

Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability

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Abstract

The proliferation of human rights disclosure and due diligence laws around the globe is a welcome development in the area of business and human rights. Corresponding improvement in conditions for workers and communities in global supply chains whose human rights are impacted by businesses has not materialized, however. In this article, we focus on the oversight and enforcement features of human rights disclosure and due diligence laws as among the missing links to achieving the accountability objectives envisaged by such legislation. Drawing on our analysis of the key legislative developments, we observe and critique that the state has almost completely withdrawn itself from the oversight and enforcement roles and assigned these crucial accountability functions solely to consumers, civil society, and investors. Without a regulatory mechanism to ensure quality of human rights disclosures and due diligence processes and impose sanctions for failing to comply with the laws, not only may the disclosures and processes be inadequate, but there is a danger that misleading disclosures and flawed processes may mask harmful impacts and be detrimental to any hopes of vindicating the rights of workers and communities in global supply chains. We offer a new perspective on a more effective approach to oversight and enforcement in which the state should function as a key actor through which consumers, civil society, and investors can hold businesses accountable.

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I. Introduction

In response to intense civil society pressure and the increasing public awareness of appalling human rights impacts of businesses including working conditions amounting to slavery and forced labor, several governments have committed themselves to taking action to prevent human rights abuses by businesses and eradicate modern slavery in global supply chains.¹ When it comes to the role of parent or lead companies, home state efforts to-date have primarily concentrated on increasing transparency.² Legislation has been adopted in the United States and Europe that requires companies to make annual public disclosures containing information about their human rights impacts. While transparency can fulfil a useful function alongside other measures in ensuring corporate accountability for human rights abuses, it can only do so if it is designed diligently and implemented robustly. The design of existing human rights transparency rules has allowed highly flawed reporting practices to emerge.³ For instance, a large number of businesses covered under the California Transparency in Supply Chains Act fail to disclose all the required information, and many do not have a disclosure statement at all.⁴ Human rights disclosures under existing legislation are at best minimal in their reporting of risks and at worst misleading about human rights impacts in supply chains and subsidiaries.⁵

The adoption of the French Law on Corporate Duty of Vigilance and the proposals for new human rights due diligence laws,⁶ recently given significant endorsement by the European Union's announcement that it will enact such a

¹ See, e.g., Theresa May, *My Government will lead the way in defeating modern slavery*, DAILY TELEGRAPH (July 30, 2016, 10:01 PM), <https://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/>. “Modern slavery” is not used as a legal term of art, but rather to encompass exploitative practices including forced labor, bonded labor, human trafficking and child labor.

² There are, in addition, legal provisions to address domestic instances of modern slavery found for instance in the Trafficking Victims Protection Act (TVPA) of 2000 (United States) and the Modern Slavery Act 2015 (UK).

³ Genevieve LeBaron & Andreas Ruhmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOBAL POL'Y (SPECIAL ISSUE) 3,15 (2017); *Risk Averse: Company Reporting on Raw Material and Sector-Specific Risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015*, 3 CORE COALITION (2017), https://corporateresponsibility.org/wpcontent/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf;

Justine Nolan, *Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?*, 15 BRAZILIAN J. INT'L L. 65 (2018). See also, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, UK HOUSES OF PARLIAMENT JOINT COMMITTEE ON HUMAN RIGHTS (Apr. 4 2017) <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44302.htm>.

⁴ Andrew G. Barna, *The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains*, 59 WM & MARY L. REV. 1449, 1463 (2018) (citing the statistic that only 62% of covered companies disclosed).

⁵ See, e.g., CORE COALITION, *supra* note 3.

⁶ See, e.g., *25 NGOs and trade unions call for a UK law on mandatory human rights due diligence*, CORE COALITION (2019), https://corporate-responsibility.org/wp-content/uploads/2019/04/190417_UK-mHRDD-campaign-statement_FINAL-with-logos.pdf.

law in 2021,⁷ promise to address some of the design shortcomings of transparency focused laws. The process of human rights due diligence (HRDD) requires companies to identify, prevent, mitigate, and communicate risks to human rights.⁸ If done properly, it can achieve real transformation of corporate behavior and prevention of harms.⁹ Company reports of human rights impacts and due diligence provide information to stakeholders to enable them to make informed choices in their interactions with the corporation. Push for transformation can come from external or internal sources – information found in reports might trigger external stakeholder pressure to transform corporate behavior, or the process of information gathering/disclosing may influence internal decision-making.¹⁰ But to be able to fulfil the transformation and prevention functions, HRDD must be done properly and reporting must contain information that is accurate and that provides a complete and meaningful picture of the issues that are being disclosed. The current design of the transparency and HRDD laws imposes requirements to disclose or carry out HRDD, but with limited exceptions, it does not contain adequate safeguards to ensure duties are carried out properly and in accordance with the relevant legislation.

Most worryingly, the transparency and due diligence rules discussed in this article typically require minimal substantive disclosure and largely adopt only “non-coercive enforcement”¹¹ which leaves the watchdog role to consumers, investors, and NGOs,¹² without a public oversight mechanism and with very limited possibilities for legal action for disclosing misleading information. Without a regulatory oversight mechanism to ensure quality of disclosures and impose sanctions for misleading information, not only may the reporting be inadequate, but there is a danger that such disclosures may present false realities and be detrimental to any hopes of improving rights of workers and communities in the global supply chain. The question of oversight and enforcement remains underexplored in the literature, however.

This article contributes to the on-going discussions about how to improve human rights disclosure and due diligence laws to achieve their stated aims. It has been observed and critiqued that the oversight and enforcement features of these laws remain weak or non-existent.¹³ Taking this as our starting point, we propose greater state involvement in transnational business regulation as it concerns human rights impacts of businesses. We argue that state-based

⁷ *EU to Legislate for Human Rights and Environmental Due Diligence*, HAUSFELD LLP (2020), https://www.hausfeld.com/perspectives/ec-to-legislate-for-human-rights-and-environmental-due-diligence?lang_id=1.

⁸ U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, ¶15, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

⁹ Robert G. Eccles & George Serafeim, *Corporate and Integrated Reporting: A Functional Perspective*, in STEWARDSHIP OF THE FUTURE (Susan A. Mohrman et al. eds., 2015); Karin Buhmann, *Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU’s Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action*, 3 BUS. & HUM. RTS. J. 23, 35 (2018).

¹⁰ *Id.*

¹¹ Tim Bartley, *RULES WITHOUT RIGHTS: LAND, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY* 7, 12, 40 (Oxford, 2018). (Corporate codes of conduct and private social or ethical audits are the prime examples of this mode of governance).

¹² Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT’L L. 1, 12 (2017).

¹³ See, e.g., Nolan, *supra* note 3, at 70 and LeBaron & Ruhmkorf, *supra* note 3.

enforcement and oversight constitute necessary ingredients for public disclosures and due diligence to contribute to the improvement of human rights conditions in supply chains and achieving accountability for adverse business impacts on human rights. We offer a new framing of the problem by analyzing how these laws assign oversight and enforcement roles between the state and the market. We critique that the state has almost completely withdrawn itself from the oversight and enforcement roles and assigned these crucial accountability functions primarily to consumers, civil society, and investors. As we discuss below, even for the French Law, civil society acts as the main driver for oversight. We offer a new perspective on a more effective approach to oversight and enforcement that distinguishes human rights disclosures and due diligence from traditional corporate reporting and due diligence. Our approach assigns these functions primarily to a public authority which should have expertise in both corporate governance and human rights, and which would also function as an enabler for consumers, civil society, and investors to hold businesses accountable.

The article begins in Part II by unpacking the concept of accountability in the context of business impacts on human rights. Next, in Part III, it outlines and compares the due diligence and reporting requirements under key examples of the relevant legislation: the EU Non-Financial Reporting Directive (enacted 2014), the French Law on the Corporate Duty of Vigilance of 2017, the California Transparency in Supply Chains Act of 2010 (CTSCA); the UK Modern Slavery Act 2015 (MSA); the Australian Modern Slavery Act 2018 (AMSA); the U.S. Dodd-Frank Act of 2010 s.1502, the EU Conflict Minerals Regulation (enacted 2017) and the Dutch Child Labor Law (enacted 2019). In doing so, it addresses briefly the reasons behind the enactment of the legislation, the transparency and due diligence requirements they contain, and the institutional arrangements supporting these, to give the reader context for the discussion that follows.

The analysis section, Parts IV and V, building on the existing scholarship,¹⁴ highlights the potential contribution to corporate accountability and the limitations of the existing legislation. In Part VI, we argue that enforcement of these laws via regulatory oversight is essential, alongside market oversight, for achieving their accountability objectives. We evaluate the options for regulatory oversight of human rights due diligence and reporting. Here, we analyze the distinguishing features of human rights reporting from financial and other types of non-financial reporting (diversity, governance, environmental). We urge policymakers to move away from placing human rights due diligence and reporting within the realm of traditional corporate reporting and instead to adopt a *sui generis* model of oversight that marries corporate reporting expertise with human rights expertise.

¹⁴ Justine Nolan, *Human Rights and Global Corporate Supply Chains: Is effective supply chain accountability possible?*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 248 (Surya Deva & David Bilchitz eds., 2017); Chilton & Sarfaty, *supra* note 12.

II. What is accountability in this context and what are the various tools for accountability?

Corporate accountability represents a movement away from voluntarism and self-regulation that traditionally characterize corporate social responsibility (CSR).¹⁵ For Newell, “the term implies both a measure of answerability (providing an account for actions undertaken) and enforceability (punishment or sanctions for poor performance or illegal conduct)”.¹⁶ In the context of business impacts on human rights, we conceive of accountability as a wider concept than liability, encompassing the idea that companies should be held to account for the consequences of their actions via non-legal accountability (risks of loss of reputation, denial of access to foreign markets, fall in share price and shareholder dissent) as well as legal accountability, which can be imposed by regulators or enforced in a court of law.¹⁷ We concur with Zadek’s common sense opinion that “[f]or accountability to work, there must be capability to do something about a given action and some level of consensus about the action that needs to be accounted for and the penalties for poor performance / illegal conduct. There needs to be a reasonably defined community that can reach decisions on these matters.”¹⁸

In following Zadek’s criteria one must first determine what needs to be accounted for in the context of transparency and due diligence for human rights abuses present in a company’s supply chains or subsidiaries. Second, one must determine what consequences and penalties may attach to performance which falls below the expected/required standard, and what processes are needed to assess compliance and impose sanctions.

Determining the scope of accountability can be a complex task where the disclosure obligations are placed on parent or lead companies even though the presence of human rights abuses in those companies’ subsidiaries or supply chains may not be contrary to any legal requirement or obligation placed on the parent / lead company. The corporate law concepts of corporate personality and limited liability and the contractual nature of relationships with suppliers insulate parent / lead companies from liability for harm caused by subsidiaries / suppliers. Therefore, at least in theory, legal liability falls on the subsidiary, supplier, or sub supplier that is directly linked to the human rights harm rather than the lead company that sells the end-product.¹⁹ For instance, the MSA imposes criminal liability for slavery and human trafficking that take place within the United Kingdom only.²⁰ Accountability arises from the presence of

¹⁵ See, e.g., Renginee G. Pillay, *The Limits to Self-regulation and Voluntarism: From Corporate Social Responsibility to Corporate Accountability*, 99 AMICUS CURIAE 10 (2014).

¹⁶ Peter Newell, *From Responsibility to Citizenship: Corporate Accountability for Development*, 33 IDS BULLETIN 91 (2002).

¹⁷ David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 335 (2011).

¹⁸ Simon Zadek, *The Meaning of Accountability*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 241 (Dorothee Baumann-Pauly & Justine Nolan eds., 2016).

¹⁹ Although it is possible for a parent or a lead company to be directly liable for the harms suffered as a result of subsidiary’s acts or omissions – See, *Lungowe v. Vedanta Resources Plc*, [2019] UKSC 20; *Chandler v. Cape Plc*, [2012] EWCA Civ 525. The French Law on the Corporate Duty of Vigilance places a legal requirement on the parent company to conduct due diligence in its supply chain, see below, Part III.

²⁰ Modern Slavery Act, §§ 1-2 (2015).

slavery within a business organization. In contrast, supply chain accountability for slavery and human trafficking overseas through the Act is to be achieved through disclosure of the steps taken to identify and eliminate these practices.²¹ Unlike the former type of criminal accountability that applies in the domestic context, the latter obligation is neither an obligation of result nor an obligation of due diligence to eliminate slavery within supply chains. Instead, it is an obligation to report the steps, if any, taken to eliminate slavery. The presence of human rights abuses and modern slavery practices legally distant from the parent or lead company renders it difficult to define what action needs to be accounted for in modern slavery or human rights disclosures, particularly if a legally mandated due diligence obligation is lacking.

