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A Norwegian Law on Business and Human Rights

Examining the Potential of the Modern Slavery Act (UK) and the Duty of Vigilance Law (France) as Legislative Models for a Prospective Norwegian Legal Regulation of the Business and Human Rights Field

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List of Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
MNC	Multinational corporation
MP	Member of parliament
MSA	Modern Slavery Act (UK)
OEIGWG	Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
UK	United Kingdom
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights

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1. INTRODUCTION

The last decades' rapid globalization has accelerated the movement of ideas, capital, persons, goods and services, which are now crossing borders in an easy, speedy and inexpensive manner.[1] As a result, the number of companies operating across borders has increased significantly. More frequently than before, are different parts of business operations taking place in different countries, which have resulted in complex webs of subsidiaries and affiliated companies, and companies more often outsourcing key stages of operations.[2] Such multinational corporations ("MNCs") have along its increase in size, experienced a growing role, power and influence in the public spheres.[3] Accordingly, many companies are now in a position where they are at risk of impacting a wide range of human rights, especially through suppliers in their supply chains that are located abroad, usually in developing countries with other standards.

The adverse impacts MNCs' activities may have on human rights have been well documented.[4] A consensus has therefore emerged that companies do have societal and environmental responsibilities when operating internationally. Business-decisions are no longer considered to be limited to its shareholders, rather, they are considered to affect a larger community.[5] However, it is an ongoing debate how to best ensure corporate accountability for human rights impacts, especially in contexts where harm happens by the hands of supplier companies located outside the parent company's home country. It is also debated whether corporations can be held legally accountable for human rights misconduct abroad, considering that States are the primary subjects under international human rights law.

Attempts to achieve corporate accountability for human rights and environment abuse have resulted in numerous regulatory initiatives, although a common feature of these initiatives is a resort to voluntariness and lack of enforcement and sanctioning mechanisms. International hard law on business and human rights does not yet exist, despite the work for a treaty have been going on for many years. As a response to this lack of international hard law and often insufficiency of other regulatory attempts, several countries have implemented domestic hard law on the subject, and many countries are in the process of implementing such. Among the

[1] Deva, 2012:2.
[2] Ibid., 4.
[3] Ibid., 3.
[4] Giesen, et al, 2020:3.
[5] Deva, 2012:3.

countries that have implemented national business and human rights legislation are the United Kingdom ("UK"), the Netherlands, France and Australia, while Norway is one of the many examples of countries debating such a law.

1.1 Research questions

This thesis aims to contribute to the current Norwegian debate regarding a potential legal regulation of business and human rights, particularly the debate relating to which legislation should be applied as a model for a Norwegian law: the UK Modern Slavery Act[6] or the French Duty of Vigilance Law[7]. The thesis will contribute by providing an in-depth comparison of the British and the French legislation along some pre-determined criteria in order to examine their adequacy to regulate business and human rights, as well as their suitability in a Norwegian context.

There are two research questions. The first relates to examining the adequacy of the British and the French legislations to regulate business and human rights, while the second specifically relates to the Norwegian debate by examining the suitability of the legislations, particularly the legislation deemed the most adequate to regulate the field, in the Norwegian context. The research questions are as follows:

> *Firstly, to what extent are the UK Modern Slavery Act and the French Duty of Vigilance Law adequate to regulate the field of business and human rights? And secondly, which of the models are most suitable for a Norwegian legal regulation of the business and human rights field?*

1.2 Structure

The rest of this introductory chapter will account for the thesis' disciplinary approach, methods and methodology, the literary context, and provide some clarifications of terms and scope. Chapter two will address business' responsibility for human rights and the environment. It will shortly address the context of why business should be regulated, and

[6] *Modern Slavery Act* 2015, c.30 [UK].
[7] Act No. 2017-339 of March 27, 2017 on the Duty of Vigilance of parent companies and instructing companies (Duty of Vigilance Law) [France].

some challenges related to achieving corporate accountability. It will briefly account for some relevant initiatives attempting to regulate business and human rights. Chapter three is an examination of the UK Modern Slavery Act and the French Duty of Vigilance Law. The chapter will address the first research question, where the two legislations will be compared against some pre-determined criteria to examine their adequacy to regulate business and human rights. A conclusion to which law seems most adequate to regulate the field will be provided. Chapter four will introduce the Norwegian debate on a potential business and human rights law and discuss the second research question. It will draw on the discussion and conclusion from chapter three regarding which legislation is deemed most adequate to regulate the field and examine the suitability of this law as a model for a Norwegian legal regulation of business and human rights. In discussing this suitability, it will mostly address the same criteria as chapter three, although it will adapt the discussion to the Norwegian context. It will further address significant strengths and shortcomings as "lessons to learn", which should be considered in the potential Norwegian law-making process in order to best ensure compliance and corporate accountability. Chapter five will provide a conclusion to both research questions.

1.3 Literature review

There is quite extensive academic literature on the general topic of business and human rights and the challenges of regulating the field, as well as some academic literature and studies examining the French and the British legislations. There are also some contributions to the Norwegian debate, although there is significantly less academic literature addressing the Norwegian context. This thesis will analyse the two legislations and draw on existing primary and secondary sources to provide an in-depth examination of the two legislations' adequacy to regulate business and human rights, and thereby examine the suitability in a Norwegian context. The French Duty of Vigilance Law and the UK Modern Slavery Act constitute the primary sources and legislations for analysis. Academic literature mostly constitutes the secondary sources.

One of the most referenced books in this thesis is *Accountability, International Business Operations and the Law. Providing Justice for Corporate Human Rights Violations in Global*

Value Chains.[8] This book *e.g.* address challenges related to regulating business and human rights, in addition to discussing both the Modern Slavery Act and the Duty of Vigilance Law. *Regulating Corporate Human Rights Violations. Humanizing Business*[9] is another book that discuss issues related to regulating business and human rights. In addition to academic literature, reports, articles and other publications also address the topics discussed in this thesis. Articles that discuss the Modern Slavery Act includes *inter alia* "The Modern Slavery Act (2015): A Legislative Commentary"[10], "The UK Modern Slavery Act 2015 Three Years On"[11], and "Hardening soft law: are the emerging corporate social disclosure capable of generating substantive compliance with human rights?"[12], while articles and commentaries that discuss the Duty of Vigilance Law includes *inter alia* "Developments in the Field. The French Duty of Care: A Historic Step Towards Making Globalization Work for All"[13], "French Companies Must Show Duty of Care for Human and Environmental Rights"[14], and "Legislating human rights due diligence: opportunities and pitfalls to the French duty of vigilance law"[15]. These articles discuss both pros and cons of the legislations, as well as their potential to regulate business and human rights.

Additionally, I will look at some studies and reviews examining effectiveness and business compliance with the legislations, which will provide illustrations and commentaries to the discussions relating to strengths and weaknesses of the legislations. The studies referred to are mainly conducted by Business & Human Rights Resource Centre[16], Ergon Associates[17], the independent review of the MSA initiated by the UK Interior Ministry[18], B&L evolution & edh enterprises pour les droits de L'Homme[19] and Amnesty International (France)[20]. Furthermore, the Norwegian Ethics Information Committee's report[21] is of relevance. The report examines

[8] Enneking, et al., (eds.), 2020.
[9] Deva, 2012.
[10] Haynes, 2016.
[11] Mantouvalou, 2018.
[12] Nolan, 2018.
[13] Cossart, Chaplier & de Lomenie, 2017.
[14] Dauthier & Smith-Vidal (4 April 2017).
[15] Triponel & Sherman (17 May 2017).
[16] "FTSE 100 & The UK Modern Slavery Act: From Disclosure to Action" (2018).
[17] "Modern Slavery Statements: One year on" (2017) and "Modern Slavery Reporting: Is there evidence of progress?" (2018).
[18] UK Home Office (2019) "Independent Review of the Modern Slavery Act. Second interim report: Transparency in supply chains."
[19] "Application of the Law on the Corporate Duty of Vigilance. Analysis of the First Published Plans" (April 2018).
[20] Barbière (25 February 2019); Amnesty International (France) (21 February 2019).
[21] Etikkinformasjonsutvalget (2019) "Åpenhet om leverandørkjeder. Forslag til lov om virksomheters åpenhet om leverandørkjeder, kunnskapsplikt og aktsomhetsvurderinger."

both the Modern Slavery Act and the Duty of Vigilance Law, address several of the criteria I will evaluate the legislations against, as well as the Norwegian context. The Committee's report additionally proposed a draft act on supply chain transparency, the duty to know, and obligations of due diligence and disclosure of findings.

There is significantly less academic literature discussing a potential Norwegian legal regulation of business and human rights compared to the other topics discussed in this thesis. The thesis therefore aims to be an academic contribution to the Norwegian debate on legal regulation of business and human rights, and ultimately provide a contribution that may help ensure that a potential legal regulation is as effective as possible in achieving corporate compliance with human rights. Such is intended to be achieved by enhancing our knowledge of the Modern Slavery Act and the Duty of Vigilance Law, in terms of what works and not in achieving corporate accountability. The thesis as such, aims to both supplement existing literature, as well as fill gaps, especially in the Norwegian context where academic literature examining the suitability of the legislations for a Norwegian legal regulation is rather limited.

The thesis will discuss which of the legislative models are most adequate to regulate business and human rights, and then how that legislation is suitable to regulate business and human rights in a Norwegian context. In so doing, it will address strengths and shortcomings that should be addressed by Norwegian legislators and some points specifically relating to the Norwegian context that should be considered (*e.g.* by accounting for existing expectations of Norwegian companies, look at how guidance and enforcement may be exercised in Norway, and address relevant instruments and standards known to Norwegian companies). Significant attention will further be dedicated to "lessons to learn" of the analysed legislations, *i.e.* hurdles to effectiveness and compliance of even the most adequate legislative model, in order to increase our understanding of what should be changed, included or excluded in a potential Norwegian law to best ensure corporate accountability, business compliance, and drive positive change. An extensive consideration of inherent flaws is often lacking in contributions to the Norwegian debate, although it is important to address flaws and weaknesses of the legislative models in order to ensure that the potential Norwegian legislation does not inherit the same obstacles to effectiveness.

