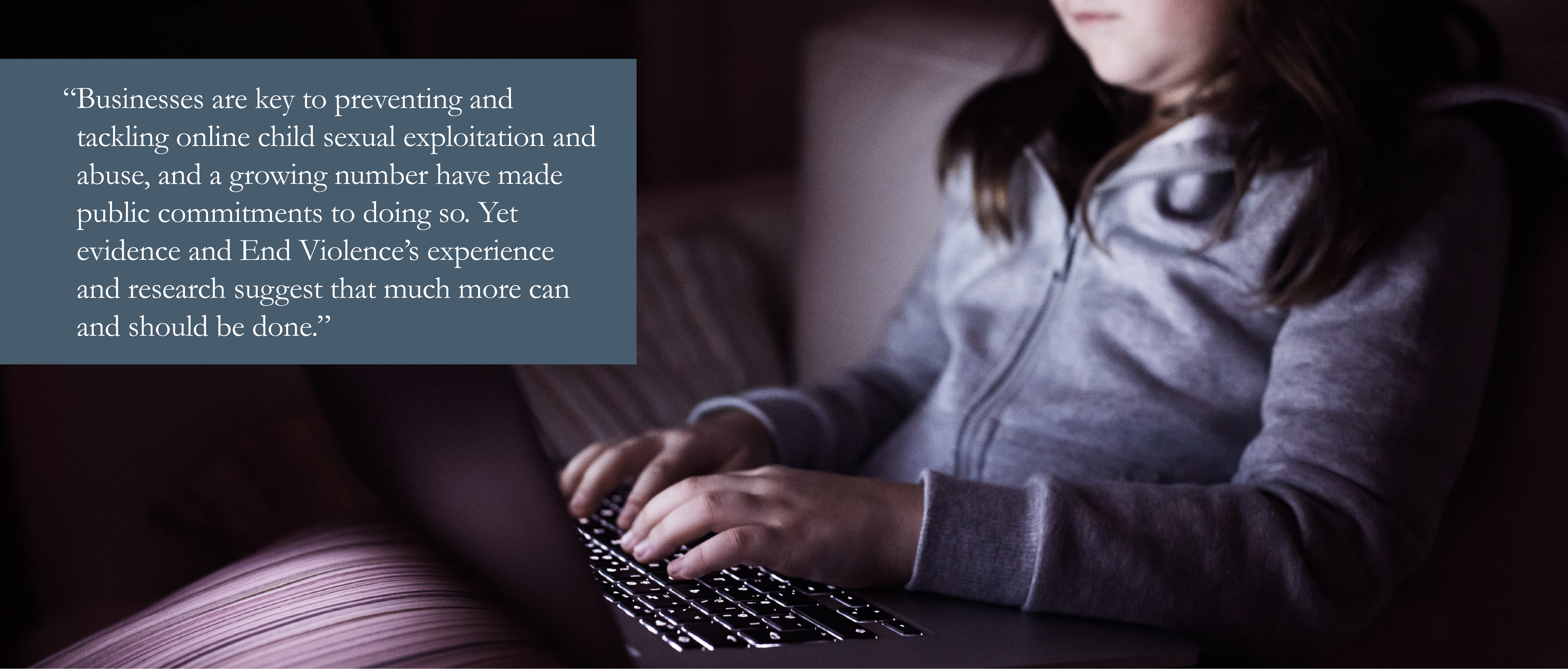

of online CSEA threats and areas of high risk on their platform; (c) identify gaps, consider where existing measures can go further, and improve and invest in innovative tools and solutions; and (d) respond to the evolving threat and changing societal and offending behaviours to reduce foreseeable and unexpected risks for users.

What more specific actions can businesses take to avoid online harm to children?

Businesses that provide and promote digital technologies have a responsibility and fundamental role to play in addressing online CSEA. There is no single method through which industry players can help to tackle this issue. While businesses of varying sector focuses, sizes and resources will have different roles and responsibilities in the global fight to end online CSEA, every digital industry player will need to give consideration to the issues discussed in this article in order for there to be an effective global response to end online CSEA.

Technology companies and internet service providers (**ISPs**) have a particularly important position from which they can enact change, and this article will largely focus on the actions that they can take. However, businesses in other industries should also consider certain steps and recommendations as outlined below, as they can often implement change in how they use the services, products and platforms offered by technology companies and ISPs.

Put Safety-by-Design at the heart of your business

Following the guidance set out in the UNGPs, all companies today should undertake human rights due diligence on their own operations and those in their value chains. This means that all ISPs should undertake 'Safety-by-Design (**SbD**)' due diligence to put user safety, especially children's safety, at the forefront of the design, development and release of online products and services. The responsible use of technology should be carefully considered throughout the design process of every new platform and service, not just as an afterthought. There are a number of resources to guide companies, both large and small, during the SbD due diligence process, such as the Child Online Safety Self-Assessment Tool developed by UNICEF in consultation with over 50 companies,[6] specific networks and resources for mobile operators via the GSMA,[7] and the Australia eSafety Commissioner's anticipated self-assessment tools for start-ups and more established companies.[8]

There are a number of opportunities today for industry, in collaboration with government, academia and NGOs, to collaborate more closely to share best practices in addressing child online safety. Funded by the End Violence Fund, UNICEF's Regional Office for East Asia and the Pacific, together with a consortium of technology companies, recently convened five multi-stakeholder roundtables to share promising industry practices. Leading private sector companies attended and contributed to the roundtables, including Google, Facebook, Microsoft, Telenor, Ericsson, MobiCom (Mongolia), Mobifone+ (Vietnam), Globe Telecom (the Philippines), True (Thailand), GSMA and civil society partners. Industry players are also creating networks, such as the joint industry think-tank that incubates innovative solutions for education content development and delivery platforms and monitors behaviour change.

