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ERADICATING HUMAN RIGHTS ABUSES IN CORPORATE VALUE CHAINS: FROM DESCRIPTION TO PRESCRIPTION?

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Summary

The rights of workers affected by the activities of Western companies have been in the spotlight recently, with consumers, investors and NGOs becoming more concerned about how companies treat those in their value chains who are most vulnerable to exploitation. This article examines the trend of legislators also turning their attention towards this area.

In the UK, the Government plans to increase the amount of information that companies must include in their modern slavery and human trafficking statements.

In continental Europe, various measures have been introduced or are proposed at a national level that will require companies to conduct due diligence on their supply chains in order to identify and address potential human rights abuses. Similarly, EU legislators have proposed a new Directive on supply chain due diligence that would require most companies registered in a Member State or selling goods or providing services in the EU internal market to carry out effective due diligence to identify and address adverse impacts on human rights, the environment and the good governance of countries where they or their suppliers operate.

Overall, the legislative direction of travel is from disclosure - requiring companies to describe what they are doing to identify and address possible human rights abuses - towards mandatory obligations which prescribe the measures companies should take.

Introduction

The human rights allegations concerning the treatment of the Muslim Uyghur population in Xinjiang, China and the recent Parliamentary enquiries into the involvement of UK retailers in Xinjiang's cotton production industry have shone a spotlight on human rights abuses in value chains that end with Western consumers. This issue is not, however, confined to China: at any given time, around 25 million people worldwide are thought to be in forced labour, of whom a quarter are children.[1] This situation has no doubt been significantly worsened by the impact of fluctuating Western consumer demand as a result of the COVID-19 pandemic.

In the last few years, NGOs, investors, consumers and others have become much more focussed on what companies are doing to address ESG issues. While the "S" of ESG (Social) is capable of embracing a wide range of issues, there is broad consensus that it includes human rights of workers and community members, working conditions and labour practices. (For more details see our briefing *"Putting the "S" into ESG"*.)

Until fairly recently it was widely considered sufficient for companies to ensure that their own activities complied with local laws relating to employment matters and human rights. In line with the increased focus on ESG issues, there has arisen a body of 'soft law' requirements - most comprehensively codified in the United Nations Guiding Principles on Business and Human Rights (**UNGPs**) - with which companies are expected to comply in order to play their part in upholding international human rights standards.

As became clear from the response to the Boohoo modern slavery revelations, and more recently from the reaction (including of two Parliamentary enquiries) to the involvement of certain UK retailers in Xinjiang's cotton production industry, in order to satisfy stakeholder expectation it is now not enough for UK companies to get their own house in order when it comes to human rights; they must also use

[1] "Global Estimates of Modern Slavery", International Labour Office, September 2017.

their influence and commercial bargaining power to ensure that those companies with which they have a business relationship (in particular their suppliers) do the same.

In contrast with stakeholder expectations in this area, companies in the UK are not subject to any legal obligation to ensure that their value chains are compliant with international human rights standards. However, this may be about to change. Recent and proposed legislation in the UK and across continental Europe, both at a national and EU level, indicates a trend towards legally binding obligations on companies to reduce the actual and potential adverse human rights impacts that are linked to their operations – in particular, their global value chains.

This article examines these legislative changes and considers their likely impact on businesses based in the UK.

The United Nations Guiding Principles on Business and Human Rights

Since their endorsement by the UN Human Rights Council, the UNGPs have become the authoritative global standard for preventing and addressing the risks of adverse human rights impacts linked to business activity. The UNGPs consist of 31 principles, structured around three fundamental pillars: the state duty to protect human rights, the corporate responsibility to respect human rights and access to remedy for victims of business-related abuses.

Although the UNGPs are not legally enforceable, recent and proposed legislative developments, both at a national and EU level, are an implementation (whether or not this is stated expressly) of at least some of the principles. The UNGPs are therefore not just a high-level framework of best practice for companies but also an indication of the direction in which legislative developments are travelling.