1.4 Disciplinary approach, method and methodology

Human rights are a natural field for interdisciplinary research and diverse methodological approaches.[22] While law plays an essential role in the field, social sciences may further increase our understanding of human rights, particularly regarding business' compliance with human rights standards. This thesis has therefore opted for a multidisciplinary approach, applying both legal and social sciences methods, in order to broaden the scope of the thesis. While a major part of the thesis is an analysis of legal texts, namely the UK Modern Slavery Act and the French Duty of Vigilance Law, the thesis will move into the field of social sciences to assess strengths and shortcomings in order to enhance our understanding of the laws' effectiveness and business' compliance with the laws. Social sciences are also relevant when discussing the legislations' suitability in a Norwegian context.

In general, there are three forms of human rights research: normative, evaluative and empirical.[23] This thesis applies an evaluative approach, which is very much a combination of the normative and empirical approaches.[24] The thesis is evaluative as it seeks to examine the adequacy of two laws to regulate business and human rights in terms of generating compliance and drive positive change, evaluated against some pre-determined criteria outlined below. The thesis' examination of the two laws' adequacy to regulate business and human rights is a critical legal analysis. Furthermore, when analysing the effectiveness and adequacy in a Norwegian context, the method is legally interpretive. This section applies an interpretive tool to examine the Modern Slavery Act and the Duty of Vigilance Law in order to ascertain the content of the legislations and, coupled with the examination from chapter three, suggest recommendations for further developments of the legislations in a Norwegian context.[25] As such, that section will interpret and apply the legal rules of the two legislations to a Norwegian context, examining their suitability in this regard.

The thesis is a qualitative document analysis, examining two cases of legislation. Hence, the data were retrieved through document analysis, in which relevant data were those related to the criteria for comparison outlined below. The data were collected by analysing the Modern Slavery Act and the Duty of Vigilance Law (*i.e.* analysing the legislative texts, including

[22] Langford, 2017:161.
[23] Ibid., 172.
[24] Ibid., 172-173.
[25] McConville & Chui, 2007:4; Dobinson & Johns, 2007:33; Greenberg, 2017:110-111.

wording and definitions, as well as contents), in addition to the strengths and weaknesses of the legislations highlighted by other literary contributions, such as academic literature, articles, reports and studies. Numbers and statistics relating to effectiveness and business compliance, were retrieved from existing studies and reviews accounted for in chapter 1.3. Overall, the data were used to compare and examine the legislations against the below-mentioned criteria, in order to understand the legislations' strengths and weaknesses to understand what Norwegian legislators should consider when striving for corporate accountability.

I will compare the two laws according to some pre-determined criteria in order to understand the legislations' strengths and weaknesses as legal regulations of the business and human rights field. Comparative research in this sense, may help understand and assess the effectiveness of two different approaches to national legal regulation of business and human rights. In terms of analytical approach, the legislations will be compared and examined against the following criteria:

1) Subjects;
2) Transparency;
3) Content and measures;
4) Supply chains;
5) Context and rights;
6) Enforcement;
7) Sanctioning, and;
8) Relation to other instruments.

These criteria were formulated following an examination of the contents in the Modern Slavery Act and the Duty of Vigilance Law, the topics that were frequently addressed by studies reviewing business' compliance with the legislations, as well as challenges to regulating business and human rights that academic literature highlights.[26] The elected criteria allows for an examination of the legislations' scope (*i.e.* potential reach and impact), how they address and possibly overcome challenges of regulating business and human rights (*e.g.* separate legal personalities of parent and supplier), what the legislations require of companies and what consequences noncomplying businesses risks (*i.e.* how the legislations incentivise

[26] *See e.g.,* chapters 2.2, 3.1.2, 3.2.2 and 3.3.9.

compliance). Hence, these criteria allow for an examination of if and how the legislations may impact business and human rights and how the two legislations possibly differ from other relevant instruments as well as each other.

Subjects, context and rights allows for an examination of the legislations' scope. *Subjects* examines which and how many companies fall within the scope of the legislations, and the practical implications of the applied threshold for application. A threshold set to high may limit the impact of the legislations, as they would only apply to a limited number of companies, *i.e.* the largest MNCs, thus excluding many small and medium-sized companies that may as well impact human rights and the environment. Likewise, if the legislations only apply to certain industries or in certain contexts. *Rights* was included to examine which rights (and possibly the environment) the legislations cover. If the legislations only cover a specific right or a specific group of rights, it necessarily excludes a wide range of other human rights, although it is widely acknowledged that multinationals can, and often do, impact on a wide range of human rights and the environment. Narrow legislations in terms of rights may risk creating an impression that business should only strive to respect some specific rights.

Content and measures were included to examine what the legislations require of business. This criterion allows for an examination of *inter alia*, whether the legislations *force* business to uncover, address and act upon risks their operations, either directly or indirectly, pose towards human rights. It is questionable to what extent legislations that do not force companies to address risks, or that allows for companies to intentionally "pick and choose" what to include in order to "look good" in the eyes of consumers and investors, is adequate to prevent human rights violations by business. *Supply chains* was also included in this respect. Often the greatest risks towards human rights and the environment lies in the operations of suppliers and contractors, where the most severe risks are often those buried deep in the supply chains. Hence, if the legislations do not adequately address supply chains, they likely exclude areas that generally pose the most severe risks towards human rights and the environment. Supply chains have additionally been one of the most frustrating areas to regulate, given issues related to the doctrine of separate legal personalities and home/host State jurisdiction. Supply chains was thus included to examine if and how the legislations cover supply chains, and how they potentially attempt to overcome the challenges related to regulation of such.

Enforcement and *sanctioning* examine how the legislations are intended to be enforced, and the available sanctioning options against non-complying businesses. A main critique of existing initiatives is their resort to voluntariness and self-regulation, *i.e.* soft law, without significant consequences for non-compliance. Such is frequently highlighted as reasons for the insufficiency of these existing instruments to regulate business and human rights. Hence, enforcement and sanctioning are likely to influence the legislations' effectiveness, as lack of enforcement and sanctioning options, *i.e.* lack of consequences for non-compliance, in many cases do not seem to incentivise business enough to comply with human rights standards. *Transparency* was also included in this regard, as it examines the requirements for publication of statements/vigilance plans. If statements/plans are easily available for enforcement-actors, it may affect the impact of the legislations as interested parties can access these and more easily evaluate company-efforts and scrutinize companies that do not adequately address their risks. Contrary, if statements/plans are difficult to access, companies are less prone to scrutiny and can easier go "under the radar" of civil society and other relevant actors.

Lastly, *relation to other instruments* was included to examine how the legislations relate to other relevant instruments. Contrary to the above criteria, this criterion does not relate directly to effectiveness and compliance. However, referencing other instruments may provide guidance for interpretation and implementation of the legislations, which can be helpful for State, business and enforcement-actors.

The same chapter will also discuss the two laws' effectiveness in terms of achieving business' compliance and drive positive change, by drawing on existing research and studies. It should, however, be kept in mind that both laws, particularly the Vigilance Law, are relatively new legislations. Hence, complete practical implications might not yet be possible to fully assess, as extensive experience, implications and, in particular, jurisprudence is still lacking. As such, the part(s) relating to effectiveness should rather be seen as commentary to the laws, often highlighting specific strengths and weaknesses.

In general, there are five ethical considerations in human rights research, namely that: the research should do no harm; the researcher should interact with recognition and respect; the research should provide beneficence and justice; the researcher should address possible collaborations and conflicts of interests correctly, and; that the research should comply with

scientific and professional standards and institutional policies.[27] As this thesis applies document analysis as method, it is particularly the latter point that is of relevance to this thesis. The thesis will thus strive to *e.g.*be academically honest, be cautious and not attempt to generalize[28] and ensure that criteria applied for comparison are well accounted for so findings can be tested (external validity).[29] It will also hopefully provide valuable insight into an important topic, that ultimately will contribute to "do good" in achieving corporate accountability for human rights violations.

1.5 Delimitations and clarifications

Whether or not MNCs should be regulated have been a topic of discussion for a long time. In order to further introduce the topics for discussion, the thesis will shortly provide some arguments and examples for why business should be responsible for human rights. However, any further discussion regarding this subject is outside the scope of the thesis. Such is also the case in relation to the ongoing debates of whether legal regulation is the best way to regulate business and human rights. This thesis takes place in the context of a specific debate, discussing two already adopted national laws. Hence, although some benefits of legal regulation and shortcomings of existing initiatives necessarily will briefly be addressed given the context, it is outside the scope of the thesis to further discuss whether legal regulation is the best option or not.

The thesis will furthermore only discuss two national legal regulations of business and human rights, namely the French Duty of Vigilance Law and the UK Modern Slavery Act. These two are not the only examples of national legal regulations of the field, however, they are two of the most prominent national regulations, and in many ways, they represent two different approaches to legal regulation. Importantly, they are the main options discussed in Norway as models for a potential Norwegian law. For these reasons, the French and the British laws are of most relevance for the topic of this thesis, and therefore chosen as the legislations for examination. Likewise, although there are many initiatives attempting to regulate business

[27] Ulrich, 2017:195.
[28] This thesis aims to provide input to a specific national debate, the Norwegian, and will only focus on two national legislations as options for a legal regulation: the British and the French. Given this objective, as well as the applied research design, the discussions and conclusions in this thesis are adapted to a specific context and thus not generalizable.
[29] Ulrich, 2017:213.

and human rights, chapter 2.3 *Developments in the field* will only mention a few examples, which are of relevance to this thesis.

The Modern Slavery Act is a lengthy instrument, covering many aspects of modern slavery. However, it is part 6, transparency in supply chains etc, that is of relevance to this thesis as this part relates to business. Hence, references to the Modern Slavery Act are primarily references to its part 6, and examination of the Act is an examination of part 6 and not the Act in its entirety.

Companies, corporations and business in this thesis generally refers to corporate organizations whose operations in some way extends across borders, where they directly or indirectly, either through their own activities or through activities in the supply chain, may affect human rights and the environment in another country than their home country. Such companies are usually referred to as MNCs and are the relevant type of company for the topic and discussions in this thesis.