We take as our starting point the action that needs to be accounted for as a failure on a parent or lead company's part to make diligent efforts to identify, prevent, mitigate, and eliminate human rights abuses in its subsidiaries and supply chains and disclose appropriately the steps taken.²² This is just one piece of the wider puzzle of accountability. We are not looking at other pieces of the puzzle such as the role of state oversight and enforcement through civil or criminal liability for human rights harms. Relatedly, we are not looking at this from the perspective of access to remedy. Our concern is whether the current disclosure and HRDD frameworks have the capability to contribute to accountability both to those affected by business impacts, and to those affected indirectly as consumers, customers, or investors who buy from and/or invest in the company on the understanding that it is doing all that can be reasonably expected to prevent and remediate human rights abuses and modern slavery in its global supply chains.

There is a spectrum of regulatory approaches to bringing about corporate accountability in terms of the consequences that will attach to poor performance, ranging from light-touch (private led regulation) through to stringent regulation with binding standards enforced by public authorities.²³ LeBaron and Ruhmkorf observe that home state regulation on business and human rights has been “enacted through a range of different institutional designs that combine elements and instruments of public and private governance.”²⁴ That said, as will be seen in Part III below, a heavy emphasis has thus far been placed on various degrees of transparency accompanied with market centered accountability mechanisms, at the light-touch end of the spectrum. This mode of regulation is a move away traditional “command and control” regulation in which governments adopt “legal rules backed by [civil or

²¹ *Id.* § 54.

²² This accords with the due diligence requirements of the U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, ¶22, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

²³ LeBaron & Ruhmkorf, *supra* note 3, at 15. Compare the Bribery Act 2010 (UK) with the MSA under these categories and find that the former produced significant changes in corporate practice while the latter has not.

²⁴ *Id.* at 17.

criminal] sanctions”²⁵ towards what is termed “reflexive” regulation,²⁶ or “New Governance”.²⁷ Through this mechanism, the government acts as “the orchestrator of private actors to encourage compliance”²⁸ and attempts to “influence normative practices indirectly by shaping the context in which society's various actors and subsystems interact and bargain with one another.”²⁹ This model has been widely supported by the CSR literature due to its promise of affecting organizational and lasting change,³⁰ whereas the command and control type regulation has been viewed with skepticism due to its potential to produce a tick-box approach to human rights issues.³¹ Human rights disclosure laws discussed in this article largely adopt this light touch regulation model based on market led model of accountability. Recent developments suggest a slow gradual movement towards more stringent regulation, with a new legislative approach featuring a legal duty to conduct due diligence and publish due diligence information backed by certain penalties and civil liability for failure to comply.³² Buhmann has argued that for the light touch approach to be successful, it needs to properly encourage organizational learning and not merely focus penalties for non-disclosure.³³ While the organizational learning focus is crucial, decades of voluntarism and soft regulation in this field have not produced successful outcomes when the bottom-line of business remains profit oriented. One reason for this lack of meaningful progress is the lack of stringent legal accountability mechanisms to push businesses to take this seriously. It has been argued by critics of the current

²⁵ David J. Doorey, *Who Made That? Influencing Foreign Labor Practices Through Reflexive Domestic Disclosure Legislation*, 43 OSGOOD HALL L.J. 353, 366 (2005).

²⁶ Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983); in the context of the nature of social disclosure rules *See*, Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L. J. 207 (2016).

²⁷ David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17(3) BUS. ETHICS QUART. 453, 454-455 (2007) (describing New Governance as ‘process-oriented, flexible, participatory, and experimental.’)

²⁸ Nolan, *supra* note 3, at 70.

²⁹ Doorey, *supra* note 25, at 357.

³⁰ Hess, *supra* note 27.

³¹ *See*, for an overview and critique of the voluntary and light touch approaches to regulation of corporate human rights impacts, Renginee G. Pillay, *The Limits to Self-regulation and Voluntarism: From Corporate Social Responsibility to Corporate Accountability*, 99 AMICUS CURIAE 10 (2014); *see also Responding to Modern Slavery – New UK Benchmarking Report*, HERBERT SMITH FREEHILLS (Oct. 24, 2017), <https://www.herbertsmithfreehills.com/latest-thinking/responding-to-modern-slavery--new-uk-benchmarking-report>.

³² French Law on the Corporate Duty of Vigilance: Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>;

The Netherlands takes an historic step by adopting child labor due diligence law, MVO PLATFORM (May 14 2019), <https://www.mvoplatform.nl/en/the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law/>; *Frequently Asked Questions about the new Dutch Child Labor Due Diligence Law*, (Apr. 14 2017), <https://www.mvoplatform.nl/news-en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law>. *See also*, Saskia Wilks & Johannes Blankenbach, *Will Germany Become a Leader in the Drive for Corporate Due Diligence on Human Rights?*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (Feb. 20 2019), <https://www.business-humanrights.org/en/will-germany-become-a-leader-in-the-drive-for-corporate-due-diligence-on-human-rights>; SWISS COALITION FOR CORPORATE JUSTICE, <https://corporatejustice.ch>.

³³ Buhmann, *supra* note 9, at 39.

transparency rules that without, as a minimum, an accompanying due diligence obligation and civil, administrative, or criminal liability for failure to comply, these rules cannot effectively contribute to corporate accountability.³⁴ The analysis in the latter parts of this article discusses the necessity for state-based oversight and enforcement supported by stakeholders as an essential ingredient for the efficacy of any laws, whether they comprise transparency obligations only or they include the additional requirement of due diligence. This is crucial to ensuring the avoidance of a disconnect between what is reported in corporate disclosures and the actual the human rights situation on the ground.³⁵

Both transparency and human rights due diligence are requirements of the UN Guiding Principles on Business and Human Rights (UNGPs).³⁶ The UNGPs, which were adopted unanimously by the UN Human Rights Council in 2011, represent a consensus of opinion among a number of states, and some companies and non-governmental organizations, about the human rights responsibilities of corporations. Human rights due diligence and the reporting of this are the way that the ‘corporate responsibility to respect’ pillar of the UNGPs is ‘operationalized’³⁷ by corporate actors. Businesses are expected to communicate the steps they take to address human rights impacts by publishing sufficiently detailed information on the impacts and steps taken to prevent, mitigate and remediate these in appropriate form and frequency.³⁸

The Commentary on reporting explains that ‘showing’ that they respect human rights involves companies communicating and “providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.”³⁹ Thus, reporting under the UNGPs is not an end in itself but, theoretically at least, is an exercise that will provide a measure of accountability.⁴⁰ Reporting alone is not sufficient, however, and the reporting provisions in the UNGPs are supplemented by a requirement that companies conduct human rights due diligence, a process that entails identifying whether they have caused or contributed to adverse human rights impacts, integrating and acting upon the findings, tracking responses, and if an adverse impact has occurred, co-operating with remediation.⁴¹ The

³⁴ LeBaron and Ruhmkorf, *supra* note 3; Nolan, *supra* note 3; UK HOUSES OF PARLIAMENT JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 3.

³⁵ For an analysis of such a disconnect, see Madhura Rao & Nadia Bernaz, *Corporate Responsibility for Human Rights in Assam Tea Plantations - A Business and Human Rights Approach*, WAGENINGEN L. SERIES (Apr. 2, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567134.

³⁶ *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, *supra* note 22.

³⁷ UNGPs 16–24 are the “operational principles” in relation to the corporate responsibility to respect pillar.

³⁸ UNGP 21. For an exploration of reporting under the UNGPs, see *UN Guiding Principles Reporting Framework*, SHIFT & MAZARS (2015), www.ungpreporting.org.

³⁹ UNGP, Principle 21, Commentary.

⁴⁰ This viewpoint is challenged, see, e.g., Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT’L L. 530 (2018).

⁴¹ UNGP, Principle 22. On human rights due diligence under the UNGPs, see Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225 (2017); Buhmann, *supra* note 9; Kendyl Salcito & Mark Wielga, *What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?*, 3 BUS. & HUM. RTS. J. 113 (2018).

enactment of transparency and human rights due diligence laws are illustrative of the polycentric governance described in the UNGPs.

The knowing and showing approach of the UNGPs has been a welcome progress from the naming and shaming approach.⁴² We argue here that for the ‘showing’ to be reliable and not misleading, there needs to be a reliable system of oversight. While the UNGPs acknowledge the role of transparency in achieving corporate accountability, Principle 3 and its commentary leave it up to each state to determine the type of transparency measures to be introduced. According to Principle 3, the states should *encourage* or *require* businesses to be transparent on how they address their human rights impacts. As far as transparency measures go, the expectations of the UNGPs could be fulfilled by states by introducing or maintaining the ‘light-touch’ regulations described above mandating reporting without any follow up measures. The UNGPs place no clear expectations on states to introduce robust measures of oversight and enforcement for transparency requirements. We argue in this article that such measures are a crucial element of transparency and human rights due diligence laws to ensure corporate accountability.

III. Key features of human rights disclosure and due diligence laws

We divide the legislation mandating human rights disclosure into two main categories: (1) general human rights transparency and due diligence laws and (2) laws that target a specific human rights issue.⁴³ The key features of the different laws are outlined below, with particular focus on two distinct elements: the type of disclosure required and the processes in place (or the lack thereof) to ensure accessibility and accuracy of the disclosures.

A. General human rights due diligence and disclosure

In this section, we focus on the EU Non-financial reporting Directive (EU NFD)⁴⁴ and the French Law on the Corporate Duty of Vigilance. The EU NFD applies to all companies of a certain size governed by laws of individual EU Member States.⁴⁵ These companies are required to report on human rights and related matters “to the extent necessary for an understanding of the undertaking’s development, performance and position and of the impact of its activity.”⁴⁶ Companies within the scope of these reporting requirements must

⁴² Buhmann, *supra* note 9, at 39.

⁴³ Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT’L L. & BUS. 87 (2014), discussed in David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L. J. 5 (2019).

⁴⁴ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, implemented in the UK by the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, to add s 414CB(1)-(6).

⁴⁵ *Id.* These are certain large companies and qualifying partnerships with more than 500 employees.

⁴⁶ *Id.*

additionally disclose due diligence processes implemented by the company in pursuing policies related to non-financial matters, the outcome of these, and the principal risks arising in connection with the company's operations, including how the company manages these. The provision adopts a 'comply or explain' approach, meaning that companies can elect to comply with it in one of two ways: either by making the required disclosures or by providing an explanation for why they have elected not to do so.⁴⁷ The Directive leaves it up to each EU Member State to determine whether to require verification of reports by an independent assurance service provider and whether to have a sanctions regime for companies that fail to report adequately. As a minimum, each Member State is to require checks by an auditor of the existence of a report.⁴⁸ Some Member States have, through their implementing legislation, required these disclosures to be made in the management report,⁴⁹ and some have imposed additional checks.⁵⁰ Thus Member States vary in the checks they have in place.

Turning next to the French Law on the Corporate Duty of Vigilance, this requires companies meeting the threshold requirements for size⁵¹ to create and implement an annual 'vigilance plan' aimed at identifying and preventing human rights violations in both their domestic and their international operations, including those associated with their subsidiaries and supply chain.⁵² The development and the publication of the plan and a report on its implementation are among the substantive obligations prescribed by the 'duty of vigilance'.⁵³ The plan must set out the steps that the company will take to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, health and safety and the environment.⁵⁴ This includes mapping out and analyzing the risks, and putting measures in place to mitigate risks and address negative impacts, including an alert mechanism and a monitoring

⁴⁷ Virginia E. Harper Ho, *Comply or Explain and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 321 (2017).

⁴⁸ According to a study reviewing how member states have transposed the directive into their national law, 20 member states only require the existence of the reports to be verified and not the content. The states are Austria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Norway. *See* Global Reporting Initiative, *Member State Implementation of Directive 2014/95/EU: A Comprehensive Overview of how Member States are Implementing the EU Directive on Non-financial and Diversity Information*, CSR EUROPE 1, 16-31 (2017).

⁴⁹ *Id.* Eight states require consistency checks with the management report. Belgium, Bulgaria, Denmark, Latvia, Netherlands, Romania, UK and Iceland.

⁵⁰ For instance, Denmark. This subject is taken up in Part VI below.

⁵¹ The law applies to any company registered in France that has (a) 5,000 or more employees, including employees of its direct or indirect French-registered subsidiaries; or (b) 10,000 or more employees, including employees of its direct or indirect French-registered or foreign subsidiaries: *see* Loi no. 2017-399, *supra* note 32, at art. 1. It is estimated that the law applies to about 150 companies: Anna Triponel & John Sherman, *Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law*, INTERNATIONAL BAR ASSOCIATION (2017).

⁵² This covers the companies that the company controls directly or indirectly and, moving down the supply chain, the activities of its subcontractors and suppliers 'with which [it] maintains an established commercial relationship', *see* Loi no. 2017-399, *supra* note 32, at art. 1, ¶ 3.

⁵³ Stéphane Brabant & Elsa Savourey, *France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies*, INT'L REV. OF COMPLIANCE & BUS. ETHICS 1, 2 (2017).