Empower children and families

To address CSEA effectively, industry players also need to focus on empowering children themselves and families. Best practice for technology companies and ISPs would be to provide their users with access to cost-free child helplines, age-appropriate services and safe e-education platforms. They could also invest in digital literacy and skills for children, parents and caregivers, as well as use their platforms to raise public awareness of the risks for children and other vulnerable groups. End Violence, together with its partners, collected key resources that industry can use to make online platforms safe and accessible for children during the Covid-19 pandemic.[9]

Lead the design and scaling-up of technology tools and increase investment

Addressing online CSEA will also require businesses to invest in advanced, low-cost, and scalable tools required for swift detection, investigation, and intervention to address online CSEA. Businesses with strong engineering capacity, financial assets and global reach will need to support and work with key global actors to provide financial and technical resources in order to adapt existing tools to different contexts and systems around the world, and secure licensing, training and maintenance of such tools.

Generally, companies in all industries can help to make a substantial impact by providing resources to organisations that work to leverage existing and build new cutting-edge technology tools to tackle online CSEA (such as machine learning, AI and data science). For example, End Violence invested in an AI-based law enforcement tool which, so far, has helped to identify and rescue 1,792 child victims globally and arrest 1,151 offenders in less than two years; over 1,200 law enforcement officers in 55 countries also reported an estimated time saving of up to 60%. Companies that may not be able to provide expertise in relevant areas for online CSEA may equally find this to be an impactful step to take.

This is also an area in which the technology industry can have a particularly significant impact. There are impressive examples of involvement, including: (i) 'PhotoDNA', a collaboration between Microsoft and Dartmouth University, which set a global standard by creating a digital fingerprint of known CSAM that can be used for detection, reporting and removal at scale; (ii) Google's AI-powered Content Safety API, which improves the ability of NGOs and other technology companies to review CSAM at scale; (iii) Facebook's open-sourcing photo and video matching technology, which supports companies by keeping their services safe and allowing their systems to communicate with each other, making their safety features more effective; and (iv) Project Artemis, a text-based tool developed by Microsoft in collaboration with the Meet Group, Roblox, Kik, and Thorn, which detects and reports online predators attempting to groom and lure children for sexual purposes. As a next step, companies in the technology sector will need to create and collaborate on tools and resources to be used by government, NGOs and businesses in other sectors.

Collect and share data

Industry has a crucial role to play in collecting and sharing data on children's online access, use and risks, and particularly on offending patterns, to create a stronger and broader evidence base in all countries and gain insight into the scale and nature of the problem. For example, ISPs can provide data for innovative and replicable research projects like Disrupting Harm[10] to assess the scale, nature and context of online CSEA across countries. Companies can also fund data collection and research to inform product and policy design across sectors.

Without meaningful participation from private companies and industry, we cannot fully understand the scale and nature of online CSEA or identify solutions to it. In June 2020, End Violence launched a multi-year collaboration with the Technology Coalition, a group of 18 of the biggest technology companies, including Google, Microsoft, Facebook, Apple and Twitter. Through this partnership, the Technology Coalition and End Violence have set up a Safe Online Research Fund to advance the understanding of patterns of online CSEA and learn from effective efforts (behavioural, technological and educational) in order to prevent, deter and eradicate it. The vision is to fund innovative research that produces actionable insights which can impact product and policy development, with a priority given to research that can inform the industry's approach to combatting online CSEA.[11]

Collaborate with public sector organisations

Over the past four years End Violence's Safe Online team, industry players and other stakeholders have worked together to test and scale new solutions and technologies to keep children protected from online harms, and industry has played a critical role in this collaboration. Through our Safe Online investments, we tested new types of collaboration, with a number of successful examples, such as the following:

- **Customer access to tools and messages**: The unique partnership between Capital Humano y Social Alternativo and Telefónica in Peru resulted in the availability of child online safety awareness raising messages and educational tools for over 14 million customers. Similarly, mobile operators in Namibia and Madagascar disseminated free messages on child online safety, and in Costa Rica seven ISPs committed to incorporating an e-mentoring programme into their child online safety offerings to customers.
- **Stakeholder access to training**: In the Philippines, Plan International delivered training on child online safety to 1,387 internet café and pisonet operators. Subsequently, 1,170 signed a code of conduct with the community to regulate their role and operations in preventing and responding to online CSEA.
- **Design of safe technology**: In Vietnam, ChildFund Australia worked with the local government to design a safe and child-friendly internet café, which was piloted in an effort to build a safe and healthy environment for children, as well as raise revenue for them. It also delivered four workshops to 110 online game shop owners and managers.

Through continued collaboration between End Violence, technology companies and the ISP industry, as well as other businesses more generally, a variety of viewpoints, areas of expertise and ideas can be brought together to fight online CSEA.

A call to action for industry: Investment, innovation and implementation

Through its Safe Online work, End Violence continues to invest to tackle this ever-growing problem; in 2020, End Violence's Safe Online portfolio will reach USD45m with impact in over 70 countries. However, this investment cannot match the enormous scale of the fight against online CSEA. Industry players should continue to collaborate with the public sector and provide much-needed resources to match the fighting power against the reality of children's risks online.