Home State refers to where an MNC is domiciled, headquartered or registered, while *host State* refers to the State where operations abroad take place, either by the MNC directly or by suppliers.

The doctrine of *separate legal personalities* is a vital part of company law, essentially meaning that parent companies and subsidiaries constitute separate legal entities, making the subsidiary a legal person in its own rights. This is of relevance to the context of business and human rights as such generally means that parent companies are not liable for wrongs committed by a subsidiary.

Hard law generally refers to legal instruments and laws, that provide binding legal obligations which can be legally enforced before a court. In contrast, *soft law* is generally legally non-binding instruments.

2. BUSINESS' RESPONSIBILITY FOR HUMAN RIGHTS AND THE ENVIRONMENT

Initially, States were thought to be the only institutions under an obligation to respect, protect and promote human rights, and individuals to be the sole beneficiaries of human rights.[30] However, globalization and the growth of MNCs has had a significant impact on changing the dynamics of human rights, raising questions about the nature and extent of business' human rights responsibilities.[31] Globalization of the world economy and trade poses new challenges for human rights realization as other actors now are in a position to both violate and fulfil human rights. Given the role, power and influence MNCs have acquired, business is an example of such actors that may impact on human rights.

Acting either alone or in conjunction with States, MNCs now pose a real threat to violate a wide range of human rights, including civil, political, social, cultural and economic rights, in diverse ways.[32] Legally, however, States are still the primary subjects within international human rights law. The principle of business' human rights responsibility is often a reference of society's expectations that business respect and comply with the same human rights standards as States, although such is yet not internationally statutory.[33] Therefore, in many instances of human rights and environmental abuse by MNCs, victims are without protection and possibility for redress, and MNCs without accountability, due to lack of effective regulation.

2.1 Challenges related to corporate accountability

The global context relating to business and human rights is characterised by a complexity, scale and reach of corporate structures that hinders achievement of corporate accountability; lack of a level playing field; legal and practical barriers hindering victims' pursuit of remediation, and; lack of enforcement of existing standards, especially in relation to MNCs and their myriad of subsidiaries and suppliers.[34] Options which are usually present to control

[30] Deva, 2012:3.
[31] Ibid., 2-4.
[32] Ibid., 3-4.
[33] Hjort, 2019:4.
[34] European Coalition for Corporate Justice, 2017:2.

human beings from committing wrongs, are unavailable against corporations. Hence, regulation of business is a rather difficult task.[35]

This task is further complicated when the companies in question are MNCs. MNCs can structure their operations through a web of parent, subsidiary and affiliate sister concerns, making them difficult regulatory targets.[36] One of the most frustrating challenges regarding business and human rights is precisely that associated with global supply chains, as the frequent remoteness between a parent company and the abuse occurring in supply chains abroad, in practice complicates establishing criminal responsibility for wrongs committed.[37] Multinationals' supply chains are frequently characterised as low cost, efficient and risky, spanning multiple sourcing countries with a wide range of economic, political, social, labour and environmental standards.[38] Global supply chains are now estimated to account for more than 450 million jobs worldwide.[39]Accordingly, many of our everyday products are now being produced abroad, often under conditions that are considered unacceptable in the countries where the products are put on the market.[40]

2.1.1 Host States

Controlling the presence and activities of foreign investors, is in principle subject to the absolute discretion of the host State. However, this is often fettered by international economic agreements to which the host State is signatory.[41] Additionally, corporations often operate, or have parts of its operations, in countries that do not have the capacity, resources or will to protect those within their jurisdiction against human rights abuse by MNCs. The result is that multinationals' activities are often difficult to monitor and regulate, and victims often deprived of options for redress. The absence of host State resources, coupled with economic pressure upon host States to appease foreign investors, often give way to a more relaxed regulatory environment than in the country where the MNC is domiciled.[42]

[35] Deva, 2012:50.
[36] Ibid.
[37] Ibid., 4.
[38] Nolan, 2018:66.
[39] Ibid.
[40] Giesen, 2020:3.
[41] Dowling, 2020:223.
[42] Ibid.; Nolan, 2018:66.

Hard law in host countries where much of MNCs' activities take place, does not always sufficiently address the negative impacts corporate activities may have on human rights and the environment. If hard law on the subject even exist, in many cases, host States are still unwilling or unable to enforce it,[43] *e.g.* due to the income MNCs can generate for the host State that may be considered more important to the host State government than workers' and human rights.

The reality is that MNCs in many cases enjoy more power, influence and capital than the host State. The MNC thus places the State in a weaker position, challenging the State's ability to control the MNC. It is further suggested that where host States in fact do attempt to exercise influence or control over a foreign MNC by enforcing an element of local participation, the MNC will still be responsible for major decisions and the host State remain reliant on these for the success of the venture.[44]

2.1.2 Separate legal personalities and corporate veil

Although increased attention is being paid to the potential negative impacts of corporate activities in supply chains, regulating corporate conduct is complex. One issue is that related to the doctrine of separate legal personalities. Although the principle evolved before the concept of MNCs, modern MNCs take full advantage of the doctrine to escape regulation.[45] The doctrine creates a 'corporate veil', causing significant hurdles to efforts attempting to hold parent companies accountable.[46]

It is common for parent companies to rely on the separate legal personalities of its subsidiaries and local business relationships, in order to avoid lawsuits in the country where it is headquartered or domiciled.[47] Regulation and accountability can be avoided by parents by using foreign subsidiaries or joint ventures in partnership with host governments, which permits MNCs to present themselves as national enterprises and hence mask the reality of who is behind the operation.[48] As such, MNCs can frustrate the pursuit of legal accountability for harm stemming from the activities of a subsidiary abroad. Accordingly, victims are

[43] Schaap, 2020:192.
[44] Dowling, 2020:223.
[45] Deva, 2012:50.
[46] Mantouvalou, 2018:1038.
[47] Dowling, 2020:225.
[48] Ibid., 223-224.

usually not able to seek redress in the parent company's home State, and in the host State where the subsidiary is domiciled, frequent limitations on access to justice often prevent victims from enforcing their legal rights there as well.[49]

2.1.3 Jurisdiction

Extraterritorial tort cases are possible but are usually frustrated by various barriers. Home State courts can establish their jurisdiction over a parent company under the domicile principle. It may potentially also establish jurisdiction based on the doctrine of *forum of necessity*, in cases where victims face denial of justice in the host State.[50] However, it is usually difficult to establish that the parent company was under a duty of care of third parties for abuse taking place in host States by local subsidiaries, suppliers or business partners,[51] given the separate legal personalities of companies.

The doctrine of *forum non conveniens,* is another frequent obstacle to victims' pursuit of redress. The doctrine allows courts to dismiss cases on grounds that relevant factors favours that the trial takes place in a foreign forum,[52] meaning that home State Courts are often unable to establish jurisdiction over parent companies for actions of local subsidiaries, suppliers or business partners abroad. Hence, victims are often left without possibilities for redress in any jurisdiction, as host States, for reasons discussed above, often are unable or unwilling to redress wrongs in host State courts, and international hard law on the subject still does not exist.

The corporate veil can be pierced in certain situations, but the evidentiary burden has proven difficult to discharge as parent companies keep 'distance by design' from subsidiaries, and courts generally demand a high level of proof regarding necessary control exercised by the parent over its subsidiaries.[53] Furthermore, since MNCs operate at a transnational level, they can move their operations from one jurisdiction to another, and legally become invisible, disappear totally, or take a new form and name to avoid regulation and lawsuits.[54]

[49] Ibid.
[50] Ryngaert, et al., 2020:283.
[51] Ibid.
[52] Deva, 2012:69.
[53] Ibid., 50
[54] Ibid., 50-51.

2.2 Developments in the field

There are several existing initiatives attempting to regulate business and human rights, and further developments are happening at the national, regional and international level. The rest of this chapter will account for some of these developments that are of relevance to this thesis.

2.2.1 Internationally and regionally

At the regional level, the European Commission is in the process of launching formal consultations for an EU-wide regime on mandatory human rights and environment due diligence.[55] In December 2019, over 100 organisations launched a campaign calling for EU due diligence legislation, and earlier this year, EU published the report "Study on due diligence requirements through the supply chain."[56] In April, the European Commissioner for Justice announced that the Commission commits itself to introducing rules for mandatory corporate environmental and human rights due diligence, intended to be introduced early 2021. [57] The European Economic and Social Committee affirmed this in September, by publishing a set of recommendations of the intended mandatory due diligence, referencing in particular the UNGP.[58]

Internationally, the work for an international treaty on business and human rights is ongoing, although no agreement has yet been reached on a treaty on business and human rights. This is due in part to resistance by the business community and of capital-exporting States, as well as the difficulty of transposing to corporations norms that are designed to be addressed to States.[59] There are still many opposing arguments to a treaty on business and human rights, and in many cases lack of political will as well. Despite this, the work continues, and the current draft under consideration is the Second Revised Draft on *the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*.[60]

[55] Shift, 2020:1.
[56] European Commission, 2020.
[57] Business & Human Rights Resource Centre (2020).
[58] European Economic and Social Committee *Mandatory due diligence (exploratory opinion),* adopted 18 September 2020.
[59] De Schutter, 2016:43.
[60] OEIGWG Chairmanship Second Revised Draft 06.08.2020, by the open-ended intergovernmental working group mandated to "elaborate an internationally legally binding instrument to regulate, in international human

Despite the lack of a treaty on business and human rights, a variety of legal and policy measures has been implemented in the attempt to ensure business' respect for human rights. However, in the absence of hard law, these measures have depended on the slow and steady evolution of voluntary initiatives to seek corporate compliance with human rights standards. Implementation and monitoring of such initiatives has largely relied on self-regulation by business, as well as the coercive voice of civil society in encouraging, coercing and often shaming corporations to address their impacts on human rights.[61]

Among the initiatives at the international level, and of relevance to this thesis, is *the United Nations Guiding Principles on Business and Human Rights*[62] ("UNGP"). The UNGP was endorsed by the Human Rights Council in 2011, after considerable consultations with various stakeholders.[63] It introduced obligations for both States and business and is well-known to many corporations around the world. Due diligence is the central tool, which should enable companies to meet their responsibility in relation to respect for and avoid infringement upon human rights (Principle 11). Businesses should conduct due diligence processes to identify, prevent, mitigate and account for how they address their human rights impacts, in addition to a policy commitment to respect human rights and processes to enable remediation of adverse human rights impacts they cause or contribute to (Principle 15). Due diligence processes include assessing actual and potential human rights impacts, integrating and acting upon the findings from such assessments, tracking responses, and communicate how impacts are addressed. The process should cover impacts the company may cause or contribute to through its own activities or which may be directly linked to its operations, products or services by its business relationships. Due diligence processes should be continuous and will vary according to the complexity and size of the company (Principle 17).