⁵⁴ Loi no. 2017-399, *supra* note 32.

scheme to follow up on the plan's implementation.⁵⁵ Unlike most of the other laws discussed in this article, the French law's transparency requirement can only be fulfilled by complying. There is no room for compliance by explaining why no steps have been taken, as taking the prescribed steps is a fundamental obligation placed on companies covered under the law. Since the development of the plan, its implementation, and the communication of these constitute together the vigilance duty, the French law brings together the HRDD and transparency elements of the UNGPs second pillar discussed above in Part II.

Compliance with the law is established through a court process whereby companies can be legally compelled, at the request of a party with standing, including an NGO or a trade union, to create and implement an adequate vigilance plan.⁵⁶ Prior to the initiation of a court process, companies will be given a three-month period to comply with the requirements of the law. Periodic penalties may be imposed by the court, if companies are found to be failing their vigilance obligations. Up to date, a small number of notices have been served to companies on the basis of vigilance plans published being inadequate, and two of these have proceeded to the courts at the end of the three month notice period.⁵⁷ Accountability also takes place through a process by which victims who have been harmed by a company captured by the legislation can claim damages for negligence through an ordinary civil lawsuit, using the company's noncompliance with the due diligence obligation as evidence of its wrongdoing.⁵⁸

Combining HRDD and transparency backed up with sanctions, the French law is the most promising piece of legislation presently in force to advance corporate accountability. It is not without shortcomings, however. It has been highlighted that the law's threshold for coverage is very high,⁵⁹ the sanctions available are weak in terms of remediating harms,⁶⁰ and there is a lack of governmental monitoring and oversight for compliance by covered companies.⁶¹ While the French law takes a crucial step by attaching sanctions to the vigilance obligations, in the absence of a formal oversight mechanism, it is left completely to the civil society organizations (CSOs) to monitor companies' compliance and initiate the complaints procedures available under

⁵⁵ *Id.* ¶¶ 4-9.

⁵⁶ *Id.* ¶¶ 7-9; Brabant & Savourey, *supra* note 53, at 4.

⁵⁷ Decisions on the substance of the complaints are pending at the time of writing; *See* Stéphane Brabant & Elsa Savourey, *All Eyes on France – France Vigilance Law First Enforcement Cases: Current Cases and Trends*, CAMBRIDGE CORE BLOG (Jan. 24 2020), https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/#_edn13; Elsa Savourey, *All Eyes on France – France Vigilance Law First Enforcement Cases: The Challenges Ahead*, CAMBRIDGE CORE BLOG (Jan. 24 2020), <https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-2-2-current-cases-and-trends/>.

⁵⁸ Companies would incur civil liability under the French Civil Code Articles 1240 and 1241: *see* Sandra Cossart, Jérôme Chaplier & Tiphaine Beau de Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317 (2017).

⁵⁹ *Law on Duty of Vigilance of Parent and Outsourcing Companies Year One: Companies Must Do Better*, FORUM CITOYEN POUR LA RSE 1, 8 (2019), <https://plan-vigilance.org/wp-content/uploads/2019/06/2019.06.14-EN-Rapport-Commun-Companies-must-do-better.pdf>.

⁶⁰ Brabant & Savourey, *supra* note 53, at 2-4.

⁶¹ *See* the civil society initiative attempting to rectify the lack of formal monitoring and oversight at <https://vigilance-plan.org/duty-of-vigilance-radar/> (last visited 31 May 2020).

the law. The lack of an official list and repository for vigilance plans render it challenging for CSOs, trade unions and other stakeholders to identify shortcomings and take part in the enforcement of the obligations.⁶² A preliminary proposal has been put forward to address this that would entail designating certain individuals, within the French administration, to look into which companies are within scope of the law, how the law is implemented and whether some provisions of the law need to be clarified.⁶³ A need for formal oversight and more robust enforcement constitute the main focus of the analysis presented in the later parts of this article.

B. Targeted due diligence and transparency

Targeted due diligence and transparency legislation focuses on specific issues, such as modern slavery, child labor, or conflict minerals. In this section, we will first examine laws mandating disclosure on modern slavery. The design of the three statutes dealing directly with modern slavery is similar although each legislative scheme has slight variation.

The CTSCA, which came into force in January 2012, requires certain large retail sellers and manufacturers doing business in the state of California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chain for tangible goods offered for sale.⁶⁴ The disclosed information should be posted on the retail seller or manufacturer's website. Specifically, a company to which the legislation applies must disclose to what extent, if any, it: verifies product supply chains to evaluate and address risks of human trafficking and slavery; conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains; requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business; maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; and provides relevant training.⁶⁵ There is no requirement to update the report on a periodic basis. The Californian Franchise Tax Board produces an annual list of companies covered by its provisions, based on information from tax returns.⁶⁶ There is, however, no official repository where these reports must be deposited for public access. A large number of covered businesses fail to disclose information on all the required areas of activity, and many do not have a

⁶² Brabant & Savourey, *supra* note 57.

⁶³ *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, THE MINISTRY OF THE ECONOMY AND FINANCE (Jan. 2020), https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf.

⁶⁴ CTSCA, S.B. 657 § 3.

⁶⁵ *Id.* § 3(b).

⁶⁶ Kamala Harris, *The California Transparency in Supply Chains Act: A Resource Guide*, 3 (2015). Note however that the CTSCA does not require companies to report on an annual basis, meaning that companies can comply with the law by reporting just once.

disclosure statement at all.⁶⁷ The only state-based relief under the CTSCA for failure to report is injunctive.⁶⁸ Following a compliance review in 2015, the Californian Department of Justice took steps to improve compliance with the Act by writing to companies and asking them to provide an explanation of why the legislation does not apply to them, or a link to a compliant disclosure.⁶⁹ To date, the Attorney General of California has not yet brought an action against a corporation for non-disclosure under the Act.⁷⁰ From the foregoing, it is not possible to conclude that CTSCA contains a robust oversight and enforcement of the transparency obligations.

In the UK, section 54(4) of the MSA, introduced a modern slavery and human trafficking transparency requirement for certain ‘commercial organizations’ with a turnover of at least £36 million that ‘carry on’ business in the UK. The law adopts a comply or explain approach by requiring companies to publish either a statement of the steps the organization has taken to ensure slavery and human trafficking is not taking place in any of its supply chains or in any part of its business, or a statement that the organization has taken no such steps.⁷¹ The MSA does not prescribe specific content for the disclosures, but provides a non-exhaustive list of items that *may* be included in the ‘slavery and human trafficking statement’, including information about a commercial organization’s⁷² policies and due diligence processes in relation to slavery and human trafficking in its business and supply chain; the parts of its business most at risk of slavery and human trafficking and steps put in place to assess and manage that risk, including performance indicators for the success of these steps.⁷³ The statement must be approved by the board of directors of a limited company or all members of a limited liability partnership.⁷⁴ The MSA covers steps taken in ‘any of [a corporation’s] supply chains,’ a broader requirement than that in the CTSCA, which covers the direct supply chain only.⁷⁵ The MSA also requires yearly updates, in contrast to the CTSCA’s one-off approach.⁷⁶ There is no official list however of companies that are required to report,

⁶⁷ Andrew G. Barna, *The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains*, 59 WM & MARY L. REV. 1449, 1463 (2018) - only 62% of covered companies disclosed.

⁶⁸ CTSCA, S.B. 657 § 3(d).

⁶⁹ Sarah Altschuller, *The California Transparency in Supply Chains Act: New Guidance and Increased Enforcement Efforts*, HOAG FOLEY (May 10 2015), <http://www.csrandthelaw.com/2015/05/10/the-california-transparency-in-supply-chains-act-new-guidance-and-increased-enforcement-efforts/>.

⁷⁰ Jena Martin, *Background Memo on Policy Options for Addressing and Preventing Forced Labor, Modern Slavery and Human Trafficking in Supply Chains*, UNIFORM LAW COMMISSION (May 2020). (on file with authors).

⁷¹ It is estimated that s 54 covers between 12,000 and 17,000 companies. CORE COALITION, *supra* note 3, at 3.

⁷² Defined in the Modern Slavery Act 2015, § 54(12) as a body corporate / partnership wherever incorporated / formed which carries on a business or part of a business in the UK.

⁷³ *Id.* § 54(5).

⁷⁴ *Id.* § 54(6).

⁷⁵ *Id.* § 54(4)(a)(i). Commercial organizations caught within the definition are not however required to report on all the supply chains in their groups overseas, such as those of wholly owned foreign subsidiaries: Parosha Chandran, *A Loophole in the Slavery bill could Allow Companies to Hide Supply Chain Abuses*, THE GUARDIAN (Mar. 24 2015), <https://www.theguardian.com/global-development/2015/mar/24/loophole-modern-slavery-bill-transparency-supply-chain-abuses>.

⁷⁶ MSA, § 54(4)(a).

although the UK Home Office has written to 10,000 companies that it believes may be eligible.⁷⁷ Nor is there an official database where such reports are deposited.⁷⁸ If a business falling under section 54 fails to report, the Secretary of State may bring court proceedings for injunctive relief.⁷⁹ As yet there has been no instance of this happening in practice. There is no other means of enforcement or oversight in the Act. Furthermore, there are no mechanisms to ensure the accuracy of the report contents (though the report contents can be so vague under this law that there seems little need for assurance).

There have already been three reporting cycles under the MSA. Generally, however, disclosure has been of a low standard, not always meeting even the minimum requirements of the Act including sign-off at senior level and visibility on the company website.⁸⁰ Many companies have not reported at all.⁸¹ Acknowledging deficiencies of the MSA, an independent review of the Act published in 2019 recommended to the UK Government to abandon the comply or explain approach and adopt a comply approach with prescribed minimum content for the report, establish a repository for statements, establish a monitoring and enforcement mechanism and strengthen sanctions for failure to comply.⁸²

Like the CTSCA and the MSA, the Australian Modern Slavery Act 2018 (AMSA) requires companies that meet a prescribed size threshold to report on the risks of modern slavery in their operations and supply chains,⁸³ and actions taken to assess and address those risks. This law abandons the comply or explain approach adopted in the UK MSA. It is mandatory for companies to provide the particular information listed in the Act. The Australian MSA also makes provision for a government funded central repository for slavery and human trafficking statements,⁸⁴ but it does not penalize companies for noncompliance,

⁷⁷ *Reducing Modern Slavery Inquiry 2018 - UK Parliament*, UK HOUSES OF PARLIAMENT PUBLIC ACCOUNTS COMMITTEE 10.

⁷⁸ An NGO led initiative aims to fill in this gap, see MODERN SLAVE REGISTRY, <http://www.modernslaveryregistry.org/> (last visited 1 June 2020).

⁷⁹ MSA, § 54(11).

⁸⁰ *FTSE 100 at the Starting Line: An Analysis of Company Statements under the UK Modern Slavery Act*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (Oct. 2016); CORE COALITION, *supra* note 3; *First Year of FTSE 100 Reports under the Modern Slavery Act: Towards Elimination?*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (Dec. 2017).

⁸¹ According to CORE, 60% of companies that are covered by s.54 have failed to produce a report: *Written evidence submitted from CORE*, CORE COALITION ¶8 (2018), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/reducingmodern-slavery/written/78389.pdf>.

⁸² Secretary of State for the Home Department, *Independent Review of the Modern Slavery Act 2015: Final Report*, OGL ¶ 17 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf; See also UK HOUSES OF PARLIAMENT PUBLIC ACCOUNTS COMMITTEE, *supra* note 77, at 6, to read a report by the Public Accounts Committee, recommending that the government should consider publishing a list of companies that have complied and not complied with the legislation, rather than falling back on civil society to undertake this work. The government has responded to the report, agreeing to this recommendation, *Government Response to the Committee of Public Accounts on the Thirty-First to the Thirty-Seventh reports from Session 2017-19*, HM TREASURY 1, 23 (2018), <https://www.parliament.uk/documents/commons-committees/public-accounts/Cm-9643-Treasury-Minutes-june-2018.pdf>.

⁸³ Companies are required to report if they carry on business in Australia with a minimum annual consolidated revenue of AU\$100 million – Australian Modern Slavery Act, §5 (2018).

⁸⁴ *Id.* § 18-20.

though the Minister for Home Affairs can make an inquiry if a company has not complied. If a company fails to respond, the minister may publicly disclose information about the company's failure to comply.⁸⁵ The law was passed in November 2018, and the first disclosure under the Act was made in 2019. In terms of 'enforcement', the AMSA creates a mechanism through which non-compliant entities can be asked to explain and remedy their failure to report, or risk being named on the government-maintained register. The relevant minister will report to parliament annually on compliance trends, enabling oversight of overall compliance patterns by parliamentarians.