The UN Secretary-General, Antonio Guterres, recently noted that if there is one area in which the key global actors must come together and show the power of digital cooperation across countries and sectors, it is the area of tackling the scourge of online CSEA.[12] It is one of the key goals of the Safe Online initiative to see more industry players come together, as enhanced cross-sector collaboration and engagement modalities remain paramount to ensuring tangible results.

Industry players are vital stakeholders in the attempt to tackle this problem. Although it has made a start, the technology sector can do much more to address CSEA by engaging in meaningful SbD due diligence during product development and before providing the sort of services, products and platforms that are currently being misused. Businesses in all sectors that use digital services, products and platforms should also be mindful of the impact that they can have and put in place measures to combat their misuse. Finally, it is fundamental that all businesses aim to use their power to drive technological policy and practice across sectors and countries to ensure that all children are safe online.

Online CSEA is an abhorrent and widespread violation of children's rights. End Violence calls upon all stakeholders, particularly industry players, to work together to put an end to it. Time is short to meet the goal of ending all forms of violence against children by 2030. The time to act is now.

1. United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (2011). See also, United Nations Global Compact, *The Ten Principles of the UN Global Compact:* https://www.unglobalcompact.org/what-is-gc/mission/principles; and UNICEF, The Global Compact, and Save the Children, *Children's Rights and Business Principles*: https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf
2. Child sexual abuse material, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography means *"any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes"*. In the digital context, CSAM is captured in the form of digital images and videos, as well as live-streamed videos. The production, distribution and possession of this type of material is a criminal offence.
3. See, EUROPOL, *Exploiting isolation: Offenders and victims of online child sexual abuse during the COVID-19 pandemic* (19 June 2020): https://www.europol.europa.eu/newsroom/news/exploiting-isolation-sexual-predators-increasingly-targeting-children-during-covid-pandemic; and WePROTECT Global Alliance, *Intelligence report on impacts of COVID19 on online Child Sexual Exploitation and Abuse* (13 April 2020): https://static1.squarespace.com/static/5630f48de4b00a75476ecf0a/t/5ebc58d038eb072b909874ca/1589401809129/Impact+of+COVID-19+on+Online+Child+Sexual+Exploitation.pdf
4. Child Online Safety Universal Declaration adopted by the UN Broadband Commission for Sustainable Development https://broadbandcommission.org/Documents/working-groups/ChildOnlineSafety_Declaration.pdf
5. Voluntary Principles to Counter Online CSEA: https://static1.squarespace.com/static/5630f48de4b00a75476ecf0a/t/5e6123f79f9a545c228c7d1b/1583424503764/11+Voluntary+principles+-+formal+letter.pdf
6. UNICEF Tools for companies in the ICT sector: https://www.unicef.org/csr/toolsforcompanies.htm
7. The GSM Association is an industry organisation that represents the interests of mobile network operators globally. GSMA resources for mobile operators: https://www.gsma.com/publicpolicy/consumer-affairs/children-mobile-technology/mobile-alliance
8. eSafety's Safety by Design initiative and principles: https://www.esafety.gov.au/key-issues
9. End Violence's partners include ITU, UNESCO, UNICEF, UNODC, WeProtect Global Alliance, WHO and the World Childhood Foundation USA. Safe Online resources for industry: https://www.end-violence.org/safe-online#covid-19
10. Disrupting Harm research project funded by the End Violence Fund: https://www.end-violence.org/disrupting-harm
11. Tech Coalition Project Protect: A plan to combat online child sexual abuse: https://www.technologycoalition.org/2020/05/28/a-plan-to-combat-online-child-sexual-abuse/
12. Roadmap for Digital Cooperation https://www.un.org/en/content/digital-cooperation-roadmap/assets/pdf/Roadmap_for_Digital_Cooperation_EN.pdf

Artificial Intelligence's 'Black Box' problem

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A résumé screening algorithm declines to shortlist any women for a job; a sentencing program concludes that a defendant has a high risk of reoffending but will not say why. Who is responsible when your business uses technology that makes discriminatory decisions – in some cases following processes that are impossible for you to understand? This article considers the responsibility that companies deploying artificial intelligence (AI) systems could bear, applying a human rights lens to scrutinise the increasing opacity of AI systems.

Rise of the Machines

AI is transforming the way businesses operate, with breathless talk of a fourth industrial revolution adding trillions to global economic output by 2030[1]. But a curious feature of this transformation is that AI systems are becoming more pervasive and more complex at the same time – reliance on them is growing even as the ability of non-specialists to understand their actions diminishes.

Where AI systems are used to make decisions with legal consequences and social impact, the fairness and trustworthiness of those systems becomes critical. National, international, and civil society organisations are paying increased attention to the design and use of AI systems. Principles – for the most part non-binding[2] – are being developed to govern various aspects of AI, including the OECD's principles on Artificial Intelligence and the launch of the Global Partnership on Artificial Intelligence to promote the growth of responsible AI.