The UNGPs identify three components of the corporate responsibility to respect human rights:

1. Institute a policy commitment to meet the responsibility to respect human rights.
2. Undertake a process of human rights due diligence – the process of assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed – not only in respect of a company's own operations but its value chains as well.
3. Put in place processes to enable remediation of any adverse human rights impacts that the company causes or contributes to.

According to this framework, human rights due diligence is the primary means by which all business enterprises are expected to ensure that their value chains are compliant with international human rights standards.

Human rights in UK value chains

UK Modern Slavery Act 2015 (MSA)

In 2013, the UK became the first country to produce a 'National Action Plan' to implement the UNGPs. Rather than placing substantive obligations on companies to comply with the components of the corporate responsibility to respect human rights, the UK Government opted to introduce reporting obligations aimed – in part – at improving upstream value chain transparency. Against a backdrop of stakeholder accountability, the intention was to encourage a 'race to the top' in terms of corporate human rights compliance.

Since October 2015, the MSA has required certain commercial organisations to publish an annual modern slavery and human trafficking statement.

Upon its introduction, the MSA was hailed as a landmark and innovative piece of legislation – one of the first in the world to require companies to report on how they are tackling human rights abuses not only within their own businesses but also along their supply chains.[2] Undeniably, the transparency provisions have raised awareness (both in board

Section 54 MSA transparency requirements

- **Scope**: Commercial organisations with an annual turnover of £36 million or more and which carry on part of their business in the UK. Around 16,000 businesses meet these criteria.
- **Content**: The statement must explain the steps (e.g. human rights due diligence) that the organisation has taken in the past year to ensure that slavery and human trafficking is not taking place in any part of its business or its supply chain. Alternatively, the statement may state that no such steps have been taken.
- **Approval**: The statement must be approved by the board of directors (or equivalent, in the case of a partnership) and signed by a director (or equivalent).
- **Publication**: The statement must be included in a prominent place on the relevant organisation's website homepage.

[2] "Historic law to end Modern Slavery passed", UK Government, 26 March 2015.

rooms and among consumers) of slavery and human trafficking in global supply chains. This has encouraged many organisations – in particular those with household names and prominent consumer-facing brands – to take meaningful steps towards addressing the issue. This has had a cascading effect along certain supply chains such that entities that fall outside the scope of the transparency obligations are now complying with best practice on human rights in order to satisfy their major clients and business customers.

Shortcomings

Although the MSA represents a step in the right direction, it is based on the questionable theory that consumers and other stakeholders in companies will scrutinise modern slavery and human trafficking statements and, where they believe a company is doing too little, apply sufficient pressure to improve its behaviour. This approach is consistent with the UK Government's non-interventionist approach with respect to ESG matters more generally of relying on adverse capital allocation as a result of reputational damage rather than direct intervention.

It is also clear that the MSA suffers from a number of other shortcomings. A February 2021 report by the Business & Human Rights Resource Centre (**BHRRC**) noted the following:[3]

- 40% of organisations to which the MSA regime applies fail to produce a statement. Since 2015, there has not been a single injunction or administrative penalty applied to a company for failing to report.
- The majority of the organisations that do report are publishing general statements. For example, multinational companies linked to high-risk sectors routinely fail to disclose well-known risks to human rights in their statements.
- The MSA does not place a legally binding obligation on organisations to effectively address the risks of slavery and human trafficking that are identified: the MSA explicitly states that a company can publish a statement that says it has taken no action at all.

The BHRRC report concludes:

> "The [MSA] has raised awareness of the prevalence of modern slavery and encouraged a cluster of leading companies and investors to do more. But, ultimately, our analysis of five years' worth of statements in the Modern Slavery Registry has revealed no significant improvements in the vast majority of companies' policies, practice or performance."

Proposed reforms

In September 2020, the UK Government announced a number of amendments to the MSA regime[4] designed to implement – at least in part – the findings of an independent review of the MSA carried out by members of the House of Lords.[5] More recently, and specifically in response to the Uyghur human rights abuses, the Government has announced a series of additional changes.[6] These measures are to be enacted as soon as parliamentary time allows.