Outside the arena of modern slavery, in the United States, the Conflict Minerals Rule (adopted by the Securities Exchange Commission (SEC, the federal independent financial services regulatory body) in 2012 pursuant to the federal Dodd-Frank Act s.1502) requires companies reporting to the SEC to conduct due diligence and to report on the sourcing of certain minerals (tin, tungsten, tantalum, and gold). These companies must make reasonable and good faith effort to determine whether the specified minerals used in the manufacture of their products originated in the Democratic Republic of Congo and its neighboring countries, and to disclose their determinations and describe their country of origin inquiries to the SEC and on their public websites. Where this inquiry reveals that the minerals did originate in these countries, the company must exercise due diligence on the source and chain of custody of the mineral, in accordance with a nationally or internationally recognized due diligence framework.⁸⁶ Where the due diligence confirms the company's determination, it must file a Conflict Minerals Report with the SEC, and post the same on its website. There is no list of companies that must comply with the Conflict Minerals Rule but an annual Government Audit Office (GAO) report to congressional committees examines how companies responded to the Conflict Mineral Rules in the previous calendar year and analyses a generalized random sample of company reports.⁸⁷ In terms of enforcement and sanctions, the Conflict Minerals Rule imposes penalties on companies for not reporting or complying in good faith. Form SD (the form used for submitting the disclosure) is deemed filed under the Securities Exchange Act of 1934 and subject to section 18 of the Exchange Act, which attaches liability for any false or misleading statements. There has however been no enforcement action against

⁸⁵ *Id.* § 16A.

⁸⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Congress, § 1502 (2010) amends § 13 of the Securities Exchange Act of 1934. The Final Rule for the implementation of § 1502 was approved by the SEC in August 2012: SEC, 17 CFR 240 and 249b, Conflict Minerals, Final Rule. For more detail of what is required, see Olga Ortega-Martin, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, 32 NETHERLANDS Q. OF HUM. RTS. 44, 64-65 (2014).

⁸⁷ U.S. General Accounting Office, Report to Congressional Committees, Conflict Minerals, GAO-19-607 (2019).

companies for failure to comply with the Conflict Mineral Rule,⁸⁸ despite the mixed record of engagement and compliance among companies.⁸⁹

The European Union has also passed a disclosure law aimed at supply chain due diligence for the use of conflict minerals.⁹⁰ This is company law, not securities law, laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. The Regulation will enter into force in 2021. The geographical scope of the EU Regulation is broader than the Dodd-Frank Act s. 1502, targeting imports not only from conflict zones and areas where a risk of armed confrontation exists but also from failed states and areas where widespread and systematic violations of international law, including human rights abuses, occur.⁹¹ Nationally, implementing the Regulation depends on the responsible authorities designated by Member States.⁹² These authorities should conduct ex-post checks on how Union importers comply with the Conflict Minerals Regulation.⁹³ This includes audits of records as well as on-the-spot inspections.⁹⁴ The Regulation has been criticized for its lack of sanctions.⁹⁵ Member States set the rules that apply to infringements of the Regulation. When an infringement occurs, the competent authorities issue a notice of remedial action to be undertaken by the company.⁹⁶ Whether compliance will be achieved without penalties for failure to take remedial action remains to be seen.

The only example of a targeted due diligence law is the Dutch Child Labor Due Diligence Act, which was approved by the Dutch Senate in 2019,

⁸⁸ In April 2017 the SEC released a statement indicating that the staff of the SEC would not recommend enforcement action if companies only file a Form SD, and not a Conflict Minerals Report, *see* SEC Division of Corporation Finance, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (Apr. 7, 2017), <https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule>. Companies are being encouraged to continue to file Conflict Minerals Reports, and many continue to do so. *See Id.*

⁸⁹ *Mining the Disclosures 2019: An Investor Guide to Conflict Minerals and Cobalt Reporting in Year Six*, RESPONSIBLE SOURCING NETWORK (2020).

⁹⁰ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017, Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, art. 6, 2017 O.J. (L 130).

⁹¹ No definitive list of “conflict-affected” or “high-risk” countries has been published yet and Union importers are encouraged to make this assessment themselves based on non-binding guidelines issued by the European Commission. Commission Recommendation 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, 2018 O.J. (L 208) 94, 94.

⁹² *List of Member State competent authorities designated under Article 10(1) of Regulation (EU) 2017/821*, https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157843.pdf.

⁹³ Conflict Minerals Regulation, arts. 10-11.

⁹⁴ Freshfields Bruckhaus Deringer LLP, *The EU Conflict Minerals Regulation - New due diligence requirements for importers*, LEXOLOGY (June 5, 2020), <https://www.lexology.com/library/detail.aspx?g=767728d7-ad5e-46ad-8746-40bde6d921ee>.

⁹⁵ John Williams, *The battle for stronger EU conflict minerals legislation*, GLOBAL MINING REVIEW (Feb. 4 2020, 11:25 AM), <https://www.globalminingreview.com/finance-business/04022020/the-battle-for-stronger-eu-conflict-minerals-legislation/>.

⁹⁶ Conflict Minerals Regulation, art. 16.

and is yet to go into effect.⁹⁷ Like the French law, the Act brings together the HRDD and transparency elements of the UNGPs' second pillar by pushing companies to examine their supply chains for child labor, act upon their findings, and report that they have done so. Specifically, the Act requires all companies that supply goods or services to Dutch end-users to issue a declaration that due diligence is conducted to prevent child labor from being used in the production of goods and services. In order to make the requisite declaration, it is implicit that the company must conduct the necessary due diligence. Should the due diligence give the company a reasonable suspicion of child labor in the production of the company's goods or services, it must adopt and implement a plan of action to address this.

Once the obligation is in place, a new regulator [*toezichthouder*] will be created that will publish the corporate human rights due diligence statements in an online public registry.⁹⁸ There will not be a formal list of companies that must comply with the law, however. Affected third parties such as victims cannot sue companies under the Act,⁹⁹ but they can submit complaints that may trigger enforcement by the regulator. Any individual or entity wishing to submit a complaint must first submit the complaint to the company itself. If the company's reaction is 'inadequate' according to the complainant, and on the basis of concrete evidence of non-compliance with the Act, a complaint can be filed with the regulator.¹⁰⁰ A company can be fined up to €8,200 for failing to submit a statement declaring that it exercises due diligence.¹⁰¹ If a company fails to carry out due diligence in accordance with the Act or to draw up a plan of action, or to comply with any further requirements that are established pertaining to due diligence and the plan of action, a fine of up to €870,000 or 10% of the worldwide annual turnover of the company can be imposed.¹⁰² Thus, in terms of regulatory oversight, the Act provides the most comprehensive oversight among the laws discussed. But the scheme still has gaps: in particular, the Dutch authorities will not actively enforce the law apart from when they do so in response to a third-party complaint, meaning that the law relies on the

⁹⁷ The expectation is that the Act will become effective sometime in 2022. The three-year period between the Act's approval and it going into effect would give the government time to prepare a General Administrative Order that appoints the regulator and fleshes out the obligations of companies under the Act in more detail, *see Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies*, ROPES & GRAY (June 5, 2019), <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>.

⁹⁸ Dutch Child Labor Due Diligence Act art. 3 (2019). *See* Anneloes Hoff, *Dutch Child Labor Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence*, OXFORD HUMAN RIGHTS HUB (June 10, 2019), <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence>.

⁹⁹ *Study on Due Diligence Requirements Through the Supply Chain*, EUROPEAN COMMISSION 211 (2020). Plaintiffs under general Dutch tort law, nevertheless, would still be able to rely indirectly on the Act if the violation of the Act by the company could be construed as an indication of an act contrary to a duty of care to society. Where the compliance officer breaches their obligations, such as by a violation of the implementation of a due diligence process that causes serious bodily harm, the compliance officer themselves incur personal criminal liability. This can be punishment of a maximum of 2 years' imprisonment and a €20,500 fine.

¹⁰⁰ Dutch Child Labor Due Diligence Act art. 3 (2019).

¹⁰¹ ROPES & GRAY, *supra* note 97.

¹⁰² *Id.*

watchdog role of civil society to ensure its effectiveness.¹⁰³ We discuss the problems with this approach in Part V.

IV. Benefits of transparency and HRDD requirements to corporate accountability for human rights impacts

Despite their shortcomings, which are discussed in later sections, the current transparency and HRDD requirements do move the legal framework closer towards bringing human rights standards to bear on corporate activities. The most obvious positive impact is that it places human rights on the corporate agenda at the highest levels of management for the covered businesses.¹⁰⁴ By placing an expectation on companies to think about at the board level and, ideally, engage in the issues external reporting and HRDD raise,¹⁰⁵ this may influence internal business decisions that produce adverse human rights impacts.¹⁰⁶

Corporations may be prompted to monitor and change their own behavior, as well as to push for change in supplier practices. The different degrees of expectations placed on companies by different types of legislation will influence the extent of the positive change (if any) that may occur. Whereas a mandatory HRDD law such as the French Law on the Corporate Duty of Vigilance may achieve a greater commitment from the businesses covered and more substantial change on the ground for those adversely impacted, the a light touch disclosure law, such as the UK MSA is less likely to bring a substantial change for the workers and communities affected.¹⁰⁷

Human rights disclosures may reveal information that stakeholders did not previously have access to, if as a minimum they cover description of policies and processes. In other words, reporting on human rights impacts can contribute to legal and non-legal accountability by providing shareholders and other stakeholders with formal acknowledgement by the company of its human rights risks, policies and processes.¹⁰⁸ In terms of enhancing legal accountability, due diligence laws play a crucial role by expressly placing a legal duty on businesses to prevent, mitigate and remediate human rights impacts. These duties are

¹⁰³ Chiara Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in *LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS - EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW* 12 (M. Buscemi, N. Lazzarini & L. Magi eds., 2020).

¹⁰⁴ Equality and Human Rights Commission, Submission to the Joint Human Rights Committee of the UK Houses of Parliament, ¶7.1 reported that in their consultations with businesses on the transparency in supply chains clause ‘businesses told [them] that the Modern Slavery Act had prompted their boards to discuss human rights issues.’ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business-2017-promoting-responsibility-and-ensuring-accountability/written/35138.html>.

¹⁰⁵ CHARLOTTE VILLIERS, *CORPORATE REPORTING AND COMPANY LAW* 51 (Cambridge University Press, 2002).

¹⁰⁶ Eccles & Serafeim, *supra* note 6, at 3. For a discussion of how social disclosure can catalyze internally driven changes in corporate behavior, see Park, *supra* note 43; See also, for an analysis of the shortcomings of the EU NFRD on affecting organizational change, Buhmann, *supra* note 9, at 36-39.

¹⁰⁷ CORE, *supra* note 81.

¹⁰⁸ *Id.* at 31.

backed up by various enforcement and liability measures. As for disclosures, information disclosed in human rights reports can be relied on as evidence in litigation brought against parent or lead companies by individuals harmed at subsidiary or supplier sites¹⁰⁹ or by consumers misled by the company's disclosures.¹¹⁰ Most recently, corporate sustainability reports have been relied on by the plaintiffs in *Lungowe v Vedanta* case in England and *Jabir v KiK* case in Germany to demonstrate the existence of a *prima facie* duty of care assumed by the parent or the lead company towards the communities or workers harmed by the subsidiary or supplier's activities.¹¹¹

On the non-legal accountability side, the approach of a company to its human rights due diligence and reporting can inform stakeholder decisions in relation to the company - for example investment decisions; purchasing decisions of consumers and customers and employment decisions.¹¹² It is expected that the stakeholders informed by the human rights disclosures will put pressure on businesses to improve their policies and practices. The opinion of stakeholders matters because, it is claimed, the social legitimacy of business is monitored through the public-policy arena rather than the marketplace.¹¹³ External agencies such as international finance institutions or government agencies may scrutinize these reports if they require evidence that companies have identified and managed human rights risks as a condition of providing support to them. Such support could be the provision of export credit, the granting of a procurement contract or the loan of finance.¹¹⁴ Civil society organizations have made use of the information in various ways that help the public and policy-makers see the shortcomings of the legislation but also highlight the contrasts between a company's statements on human rights and its actual performance. The value of these developments should not be overstated, however. The next section discusses the inadequacies of the existing legal frameworks for improving corporate accountability for adverse human rights impacts.

¹⁰⁹ For more on this see, Rachel Chambers & Anil Yilmaz-Vastardis, *The New EU Rules on Non-financial Reporting: Potential Impacts on Access to Remedy?*, 1 HUM. RTS. & INT'L LEGAL DISCOURSE 18, 18-40 (2016).

¹¹⁰ See *infra* p. 24 and note 152.

¹¹¹ See Dominic Liswaniso Lungowe and Others v. Vedanta Res. PLC. and Konkola Copper Mines PLC [2017] EWCA Civ 1528, [84]; Sheldon Leader, Jane Wright & Anil Yilmaz, *Legal Opinion on English Common Law Principles on Tort - Jabir and Others v KiK Textilien Und Non-Food GmbH*, (Dec. 7 2015), https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf.

¹¹² Choudhury, *supra* note 23, at 191; See *UN Guiding Principles Reporting Framework*, *supra* note 33.