The OECD principles, for example, require AI actors to respect the rule of law, human rights, and democratic values throughout the AI system life-cycle. These include freedom, dignity and autonomy, privacy and data protection, non-discrimination and equality, diversity, fairness, social justice, and internationally recognised labour rights.[3]

One example of how a poorly deployed AI system could breach these rights is through algorithmic bias, where historic data fed into an AI system perpetuates past biases in human decision-making. As AI systems themselves lack legal personality, a business that uses such a system could be found in breach of the right to equality and non-discrimination that is enshrined in human rights law.[4]

When AI systems rely on the use of big data, this also introduces concerns over the surveillance and monitoring required to gather that data, which could be a breach of an individual's right to privacy.[5]

Foreseeable Harms

If the risk of a breach of human rights is foreseeable, it is incumbent upon the business deploying the AI system to put in place reasonable safeguards. Such safeguards could start with an 'algorithmic impact assessment' – making public details about each AI system to be used and undertaking an assessment of the potential harms to which it might give rise, as well as how to address them. Ideally, this should allow for a comment period during which individuals potentially affected could challenge either the harms that had been flagged or the proposed response.

Once a system is up and running, audit trails should log behaviour of the AI system and facilitate bias checking. Staff using a system should be trained to know its capacities – and its limitations. This can help guard against another kind of bias: 'automation bias' is the danger that humans often ascribe to a computer system greater trust in its analytical abilities than their own. That may be sensible for complex calculations, but not necessarily for value judgments, such as whether a person should be employed or given a loan.

The most complex issues arise when a breach of human rights is less foreseeable because the process by which AI decisions is reached is truly opaque: when it is the proverbial 'black box'.

The Problem with Black Boxes

'Opaque' means difficult to understand or explain. This can give rise to at least three kinds of problem. The first is that decision-making within such a 'black box' may lead to inferior decisions. Accountability and oversight are not merely tools to punish bad behaviour: they also encourage good behaviour. Excluding oversight reduces opportunities to identify wrongdoing, as well as the chances that decisions will be subjected to meaningful scrutiny and thereby be improved. A leading automobile manufacturer, for example, is alleged to have written code that gamed tests used by regulators to give the false impression that vehicle emissions were lower than in normal usage.[6] Similarly, a company is alleged to have designed a version of its app that identified and denied service to users whose behaviour suggested that they were working for regulators, in order to limit their ability to gather evidence.[7]

A second type of problem is that opaque decision-making practices may provide cover for impermissible decisions, such as through masking or reifying discrimination. An example is a large retailer's résumé-screening algorithm, which was trained on ten years of data but had to be shut down when programmers discovered that it had 'learned' that women's applications were to be regarded less favourably than men's.[8] Unintended biases may also be revealed due to the training data, such as the well-known problems with facial recognition that was trained primarily using fair-skinned faces.[9] Different problems can arise with selection and weighting of variables. An ostensibly neutral metric like productivity of employees, for example, might adversely impact women if it does not account for the fact that they are more likely than men to take parental leave.[10]

Thirdly, the legitimacy of certain decisions depends on the transparency of the decision-making process as much as on the decision itself. A well-known case in the United States challenged reliance upon a proprietary sentencing algorithm called COMPAS. Although the trial judge ruled out probation because the algorithm said the defendant had a high chance of reoffending,[11] the Supreme Court of Wisconsin upheld the sentence on the basis that the score it generated was supported by other independent factors and 'not determinative' of his sentence.[12] It went on, however, to express reservations about the use of such software, requiring that future use must be accompanied by a 'written advisement' about the proprietary nature of the software and the limitations of its accuracy.[13]

Proprietary and Complex Opacity

An AI system may be opaque for three reasons. The first is that certain technologies may be proprietary. If you invest in an AI system, you don't want your competitors getting access to it for free. A second form of opacity may arise from complex systems that require specialist skills to understand them. These systems may evolve over time, sometimes patched by different IT teams, but they are in principle capable of being explained.

What happens when an AI system that is opaque for these reasons – proprietary or complex – makes decisions with legal or social impacts? There are usually solutions. Intellectual property law has long recognised the necessity of protecting intangible creations of the human mind but with permitted exceptions, such as those based on fair use. To deal with complex issues, governments and judges routinely have recourse to experts. Thus, proprietary opacity can be dealt with by court orders and complex opacity through recourse to experts.

Opacity by Design

The same cannot be said of a third reason for opacity, which is that some systems are naturally opaque. Some deep learning methods are opaque effectively by design, as they rely on reaching decisions through machine learning rather than, for example, following a decision tree that would be transparent, even if it might be complex.[14]

To pick a trivial example, the programmers of AlphaGo could not explain how it came up with the strategies for the ancient game of Go that defeated the human grandmaster, Lee Sodol, in 2016. Lee himself later said that in their first game, the program made a move that no human would have played – and which was only later shown to have planted the seeds of its victory.[15]

Such output-based legitimacy – optimal ends justifying uncertain means – is appropriate in some areas. Medical science, for example, progresses based on the success or failure of clinical trials with robust statistical analysis. If the net impact is positive, the fact that it may be unclear precisely how a procedure or pharmaceutical achieves those positive outcomes is not regarded as a barrier to allowing it into the market.[16]

Legal decisions, on the other hand, are generally not regarded as appropriate for statistical modelling. Though certain decisions may be expressed in terms of burdens of proof – balance of probabilities, beyond reasonable doubt, and so on – these are to be determined in individualized assessments of a given case, rather than based on a forecast of the most likely outcomes from a larger set of cases.

There is now a growing literature criticising reliance on algorithmic decision-making with legal consequences. These issues with inherently opaque AI systems cannot be fully resolved through calls for transparency or 'explainability'.

Naturally opaque systems may require novel forms of 'explanation' or an acceptance that some machine-made decisions cannot be explained – or, in the alternative, that some decisions should not be made by machines at all.

So who is responsible for decisions made in a 'black box'?