2.2.2 Nationally

The 2017 report by Corporate Human Rights Benchmark reported low levels of due diligence practice and reporting.[64] A survey conducted by Norton Rose Fulbright and the British

rights law, the activities of transnational corporations and other business enterprises", established by UN Human Rights Council Resolution 26/9, adopted 14 July 2014.

[61] Nolan, 2018:66.

[62] UN Office of the High Commissioner for Human Rights [OHCHR], 2011.

[63] Deva, 2012:104.

[64] Corporate Human Rights Benchmark, 2017:10 ,27.

Institute of International and Comparative Law[65] concluded similarly, finding that over 50 per cent of the surveyed companies worldwide had never undertaken a specific human rights due diligence process. Thus, a majority of companies were either not conducting or not adequately reporting on their human rights' due diligence practices,[66] which may partly be attributed to the non-binding nature of existing initiatives.[67] The continued human rights abuse by business and the often-insufficiency of voluntary initiatives have resulted in calls for hard law on business and human rights, both by business and civil society. Some recent legislative initiatives at the national level have attempted to change the trend of low compliance, by adopting domestic hard law.

Domestic law can offer potential for addressing human rights and environment abuse by imposing duties on corporations not to commit human rights violations in their activities, including their supply chains. Domestic law can supplement existing soft law instruments or offer an alternative to regulation in the absence of hard law at the international level.[68] Depending on how laws are designed, they may overcome hurdles associated with separate legal personalities, issues related to jurisdiction and *forum non conveniens,* offer real sanctioning and enforcement opportunities, and provide opportunities for redress for victims. Adopting hard law on business and human rights nationally may ease the tasks of both enforcement and sanctioning of non-compliant businesses, as such tasks can be given to specific agencies, and legislations can be adapted according to the context and needs in the given State. As such, domestic law on business and human rights may offer an interesting route to hold businesses responsible for human rights impacts in the absence of hard international law and lack of compliance with other soft law instruments.

3. BUSINESS AND HUMAN RIGHTS LEGISLATIONS IN THE UK AND FRANCE

Recent years' developments in the business and human rights field have included adoptions of several national legislations. In general, they either cover a wide range of rights, or a specific right or group of rights. The UK Modern Slavery Act ("MSA") and the French Duty of

[65] McCorquodale et al., 2017.
[66] Ibid., 197; Nolan, 2018:72.
[67] Ibid., 71.
[68] Schaap, 2020:209.

Vigilance Law are two examples. The MSA expressly addresses transparency in supply chains, by requiring big businesses providing goods or services to produce a yearly statement on the steps it has taken to keep its business operations free from modern slavery. The Duty of Vigilance Law imposes an obligation on big companies to develop vigilance plans and implement due diligence processes to identify risks and prevent serious violations of human rights and the environment.

Although the legislations in many ways resemble each other, there are significant distinctions, maybe most prominently that one covers a wide range of human rights while the other is specific to modern slavery offenses. The legislations thus represent two different alternatives to regulation of the business and human rights field, and other national legislations in the field often opts for one of these alternatives. The Norwegian debate is in many respects centred around which of these two laws would be the best legislative model for a Norwegian law.

3.1 The Modern Slavery Act (UK)

3.1.1 Background

Modern slavery, involving some of the worst forms of exploitation, is one of the fastest growing forms of organised crime. It is lucrative business, estimated to generate billions in profits every year. For a long time, various forms of exploitation have been characterised as low risks with high rewards for the exploiters.[69]

Modern slavery entered the UK agenda after the European Court of Human Rights ("ECtHR") examined compliance of legislative frameworks in several legal orders, including the UK, with Article 4 of the European Convention of Human Rights ("ECHR")[70]. The ECtHR highlighted the need to address the most severe forms of labour exploitation.[71] In addition, and even more influential, was the 2013 report 'It Happens Here'[72], which revealed a widespread prevalence of modern slavery in the UK and highlighted the need for a Morden Slavery Act.[73] In response, the British Parliament established the Joint Committee on the

[69] Haynes, 2016:40.
[70] Opened for signature 4 November 1950 (entered into force 3 September 1953).
[71] Mantouvalou, 2018:1020.
[72] The Centre for Social Justice, 2013.
[73] Ibid.; Mantouvalou, 2018:1021.

Draft Modern Slavery Bill to consider a draft bill.[74] In its work, the Committee relied upon input from, *inter alia*, business leaders who suggested that legislation was necessary to level the playing field. The Committee concluded by calling upon the UK to take a lead in eradicating modern slavery in business operations and supply chains.[75]

The MSA was adopted on March 26, 2015. The concept 'modern slavery' in the Act is broad, seeking to capture the offenses of slavery, forced and compulsory labour, servitude and human trafficking.[76] By establishing these modern slavery-offenses, the Act substantively implemented UK's international slavery-related obligations.

3.1.2 The Act

The MSA is a rather lengthy document, spanning seven parts and 62 sections. Part 1 outlines slavery and trafficking offenses, penalties and sentencing; part 2 contains provisions for prevention orders; part 3 outlines enforcement powers on ships; part 4 establishes the Independent Anti-Slavery Commissioner; part 5 contains provisions for protection of victims; part 6 addresses transparency in supply chains etc, and; part 7 outlines miscellaneous and general details.

Section 54 in part 6 is of relevance to this thesis, as it covers "transparency in supply chains etc." Section 54 (1-3) imposes an obligation on large commercial organisations with a yearly total turnover of GBP 36 million, that supply goods or services, to prepare a slavery and human trafficking statement each financial year. It is not relevant whether the company is registered or headquartered in the UK or elsewhere, the Act only requires that some operations take place in the UK (s 54(12)).

The Act requires business to produce a statement stating either the steps taken to ensure that slavery and human trafficking is not taking place in its operations or supply chains, or a statement that the organisation has taken no such steps (s 54(4)). Section 54(5) lists what the statements *may* include: information on organisation structure, business and supply chains; policies and due diligence processes in relation to slavery and human trafficking; parts of business and supply chains with risk of slavery and human trafficking taking place and steps

[74] Ibid.
[75] Ibid., 1037-1038.
[76] Haynes, 2016:35.

taken to assess and manage those risks; effectiveness of measures in ensuring that slavery and human trafficking is not taking place in business or supply chains, measured against what the company considers appropriate performance indicators, and; the training available to company staff. The Secretary of State may issue further guidance on the duties imposed, particularly on the kind of information to be included in the statements (s 54(9-10)). The statements should further be signed by a director, designated board member, general partner or partner (s 54(6)), and be made public on companies' websites (s 54(7)). In case the company does not have a website, it must provide a copy of the statement within 30 days to anyone who makes a written request (s 54(8)). For non-compliant businesses, the Secretary of State may bring civil proceedings in the High Court for an injunction (s 54(11)).[77]

Of additional relevance, are Sections 40-44 in part 4, which established the Independent Anti-Slavery Commissioner. The Commissioner is empowered to make reports on slavery and human trafficking; make recommendations to public authorities; support research; provide information, education and training, and; consult and co-operate with public authorities and voluntary organisations (s 41(3)).

3.2 The Duty of Vigilance Law (France)

3.2.1 Background

The French Duty of Vigilance Law is often considered a result of the Rana Plaza-accident. Rana Plaza was a nine-story building on the outskirts of Dhaka, Bangladesh, which collapsed in 2013. The collapse killed more than 1,000 garment industry-workers, including workers for large MNCs like Zara and H&M.[78] In response, the French government wanted to introduce mechanisms to cover whole production chains, to prevent such infringements on human rights from occurring.[79] After four years of back-and-forth between the National Assembly and the Senate, as well as considerable joint efforts from civil society organizations, trade unions and Members of Parliament, a compromise was finally reached. In this process, the bill was

[77] A guide, "Transparency in supply chains etc. A Practical guide" (UK Home Office, 2017) was developed to further explain which companies are covered and the steps required to comply with the Act.
[78] Barbière (25 February 2019); Amnesty International (France) (21 February 2019).
[79] Dauthier & Smith-Vidal (4 April 2017).

watered down, and did no longer introduce a new liability regime nor provide for the reversal of burden of proof from victims to companies.[80]

The Duty of Vigilance Law reached voting on February 21, 2017, after which it was referred to the Constitutional Court on grounds of unconstitutionality. In a landmark ruling on March 23, 2017, the Court held the majority of the law's text to be in line with constitutional principles, although the exception being the civil fines meant to sanction non-compliance.[81] The law entered into force on March 27, 2017.[82]

3.2.2 The Law

The Duty of Vigilance Law[83] requires development and implementation of vigilance plans by companies headquartered on French territory that employs at least 5,000 workers within the company, including direct and indirect subsidiaries, or companies headquartered on French territory or elsewhere that has at least 10,000 employees in its service and in its direct and indirect subsidiaries. Relevant corporations shall establish and implement vigilance plans covering the parent's own operations, and the operations of all subsidiaries and companies the parent controls (Article 1). The plan shall include reasonable measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety of persons and the environment, resulting directly or indirectly from the activities of the parent or subcontracting companies, from activities of companies it controls directly or indirectly, and from activities of subcontractors and suppliers with whom it maintains an 'established commercial relationship'[84], when such operations derive from this relationship (Article 1).[85]

The law requires elaboration, disclosure and effective implementation of vigilance plans, to which the key mechanism is human rights due diligence. Article 1 lists five vigilance measures that the plans shall include: 1) mapping that identifies, analyses and ranks risks; 2) procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers with

[80] Cossart, Chaplier & de Lomenie, 2017:317.
[81] Ibid., 318.
[82] Full compliance was only required the next fiscal year.
[83] Unofficial English translation available at: https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf
[84] 'Established commercial relationship' is defined as a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and a reasonable expectation that the relationship will last (Cossart, Chaplier & de Lomenie, 2017:320).
[85] Dauthier & Smith-Vidal (4 April 2017).

whom the company maintains an ‘established commercial relationship’, 3) appropriate actions to mitigate risks and prevent serious violations; 4) an alert mechanism that collects reports of existing or actual risks, and; 5) a monitoring scheme to follow up on the measures implemented and assess their efficiency. A Council of State decree can add to these measures if necessary, by specifying modalities for elaborating and implementing the plans. The plans shall further be drafted in association with stakeholders, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. The plans shall be published in corporations’ annual Financial Statements (Article 1). Articles 1 and 2 states that if a company does not comply with the law, a formal notice to comply can be issued, after which the company has three months to comply. For continued non-compliance, the Court can urge the company to comply with its duties, under financial compulsion if appropriate. Actions to establish liability, can additionally be filed by any person with a legitimate interest to do so.