Modern Slavery Act: proposed reforms

- Each organisation will be required to address the following areas in its statements:
  - its structure, its business and its supply chains;
  - its policies in relation to slavery and human trafficking;
  - its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
  - the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
  - its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against

[3] "Modern Slavery Act: Five years of reporting", Business & Human Rights Resource Centre, February 2021.

[4] "New tough measures to tackle modern slavery in supply chains", Home Office, 22 September 2020.

[5] "Independent review of the Modern Slavery Act 2015 second interim report: transparency in supply chains", 22 January 2019.

[6] "Xinjiang: Forced Labour", the Secretary of State for Foreign, Commonwealth and Development Affairs and First Secretary of State, Hansard, 12 January 2021.

such performance indicators as it considers appropriate; and

- the training about slavery and human trafficking available to its staff.

If an organisation has taken no steps in an area, it will need to state this clearly and will be encouraged to explain the reasons why.

- Public sector organisations which meet the £36 million threshold in the MSA, which in aggregate account for c.£280 billion in public procurement spending (around 30% of the UK Government's annual budget), will be required to publish slavery and human trafficking statements.
- UK Government bodies will exclude suppliers from public procurement processes where there is sufficient evidence of human rights violations in their supply chains.
- All organisations will be required to report on the same twelve month period (1 April to 31 March), with a single reporting date of 30 September. Further, an organisation's statement will need to specify the date on which it was approved by the board and the date it was signed by a director.
- "Group" statements must name all of the entities in the corporate group which are covered by the statement.
- Organisations must submit their statement to a central registry which will bring all modern slavery statements together in one place, making it easier for stakeholders to find and compare them.
- The Home Office will introduce fines for businesses that do not comply with their transparency obligations – no indication has yet been given as to the level of these fines or how they are to be calculated. Together with UK Government proposals for a "single enforcement body" for employment rights, this measure is suggestive of increased levels of enforcement going forward.

Non-Financial Reporting Directive (NFRD)

Large public interest entities with more than 500 employees (listed companies, banks and insurance companies) are already required by rules derived from the EU NFRD to disclose the information necessary for an understanding of the company's development, performance and position relating to the impact of its activities on environmental, social and employee issues, human rights and anti-corruption and bribery matters. Specifically, companies must describe the policies pursued in relation to those matters, including any due diligence processes that have been implemented. Companies must also report on the principal ESG risks that their operations pose (including, where relevant and proportionate, through their business relationships) and how the company manages those risks.

While the NFRD does not require companies to carry out due diligence, a company may find it is unable to report accurately on its principal non-financial risks, policies and the effectiveness of those policies unless it has done so.

The NFRD has had a substantial impact on European ESG standards generally. However, the specific impact on UK companies with respect to human rights compliance in their value chains has been relatively limited. Put simply, the public interest entities to which the NFRD applies and for which adverse human rights impacts are sufficiently material to warrant NFRD disclosure are the same household names and prominent consumer-facing brands which were already the success stories of the MSA regime. It is therefore unsurprising that many UK listed companies satisfy their human rights reporting requirements under the NFRD by cross-referring to (or re-iterating) their modern slavery and human trafficking statements.

Although adverse human rights impacts in value chains may currently only be relevant from an NFRD perspective to a limited pool of companies, there are two principal reasons why this may not continue to be the case. Firstly, as stakeholders become more focussed on human rights impacts (and ESG matters more generally), related disclosures will become increasingly relevant to understanding a company's "*development, performance and position*"[7] – further stakeholder attention on ESG matters could therefore

[7] Companies Act 2006, section 414CB.

require a broader pool of companies to make human rights-related disclosures (including with respect to their value chains). Secondly, the European Commission consulted last year on proposed changes to the NFRD that will increase the amount of information that companies must disclose. An Amending Directive is expected to be published in Q2 of 2021[8]. In addition, the new EU Sustainable Finance Disclosure Regulation (SFDR) and EU Taxonomy Regulation will result in investors asking companies to provide more, and more granular, information about ESG matters. (For more details see our briefing "*All change, no change? Corporate reporting in the post-Brexit world*".) These pieces of legislation will set a new standard for non-financial disclosure across continental Europe and, even if the UK does not adopt similar rules, companies in the UK will be strongly encouraged by investors comply.