Businesses deploying AI systems need to pay attention to this question, because – for the moment, at least – AI systems themselves have no legal personality. When things go wrong, legal responsibility will fall on the producer, the owner, or the user. The OECD principles, for example, make clear that 'AI actors' include all those who play an active role in the AI system lifecycle, including organisations and individuals that deploy or operate AI.[17] If proper safeguards cannot be put in place, businesses should be aware of the risks of deploying an inherently opaque system and determine whether the benefits of deploying such a system outweigh those risks.

> "So who is responsible for decisions made in a 'black box'? Businesses deploying AI systems need to pay attention to this question, because — for the moment, at least — AI systems themselves have no legal personality. When things go wrong, legal responsibility will fall on the producer, the owner, or the user."

* This essay draws upon an article forthcoming in the American Journal of Comparative Law entitled 'Through a Glass, Darkly: Artificial Intelligence and the Problem of Opacity'.

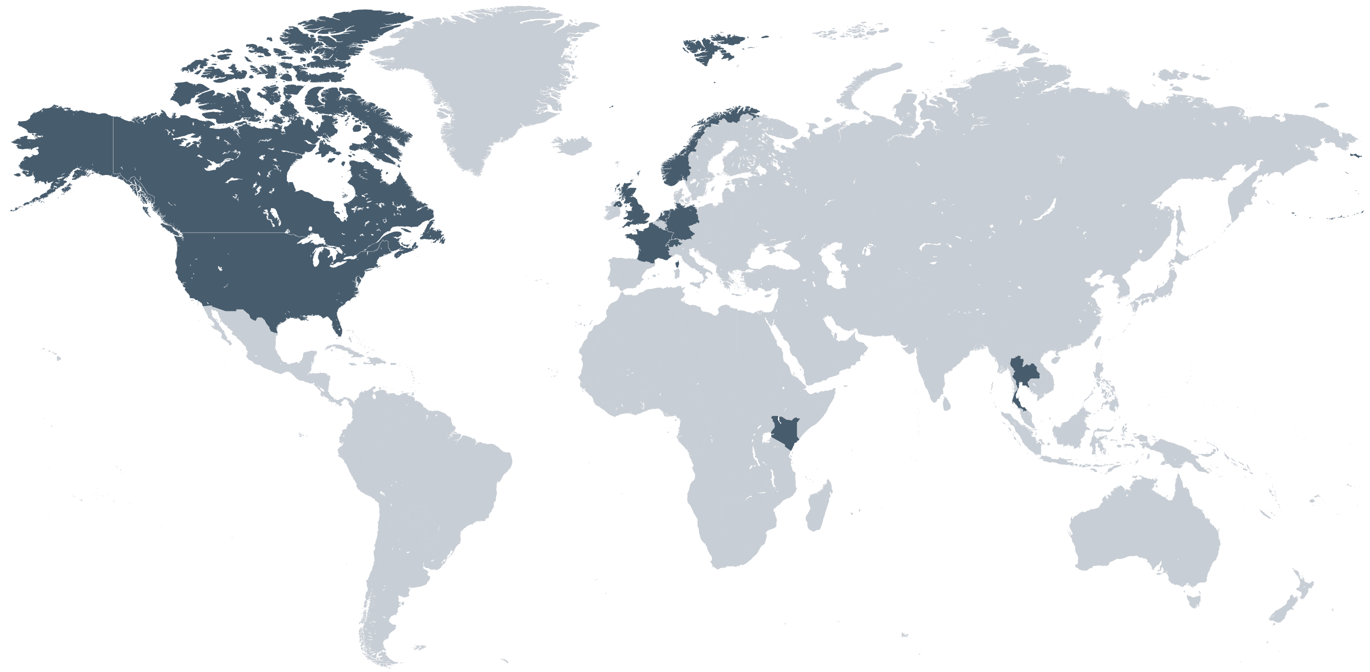
1. Jacques Bughin et al., Notes from the AI Frontier: Modeling the Impact of AI on the World Economy (McKinsey Global Institute, Brussels, 2018); Katharine Rooney, How You Can Get Your Business Ready for AI (World Economic Forum, Geneva, 2020).
2. Binding obligations also appear in documents such as the EU General Data Protection Regulation 2016/679 (GDPR) 2016 (provisions on automated processing).
3. OECD, Recommendation of the Council on Artificial Intelligence, C/M(2019)10 (22 May 2019)
4. See, eg, Universal Declaration of Human Rights (1948), Article 7.
5. Ibid. Article 12.
6. Carmaker Allegedly Used Software that Circumvents Emissions Testing for Certain Air Pollutants (U.S. Environmental Protection Agency, Washington, DC, 18 September 2015).
7. Financial Times, 4 March 2017; Michael Guihot, Anne F. Matthew, and Nicolas P. Suzor, 'Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence', 20 Vanderbilt Journal of Entertainment & Technology Law (2017) 385, at 426.
8. Ignacio N. Cofone, 'Algorithmic Discrimination Is an Information Problem', 70 Hastings Law Journal (2019) 1389, at 1397-98; Katherine J. Strandburg, 'Rulemaking and Inscrutable Automated Decision Tools', 119 Columbia Law Review (2019) 1851, at 1852.
9. Karl Manheim and Lyric Kaplan, 'Artificial Intelligence: Risks to Privacy and Democracy', 21 Yale Journal of Law & Technology (2019) 106, at 159; Sonia K. Katyal, 'Private Accountability in the Age of Artificial Intelligence', 66 UCLA Law Review (2019) 54, at 69.
10. Cf. Rafael Lalive et al., 'Parental Leave and Mothers' Careers: The Relative Importance of Job Protection and Cash Benefits', 81(1) Review of Economic Studies (2014) 219.
11. State v. Loomis, 881 N.W.2d 749, 755 (Wis., 2016).
12. Ibid. at 753. The U.S. Supreme Court declined to hear an appeal. Cert. denied, 582 U.S. (June 26, 2017) (No. 16-6387).
13. Ibid. at 763-64.
14. Machine learning denotes the ability of a computer to improve on its performance without being specifically programmed to do so. This process may be supervised or unsupervised, or through a process of reinforcement: Kevin P. Murphy, Machine Learning: A Probabilistic Perspective (2012), at 2. 'Decision tree' is U.S.ed here in the sense of a static set of parameters specified in advance and to be applied consistently. This is distinct from decision tree models that are themselves developed through machine learning.
15. David Silver et al., 'Mastering the Game of Go Without Human Knowledge', 550 Nature (10/18/online 2017) 354.
16. Alex John London and Jonathan Kimmelman, 'Why Clinical Translation Cannot Succeed Without Failure', 4 eLife (2015) e12844. Research into mental illness in particular is fraught with uncertainty as to the underlying caU.S.es of disease and the mechanisms that bring about cures. See Anne Harrington, Mind Fixers: Psychiatry's Troubled Search for the Biology of Mental Illness (2019).
17. OECD, Recommendation of the Council on Artificial Intelligence, C/M(2019)10 (22 May 2019).