3.3 Comparison of the Modern Slavery Act and the Duty of Vigilance Law

The rest of this chapter will discuss the first research question: *to what extent are the UK Modern Slavery Act and the French Duty of Vigilance Law adequate to regulate the field of business and human rights?* After comparing and examining the legislations against the criteria outlined in chapter 1.4, it will arrive at a conclusion of the legislations’ adequacy and answer which legislation seem most adequate to regulate business and human rights.

3.3.1 Subjects

The two legislations apply different criteria for determining which companies are within the scope of the laws. While the MSA applies a profit-based criterion, the French law set the criteria according to number of employees. The MSA has potential to cover many companies as the Act does not require relevant corporations to be registered or headquartered in the UK, only that parts of operations take place in parts of the UK. The Vigilance Law, on the other hand, only applies to companies established in France. However, the French law covers all industries, while the MSA only applies to goods- and service providing organisations.

It is estimated that the French law affects 100-300 companies, while the MSA applies to about 12,000 companies.[86] Hence, the criteria determining the thresholds for application, means that the Duty of Vigilance Law covers significantly fewer companies than the MSA. Except for the limitation to certain sectors, the criteria applied by the MSA thus seem most adequate in this matter, as it may have greater impact given the large number of companies it imposes obligations upon.

A hurdle to effectiveness for both laws, is that neither France nor the UK provides an official list of companies subjects to the legislations. As such, the numbers regarding how many companies are subjects, are only estimates. The lack of such official lists may have contributed some to weak compliance with the laws, as both laws rely on external actors, *e.g.* investors, civil society and consumers, to act as compliance enforcers. Lack of official lists of companies subjects to the laws, complicates the task for such actors to track compliance and act as compliance enablers as there is no clear overview of which companies are within the scope of the laws.[87] The result may be that, with the exception of big MNCs that are obvious subjects, smaller and medium-sized companies that fulfil the criteria gets away with noncompliance as they are generally less prone to external scrutiny.

3.3.2 Transparency

Both legislations require that the statements/plans shall be made public. While the MSA requires publication on companies' websites, or upon request within 30 days for companies that do not have websites, the Vigilance Law requires companies to include their plans in their Financial Statements. These requirements for transparency should enable stakeholders and other civil society actors to evaluate whether companies reporting under the MSA has correctly identified risks of modern slavery in their operations, and whether French companies has correctly identified risks in their activities and whether measures are adequately and effectively implemented.[88]

[86] The French numbers varies from 100 to 300 companies (Barbière (25 February 2019); Hjort, 2019:11). The British numbers varies from 9,000 to 18,000 companies, in which 12,000 is a frequent estimate (Business & Human Rights Resource Centre, 2018:22; Hjort, 2019:11). Unofficial, non-exhaustive lists of companies and statements/vigilance plans are available at: https://www.modernslaveryregistry.org/ (MSA) and https://vigilance-plan.org/ (Vigilance Law).
[87] Nolan, 2018: 69-70.
[88] Cossart & Chatelain (27 June 2019).

With the reliance of both laws on external compliance enforcers, the MSA-option for publication on company websites seem the better option as this better enables such external actors to access and evaluate statements. Publication on companies' own websites also allows for more frequent updates of statements by companies as operating contexts and risks change.

3.3.3 Content and measures

A review on the MSA conducted by the Business and Human Rights Resource Centre[89] found that among FTSE 100 companies[90], only a small amount of companies indicated an understanding of their modern slavery risks and a commitment to addressing them and preventing the risks from occurring, with statements reflecting better action and providing detailed disclosure.[91] The review further found that even the best-complying companies were selective about what they disclosed in their statements, by providing individual examples with positive results rather than detailing widespread, embedded risks.[92] Overall, too many companies failed to even acknowledge that they had any risks in their operations, thus effectively limiting their ability to eliminate risks and prevent abuse. Even among those companies that identified risks to modern slavery in their operations, only a few disclosed what those risks were.[93] In general, companies published the bare minimum in order to avoid legal or reputational risks, and applying a highly selective approach in order to minimise any "negative"-impressions.[94] A 2017 review by the UK Joint Committee on Human Rights[95] recommended mandating human rights due diligence to increase compliance, after finding that about 35 per cent of statements submitted did not discuss risk assessment processes and about two thirds did not identify priority risks. Most MSA-statements were simply disclosing general information about existing policies.[96]

[89] "FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action" (2018).
[90] FTSE 100 is a share index of the 100 companies with the highest market capitalisation of those listed on the London Stock Exchange.
[91] Business & Human Rights Resource Centre, 2018:3, 25.
[92] Ibid.
[93] Ibid.
[94] Ibid., 23.
[95] "Human Rights and Business 2017: Promoting responsibility and ensuring accountability" (2017).
[96] Ibid., 37-39, 59; Nolan, 2018:70-71.

As of 16th November 2020, only about 30 per cent of all companies reporting under the MSA in the Modern Slavery Registry[97] met all the minimum requirements[98] set out in the act. The poor reporting on the areas suggested in Section 54(5) may well be attributed to its voluntary nature, as it lists what companies *may*[99] include in their statements. Hence, companies are under no obligation to report on any modern slavery issues that they do not want to disclose, or which might have reputational risks. The lack of any proscribed form of content or length allows for the lack of consistency and substantive disclosure in the statements submitted under the Act.[100] Lack of specific reporting-criteria allows businesses to apply a highly selective approach to the law. Furthermore, the MSA even allows businesses to simply state that they have *done nothing* to address modern slavery in their operations, which some companies have chosen to do.[101] Hence, as the law is, companies can easily comply with the Act without actually doing anything to ensure that modern slavery does not occur in their operations or supply chains. Without specific criteria regarding these issues, by allowing companies to apply a "pick and choose"-approach, the law's ability to bring positive change is questionable. It is also questionable the extent of change a law can bring that does not require companies to act on their modern slavery findings nor expressly requires due diligence in company practices.[102]

An important feature of the Vigilance Law is therefore the mandated human rights and environment due diligence processes it requires. The law requires, of businesses within its scope, elaboration, disclosure and effective implementation of vigilance plans, with measures including mapping to identify, analyse and rank risks; procedures to regularly assess the situation of certain subsidiaries, subcontractors or suppliers; actions to mitigate the risks and prevent serious violations; an alert mechanism, and; a monitoring scheme to follow up on the plan's implementation and efficiency of implemented measures. These are not merely suggestions of what businesses *may* include in their vigilance plans, rather, it is a list of what

[97] https://www.modernslaveryregistry.org/ is a non-exhaustive registry of modern slavery statements, established by the Business & Human Rights Resource Centre in the absence of any central registry. (Numbers accessed 18th November 2020).
[98] The minimum requirements: statements are published on the company's website; statements are signed by a director or equivalent, and; explicit approval by the board is included in the statements.
[99] The statutory guidance was revised in March 2018 to clarify that companies are *expected* to cover the six areas in Section 54(5) (UK Home Office, 2019:10). However, it is still not *mandatory* for companies to cover them.
[100] Nolan, 2018:74.
[101] Mantouvalou, 2018:1040.
[102] Nolan, 2018:69.

businesses *shall* include in their plans. The law thus specifies measures that must be adequately and effectively implemented, ensuring that businesses cannot get away paying "lip service" or treat the law as a "tick-box" exercise.[103] By outlining specific measures that businesses shall include in their plans, companies cannot comply with the law by applying a selective approach where they "pick and choose" what to include and exclude in order to "look good" in the eyes of investors, consumers and civil society. Thus, by setting a standard of conduct and require certain measures, to which lack of implementation may result in liability, the Vigilance Law offers real potential to regulating business and human rights.

3.3.4 Coverage of supply chains

The MSA do not require relevant corporations to be registered or headquartered in the UK, rather, the requirement is that some operations take place in parts of the UK. While this first point gives the Act a wide scope, the second limits it and restricts the Act's application. The requirement of carrying out business, or parts of business, in any part of the UK, without further specifications, essentially only requires business to report on their UK activities.[104] Without expressly imposing an obligation to cover operations abroad, companies are ultimately not required to cover supply chains in their overseas groups in their statements. Hence, companies that operates in the UK but do not wish to report on the working conditions in non-UK-subsidiaries are provided the 'perfect cover' for questionable practices taking place in supply chains abroad.[105]

A report by Ergon Associates[106] found that most companies did in fact cover supply chains in their statements. However, very few statements covered contractor relationships, which is where much of the modern slavery risks are located. Furthermore, some companies stated that they were only reporting on their UK operations, thus excluding overseas franchises and operations completely.[107] As the law is, without expressly requiring supply chain coverage outside the UK, and specific criteria regarding such, companies can in their statements exclude many high risk suppliers with severe risks of modern slavery, and still comply with the Act.

[103] Cossart, Chaplier & Lomenie, 2017:321.
[104] Haynes, 2016:54.
[105] Ibid.
[106] "Modern Slavery Statements: One year on" (2017).
[107] Ibid., 3.