¹¹³ Dennis Patten, *Exposure, Legitimacy and Social Disclosure*, 10 J. ACCT. & PUB. POL'Y 297 (1991).

¹¹⁴ Shift-Mazars, *supra* note 112; In the UK, the MSA and other relevant legislation do not require public procurement processes to consider company reports under MSA, § 54. It has been recommended by an independent review that the UK Government introduce standards to exclude non-compliant companies from eligibility for public contracts. Frank Field, Maria Miller & Baroness Butler-Sloss, *Independent Review of the Modern Slavery Act*, ¶ 2.6.4, <https://drive.google.com/file/d/1KjrBF1qM1jLq4I-DFTy98t1VLZMsBapy/view>.

V. Weaknesses and pitfalls of this mode of market-led accountability

Our analysis of the existing disclosure and HRDD laws in Part III demonstrates that, despite the variation in the obligations imposed, they rely predominantly or exclusively on the ‘market’ to exercise checks and hold businesses accountable for human rights impacts.¹¹⁵ This is not unusual since, at least for corporate disclosures, the main objective is to empower market actors with information. But when the disclosure rules themselves are not designed robustly, the empowerment and accountability functions are hindered by businesses’ lack of disclosure, inadequate disclosures and misleading disclosures. While HRDD laws represent a crucial step for improving corporate accountability by imposing substantive obligations on businesses to identify, prevent, mitigate, and remediate human rights impacts and communicate these steps, they still heavily rely on initiatives from stakeholders for oversight and enforcement. Communication of the HRDD processes and outcomes to stakeholders via corporate disclosures is a key tool for those stakeholders to understand and react to the human rights performance of businesses. To effectively and meaningfully exercise this role, stakeholders need the support of regulatory tools to ensure completeness and accuracy of HRDD disclosures.

Studies have shown that disclosure laws have had very limited success in improving human rights conditions for affected groups and improving accountability for impacts.¹¹⁶ This is unsurprising if these laws fail to elevate human rights and environmental impact considerations on the priorities list of the corporate world driven primarily by increasing profits.¹¹⁷ We argue here that to improve the accountability function of HRDD and reporting obligations, two main weaknesses in the current rules need to be overcome. The first one relates to the content of the reports and the information that should be or is disclosed under the relevant legislation. According to benchmarking reports analyzing these disclosures,¹¹⁸ the content of the reports remains largely limited to disclosure of information on commitments and policies rather than disclosing concrete risks to workers and communities and substantive steps taken to address them. This is particularly problematic where the reporting requirements are not accompanied with a due diligence obligation. We join scholars who have argued that the lack of a due diligence obligation preceding the disclosure places serious limitations on the law’s promise to increase corporate accountability and

¹¹⁵ See, e.g., Theresa May, *Modern Slavery and Supply Chains Consultation Consultation*, HOME OFFICE 1, 8 (2015) (“We believe that once it is made clear what activity major businesses are undertaking to ensure slavery and human trafficking is not taking place in their supply chains or own business, pressure from consumers, shareholders and campaigners and competition between businesses will encourage those who have not taken effective steps to do so.” And also, at 13, “Instead of relying on heavy-handed regulation, this measure will encourage businesses to do the right thing, by harnessing consumer and other stakeholder pressure, which will encourage and influence businesses to do more”).

¹¹⁶ See Rao & Bernaz, *supra* note 35; *Seeing Through Transparency: Making Corporate Accountability Work for Workers*, FLEX (July 2018), <https://www.labourexploitation.org/publications/seeing-through-transparency-making-corporate-accountability-work-workers>.

¹¹⁷ Bartley, *supra* note 11, at 49; Bartley, *supra* note 11, at n.56.

¹¹⁸ See, e.g., Michelle Langlois, *Human Rights Reporting: Are Companies Telling Investors What They Need to Know?*, SHIFT (May 2017), <https://shiftproject.org/resource/human-rights-reporting-are-companies-telling-investors-what-they-need-to-know/>.

contribute to eradicating human rights abuses.¹¹⁹ Most disclosures have been largely limited to descriptions of the company's commitments and processes in addressing human rights and modern slavery issues in their supply chains.¹²⁰ Little space, if any, is dedicated to issues of substance such as the specific risks to employees and communities identified within the company's own business and its supply chain, and references to the concrete steps they have taken to eliminate those risks and remediate the grievances.¹²¹ More advanced reports typically present the company's declared approach/commitment to tackling modern slavery or human rights issues, expectations from its suppliers, links to a list of suppliers (first tier),¹²² most salient risks identified, and the plans, policies, programs and procedures it has established to assess and address the risks, and finally may include some case studies.¹²³ The pattern of focus on procedures and policies resembles the audit and certification processes that are widely employed by lead firms to regulate labor, human rights and environmental performance in their supply chains and which typically focus on the process rather than substance.¹²⁴ Since audits and certification processes have so far been the central tool used to deal with human rights impacts in supply chains, it is unsurprising that most disclosures are limited to process as well.

The content of human rights disclosures can be strengthened if they accompany a human rights due diligence obligation. As the HRDD framework proposed by the UNGPs clarifies that the process should focus on the risks to the rights holders rather than focusing on the risks to the business itself, the focus of the reports attached to the HRDD processes should contain rights holder oriented communication. But as we discuss in the following parts of this article, an HRDD obligation alone may not enhance the usefulness of disclosures in terms of accountability. The analyses of the initial disclosures

¹¹⁹ Justine Nolan & Gregory Bott, *Global Supply Chains and Human Rights: Spotlight on Forced Labor and Modern Slavery Practices*, 24 AUSTRALIAN J. HUM. RTS. 44, 56 (2018). See also Nolan, *supra* note 3; Genevieve LeBaron, *The Global Business of Forced Labor: Recommendations to UK Policymakers*, ECONOMIC & SOCIAL RESEARCH COUNCIL 1, 4-5 (2018).

¹²⁰ An Ergon Associates study found that 'most statements do not go further than general commitments and broad indications of processes. *Reporting on Modern Slavery: The Current State of Disclosure*, ERGON (2016). See also *Modern slavery reporting: Is there evidence of progress?*, ERGON (2018); LeBaron and Ruhmkorf's study shows that companies reporting on bribery under the UK Bribery Act are using a much more firm and clear language, while modern slavery reporting uses a weaker and aspirational language, LeBaron & Ruhmkorf, *supra* note 3, at 25; SHIFT, *supra* note 118; CORE COALITION, *supra* note 3, at 6.

¹²¹ 2018 Research Report: *The state of Corporate Sustainability Disclosure under the EU Non-Financial Reporting Directive*, ALLIANCE FOR CORPORATE TRANSPARENCY (2018), http://www.allianceforcorporatetransparency.org/assets/2018_Research_Report_Alliance_Corporate_Transparency-66d0af6a05f153119e7cffe6df2f11b094affe9aaf4b13ae14db04e395c54a84.pdf.

¹²² Since rights abuses are most severe in further tiers of a brand's supply chain, including the informal subcontracting arrangements, unless modern slavery reports pay particular attention to disclosing the company's practices on the treatment of the most vulnerable workers in the supply chain, they will be of little value. See also FLEX, *supra* note 109, at 30-31.

¹²³ See, e.g., *Modern Slavery Statement 2017/18*, MARKS & SPENCER (May 2018), <https://corporate.marksandspencer.com/documents/plan-a-our-approach/mns-modern-slavery-statement-june2018.pdf>.

¹²⁴ Bartley, *supra* note 11, at 55. For discussion of the duty of care of social auditors, see Tara Van Ho & Carolijn Terwindt, *Assessing the Duty of Care for Social Auditors*, 27 EUR. REV. PRIV. L. 379, 379 – 401 (2019).

under the French Law on the Corporate Duty of Vigilance law demonstrate that despite the improvements in disclosures, reporting ‘remains relatively immature’.¹²⁵ For those companies that have complied with the reporting requirement, disclosures on policies and processes remains the key message. The implementation of s.1502 of the Dodd-Frank Act also suggests that even with a due diligence requirement, more is needed to make these laws effective in achieving their aims.¹²⁶ Many HRDD disclosures focus on commitments and processes in the abstract and this fails to provide the kind of meaningful information that stakeholders may rely on in making investment, purchasing, and campaigning decisions about that company. This type of disclosure can also easily transform into a publicity tool painting a misleading picture of a company’s human rights performance. More dangerously, it can mask and legitimate serious abuses, especially where they report successes based on audits and certification.¹²⁷

This takes us to the second weakness in these laws, which is our focus in the rest of this article. The lack or inadequacy of mechanisms for formal oversight and enforcement render the role of the stakeholders, as guardians of accountability, extremely challenging and thus undermine the accountability objectives of these laws. It is hoped that the market forces alone will assume the oversight function and produce the desired accountability outcomes without having the support of appropriate regulatory tools in exercising this function. We argue here that even if the first weakness is overcome, as it has been in the French law, without a formal verification, oversight, and enforcement process the utility of the disclosures to empower stakeholders to pressure for change will be undermined due to: (1) the reliability of the information disclosed remaining questionable, (2) stakeholders being left to search for a needle in a haystack in the absence of formal lists of covered businesses and central public repositories for reports, and (3) even where the inadequacy and the accuracy of disclosures are well established, lack of enforcement measures and sanctions that can be triggered by stakeholders will weaken their leverage. The flaws on content and oversight are closely linked and for mandated disclosure to contribute meaningfully to corporate accountability for adverse human rights impacts, both must be addressed by the policy and law makers. In the remaining parts of this article, we engage in an in-depth discussion of oversight and enforcement issues.

A. Market oversight

Even when companies do fulfil their obligation to report on issues of human rights and modern slavery, doubts remain as to the effectiveness of these

¹²⁵ *Human Rights Reporting in France: A Baseline for Assessing the Impact of the Duty of Vigilance Law*, SHIFT 2018, <https://humanrights.wbcsd.org/project/human-rights-reporting-in-france-a-baseline-for-assessing-the-impact-of-the-duty-of-vigilance-law/>.

¹²⁶ Galit A. Sarfaty, *Shining a Light on Global Supply Chains*, 56 HARV. INT’L L. J. 419, 431 (2015). In this study Sarfaty finds that only about 7% of companies report strong due diligence measures in their 2014 reports prepared in order to comply with the regulation.

¹²⁷ Genevieve LeBaron & Jane Lister, *Benchmarking Global Supply Chains: The Power of the ‘Ethical Audit’ Regime*, 41 REV. INT’L STUD. 905 (2015); LeBaron, *supra* note 112, at 3 uncovered that “certification had little to no impact on labor standards within the tea industry ... [and] [s]ome of the worst cases of exploitation documented within [their] research occurred on ethically certified plantations.”

reports from an accountability point of view. Early empirical research indicates that, the legally mandated human rights and modern slavery disclosures are “quite limited”,¹²⁸ “more symbolic than substantive”¹²⁹ and that some companies even appear to copy each other’s explanations of their due diligence processes.¹³⁰ These practices of failing to comply or selective reporting have reportedly been unwelcome by certain businesses that want to see serious monitoring and enforcement so as to level the playing field.¹³¹ The Ethical Trading Initiative (ETI), in a submission to the UK Houses of Parliament Public Accounts Committee, reported that a large majority of companies they have engaged with stated that: “it is important for the Government to monitor compliance with section 54 of the [Modern Slavery] Act and [...] the Act could not be effective without this.”¹³²

We saw in Part III above that the reporting and HRDD laws analyzed in this article take varying approaches to the regulation of oversight and enforcement. The common rationale behind each law is to empower key stakeholders, such as investors, consumers, and civil society, with information that will enable them to bring human rights standards to bear on corporate misconduct. In this respect, these stakeholders can play a crucial role of oversight and enforcement by making effective use of the information disclosed through these reports. In other words, the stakeholders will take notice of businesses that fail to report or reports inadequately, and penalize them by not purchasing products, divesting or not investing, or by running campaigns to raise awareness about the businesses failure.¹³³ These market interventions can, in their most legalized form, include consumer suits for misleading disclosures or advertising. The thinking is that these market pressures will result in companies improving their practices/processes on human rights and modern slavery risks in their supply chains.

There are a few overly optimistic assumptions here and this approach has been challenged already from several angles, particularly with respect to the scale of the desired transformative impact of human rights reports on consumer

¹²⁸ Rachel N. Birkey et al., *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, 152 J. BUS. ETHICS 827, 837 (2018).

¹²⁹ *Id.*

¹³⁰ Steve Gibbons, *What are construction and building companies reporting under the Modern Slavery Act?*, LINKEDIN (Feb. 22 2017), <https://www.linkedin.com/pulse/what-construction-building-companies-reporting-under-modern-gibbons>. See also Hess, *supra* note 43, at 53, which examines human rights reporting and concludes that reports are “unbalanced, incomprehensive, and inconsistent” and that reporting under CTSA and MSA “face[s] similar challenges.”