BIICL proposal for mandatory human rights obligations

In February 2020 the British Institute of International and Comparative Law (**BIICL**) published a report on the legal feasibility of introducing into UK law a new provision (based on the Bribery Act 2010) under which UK companies would be liable for failing to take sufficient steps to prevent human rights abuses that are caused by, or connected to, the activities of the company, its subsidiaries and business partners, wherever in the world those abuses occur. A company that failed to prevent such human rights abuses would be liable to pay damages to those affected unless the company could show that it had taken reasonable precautions to prevent such harms. As with the Bribery Act, the Government was advised to develop and publish guidance for companies on what amounts to "reasonable precautions". "Human rights" would be defined by reference to international standards, principally the UNGPs, and would include environmental harms. Companies of all sizes that carry on business in the UK would be caught.

The UK Government has not yet indicated whether or not it intends to take forward the BIICL proposals.

Momentum in Europe: making supply chain due diligence mandatory

National legislation

In continental Europe, recent legislation (both implemented and proposed) at the national level indicates a movement away from reliance on reporting requirements and towards placing substantive obligations on companies to respect human rights (often incorporating the framework as set out in the UNGPs).

The 2017 French Duty of Vigilance Law – one of the first of its kind – requires certain large companies established in France (of which there are currently c.150) to publish and implement a vigilance plan which includes appropriate measures for identifying and preventing serious infringements on human rights and environmental damage resulting directly and indirectly from a company's activities and those of its business relations (including its subsidiaries, subcontractors and suppliers). Failure to publish and implement an adequate plan exposes the relevant company to civil liability from stakeholders (including victims) in the event that any such infringement and/or damage occurs.

Similar legislation is proposed in Germany (requiring any company based in Germany with 500 or more employees to conduct human rights due diligence at all stages of its value chain). Austria, Switzerland, Finland, Denmark and Norway are also considering introducing mandatory human rights due diligence requirements.

Perhaps the most radical example of national legislation in this area is the Dutch Child Labour Due Diligence Act 2019, which is expected to come into force in mid-2022. The legislation imposes a duty of care on every company that sells or supplies goods or services to end-users in the Netherlands to prevent those goods or services from coming into existence through child labour. Although at the extreme end of the spectrum, failure to comply with the requirements of the legislation could result in the imprisonment of directors and fines of up to 10% of worldwide revenue.

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[8] "Non-financial reporting by large companies (updated rules)", European Commission.

Dutch Child Labour Due Diligence Act

Scope: The law applies to all companies that sell or supply goods or services to Dutch consumers, no matter where the company is based or registered, with no exemptions for legal form or size.

Effective date: It is expected that the Act will come into effect in mid-2021. The Act contains a five year transition period.

Definition: Child labour is given a broad definition and includes any form of work conducted by persons under the age of 18 albeit the Act reflects The Minimum Age Convention 1973 in recognising that light work by children is permitted in certain limited circumstances.

Requirements: Companies must determine (through the adoption of a risk-based approach) whether there is a reasonable suspicion that the relevant goods or services supplied have been produced using child labour. If such a suspicion exists, the relevant company must (a) carry out due diligence to determine if child labour is being used and (b) develop and implement an action plan. Companies must submit an annual declaration to a regulator (which is yet to be established) stating that adequate due diligence has been carried out to prevent child labour.

Enforcement: For the regulatory authority to become involved, tangible evidence that a company's products or services were produced using child labour must be presented. Companies failing to comply with the Act can be subject to fines of up to €750,000 or 10% of total worldwide revenue (whichever is higher) and, in certain circumstances, company directors can be liable for up to two years' imprisonment.

Although the requirements described in this section have been implemented at a national level, they are each likely to have a considerable extra-territorial impact through a cascade of minimum human rights standards along global value chains. Companies may therefore find themselves subject to contractual requirements or commercial pressure as a consequence of legislation which does not apply to them directly.

Should this trend continue, companies in the UK and elsewhere may need to get used to complying with a growing patchwork of national human rights obligations.