The Duty of Vigilance Law, however, requires that due diligence also cover subsidiaries, subcontractors and suppliers with whom the company maintains an *'*established commercial relationship'. The law thus expressly clarifies that due diligence duties extends beyond the parent's own operations, as operations of companies the parent controls also should be covered. The duty of care thus covers risks and serious harm that may derive from supply chain activities, and subsidiaries that do not on their own fulfil the criteria for developing a vigilance plan, have a duty to implement the vigilance plan of the parent company. As such, the duty of care in the French Law, extending beyond a parent's own activities, has potential for far-reaching consequences. It offers potential to cut across the separate legal personalities of parent, subsidiary and supplier companies, by imposing a positive legal duty on MNCs to control and influence the activities of separate legal persons.[108]

It is undoubtedly a strength of the Vigilance Law that it covers supply chains. Nevertheless, the inclusion of 'established commercial relationships' and its corresponding definition, *i.e.* stable and regular relationships, with a certain volume of business and a reasonable expectation that it will last, [109] may result in parent companies want to limit, to a certain extent, communication with subsidiaries in order to ensure their "legal separateness" and avoid the possibility of corporate veil piercing.[110] This issue will be further discussed in chapter four.

3.3.5 Context and rights

One of the main distinctions between the two legislations, relates to which human rights they cover. The MSA is rights specific as it only applies to modern slavery offenses. This is a rather restrictive scope, contrary to numerous international and national efforts to regulate business conduct that infringes upon a wide range of human rights. The business and human rights agenda often involves the full range of internationally recognised human rights, as it is widely acknowledged that business conduct can, and often do, interfere with all human rights protected in international treaties. Thus, the restrictive scope of the MSA do not address or

[108] Dowling, 2020:229.
[109] Cossart, Chaplier & de Lomenie, 2017:320.
[110] Fasterling, 2020:29-30.

attempt to prevent abuse by corporations relating to other rights than modern slavery, *e.g.* does the MSA not address business impact on the environment or upon local communities. Although modern slavery rightly should be addressed and eradicated, the narrow focus risks creating an impression that this is the only matter where business conduct should be regulated, and for businesses subjects to the law, that it is only modern slavery-offenses that they shall seek to avoid infringement upon.[111]

The French Duty of Vigilance Law applies a much wider scope. Although the law itself does not define 'human rights and fundamental freedoms', the preparatory work makes clear that it should be interpreted in line with the UNGP and some additional instruments.[112] Hence, the law should be interpreted to include the rights covered in the *Universal Declaration of Human Rights*[113], the *International Covenant on Civil and Political Rights*[114], the *International Covenant on Economic, Social and Cultural Rights*[115], and the core ILO Conventions[116].[117] Additionally, the rights included in the ECHR, the French Constitution, the French Human Rights Declaration, and the 2004 Earth Charter are also covered.[118] The French law thus covers a wide range of rights and does not limit itself to one particular right or a particular group of rights.

The MSA's narrow rights-scope is coupled with the rather limited geographic reach addressed above, where corporations operating in the UK do not expressly have an obligation to report on overseas groups. The result is that key elements of human rights due diligence is missing from the MSA as compliance with the Act does not require identifying or addressing any other human rights impacts besides those occurring in the relevant context, sector or geographic region.[119] The French vigilance law does not apply such a narrow scope, but instead applies a broad-reaching span in relation to rights, sectors and geography. The French law may therefore overcome frequent due diligence limitations, which are common in existing instruments and legislations. For companies subjects to the French law, the broad-reaching

[111] Mantouvalou, 2018:1040.
[112] Etikkinformasjonsutvalget, 2017:5.
[113] Adopted 10 December 1948, A/RES/217(III).
[114] Opened for signature 16 December 1966 (entered into force 23 March 1976).
[115] Opened for signature 16 December 1966 (entered into force 3 January 1976).
[116] ILO core conventions: No. 87 and 98 (Freedom of Association), No. 29 and 105 (Forced Labour), No. 100 and 111 (Discrimination), and No. 138 and 182 (Child Labour).
[117] UN OHCHR, 2011:13-14, *See* commentary to Principle 12.
[118] Hjort, 2019:9; Etikkinformasjonsutvalget, 2017:5.
[119] McCorquodale, et al., 2016:202.

scope additionally applies to the activities of companies under its control and other relevant third parties,[120] to observe the broad range of rights and freedoms in the above-mentioned instruments.

3.3.6 Sanctioning options

The sanctioning options under the MSA against non-complying businesses are few. The Secretary of State may seek an injunction through the High Court by requiring businesses' compliance in producing or publishing a statement. There is a possibility of fines, however, the provision for such and the size of fines lack jurisprudence.[121] The Government made clear that, although there is an option for injunction, consumers, investors and non-governmental organisations should constitute the actors for monitoring compliance and applying pressure on businesses.[122] Thus, the enforcement-rationale of the MSA is that forced disclosure will compel businesses to undertake human rights-focused examination of supply chain practices,[123] where the main incentive for compliance is scrutiny by civil society.

The option to establish corporate criminal liability for modern slavery offenses committed overseas or in supply chains, is very limited. The MSA did not include any provisions to enable access to remedies for victims of modern slavery by business.[124] In UK modern slavery law, corporate criminal liability can only be established if the offense is committed by an individual who is the "directing mind and will" of the corporation and who, when acting in the company's business, is considered to be the "embodiment of the company".[125] This essentially means that corporate criminal liability requires that a controlling officer[126] must have committed the offense, when acting within the scope of his or her authority. It is usually difficult to identify the "controlling officer" and it is usually not this person who in practice carries out the offense him- or herself. Thus, under the MSA, the possibilities for holding corporations, especially big business, criminally liable for modern slavery offences are very

[120] Ibid., 202.
[121] Etikkinformasjonsutvalget, 2019:146.
[122] UK Home Office, 2019:7; UK Home Office, 2017:6.
[123] Nolan, 2018:69.
[124] Mantouvalou, 2018:1041.
[125] Schaap, 2020:204.
[126] Case law suggests that "controlling officer" can be senior managers and, in certain circumstances, individuals who have been explicitly authorised by the board to act on the company's behalf (Schaap, 2020:204).

limited.[127] As the "controlling officer" is much more likely to profit from the crimes criminalised by the MSA, this hurdle to liability could have been avoided, *e.g.* by making profiting from modern slavery an offense as well, like the Dutch modern slavery legislation did.[128] However, as the Act is, corporations or "controlling officers" are under no obligation not to profit from modern slavery.

Hence, contrary to the other sections of the MSA, where *inter alia*, the maximum sentence for modern slavery-offenses was increased to life imprisonment,[129] part 6 relating to business conduct is in practice a soft law provision. The MSA as such did not attempt to pierce the corporate veil with hard, legal rules and sanctions for non-complying businesses.[130] The MSA opts for self-regulation as opposed to hard law rules for transparency in supply chains, which means that the regulatory response of the MSA for grave moral wrongs involves harsh penalties for individual perpetrators, but only soft law measures for business.[131] Hence, in practice, the harshest sanctioning option of the MSA regarding business is loss of reputation, to which the 2017 review by the UK Joint Committee on Human Rights recommended introducing civil (and criminal) penalties for human rights violations that had occurred.[132]

The French Vigilance Law, on the other hand, is a formal recognition of the often-insufficient nature of soft law principles and voluntary initiatives to address the harmful impacts MNCs can have for human rights and the environment. The law translates into legal terms the economic reality of the decisive influence parent companies have over their subsidiaries and supply chains regarding prevention and remediation of human rights and environmental harm.[133] For non-complying companies under the Duty of Vigilance Law, there are two sanctioning options, relating to prevent harm and to compensate for harm caused.

The first sanctioning option aims to prevent harm. Anyone with a legal interest may request the Court to issue an injunction to non-complying businesses, to comply with the law within three months by preparing, implementing and make public a vigilance plan. Continued lack of compliance may lead to financial compulsion, if appropriate, including the imposition of daily

[127] Schaap, 2020:204.
[128] Ibid., 206.
[129] Haynes, 2016:34.
[130] Mantouvalou, 18:1038.
[131] Ibid., 1018.
[132] House of Lords, House of Commons Joint Committee on Human Rights, 2017:59; Nolan, 2018:75.
[133] Cossart & Chatelain (27 June 2019).

fines.[134] Although the possibility of fines is still present, the draft version of the law proposed much higher fines for noncompliance. In the draft bill, a judge could have imposed a fine up to EUR 10 million if a company did not develop, publish and effectively implement a vigilance plan, in order to ensure effectiveness of the duty of care. If damage occurred that could have been avoided if a vigilance plan had been effectively implemented, the fine could have been increased up to EUR 30 million.[135] However, these harsher fines were removed by the Constitutional Court on grounds of unconstitutionality due to vagueness of the language in the bill. Under the final law, a company cannot be fined significantly if it does not establish a vigilance plan or does not comply with the vigilance plan it has developed.[136] The law lost much of its deterrent value with the removal of these fines, which is regrettable in the sense that such could have been strong incentives for corporations to comply with the duty of care. However, although the fines still present might be limited, breaching the duty of care may still entail corporate liability.

The second sanctioning option stems from general principles in French tort law, which can entail compensation for harm caused.[137] The Vigilance Law introduced judicial mechanisms to enforce the law and provide remedies to victims. Hence, interested or affected parties have access to a legal tool to improve prevention of violations and request accountability for human rights violations and environmental harm caused by French multinationals and their subsidiaries, subcontractors and suppliers.[138] Anyone with a legal interest regarding compensation, *i.e.* victims or concerned parties, can through civil action seek redress for lack of compliance that have resulted in damages.[139] Companies can thus be held liable for damages that could have been avoided if the company had complied with the Vigilance Law.