¹³¹ FLEX, *supra* note 122, at 20-22, “One FLEX interview participant who is in favor of stronger enforcement of the Act, said that he was concerned that penalties in isolation could result in transparency reporting being a tick box exercise for many companies. He suggested that a penalty for non-compliance should only be introduced in combination with expectations or requirements on the content of statements as many statements otherwise are unlikely to provide meaningful information.”

¹³² *Written evidence to the UK Houses of Parliament Public Accounts Committee*, ETHICAL TRADING INITIATIVE (2018), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/reducing-modern-slavery/written/78586.htm>.

¹³³ *Responding to Modern Slavery – New UK Benchmarking Report*, *supra* note 26.

behavior.¹³⁴ Narine argues that company human rights disclosures, including on modern slavery, are not always widely disseminated or known about and that stakeholders who do know about them do not use the information they contain adequately to press for corporate reform.¹³⁵ She concludes that evidence of consumer behavior changing as a result of such disclosure is ‘at best inconsistent’.¹³⁶ Narine’s reasoning would also apply to HRDD related disclosures. Her viewpoint chimes with a study of human rights disclosure conducted by Chilton and Sarfaty, which found that consumers perceived non-compliant or inadequate supply chain disclosures in the same way as they did detailed disclosures showing a high level of due diligence.¹³⁷ Their study suggests that “supply chain disclosures are unlikely to be understood and used by consumers making purchasing decisions.”¹³⁸

It is important to acknowledge the limitations of the impact HRDD and disclosure will have on the transformation of corporate behavior if they heavily or solely rely on a market-based enforcement model. Consumer and investor perceptions might change the longer these rules are in force, or as the ability of civil society organizations to raise public awareness of HRDD and reports increases, thus elevating their impact.¹³⁹ But we put forward two arguments why this will not overcome the limitations of the impact HRDD and disclosure laws can have on improving business behavior. First, the passage of time alone will not overcome the weaknesses relating to the content of the reports discussed in the previous section. Second, as we argue in this article, improving content requirements alone will also not suffice to achieve the optimal accountability and transformation objectives envisaged by these disclosure laws. Chilton and Sarfaty identify the limitations of reliance on consumers as influencers in this area. They note that corporate disclosures are generally not sufficiently effective, but that they are less likely to produce meaningful outcomes in this particular area. This is because the information communicated to the consumer relates to processes used in the making of the product and not to its characteristics. They argue that consumers might not be willing to change their purchasing decisions based merely on process if all other qualities of the product are the same.¹⁴⁰ Their reasoning here would also apply to HRDD disclosures. The other obstacle they observe is the difficulty in interpreting the contents of the disclosure. For instance, MSA reports merely present the processes a company is using to try to tackle modern slavery in their supply chain, but do not report the incidences of modern slavery and how the company responded to it. Also, companies will face different risks depending on variables like sector,

¹³⁴ Marcia Narine, *Disclosing Disclosure’s Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM HUMAN RIGHTS L. REV. 33 (2015); Chilton & Sarfaty, *supra* note 12.

¹³⁵ Narine, *supra* note 134.

¹³⁶ *Id.* at 48.

¹³⁷ Chilton & Sarfaty, *supra* note 12, at 6.

¹³⁸ *Id.* They do note that the study had several limitations, like the fact that these reporting requirements are new.

¹³⁹ Narine, *supra* note 134, at 40.

¹⁴⁰ Chilton & Sarfaty, *supra* note 12, at 23; FLEX, *supra* note 122, at 20-21 reports that ‘one company representative [interviewed] suggested the idea that consumers are going to challenge companies for failure to comply with the Act or for publishing statements of poor quality is flawed, saying “we’re so far away from this being the reality.”’

business model, or location of sourcing. It is very unlikely that consumers will be able to interpret the contribution of these factors to eradicate modern slavery.

Another important reality to note is that even where awareness is high and there is a sustained reaction against a business because of its performance in this area, this can only cover businesses/brands that are consumer facing.¹⁴¹ This leaves many large businesses that operate in industries like mining, construction, shipping, or defense outside one of the main radars of the transparency legislation. These businesses may still be under the civil society organization or investor radar, but it needs to be recognized that it may be harder for CSOs to garner public interest to a campaign against a non-consumer facing company and some investors might place less importance on reputational risk posed to a business that is non-consumer facing.

In view of these hurdles for consumers, it is more likely that the greatest pressure on businesses to improve their human rights performance will come from CSOs and investors than consumers. Interested CSOs and investors scrutinize human rights and modern slavery disclosures actively.¹⁴² CSOs publish their analyses of these reports, highlighting the levels of compliance as well as the weak and notable practices.¹⁴³ They also invite companies to respond to allegations against them of human rights abuses in their supply chains, informally or as part of a process established in law, such as the process available under the French Law on the Corporate Duty of Vigilance.¹⁴⁴ The information contained (or the lack of information) in a human rights or modern slavery statement can bring the spotlight on the policies and performance of the reporting companies. Similarly, investors can raise concerns and questions with businesses they are investing in during annual meetings or directly with management.¹⁴⁵ They might take into consideration the human rights record of a business or its efforts to eliminate modern slavery in its supply chain when making their investment or divestment decisions.¹⁴⁶ Both groups of stakeholders can also engage with policy-makers to increase efforts to eliminate modern slavery, if they find the legislative framework inadequate.

The amount, accuracy, and type of information presented in the reports or, in many cases, the lack of reporting, place a substantial limit on the

¹⁴¹ *Written evidence to the UK Houses of Parliament Public Accounts Committee*, *supra* note 132.

¹⁴² In fact, it has been observed that “due to insufficient regulation, a large burden lies with the international civil society which, in various ways, monitors the functionality of transnational corporations.” Jernej Letnar Čerňič, *Moving Towards Protecting Human Rights in Global Business Supply Chains*, 36 B.U. INT’L L. J. 101, 109 (2018); *see also*, INVESTOR ALLIANCE FOR HUMAN RIGHTS, <https://investorsforhumanrights.org> (last visited July 31, 2020).

¹⁴³ *See, e.g., Modern Slavery Reporting: Weak and Notable Practice*, CORE COALITION (June 2017), <http://www.respect.international/wp-content/uploads/2017/10/Modern-Slavery-Reporting-Weak-and-Notable-Practice-CORE-2017.pdf>; CORE COALITION, *supra* note 3.

¹⁴⁴ *See supra* notes 56-58, NGOs make allegations to the company in the first instance, and may elevate their concerns to the court if the company does not respond adequately.

¹⁴⁵ *Engaging with Companies on Modern Slavery: A Briefing for Investors*, CORE COALITION 1, 9 (June 2017), https://corporate-responsibility.org/wp-content/uploads/2017/06/Core_InvestorBriefingFINAL-1.pdf.

¹⁴⁶ For instance, investment fund Blackrock divested from Nevsun Resources Ltd because of the allegations that the latter uses forced labor in its Eritrean mining operations, after receiving pressure from NGOs. *See* BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <https://www.business-humanrights.org/en/campaigners-welcome-blackrock’s-divestment-from-nevsun-following-campaign-over-alleged-use-of-forced-labour-in-eritrea-nevsun-denies-use-of-forced-labour#c17272> (last visited June 1 2020).

contribution of investors/CSOs to improving corporate accountability in this area.¹⁴⁷ Businesses are required to disclose very little to comply with the reporting requirements, and under some of the laws this includes the option of disclosing lack of action in this area. The disclosures, even the most detailed ones available, mainly focus on process and contain little information on concrete problems. It is difficult for an investor or an CSO to extract actionable information from these disclosures on a company's actual human rights performance. These factors significantly limit these stakeholders' ability to use the disclosures to hold businesses accountable for human rights violations in their supply chains. With only a very small number of CSOs monitoring the legislation,¹⁴⁸ it is unreasonable for policy-makers to expect civil society actors with limited resources to drive the push towards business compliance with the transparency laws without any serious regulatory support.

One of the only means of private legal action challenging the accuracy of human rights disclosure is consumer litigation. When activist consumers sue companies, this has the potential to send a powerful message.¹⁴⁹ The cause of action could be a suit under consumer protection law or other statutory prohibition on misrepresentation, unfair competition or false advertising, challenging the accuracy or adequacy of the disclosure and arguing that consumers were ill-informed or misled when purchasing products, causing them harm.¹⁵⁰ The disclosure that is challenged through this litigation has in some instances been made pursuant to one of the laws discussed in this article, but many of these cases concern product information from labels or other product literature.¹⁵¹ On the whole, the impact of these lawsuits has been quite limited so far. A series of cases brought against companies in California alleging inadequate and/or misleading disclosure of documented modern slavery in their supply chains were rejected by the courts.¹⁵² There is a concern that even if

¹⁴⁷ See *supra* note 120.

¹⁴⁸ *Written evidence to the UK Houses of Parliament Public Accounts Committee, supra* note 132.

¹⁴⁹ Ryan J. Turner, *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17 MELBOURNE J. INT'L L. 188, 197 (2016).

¹⁵⁰ For a full list of cases, see *infra* p. 24 and note 152. There have been similar cases outside the United States. In Germany, a successful complaint was filed against German retailer Lidl in 2010 for false advertising and unfair competition arising from the retailer's claims of fair working conditions in its supply chain. Following the complaint, Lidl agreed to retract the claims made in its marketing material on working conditions in its supply chain. Although this was a successful outcome of the litigation, and it had an impact on the company's public statements on these issues, it is not possible to determine whether it had any substantive impact on the company's sourcing policies or practices: see *Complaint re Fair Working Conditions in Bangladesh: Lidl Forced to Back Down*, ECCHR,

<https://www.ecchr.eu/en/case/complaint-re-fair-working-conditions-in-bangladesh-lidl-forced-to-back-down/>. This complaint did not relate to disclosure made under modern slavery legislation but rather to statements on its supply chain that the company made voluntarily.

¹⁵¹ One of the early cases in this line, *Marc Kasky v. Nike, Inc., et al.*, 27 Cal. 4th 939 (2002), concerned representations that Nike had made about working conditions in its supply chain. A settlement was agreed for \$1.5 million and involved investments by Nike to strengthen workplace monitoring and factory worker programs.

¹⁵² See *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 U.S. Dist. LEXIS 5524 (N.D. Cal. Jan. 15, 2016) (this case was dismissed for lack of standing); *Barber v. Nestle*, 154 F. Supp. 3d 954 (2015) (the court dismissed the plaintiffs' false advertising and unfair competition claims on the grounds that the CTSCA creates a safe harbor from liability by defining what a company is required to disclose regarding the use of forced labor in its supply chain. It also dismissed the misrepresentation claim, finding that the statements about supplier

these cases were successful, companies would make changes to their labels and product literature, rather than seek to improve conditions for workers in their supply chains. Damages are complicated to calculate in this type of case, because it is hard to value the loss to the plaintiffs, when the harm they have suffered is that they would not have bought the products if they knew about the use of child and forced labor in the supply chain. The lack of success in claims to date has not prevented new cases being brought, however.¹⁵³ Thus, consumer litigation has the potential to provide enforcement of reporting accuracy and adequacy but in an ancillary role to other types of enforcement.

VI. The importance of regulatory oversight and the institutional options

We argue in this article that to achieve their stated accountability goals, human rights due diligence and disclosure requirements should be accompanied by rules establishing: (1) a formal list of businesses covered by the requirements (2) a publicly accessible repository for storing annual disclosures (3) the type of human rights information to be disclosed and (4) an institutional structure to exercise oversight and enforcement functions and provide training and guidelines to ensure accuracy and completeness of disclosures. Without these features accompanying the disclosure requirements, stakeholders' ability to make effective use of the information disclosed becomes significantly diminished.¹⁵⁴ The presence of an oversight body with the powers to check accuracy and completeness and impose sanctions for misleading and incomplete disclosures will allow the stakeholders targeted by the transparency rules to exercise their leverage more systematically and effectively. Admittedly, it may be a huge task for a regulatory body to scrutinize all reports submitted, especially as the number of covered companies grow, but the body could routinely review a random sample each financial year and be prompted by investors, consumers, and civil society to carry out additional reviews or investigations. Stakeholders should have standing to initiate complaints regarding suspected discrepancies and inaccuracies in reports to an expert body,

adherence to law and industry standards were 'aspirational'); *Hodsdon v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018) (the court, dismissing the case, found that Mars does not have a duty to disclose forced labor in its supply chain because it is not a physical defect that affects the central function of the chocolate products). *See also* *Tomasella v. Nestlé USA, Inc.*, 364 F. Supp. 3d 26 (D. Mass. 2019); *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60 (1st Cir. 2020); *Tomasella v. Hershey Co.*, No. 18-cv-10360-ADB, 2019 U.S. Dist. LEXIS 14488 (D. Mass. Jan. 30, 2019) (a federal judge dismissed the lawsuit because the consumers' claims were not actionable under Massachusetts law and they failed to show that the companies deceived them).