EU legislation

The European Commission, Counsel and Parliament have each identified the area of mandatory supply chain due diligence as ripe for regulatory alignment. In March this year the Parliament voted overwhelmingly to support a proposal for a Directive on corporate due diligence and corporate accountability. The Commission is expected to publish its own version of such a proposed Directive in Q2 of 2021, following the completion in February of a public consultation that received more than 470,000 contributions.

Although the European Parliament's proposed Directive is a recommendation to the Commission and is therefore not binding, it does give an indication of the possible nature and scope of the Commission's own proposal. Once the final version of the Directive completes the EU legislative process and is published in the Official Journal of the EU, member states will have a period of time (probably 24 months) to implement it into their national laws.

European Parliament proposal for an EU Directive on corporate due diligence and corporate accountability

Scope: The proposed Directive would apply to all undertakings either governed by the law of a Member State or operating in the internal market selling goods or providing services, but excluding SMEs that are unlisted and not operating in high risk sectors (such sectors to be determined by the Commission).

Obligations: Undertakings would be required to carry out effective due diligence (broadly as defined in the UNGPs) with the respect to adverse impacts on human rights, the environment and good governance of countries in their operations and business relationships. If an undertaking concludes that it does not cause or contribute to any such adverse impacts, it would have to publish a statement to that effect. If an undertaking is unable to make such a statement, it would need to establish, effectively implement and publish a due diligence strategy (to be reviewed annually).

In addition to various stakeholder engagement and grievance mechanism requirements, undertakings would be required to ensure (and regularly verify) that their business partners (including all suppliers directly linked to the undertaking's operations, products or services) put in place and carry out human rights, environmental and good governance due diligence.

Undertakings would also be required to ensure that their purchase policies do not cause or contribute to adverse impacts on human rights, the environment or good governance.

Remediation: Where an undertaking has caused or contributed to an adverse impact, it would have to provide for or cooperate with a remediation process.

Remedies (both financial and non-financial) would be determined in consultation with affected stakeholders.

Enforcement: Sanctions would be determined by Member States. However, according to the recitals to the proposed Directive, these should be "comparable in magnitude to fines currently provided for in competition law and data protection law" (i.e. up to 10% of global turnover for the most serious breaches).

In addition, Member States would be required to ensure that there is a route to civil liability for any harm arising out of adverse impacts on human rights, the environment or good governance (including where such adverse impacts are caused by an entity under the relevant undertaking's control, such as subsidiaries).

Whether the UK Government will introduce similar rules remains to be seen. The UK Government's announcement in August 2020 of specific issue-based legislation requiring large businesses to carry out supply chain due diligence in relation to certain 'forest risk' commodities (e.g. palm oil, soya, cocoa and beef)[9] suggests it may favour a more targeted approach.

However, Brexit will do little to diminish the importance of an EU mandatory due diligence regime for those companies in the UK and elsewhere which will need to satisfy the relevant requirements as a pre-condition to access to the European internal market. Companies in the UK will also be indirectly impacted if they feature in the value chains of companies to which the EU regime applies directly.

In addition, ESG has become an area for businesses to distinguish themselves and it would be naïve to think that UK-based businesses will not wish to demonstrate that they meet the high standards that others adhere to, even if those standards are set by the EU and are not therefore binding on them.

Practical implications for UK companies

Obliging companies to conduct supply chain due diligence and take precautions to ensure that breaches of human rights do not occur raises complex issues. On the positive side, such obligations, and the increasing disclosure requirements, should help to level the playing field by making it more difficult for less scrupulous businesses to undercut their competitors by exploiting workers, or turning a blind eye to their suppliers doing so. A joint statement by 26 companies (including Mars, Unilever and Adidas) in support of harmonised EU rules on human rights and environmental due diligence puts it this way:

> "Mandatory legislation can contribute to a competitive level-playing field, increase legal certainty about the standards expected from companies to respect human rights and the environment, clarify legal consequences for when responsibilities are not met, promote engagement and impactful actions between supply chain partners and, above all, trigger and incentivise impactful and effective actions on the ground."