Although the liability-option is a strength of the French law, it has its limitations. The final law failed to reverse the burden of proof from victims to companies. Therefore, it is incumbent on the victims or plaintiffs to discharge the burden of proof. This practice risks bringing an unfair burden of proof upon victims who already face an imbalance of power as they usually suffer an informational deficit compared to the MNC.[140] This may in practice

[134] Etikkinformasjonsutvalget, 2019:148.
[135] Triponel & Sherman (17 May 2017); Dauthier & Smith-Vidal (4 April 2017).
[136] Ibid.
[137] Etikkinformasjonsutvalget, 2019:148.
[138] Cossart & Chatelain (27 June 2019).
[139] Ibid.; Etikkinformasjonsutvalget, 2019:148.
[140] Slater (24 March 2017).

relieve the company of liability. The law requires establishing of a causal relationship for the harm caused and lack of compliance.[141] In practice, it is likely very difficult for plaintiffs to prove that there is such a causal link between the absence of a proper due diligence plan, and the loss suffered by the victims. By contrast, had the law succeeded in reversing the burden of proof, it would have been the corporations themselves that would have had to prove compliance with the due diligence requirements to avoid corporate liability for harm caused. Therefore, reversal of the burden of proof would likely have made the threat of liability much more serious for companies.[142] The same problem is evident regarding liability for others. The law failed to introduce a specific liability for others, which in practice means that it remains for the plaintiffs to prove that the parent failed to comply with its due diligence duties regarding the operations of other companies, *i.e.* subcontractors, suppliers and other business relations, whose activities caused the harm.[143] Another point is that according to the law, corporations do not have to show proof of improvements, only proof of effort. This means that even if an incident occurs, companies may still be found not liable for damages if it can verify that it had in fact implemented a vigilance plan.[144] As such, the existence of a plan may be more important than effective implementation and assessment of vigilance measures.

3.3.7 Enforcement

The MSA did not establish any official enforcement mechanisms for its business-section. Contrary to the other parts of the MSA, part 6 relating to business is a soft law provision, meaning that the legislators opted for self-regulation as opposed to hard law rules. The assumption of the law appears to be that the transparency requirements will provide a greater visibility of risks stemming from business activities for investors and consumers, and that these requirements of disclosure will be compelling enough for business to address modern slavery and undertake an examination of supply chain practices.[145]

Relying on the voices of external stakeholders to hold companies accountable through assessment and critique of corporate practices, is contrary to the traditional State regulators

[141] Etikkinformasjonsutvalget, 2019:148.
[142] Ryngaert, et al., 2020:287.
[143] Bueno, 2020:251-252.
[144] Slater (24 March 2017).
[145] Nolan, 2018:69.

role. Hence, the Act shifts the responsibility of enforcement upon non-state actors.[146] It is questionable whether self-regulation alone is the best way to deal with business conduct, and such voluntariness has been highlighted as a main issue for effectiveness and compliance with other initiatives attempting to regulate business and human rights. Academic literature has also questioned the role of reflexive law in relation to labour rights, especially in relation to workers' human rights, to which self-regulation has particularly been criticised for protecting business from reputational damage and liability, rather than protecting the human rights of workers and other relevant third parties.[147]

The low compliance by business with the MSA may be attributed to the lack of State enforcement mechanisms, as well as lack of legal sanctions and penalties against non-complying companies. The result of shifting the burden of enforcement upon external actors like investors, consumers and civil society, is that many companies that are subjects to the law, are not properly monitored. The 2018 Business and Human Rights Resource Centre report found that large multinationals generally provided more informative statements, contrary to many small and medium-sized companies that also were subjects of the law. This was because large multinationals generally were more exposed to scrutiny, while small and medium-sized companies often fell under the radar of the wider public.[148]

Contrary to the MSA, by introducing the potential for liability, the French Law recognises that disclosure alone is likely insufficient to drive improved respect for human rights. However, the law did not establish any regulatory agency to enforce the due diligence obligations of the law. As such, the law to a great extent, like the MSA, relies on external actors to enforce the law. Nonetheless, the Vigilance Law makes clear that anyone with a legal interest may ask the court to issue an injunction to companies for noncompliance with the law, and in case of harm, companies may be held liable. Hence, although the law to a large extent relies on external actors for enforcement, these external actors enjoy greater "powers" than under the MSA, as they in addition to the usual tools available, such as boycotting and "naming and shaming", have the option of bringing legal cases against companies.

[146] Ibid.
[147] Mantouvalou, 2018:1040.
[148] Business & Human Rights Resource Centre, 2018:22; Mantouvalou, 2018:1042.

A strength of the MSA, on the other hand, is the Independent Anti-Slavery Commissioner, which is directly accountable to the Secretary of State. The Commissioner cannot exercise any function in relation to individual cases of modern slavery, and thus cannot act as an enforcement agency. However, if properly executing its tasks, the Commissioner may serve several important functions in encouraging good practices related to prevention, detection and investigation of slavery and human trafficking offenses, as well as in relation to identification and provision of assistance and support to victims.[149] The Commissioner can further provide independent scrutiny of government policies and laws, as well as of the activities of statutory and non-statutory agencies. The Commissioner may also contribute to enhanced knowledge and understanding of modern slavery-related issues, provide a voice to affected parties and act as a bridge between society and government, and contribute to a more focused, co-ordinated and effective response to modern slavery.[150]

3.3.8 Relation to other relevant instruments

The French Duty of Vigilance Law resonates strongly with the UNGP, which may have several benefits. The UNGP is politically agreed upon internationally by States, describing obligations and measures expected of States *and* business. It is a familiar document to many companies around the world. The French government itself has remarked that numerous French companies are already seeking to implement the UNGP, and that the French law is aligned with these efforts.[151] The French Law therefore blends together the concept of human rights due diligence in the UNGP with French tort law, seeking to implement in legal terms the due diligence principles recommended by the UNGP to enable companies to prevent and address risks as they conduct their business operations.[152]

The Vigilance Law requires development of a due diligence plan in collaboration with stakeholders, containing all components of due diligence set forth in the UNGP. It refers the need to conduct assessment that identifies, analyses and prioritises risks, to which prioritisation should be based on the severity of the potential impact. It further stresses the need to update the assessment process continuously, recognising that risks changes in line

[149] Haynes, 2016:46.
[150] Ibid.
[151] Légifrance (28 March 2017); Triponel & Sherman (17 May 2017).
[152] Ibid.

with changing business relationships and operating contexts. [153] The Vigilance Law also references the need for a monitoring system that assesses the effectiveness of measures implemented. This strong resonance with, and intentional reference of the UNGP, means that the UNGP can be used as framework for interpretation and implementation of the French law, particularly when the latter is ambiguous or unclear. The UNGP Framework can provide guidance for companies implementing due diligence processes, and how to identify and prioritise risks.[154] It further elaborates on conduct expected of businesses to prevent and mitigate risks, accounting for how action depends on how the company is or could be involved in the impact. The UNGP can thus assist companies in developing highly flexible and effective solutions throughout their operations to minimise their risks towards human rights and the environment.[155] Referencing the UNGP can also highlight shortcomings and potential improvements of the French Law, which will be discussed further in chapter four.

The MSA substantively implemented UK modern slavery obligations under international instruments that the UK is party to,[156] including the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons*[157], the Council of Europe *Convention on Action against Trafficking in Human Beings*[158], the EU Anti-Trafficking Directive[159], and ECHR Article 4. However, common for these instruments is that States are the subjects. They *require States* to impose legislative and other measures to prevent slavery offenses and describes how States should implement measures to prevent business from committing the proscribed offenses. As such, these instruments do not impose or describe any obligations for business. Although the instruments can be referenced *e.g.* in terms of defining modern slavery offenses, they are not particularly helpful in providing guidance to business on how to comply with the obligations of the MSA. Thus, subjects of the MSA do not have additional instruments to reference when the MSA is ambiguous or when they need further guidance or clarifications of the proscribed obligations, while subjects to the Duty of Vigilance Law can look to the UNGP for clarifications of obligations and other uncertainties, as the UNGP thoroughly describes the steps and measures expected of business under the Vigilance Law. Hence, although the MSA

[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Haynes, 2016:34.
[157] Opened for signature 12 December 2002 (entered into force 25 December 2003).
[158] Opened for signature 16 May 2005 (entered into force 1 February 2008).
[159] Directive 2011/26/EU, adopted 5 April 2011.

does harmonise UK modern slavery legislation with international instruments and substantively implements UK's modern slavery obligations, these do not provide particular help for businesses.

3.3.9 Effectiveness

Neither the UK nor France provide an official list of companies affected by the respective laws, making it a difficult task for enforcement actors to evaluate business efforts. Considering the coercive force of civil society, and the lack of any official government monitoring of compliance, it is a significant hurdle to effectiveness of both laws. For external actors to evaluate all companies subjects to the laws seem rather impossible without any list of affected companies. Such limits monitoring of implementation and compliance, and the risk of sanctions towards noncomplying companies. It may also, on the other hand, result in unjustified scrutiny of companies that are not affected by the legislations.[160]

The MSA has brought some positive changes. Certain businesses have responded positively and showed engagement with modern slavery. The Act has brough modern slavery on the business agenda, *inter alia* by generating internal discussions in companies that might not otherwise have considered the issue.[161] However, various studies on the statements submitted under the MSA indicates mixed results. The most comprehensive reports have generally been those developed by companies already engaged with human rights and modern slavery prior to adoption of the MSA, which were usually companies facing scrutiny by media and civil society. However, many companies have treated the obligations as simple "tick-box" exercises.[162] Critique of the Act have highlighted, *e.g.*, the failure of companies to provide insight on how they attempt to tackle modern slavery in supply chains; the lack of a central repository for submitted reports; lack of an official list of companies affected by the Act, and; lack of enforcement and sanctioning mechanisms.[163]

Business and Human Rights Resource Centre's 2018 report concluded that the MSA failed to deliver transformational change, as compliance with the Act remained low and patchy.[164]

[160] Cossart & Chatelain (27 June 2019); Sherpa, 2019:27.
[161] Mantouvalou, 2018:1041.
[162] Etikkinformasjonsutvalget, 2019:146.
[163] Mantouvalou, 2018:1043; Nolan, 2018:69-70, 73.
[164] "FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action" (2018):3, 22.