¹⁵³ *Walker v. Nestle USA, Inc.*, No. 3:19-cv-723-L-BGS, 2020 U.S. Dist. LEXIS 106858 (S.D. Cal. June 16, 2020) and *Myers v. Starbucks Corp.*, (5:20-cv-00335) (C.D. Cal. Feb. 19 2020). Both cases allege affirmative misrepresentation by the defendant companies in relation to statements made on product labels and literature that cocoa is "sustainably sourced" "certified" and "supports" or "helps" farmers. They rely on allegations of child and forced labor in the cocoa farms, and environmental destruction as part of clearing the land for farms, to evidence that these statements are misrepresentations.

¹⁵⁴ We are not alone in reaching this conclusion. Doorey, for instance, in an article on using domestic disclosure to influence foreign labor practices, argues that the information needs to be verified by the state (and/or a credible outside auditor). Doorey, *supra* note 25.

equipped with legal authority and sufficient resources, which can investigate the accuracy or adequacy of the information, if needed compel the business to correct and complement the disclosure, and impose penalties for failure to comply. In this approach, the stakeholders continue to play a key role for holding businesses accountable, equipped with and empowered by the regulatory tools and the institutional infrastructure to exercise their watchdog role more effectively. This way, the role of oversight is not entirely or largely left to the voluntary efforts of investors and CSOs whose abilities to push for compliance can be limited by several factors such as scarce financial and human resources, lack of authority to compel further disclosures, inability to impose financial penalties. At the same time, the oversight role would not be left exclusively to the regulatory authorities, as the stakeholders would continue to play a crucial role in the accountability framework from a strengthened position by having access to a centralized list and a repository and most importantly by having standing to bring complaints before a body with powers to investigate and impose penalties.

A. Key functions of meaningful regulatory oversight

Among the HRDD and transparency laws discussed in this article, the regulatory oversight feature remains either inadequate or non-existent. Even the French Law on the Corporate Duty of Vigilance, with its advanced accountability features providing legal standing for civil society before courts to bring actions to enforce the duty to publish an adequate Vigilance Plan, lacks a regulatory body to exercise oversight over the law's implementation and to hold a central list and repository thus leaving the challenging and resource intensive monitoring function almost exclusively to stakeholders. Taking stock from the initial experiences with the transparency laws discussed in the earlier parts of this article and most recently with the French Law on Duty of Vigilance, we argue that all of the elements elaborated below are needed to achieve greater level of accountability via transparency and HRDD laws.

1. List and repository

Civil society organizations have expressed concern about the lack of information on which companies are covered by various HRDD and reporting laws currently in force.¹⁵⁵ It is often left to their investigative skills to identify which companies may be covered by disclosure requirements and confirm whether covered companies have published disclosures. Having an annually updated formal list of companies covered by human rights disclosure requirements provides the stakeholders and the regulator with an essential tool for identifying which companies have or have not complied with the most basic obligation under these laws. A central repository accessible by the public to store annual disclosures will allow stakeholders more efficient access both to the most recent reports and all the other years since the introduction of the relevant laws.

As discussed in Part III, some disclosure laws already provide for a list and/or a repository, for instance the Australian MSA. For the disclosure laws which fail to provide for the establishment of a formal list and a central

¹⁵⁵ See, e.g., Savourey, *supra* note 57.

repository for reports, there have been calls for governments to introduce these (e.g. the UK MSA) to improve the effectiveness of these laws.¹⁵⁶ In agreement with these calls, we argue that the establishment of a formal list and a repository to be an essential ingredient for improving the accountability mission of HRDD and disclosure laws.

2. Monitoring function and the content of reports:

The added value brought by having a regulator with monitoring responsibility is in ensuring submissions are made, that this occurs in a timely fashion, and exercising checks on the content of an appropriate size sample each year (coverage of all required elements in the reports, ensure accuracy). As we discussed above in Part V, the existing HRDD and disclosure laws rely primarily on stakeholders to monitor business performance and compliance with the applicable law's requirements. Even the most evolved statutory regime, the French Law on Corporate Duty of Vigilance, does not establish regulatory oversight and relies on stakeholders to monitor whether covered businesses have developed and published an adequate vigilance plan. The enforcement and sanctions mechanisms of the French law (discussed in Part III) depend solely on the stakeholders identifying the lack of compliance with the law or the misleading statements within published plans and triggering the relevant court processes stipulated in the law. We will return to the subject of stakeholders raising complaints as a trigger for regulator action below, but first we address the primary source of monitoring currently in place in this legislative field, which is the monitoring of non-financial disclosure.¹⁵⁷ Non-financial disclosure, as the complement to financial disclosure, is usually monitored by auditors in the first instance, with financial regulators holding a further oversight function. The level of monitoring provided by the financial regulator varies from state to state.

In some countries, limited oversight of human rights disclosures is exercised by accounting or securities regulators such as the Financial Reporting Council (United Kingdom) and the Securities and Exchange Commission (United States). For instance, the SEC enforces liability for any false or misleading statements under Dodd Frank s. 1502. The current US administration is not in favor of section 1502 and made a proposal to repeal it.¹⁵⁸ Verification and enforcement were stepped down.¹⁵⁹ Whether coincidentally or as a result of these developments, there is very little verification and enforcement of this law that occurred in practice. The appropriateness of the SEC as a regulator on corporate social impacts is debated. The current civil society effort in the United States to push for a new corporate transparency law on social and environmental impacts is focused on publicly listed companies – its media briefing arguing “the SEC is the right agency, given its expertise in

¹⁵⁶ *Independent Review of the Modern Slavery Act 2015: Final Report*, *supra* note 82.

¹⁵⁷ The other potential source of monitoring under existing legal regimes is the US securities regulator, the Securities and Exchange Commission. In theory at least, the SEC enforces liability for any false or misleading statements under Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.S. § 1502.

¹⁵⁸ Ed Pilkington, *Proposed Trump executive order would allow US firms to sell 'conflict minerals'*, THE GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations>.

¹⁵⁹ *Supra* note 88.

corporate disclosures, and broad mandate to protect investors and the public interest.”¹⁶⁰ On the other hand, the ability of the SEC to be a ‘humanitarian watchdog’ has been questioned, due to the organization’s lack of specialist knowledge.¹⁶¹

The EU Non-financial Disclosure Directive, which been transposed into the law of EU member states, provides a sample of instances on the monitoring of human rights disclosures. Eight states require that disclosure under the Directive forms part of the company’s management report.¹⁶² The allocation of the human rights report within the management report allows for a basic level of auditor scrutiny over the content of the report, as the EU Accounting Directive requires that the entire management report shall be checked by an auditor to verify consistency with the financial statements, compliance with legal requirements, and to check for the presence of material misstatements.¹⁶³

For a verification of a human rights report, there is not much to be gained by consistency checks with financial statements. Compliance with legal requirements is also easily verifiable as the legal requirements for human rights reporting are minimal and relatively vague. Only the checks for material misstatements could prove useful in the human rights reporting context, but such checks will require expertise and access to information that may exist within the company as well as beyond the company, and often beyond the country. Four states require verification of information beyond checks for consistency with the management report.¹⁶⁴ In Denmark, for instance, the implementing legislation envisages a regulatory review of 10-20% of listed companies which are selected for full scope enforcement each year, checking presence and content of statement.¹⁶⁵ The enforcement approach is based on materiality of the disclosed information. Material misstatements may result in the imposition of fines in accordance with the Danish Financial Statements Act.

The experience with the human rights transparency laws up to date shows that the unique features of human rights reporting call for a sui generis approach to oversight and enforcement. As with financial reporting, the rules on the required information and the oversight and enforcement relating to the completeness and accuracy of the content disclosed may be designed around the concept of ‘materiality’, but the meaning of ‘materiality’ in a human rights

¹⁶⁰ *Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019*, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE (June 10, 2019). On the SEC as a regulatory of human rights issues, see Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VIRGINIA J. INT’L L. 97 (2013).

¹⁶¹ Karen E. Woody, *Conflict Minerals Legislation: The SEC’s New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1325 (2012).

¹⁶² Belgium, Bulgaria, Denmark, Latvia, Netherlands, Romania, UK and Iceland: Global Reporting Initiative, *supra* note 48.

¹⁶³ Directive 2013/34/EU, of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 19 (according to its Article 53, the Member States will have to implement the new directive by July 20, 2015).

¹⁶⁴ Denmark, France, Italy and the Netherlands: Global Reporting Initiative, *supra* note 48.

¹⁶⁵ Act amending the Danish Financial Statements Act L 117. Global Reporting Initiative, *supra* note 48, at 19.

context is unclear in the existing reporting regulations.¹⁶⁶ Materiality has been viewed as a misleading concept in the human rights context and instead the use of ‘salient risks’ has been proposed by the UNGP Reporting Framework.¹⁶⁷ Companies are typically required to disclose material information in non-financial reports including in human rights disclosures. The EU Accounting Directive for instance describes material information as “the status of information where its omission or misstatement could reasonably be expected to influence decisions that users make on the basis of the financial statements of the undertaking. The materiality of individual items shall be assessed in the context of other similar items”.¹⁶⁸ For non-financial statements, the EU NFD adds that the required disclosures shall contain information ‘to the extent necessary for an understanding of the [...] impact of (the company's) activity’.¹⁶⁹ The NFD recognizes that in determining materiality, the context in which the business is operating needs to be taken into account. Recital 8 of the Directive states that the information disclosed should cover “principal risks of severe impacts” which will be assessed by the scale and gravity of impact. One study points out that this introduces a different approach to materiality by focusing on the “scale and gravity of the materialization of the risk, rather than whether knowledge of a principal risk would influence readers’ economic decisions”.¹⁷⁰ The approach fleshed out in the Recital 8 does align with the conception of ‘salient risk’ embedded in the pillar two of the UNGPs.¹⁷¹

In a shift away from the usual investor-risk rationale for non-financial reporting, UNGP pillar two focuses on risks to rights-holders, and the importance of taking into account the perspectives of those who may be directly affected by companies’ actions. One study notes that this aspect of the ‘materiality’ concept has not been reflected in the Member State implementing legislation covered in the study, however.¹⁷² A guidance published by the UK’s Financial Reporting Council on the non-financial reporting, for instance, emphasizes materiality for investors, thus following the classic shareholder-centric understanding of materiality in the reporting context.¹⁷³ But such an understanding of materiality for human rights reports does not align with the understanding of risk under the UNGPs which are centered around the affected individuals and communities. We argue here that human rights disclosure laws should impose mandatory minimum content for human rights disclosures covering salient human rights risks posed to individuals and communities

¹⁶⁶ Note the difference here between due diligence and reporting obligations. The due diligence laws are not framed in terms of materiality but, for instance, the French Law requires companies to detect risks and prevent serious violations with respect to human rights (the threshold is ‘serious’).

¹⁶⁷ See *UN Guiding Principles Reporting Framework*, *supra* note 33.

¹⁶⁸ See Directive 2013/34/EU, *supra* note 159, at art. 2(16).

¹⁶⁹ Directive 2014/95/EU, *supra* note 44, at art. 1(1).

¹⁷⁰ Claire Jeffrey, *Comparing the Implementation of the EU Non-Financial Reporting Directive in the UK, Germany, France, and Italy*, FRANK BOLD 1, 5 (2017),

<http://www.purposeofcorporation.org/comparing-the-eu-non-financial-reporting-directive.pdf>

¹⁷¹ Salient risk is explained in the *UN Guiding Principles Reporting Framework*, *supra* note 167.

¹⁷² Jeffrey, *supra* note 170.

¹⁷³ *Guidance on the Strategic Report*, FINANCIAL REPORTING COUNCIL (July 2018), <https://www.frc.org.uk/accountants/accounting-and-reporting-policy/clear-and-concise-and-wider-corporate-reporting/narrative-reporting/guidance-on-the-strategic-report>.

affected by the activity of the business and the steps taken to prevent, mitigate, and remediate impacts.¹⁷⁴

In assessing the completeness of human rights disclosures, auditors and regulatory bodies will have to determine which human rights issues relating to a company's business can be categorized as salient. The size and geographical spread of a covered company's business is likely to render checking the completeness of the disclosure challenging due to external information covering each overseas or domestic subsidiary or supplier's human rights impact not being readily available to the external auditors and the regulatory bodies.¹⁷⁵ The distinction between this type of reporting and reporting on diversity and governance is apparent here: diversity and governance reports are more amenable to verification by domestic regulatory bodies because they are numerical data-driven, meaning they are more easily fact checked. Local and international civil society organizations and inter-governmental bodies such as the International Labor Organization can play a supportive role here. They are in a position to investigate business related human rights impacts on the ground and their documentation of impacts can at least help regulators to raise red flags for problematic areas which may prompt a more detailed investigation. The dichotomy in approaches to human rights reporting identified in this section highlights the needs for a state-based approach to monitoring and enforcement for human rights disclosures that marries human rights with business / accounting expertise.