Other benefits to companies include improving sustainability and supply chain resilience; managing risks; enhancing reputation; and attracting investors, particularly those keen to allocate funds to companies with strong ESG credentials. Many investors are seeking to understand better the extent to which their investee companies are exposed to human rights risks and what steps they are taking to address those risks. For example, in April 2020 the Investor Alliance for Human Rights, which represents over 100 investors with more than USD 4.2 trillion in assets under management, published a statement calling for human rights due diligence to be mandatory on the basis that it is good for business, investors, and the economy:

> "In order for investors to practically conduct our own human rights due diligence under these and other emerging expectations, companies must undertake robust processes themselves. Investors can be connected with adverse impacts by funding companies or projects linked to human rights abuses… Proper and comprehensive human rights due diligence by companies, including mandatory and meaningful disclosure, enables us to identify the greatest risks to people in our portfolios and make more informed and responsible investment decisions."

This is not, however, a nil cost issue. Aside from the operational cost of conducting human rights due diligence, the corporate responsibility to respect

[9] "World-leading new law to protect rainforests and clean up supply chains", Department for Environment, Food & Rural Affairs, 25 August 2020.

human rights may require boards to take decisions with uncomfortable consequences. One example of this is the state and consumer backlash in China faced by a number of multinational retailers (including several members of the Better Cotton Initiative) following their public statements concerning the sourcing of cotton from the Xinjiang region.[10] Arguably, circumstances such as these suggest a positive role for detailed national and/or supranational legislation taking the spotlight of state-sponsored repercussions off individual market participants by allowing them to point to their mandatory obligations.

The degree to which a company is exposed to the risk of human rights abuses in its own activities and those of its suppliers will of course vary by sector, industry and geography. Due diligence should therefore be proportionate to the risks and the resources available. Although SMEs are likely to have fewer resources and less formal processes and management structures than larger companies, the responsibility to respect human rights applies to all companies, regardless of their size and it will not be an answer to reputational damage to explain that resources did not permit due care.

There is no 'one size fits all' approach. The following are some key points for organisations to consider – more detailed practical guidance on implementing the principles in the UNGPs can be found in the OECD Due Diligence Guidance for Responsible Business Conduct.

- **Adopt and disseminate a human rights policy**: Set a clear vision for your own operations and for your suppliers, and ensure that respect for human rights is central to this vision. Set measurable goals so that the company and its suppliers can work systematically towards achieving and maintaining this vision. Responsibility for achieving these goals should not sit within a single silo of the business – adopting a multi-disciplinary approach will enable human rights due diligence considerations to permeate throughout a business's operations (in particular sourcing and purchasing). Product developers, quality managers, purchasers, designers and legal teams all have important roles to play.
- **Adopt and disseminate a supplier Code of Conduct:** This is a key document in setting the framework for the practical implementation of human rights due diligence within the supply chain. The Code of Conduct may relate to a broad range of ESG issues (e.g. environmental stewardship and anti-corruption measures as well as human rights). Compliance with the Code should be a contractual requirement and a pre-condition to the ongoing business relationship.
- **Supply chain mapping:** A comprehensive and regularly-updated supply chain map is key to properly understanding and measuring human rights impacts. Oversight over the first tier of suppliers (i.e. those with which the business has a direct contractual relationship) is of course essential. But human rights abuses are often buried deep within the supply chain, and a critical first step to identifying potential human rights abuses is to understand all the links in a supply chain, including sub-contractors.
- **Adopt a risk-based approach:** The UNGPs, MSA guidance and the proposed EU Directive are absolutely clear: the expectation is for businesses to conduct due diligence on every tier of their supply chain. Although rarely acknowledged, for some companies (such as those that sell a broad range of complex products) this will be a near-impossible task requiring enormous resources: in these circumstances, the focus should be on elements of the supply chain that are thought to pose the greatest risk. But the risk assessment should be based on data, not "common perception": for example, data from publicly available sources about working conditions and worker rights in particular countries or sectors; supplier questionnaire responses; and data obtained from third parties that specialise in supply chain due diligence.
- **Stakeholder engagement and collaboration:** In addition to a robust supplier auditing process, engagement with relevant stakeholders is an essential part of gathering local knowledge and capitalising on local expertise. Dialogue with relevant stakeholders can include meetings with managers, workers and union representatives,