Key Global Legal Developments in Business and Human Rights

Sarah Morreau, Allen & Overy

2020 has seen numerous notable developments in the Business and Human Rights space. This article provides a brief overview of the key legislative and juridical developments across the globe. It is not intended to be exhaustive.

Initiatives to implement or enhance mandatory human rights due diligence have dominated legislative developments. Several jurisdictions have taken significant steps towards implementing mandatory human rights due diligence. Mandatory due diligence requirements are also being considered at an inter-state level, with the EU aiming to harmonise corporate human rights and environmental due diligence obligations, alongside the release of the Second Revised Draft of the Ecuador and South Africa-backed International Treaty on Business and Human Rights.



This year has also seen a number of high-profile cases across several jurisdictions. Whilst some decisions, such as that of the Canadian Supreme Court in Nevsun, have increasingly recognised the potential for corporate liability for human rights violations, others, including the English Court of Appeal in African Minerals, have declined to extend corporate responsibility for human rights violations abroad, particularly those committed by third parties.

For legal advice regarding these developments or other matters raised in this Review, please contact the Co-heads of Allen & Overy's Global Business and Human Rights Practice at andrew.denny@allenovery.com or suzanne.spears@allenovery.com.

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North America

USA

The Slave-Free Business Certification Act of 2020.

This bill, introduced into U.S. Congress in July 2020, seeks to create reporting and prevention obligations for large companies to combat modern slavery in supply chains by requiring a detailed independent annual supply chain audit and published supply chain disclosures.

The Business Supply Chain Transparency on Trafficking and Slavery Act of 2020

This bill was introduced into U.S. Congress in March 2020. It seeks to require certain companies to disclose information on the measures taken to identify and address forced labour, slavery, human trafficking and child labour within that company's supply chains.

JAM v International Finance Corporation, Civil Action No. 2015-0612 (D.D.C. 2020)

This case, decided in February 2020, concerned a claim brought by members of fishing and farming communities in Gujarat, India against the IFC regarding IFC financing for a coal-fired power plant which allegedly caused pollution resulting in, among other things, loss of livelihood and threats to human health. The case was reheard by the District Court of the District of Colombia, following the Supreme Court's decision in 2019 holding that immunity granted to international organisations was not absolute, as the IFC argued, but rather was the same as *"restrictive immunity"* granted to sovereign States. The District Court dismissed the case, deciding that the IFC was immune from suit as the lawsuit was not sufficiently based on activity *"carried on or performed in the United States".*

Nestlé USA, Inc v Doe I and Cargill, Inc v Doe I[1]

Appeals by Nestlé USA, Inc and Cargill, Inc are on the docket of the United States Supreme Court. The Court is expected to determine the contested scope of the Alien Torts Statute. The Court is due to hear arguments from the parties in December 2020.

CANADA

Nevsun Resources Ltd. v Araya, (2020 SCC 5)[2]

On 28 February 2020 the Canadian Supreme Court ruled that claims by three Eritrean miners for alleged breaches of domestic torts and customary international law could go ahead against a Canadian company, Nevsun Resources Ltd. The case was returned to the trial judge to determine whether and, if so, how, Canadian law imposes liability for violation of customary international law standards. The parties reached a confidential settlement, leaving undetermined the issues returned to the trial judge.