Civil society and investor groups can alert the regulators and other relevant authorities of suspected false or misleading statements or to omissions of salient risks from reports. The effectiveness of the existing procedures is variable. As noted above, the French Law on the Corporate Duty of Vigilance allows any person with legitimate interest to give official notice to the company to comply with the law. If the company does not comply within three months of the notice, a judge could oblige the company to publish a plan, under financial penalty if necessary. The judge also rules on whether a vigilance plan is complete and appropriately fulfils the obligations described in the law. But much of the heavy work of identifying and locating vigilance plans and identifying and investigating the inadequacies falls to the civil society actors. Under the Dutch Child Labor Law, any stakeholder with concrete evidence that a company's goods or services were produced with child labor will be able to submit a complaint to that company. If the issue is not resolved, the stakeholder will be able to submit the complaint to a regulator. Once a complaint is filed, the regulator may issue a legally binding instruction ordering the company to conduct the required due diligence and make the appropriate declaration. Again, the process of monitoring is very much stakeholder led. Even without specific power contained within the disclosure law, a regulator can invite and welcome complaints from external parties such as civil society organizations, as the Attorney General of California has in respect of CTSCA. As discussed above in Part III, this has not proven an effective means of oversight and enforcement.

¹⁷⁴ See for an explanation of salience in this context *UN Guiding Principles Reporting Framework*, *supra* note 167.

¹⁷⁵ There are also restrictions under international law on extraterritorial verification and enforcement. As Doorey reminds us, "Canada obviously cannot send inspectors to examine workplaces in Bangladesh to verify the accuracy of the information provided by MNCs." Doorey, *supra* note 25, at 385.

Reports from external parties are also used as part of the operating procedure for regulators reviewing companies' non-financial reports, for instance the Financial Reporting Council (FRC) in the UK accepts complaints and reviews reports on the basis of these.¹⁷⁶ The FRC's procedures are fairly limited in their effectiveness, however, as the discussion that follows in next section illustrates.

3. *Enforcement function:*

The added value brought by having a regulator with enforcement responsibility is to: investigate instances of alleged non-compliance and impose sanctions and penalties when non-compliance is found. With respect to sanctions for non-compliance, these are not the hallmark of transparency provisions, but do feature in the two due diligence laws.¹⁷⁷ Although the French Law on the Corporate Duty of Vigilance is relatively new, the enforcement mechanism was triggered for the first time in 2019, and has now been used in five instances, with two cases so far having reached a court.¹⁷⁸ There is yet to be a substantive judgment on whether a company has breached its duty of vigilance, however, because the question of which court is competent is still being litigated,¹⁷⁹ this nonetheless represents a significant departure from the status quo of minimal, if any, enforcement under the other laws discussed.

Most transparency laws discussed in this article lack an effective enforcement mechanism for non-compliance. Efforts have been made to seek sanction for noncompliance with human rights reporting requirements placed on certain large / listed companies under UK law. In one instance, civil society organization ClientEarth referred mining company Rio Tinto to the relevant regulator, the Financial Reporting Council, for failing to report the reality of the company's environmental and social impacts.¹⁸⁰ The regulator found that Rio Tinto had failed to make material disclosures about serious environmental,

¹⁷⁶ *The Conduct Committee: Operating procedures for reviewing corporate reporting*, FINANCIAL REPORTING COUNCIL 1, 3 (Apr. 1 2017), <https://www.frc.org.uk/getattachment/fb5437a7-641b-4c18-b9f8-8baa7f36c7a5/Conduct-Committee-Operating-Procedures-April-2017.pdf>. Information about making a complaint to the FRC or raising a whistleblowing concern can be found at <https://www.frc.org.uk/About-the-FRC/Making-a-complaint-to-the-FRC/Whistleblowing.aspx>. The UK implemented the EU NFRD in the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, which added § 414CB to the Companies Act 2006. On 11 March 2019, the Business Secretary [announced](#) that the Financial Reporting Council will be abolished and replaced by a new regulator, the Audit, Reporting and Governance Authority.

¹⁷⁷ The French Law on the Corporate Duty of Vigilance and the Dutch Child Labor Due Diligence Law.

¹⁷⁸ The two cases are against oil company Total. *See Total lawsuit (re failure to respect French duty of vigilance law in operations in Uganda)*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda>.

¹⁷⁹ *Id.*

¹⁸⁰ The complaint concerned, in particular, the group's non-managed Grasberg mine in Indonesia. The Norwegian Sovereign Wealth Fund had divested from Rio Tinto on account of 'severe environmental damage' at Grasberg. The mine had been subject to bombings and other attacks from local resistance groups and the mine operators continued to pay for mine security provided by the Indonesian military, despite the military's history of human rights violations in Papua New Guinea: *Referral to the Financial Reporting Review Panel: re the Rio Tinto Group Annual Report 2008*, CLIENTEARTH (July 2010). *See also* Charlotte Villiers, *Narrative Reporting and Shareholder Value*, in *DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS* 120-126 (Joan Loughrey ed., 2012).

employee, social, and community issues at a mine-site in Indonesia.¹⁸¹ Following this finding, Rio Tinto’s directors included more information as advised by the FRC in their report and accounts for the following year, and the regulator closed its enquiry. No other sanction was applied.¹⁸² There is power under the Companies Act 2006 for the regulator to apply to court for a declaration that the annual reports of a company do not comply with the relevant requirements and for an order requiring directors of the company to prepare revised accounts. However, this power has never been used.¹⁸³ This case is illustrative of the role adopted by regulators thus far in respect of human rights reporting: accepting complaints, reviewing reports, but using sanctions etc. as very much a last resort. To avoid situations of ineffective enforcement, we envisage the introduction of sanctions and penalties prescribed by the transparency or HRDD regulations that have to be imposed by the regulator in accordance with such law and not on a discretionary basis. A further added value of having a regulator with powers to impose sanctions and penalties for non-compliance is the possibility of channeling financial penalties applied to a fund which can be used as a contribution to reparations to individuals or communities affected adversely by the acts and omissions of the penalized corporation.¹⁸⁴

4. Institutional Options and Subject matter expertise:

With the political will and support behind it, a regulator can be empowered and resourced to acquire subject matter expertise both on human rights and business/accounting. A regulator staffed with appropriate experts and supported by sufficient resources would develop greater expertise over time to establish indicators on human rights risks on a sectoral and geographical basis, as well as developing guidelines for businesses and other stakeholders. In terms of understanding risk, the U.S. Department of Labor commissions an annual child labor report known as “Sweat and Toil”.¹⁸⁵ These are detailed reports of instances of child labor around the world, and the gravity of each case. This subject matter expertise, if held by regulators of corporate human rights due diligence and disclosure, would serve to enhance the ability of stakeholders to verify the content of company reports, and would also provide information for companies to consider when they assess human rights/modern slavery risks.

¹⁸¹ CLIENTEARTH, *supra* note 170.

¹⁸² *Statement by the Financial Reporting Review Panel in Respect of the Report and Accounts of Rio Tinto Plc*, FINANCIAL REPORTING COUNCIL (Mar. 15 2011), <https://www.frc.org.uk/news/march-2011/statement-by-the-financial-reporting-review-panel>.

¹⁸³ Companies Act 2006, § 456.; *Corporate Reporting Review*, FINANCIAL REPORTING COUNCIL, www.frc.org.uk.

¹⁸⁴ The fund envisaged here is different than the reparation orders made by UK courts under the MSA §§ 8-9. In a similar vein, in June 2018 the relevant UK authorities established the “*General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases*” a common framework set up “*to identify cases where compensation is appropriate and act swiftly in those cases to return funds to the affected countries, companies or people*” see *New joint principles published to compensate victims of economic crime overseas*, SFO (June 1, 2018), <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>.

¹⁸⁵ The series began as actual published reports in the 1990s and today is in mobile application form, *Sweat and Toil: Child Labor, Forced Labor, and Human Trafficking Around the World*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/general/apps/ilab>.

We see slow movement in this direction. For instance, proposals made so far to improve the MSA disclosures from an oversight perspective include provision for a government funded central repository for published statements (as was noted above, this is done by the Australian Act. It was also recommended by the UK Houses of Parliament Joint Committee on Human Rights in its 2017 report on the MSA¹⁸⁶), for the government to publish a list of companies that must report under the transparency in supply chains clause of the Act,¹⁸⁷ and for the establishment of an independent review of modern slavery statements made by companies.¹⁸⁸ The last of these is the crucial piece, according to our argument for regulatory oversight. Whether through an enhanced role for the Anti-Slavery Commissioner, or through the creation of the sui generis body we recommend, we see this as a necessary step towards the accountability goal of the legislation. As noted above, there is a proposal currently under consideration in France for additional state oversight for the Law on the Corporate Duty of Vigilance. Rather than taking the form of a regulator, this would entail designated individuals within the relevant ministry providing guidance to companies on implementation and checking on compliance.¹⁸⁹

Commentary to the UNGP 3 acknowledges the role that can be played by national human rights institutions (NHRIs) “in helping states identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-state actors”.¹⁹⁰ For moving the business and human rights agenda forward meaningfully at the domestic level, there are multiple benefits to be gained from a specialized regulator in this area, as acknowledged in the UNGPs as to the role that can be played by NHRIs for guidance and enforcement. While we do not envisage the role of the regulator proposed here to be carried out by a NHRI,¹⁹¹ a close cooperation between NHRIs and the regulator overseeing human rights reporting would be beneficial for the latter to establish and develop human rights expertise. We recommend the establishment of a sui generis body (or a specialized department within an existing body) to tackle both corporate and human rights aspects of the reporting. This independent oversight mechanism should have responsibility for reviewing reports and providing feedback to a sample of companies on an annual basis, similar to the process established through the Danish implementation of the EU NFD. We take the view that there should be provision for external parties to alert the oversight body, which can investigate the accuracy or adequacy of the information, and if needed compel the company to correct and complement the disclosure. The oversight body should be able to

¹⁸⁶ UK HOUSES OF PARLIAMENT JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 3.

¹⁸⁷ FLEX, *supra* note 122, at 20.

¹⁸⁸ UK HOUSES OF PARLIAMENT JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 3.

¹⁸⁹ THE MINISTRY OF THE ECONOMY AND FINANCE, *supra* note 58.

¹⁹⁰ U.N. Special Representative of the Secretary-General, *supra* note 22, at UNGP 3 Commentary.

¹⁹¹ Though this does not mean that NHRIs cannot be tasked with such a role. In the UK, the Equality and Human Rights Commission oversees and enforces gender pay gap reporting regulations that place obligations on the public and private sector, *see Closing the gap: Enforcing the gender pay gap regulations*, EQUALITY AND HUMAN RIGHTS COMMISSION (2018), <https://www.equalityhumanrights.com/sites/default/files/gender-pay-gap-enforcing-the-regulations-march-2018.pdf>.

impose meaningful penalties for failure to comply akin to those in the Dutch Child Labor Due Diligence Law. We stress the need the oversight body to have specialist subject matter knowledge that goes beyond that of corporate regulator to include the complexities of the human rights and modern slavery issues that are the subject of the reports. Such specialist knowledge could, for instance, come from the commission of “Sweat and Toil” type reports or from close cooperation with NHRIs. The oversight body should analyze trends in reporting, company practice, and develop training and guidance in relation to human rights, modern slavery, cases of forced labor and human trafficking, including their drivers and outcomes.¹⁹²

VII. Conclusion

We began this article by acknowledging that due diligence and transparency can contribute to improving human rights and labor conditions in global production networks. But for due diligence and transparency to make a stronger contribution to improving corporate accountability and avoid potentially masking and legitimating abuses, the legislation should move away from heavily relying on a market-based model of accountability. Numerous studies and reports show that the existing frameworks have been inadequate. One obvious area of improvement concerns the content of the disclosures.

There have also been calls for more regulatory involvement and a move away from the market-led model of oversight, such as establishment of a registry of MSA reports in the U.K., or introduction of effective sanctions for non-compliance with the reporting standards. In this article, we argued that state-based oversight and enforcement is an essential element for human rights reporting to be effective. Without this element, even where mandatory due diligence is introduced, there remain serious limitations on ensuring accuracy and completeness of reports.

Our contribution to this reform agenda is twofold: first, we argue that there is a need to support HRDD and transparency frameworks with a state-based oversight mechanism that can be also supported by stakeholders. Second, we emphasize that oversight for human rights reporting requires a fundamentally different approach to institutional expertise and to risks and materiality than financial or governance reporting. So far, oversight of a limited number of reporting frameworks were entrusted to bodies specializing in traditional corporate reporting without staffing these bodies adequately with human rights expertise. We urged policymakers to move away from this one size fits all model and adopt a sui generis model of oversight marrying knowledge of corporate reporting with human rights expertise to verify and enforce human rights and modern slavery transparency regulations.

¹⁹² The SEC Foreign Corrupt Practices Act Resource Guide is an example of the kind of guidance that can be offered to companies by a regulator: *A Resource Guide To The U.S. Foreign Corrupt Practices Act*, FCPA (2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>. The lack of equivalent state-sponsored guidance for the French Law on the Corporate Duty of Vigilance is conspicuous.