[10] "As Burberry Faces Backlash In China Over Xinjiang Cotton, Other Luxury Brands Could Face Boycott", Forbes, 26 March 2021.

local authorities and local experts such as NGOs. Engaging in this way gives companies a greater understanding of matters which cannot be easily investigated through an audit process (for example matters relating to freedom of association, collective bargaining, working hours and wages, cultural differences). Having an "on-the-ground" understanding of the issues helps to foster a collaborative approach: companies should seek to take their suppliers with them on a journey towards improved treatment of workers and local communities, building trust and helping to prevent abuses being covered up. Only as a last resort should human rights abuses result in the termination of a business relationship.

- **Ask some hard questions about your business practices**:
  - Does your existing supply chain due diligence extend beyond tier one suppliers?
  - Are your lead times very short? Do you frequently make late changes to orders? Do you take a long time to pay suppliers? Are some suppliers providing you only with items that are low value / low margin when they could provide a mixture of lower and higher value / margin items? Such practices can make it difficult for suppliers to manage their own businesses and to invest in premises and their work force.
  - Do employees responsible for buying decisions understand the costs of raw materials and labour in the country where the supplier is based?
  - Is a supplier offering prices that are significantly lower than its peers? If so, can they explain satisfactorily how this is possible without using forced labour or otherwise exploiting workers?
  - Do you attempt to verify statements made by suppliers in response to questionnaires and other enquiries (either yourself or by using a third party)? Verification could involve checking media reports; doing litigation checks; doing background checks on key individuals; and doing site visits and spot checks.
  - Do you make, or arrange for third parties to make on your behalf, unannounced visits to suppliers' premises, or carry out physical audits – for example, to see working conditions, interview management and workers and review payroll and procedure documentation, and to recommend corrective actions? Do you follow up on shortcomings that are identified and corrective actions that are recommended?
  - Do you benchmark workers' pay and terms and conditions against other suppliers from the same country (and other comparable countries)?
  - Are your supplier contracts fit for purpose? As well as requiring compliance with the company's supplier Code of Conduct, do they provide the company with sufficient rights to inspect the supplier's premises and documents and to be provided with sufficient information? Do they prohibit sub-contracting to a third party without the company's consent?

Conclusion

The US-China trade war, Brexit, manufacturing delays as a result of the COVID-19 pandemic, vaccine nationalism, the human rights allegations concerning the Muslim Uyghur population and the recent Suez Canal blockage have together placed questions as to the robustness of global value chains firmly into the spotlight. This appears to be prompting a shift in the focus of companies away from cost reduction towards more qualitative objectives such as resilience and flexibility in their value chains[11] – the reduction of human rights-related risks is an important component in meeting these objectives.

For some companies, a competitive advantage may have already been found in complying with the growing body of 'discretionary' stakeholder expectations and taking a leading role in the responsibility to respect human rights.

Those companies for which the route to a competitive advantage is less obvious should be aware that mandatory regulatory requirements with respect to human rights are coming – doing the bare minimum to ensure that value chains are compliant with

[11] In a survey of 200 manufacturers by the Digital Supply Chain Institute and Bain & Company, executives ranked flexibility and resilience as their top supply chain goals. Only 36% of senior executives ranked cost reduction as a top three goal, down from 63% who saw it as a priority over the past three years. "Supply Chain Resiliency Executive Survey Insights", Bain & Company and the Digital Supply Chain Institute, July 2020.

international standards will soon cease to be a viable option.

Companies in either position should be careful. Policy statements of aspiration with respect to human rights are not cost free. Recent case law suggests that parent companies that takes active steps, by training, supervision and enforcement, to see that policies and guidelines are implemented by their subsidiaries (and perhaps, by analogy, their suppliers) may expose themselves to third party liability. (For more details see our briefing "*Parent Company Liability back in the Supreme Court*"). Claiming to be socially responsible may, in practice, mean taking responsibility.

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