South America

BRAZIL

Associação brasileira de incorporadoras imobiliárias (ABRAINC) v Brazil, ADI 5209/DF, 16 May 2016

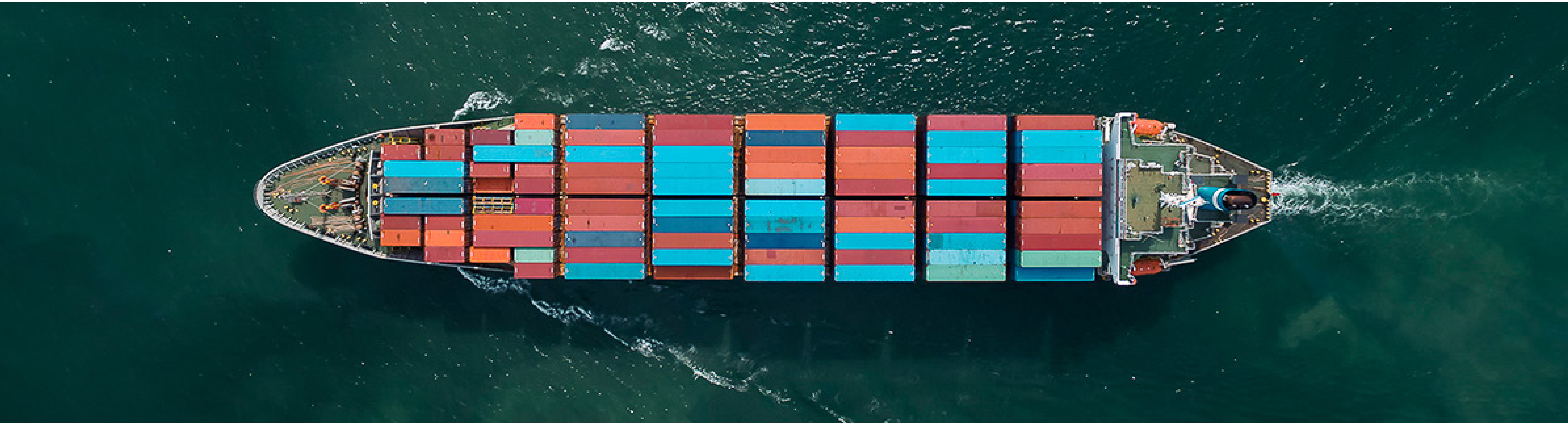
In September 2020, the Brazilian Supreme Court ruled against ABRAINC, a real estate association, holding that the "dirty list" of companies and individuals found to have used slave labour, who are therefore barred from receiving state loans, was constitutional. The challenge was brought on the basis that the list is produced by the executive, rather than by legislative procedure.

Europe

EU

Legislative initiatives on sustainable corporate governance[3]

The European Commission has been considering legislation that would impose mandatory human rights, environmental and governance due diligence requirements on all companies in the EU. A public consultation was launched in October 2020 to gather data and stakeholder views. The Commission's proposal on the matter is expected in 2021. The European Parliament has also published its own draft directive on Corporate Due Diligence and Corporate Accountability.



Proposed Council Regulation

In October 2020, the European Commission and the High Representative of the Union for Foreign Affairs and Security Regulation put forward a Joint Proposal for a Council Regulation concerning the implementation of sanctions against serious human rights violations and abuses worldwide. The proposed Regulation is intended to complement an existing proposed Council Decision, which together are intended to establish an EU Global Human Rights Sanctions Regime. If approved, the EU Global Human Rights Sanctions Regime will allow the EU to target those responsible for serious human rights violations worldwide, regardless of nationality, with greater flexibility than under the current sanctions regime.

Conflict Minerals Regulation (EU Regulation 2017/821)

The Regulation adopted in 2017 will impose human rights supply chain due diligence requirements on importers of tin, tantalum, tungsten and gold to the EU. Due diligence must be conducted on both the mining and the processing of the minerals. The Regulation enters into force on 1 January 2021.

NETHERLANDS

Child Labour Due Diligence Law[4]

This law imposes due diligence and prevention obligations on companies selling goods or services to Dutch consumers with regards to child labour in their supply chains. The law was adopted on 14 May 2019 and is likely to enter into force in 2022.

Proposed human rights and environmental due diligence law

Following calls by Dutch businesses, a proposal was submitted to the Dutch Parliament on 22 June 2020 by four political parties. The law would create due diligence obligations targeting a broader range of human rights issues than the Child Labour Due Diligence Law. Since then, in autumn 2020, the Dutch Social and Economic Council has also recommended that the Netherlands introduce a mandatory due diligence legislation.

SWITZERLAND

Due Diligence Initiative

In November 2020, Swiss voters rejected a proposal put forward by the Responsible Business Initiative, which would have created: a sanctions regime for human rights abuses; a right of standing in the Swiss courts to victims of human rights abuses; and human rights due diligence and reporting requirements for Swiss businesses. Following this vote, a counter-proposal on human rights due diligence that was approved by the Swiss Parliament in June 2020 (the Due Diligence Initiative or **DDI**) will come into force. The DDI will create human rights due diligence and reporting requirements for Swiss companies, but does not include the sanctions and standing regimes of the RBI.

Updated National Action Plan (2020-2023)

In January 2020 Switzerland adopted its National Action Plan for the years 2020-2023. The NAP builds on the previous plan, adopted in 2016, seeks to meet the challenges identified in previous years and also to provide practical measures to advance the implementation of the UN Guiding Principles by both the government and by companies.

FRANCE

First cases under Law No. 2017-399 on the "Duty of Care of Parent Companies and Instructing Companies" (Duty of Vigilance) law

Late 2019 and early 2020 saw the first cases brought under the French Duty of Vigilance Law. These cases are currently ongoing.

LUXEMBOURG

National Action Plan 2020-2022

Luxembourg's second National Action Plan, for the years 2020-2022, was approved in December 2019. The updated action plan seeks to provide a number of more concrete measures in respect of the state and businesses' responsibility to respect human rights.

UK

Proposed deforestation due diligence law

The UK Government has announced its plan for a law which: prohibits large companies from using agricultural commodities that were produced illegally in their originating countries; requires those companies to undertake due diligence checks for risks of illegal deforestation in their supply chains; and imposes fines for violations. The Government has indicated that it will implement its plan through an amendment to the Environment Bill.

Kadie Kalma & ors v African Minerals Ltd & ors, [2020] EWCA Civ 144[5]

In March 2020, the Court of Appeal of England and Wales ruled on a case brought by individuals who alleged that they had been harmed by the Sierra Leonean Police during outbreaks of unrest connected to the defendants' mine. The court found that a duty of care to the workers at the mine did not extend to preventing on-site abuse by the police. Nor was African Minerals considered an accessory to the torts committed by the police, as there was no 'common design' between the two.

Municipio de Mariana v BHP Group plc and BHP Group Ltd [2020] EWHC 2930 (TCC)[6]

In November 2020, the High Court of England and Wales struck out the claims of over 200,000 claimants brought against BHP Group Plc and BHP Group Limited arising out of the failure of the Fundão tailings dam in 2015. The Court found that the existence of parallel proceedings concerning the same issues in Brazil (which were still ongoing) rendered the English proceedings an abuse of process.

GERMANY

Draft due diligence law[7]

The German Government has announced its intention to bring in a Due Diligence Act, which will include mandatory human rights due diligence for German companies with respect to both suppliers and customers. The proposed Act will impose fines for non-compliance and will also enable private enforcement.

Proposed amendment to Network Enforcement Act

The Network Enforcement Act came into force in 2017 and obliges social network providers to remove unlawful content. The proposed amendment now also includes an obligation on social networks to report that content to the Federal Criminal Police Office.

NORWAY

Draft Ethics Information Committee act on Supply Chain Transparency

In November 2019, the Ethics Information Committee recommended the adoption of mandatory business human rights legislation which would: (i) provide consumers, trade unions, civil society organisations and others the right to information on the human rights impact of businesses and operations; and (ii) through knowledge and disclosure obligations, protect human rights in supply chains. Enterprises are also required to know of any salient risks that might have a negative impact on fundamental human rights in that enterprise's business and supply chains. Additional due diligence and disclosure requirements would apply to larger companies

Asia Pacific

INDIA

Draft Environmental Impact Assessment Notification, 2020

Released in March 2020, the Draft Environmental Impact Assessment Notification (**EIA Notification**) aims to replace the previous 2006 Notification, which takes into account key human rights such as indigenous rights and the right to a clean environment as part of the notification process. Changes from the 2006 Notification include exemptions from public consultation for several large industries and projects as well as projects involving 'strategic considerations'. It also provides a mechanism for ex post facto environmental clearance, subject to certain conditions, for projects that were commenced without obtaining clearance.

THAILAND

National Action Plan (2019-2022)

Thailand's first National Action Plan was launched at the end of 2019 and focuses on four key areas: labour; community, land, natural resources and the environment; human rights defenders; and cross-border investments and multinational enterprises.

AUSTRALIA

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors [2020] QLC 33

Youth Verdict, along with other NGOs, objected to an application by Waratah for a mining project on human rights grounds. Waratah sought to strike out these objections before the Queensland Land Court or obtain a declaration that the court did not have jurisdiction to consider those objections. The role of the court in this instance was to review the objections and to give a recommendation to the executive on whether to issue the license. The court found that it was required by the Queensland Human Rights Act to take into account human rights issues when making its recommendation, and so could also take into account objections based on human rights grounds.

Africa

KENYA

Kenya National Action Plan on Women, Peace and Security 2020-2024

On 27 May 2020, the Kenyan government announced the launch of its second generation NAP, for the period from 2020 to 2024. Focal points of the NAP include climate change; violent extremism; gender-based violence; human trafficking; and humanitarian disasters.

Owinouhuru community v Metal Refinery (EPZ) Limited and others

In July 2020, the Environment and Land Court at Mombasa awarded damages in a class action lawsuit on behalf of the Owino Uhuru community in Kenya against a metal refinery, Metal Refinery (EPZ) Limited (**EPZ**), the company that owned the land used for the metal smelter, and various government authorities. EPZ was found to have used lead-acid batteries in its smelting plant resulting in lead contamination and poisoning of nearby land and inhabitants. A total of 1.3 billion Kenyan shillings (approximately USD12m) was awarded in damages, for which EPZ was found to be 25% responsible.

GLOBAL

Second Draft International Treaty on Business Human Rights

On 7 August 2020, the Intergovernmental Working Group released the Second Revised Draft of the proposed binding treaty on business and human rights. The treaty seeks to establish international standards for business and human rights and has been in progress for a number of years. The Second Revised Draft clarifies and refines a number of the key articles in the draft text.

1. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/us-supreme-court-to-consider-scope-of-the-alien-tort-statute
2. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/nevsun-resources-ltd-v-arayacanadian-supreme-court-confirms-that-eritreans-can-seek-legal-redress-against-canadian-parent-company
3. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/a-first-step-towards-eu-wide-legislation-on-mandatory-human-rights-due-diligence
4. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action
5. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/mining-company-not-liable-for-unlawful-acts-of-sierra-leonean-police
6. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/english-court-strikes-out-claims-against-bhp-for-brazilian-dam-collapse
7. For further information see: https://www.allenovery.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-germany-takes-another-step-towards-global-value-chain-regulation

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