Ergon Associates 2017-review found that statements were often identical, suggesting that companies did not substantially engage with the issues.[165] In 2018, they found that only about 54 per cent of companies produced a follow-up statement.[166] Of those follow-up statements, about 42 per cent made only minimal changes or no changes at all, indicating lack of a continuous improvement approach by companies. Although statements tended to get longer, they generally did not become more informative, and detailed information on risk assessments were rare.[167] The review concluded that there was significant scope for improvement, especially for high-risk areas. As contributing factors to poor reporting, it highlighted a lack of clarity in the Act regarding business' obligations, and especially the non-binding nature of the Act. It concluded that the essentially voluntary approach of Section 54(5) that recommends rather than mandates content, the lack of official monitoring and enforcement mechanisms, few sanctioning options, and sole reliance on civil society to monitor compliance, was an insufficient approach. Furthermore, the risk of stale, repetitive or absent reporting was particular for smaller companies, *i.e.* those companies outside the eye of public.[168] On a more positive note, it highlighted that the MSA had an important awareness-raising role internally in companies, and the requirement for board sign-off contributed to internal policy-reviews and risk assessments as directors increasingly requested reassurance and information on slavery in their operations. For many larger companies, the processes were embedded and extended to broader areas, now producing data on risks that were previously unconsidered or hidden.[169]

A 2019, Interior Ministry-initiated independent evaluation of the MSA, concluded that the impact of the Act was limited, and the current approach insufficient.[170] It found that business and civil society agreed that confusion surrounding the obligations and lack of enforcement and penalties were core reasons for poor quality of the statements.[171] The report provided several recommendations, including clarifying and providing a list of companies affected by the Act; mandating the six areas for reporting in Section 54(5) by replacing *may* with *shall* or *must*; better guidance of what is expected of companies; require companies to consider the

[165] "Modern slavery statements: one year on" (2017); Mantouvalou, 2018:1042.
[166] Ergon Associates, 2018:2.
[167] Ibid.
[168] Ibid., 2, 21.
[169] Ibid.
[170] UK Home Office, 2019:7-8.
[171] Ibid.

entirety of their supply chains; strengthen transparency by establishing a central government-run repository for statements; the Independent Anti-Slavery Commissioner should monitor compliance; increase sanctions and establish an enforcement body, and; expand the scope to include public sector.[172]

Regarding compliance with the French Law, did a 2019 analysis by a group of NGOs conclude that the results were poor. French MNCs had yet to respond well enough, and the government had taken little action to enforce compliance.[173] Major shortcomings were found in the plans published in 2018, where companies had applied the law with different levels of requirements and most plans focused on risks to the company and not to third parties or the environment. Most plans did not specify scope, particularly regarding suppliers and sub-contractors, and usually no details were provided on high-risk projects or how to avoid risks from occurring.[174] Others have critiqued companies for construing the law as a mere reporting exercise, as many plans in 2018 and 2019 were extremely brief, barely mentioning that the company had complied with the five measures required by the law, or by simply listing some pre-existing policies.[175] The first plans were generally short, not enabling an understanding of which risks had been identified, where they were located, and how companies had responded. Such lack of information does not allow for effective vigilance, as it hinders both company and stakeholders from knowing and alerting potential harmful impacts.[176]

Another analysis of 64 vigilance plans were more positive. Concluding that companies do follow up on the requirements regarding guidelines and strategies, the law has resulted in developments of new practices in addition to already existing approaches. Companies' actions were especially positive in relation to follow-up of suppliers and contractors, where most companies had conducted new assessments to identify high risk contractors, although, the focus was generally on workers' rights, and to a lesser extent on *e.g.* local communities.[177] The law has furthermore contributed to integrating societal responsibility work in companies. Overall, companies that already had advanced routines in place pre passing of the law had

[172] Ibid., 9-11, 17.
[173] Amnesty International (France) (21 February 2019); Barbière (25 February 2019).
[174] Ibid.
[175] Cossart & Chatelain (27 June 2019).
[176] Sherpa, 2019:10.
[177] B&L evolution & edh enterprises pour des droits de L'Homme, 2018:4,15; Etikkinformasjonsutvalget, 2019:149.

usually not made big changes, while for other companies it was a natural extension and strengthening of ongoing work.[178]

The legal enforcement mechanisms under the Vigilance Law were first triggered in June 2019.[179] Since then, several Court injunctions have been issued, and some additional legal cases has been filed.[180] However, given the recent triggering of the mechanism, jurisprudence is still very limited and not yet possible to assess the impact of.

3.4 Adequacy to regulate business and human rights

Where the MSA is rights-specific, covering only modern slavery-offenses, the Vigilance Law has a wide scope, covering a range of human rights as well as the environment. It further applies to all industries, contrary to the MSA's application only to goods and service providers. The narrow scope of the MSA risks creating an impression that abuse of other human rights and the environment is not necessary to address, which is contrary to numerous efforts to regulate business and human rights. The French Law mandates due diligence processes of relevant businesses, elaborating specific requirements and measures expected of companies, thus removing the option for companies to apply a "pick and choose"- approach. The MSA, however, allows companies to be selective in their reporting, which does not force companies to address risks in their operations. Additionally, the Act does not require any actions at all, as business can simply state that they have done nothing. The MSA provides a "perfect cover" for companies that do not want to report on risky tiers and questionable practices abroad, as the Act does not expressly impose any obligations to report on overseas supply chains. The Vigilance Law, however, requires due diligence processes to also cover supply chains, thus offering real potential to cut across separate legal personalities of parents and subsidiaries. Additionally, the French legislators chose to reference the UNGP, which can provide guidance and clarifications where the Vigilance Law may be unclear, an option that companies reporting under the MSA does not have.

The sanctioning options under the MSA are limited, and liability practically not an option. The Vigilance Law introduced judicial mechanisms where victims of MNC's harm may seek

[178] Ibid.
[179] Legal action against noncomplying companies was first possible in 2019.
[180] Brabant & Savourey (24 January 2020).

redress through civil action. Thus, where the MSA chose a soft law approach, relying exclusively on self-regulation and scrutiny by civil society, the French law recognises the often insufficiency of soft law by attempting to pierce the corporate veil with hard legal rules. Although these judicial mechanisms have its flaws, they nevertheless do provide an option for remedy and corporate liability, contrary to the MSA. Providing an option for liability may ensure real impact of the law, as numerous studies, as illustrated above, highlights lack of sanctioning options as a core reason for noncompliance and limited impact of other attempts to regulate business and human rights.

Although the MSA has some strengths, including its threshold for application and requirements for transparency, the Vigilance Law seems the most adequate legislation to regulate business and human rights given the overall examination. Hence, compared to the MSA, the Vigilance Law seems most equipped to overcome fundamental challenges in achieving corporate accountability, particularly by enabling sanctioning for noncompliance and the overall scope of the legislation. This is not to say that the Vigilance Law does not have its flaws, these, however, will be examined in the next chapter.

4. A POTENTIAL NORWEGIAN BUSINESS AND HUMAN RIGHTS LAW

There are many examples of human rights and environment abuse by Norwegian MNCs abroad. For instance, local communities neighbouring Norsk Hydro's aluminium plant in Barcarena, Brazil, complained for many years that the plant impacted their lives, especially the lives of indigenous people and children. The locals complained that it was destroying their environment and livelihoods by polluting rivers, water and air, killing animals, tainting local produce and producing toxic fish, causing numerous health issues and illnesses. In February 2018, record-setting rains and lack of due diligence at all levels resulted in flooding of the plant, which contaminated surrounding water with red mud, one of the most toxic waste components in aluminium production.[181] This, however, is not a typical case. Hydro themselves owned the facilities in Brazil and were thus fully responsible. More common is it that the connection between the parent company and the harm is more indirect, often occurring in the supply chain. Telenor experienced this in 2008 when a documentary revealed

[181] Watts (21 July 2018).

child labour, environmental offenses and serious breaches of elementary safety regulations occurring at suppliers of antenna towers to Grameenphone in Bangladesh, a company which Telenor owned 62 per cent of the shares. Telenor was mostly unaware of the harm, due to poor routines and systems regarding their supply chains. The company's own investigations further revealed that eleven deaths had occurred in relation to the subcontractor's operations during just one year.[182]

These cases are just two examples of human rights and environment harm relating to Norwegian MNCs, illustrating that Norwegian companies are just as much at risk of impacting a wide range of human rights and the environment, and the importance of regulating business and human rights.

4.1 Inadequacy of existing legislations and possible benefits of a business and human rights law

Current Norwegian legislation includes several laws that, in some manner, relate to business and human rights. For instance does the Penal Code prohibit a number of modern slavery-related offenses; the Working Environment Act prohibits child labour and discrimination; the Accounting Act obligates big business to clarify their actions in relation to their societal responsibilities, and; the Pollution Control Act obligates companies to investigate and consider risks of environmental damage.[183] However, only a few specifically mentions 'human rights' and they generally lack sanctioning options for human rights violations. The laws only cover some very specific rights, in specific contexts. In relation to business and human rights, the legislation is fragmented, complex and confusing, as each law mainly concern specific sectors or industries, and applies to different obligated parties. Hence, it is quite inaccessible for business in terms of gaining an overview of existing duties. Additionally, the legislations only apply within Norwegian borders, thus excluding supply chains and business activities abroad.[184]

A law on business and human rights may therefore have several benefits. A legal regulation can establish a statutory purpose that companies do have human rights responsibilities, clarify

[182] Telenor (5 September 2008); Telenor (2008); Gaarder (23 May 2008).
[183] Hjort, 2019:13-19.
[184] Ibid., 12.

these responsibilities and comprise them into one law.[185] A law can introduce obligations relating to subsidiaries and subcontractors abroad, thus extend the scope beyond Norwegian borders and limit risks of severe human rights violations relating to Norwegian companies' ventures abroad. Such may have significant impact as human rights risks are often most severe in developing countries with other standards.[186] The law can further introduce sanctions for noncompliance and increase civil society's ability to evaluate company efforts by requiring transparency. Overall, a law has the potential to strengthen human rights protection and prevent abuse, by forcing companies to address the risks they pose towards human rights and the environment. [187] A law can also contribute to level the playing field for human rights-conscious companies, as these companies currently risks losing the competition to companies that do not care for human rights and the environment. The effectiveness and ability to create positive change will, however, depend on the law's design.

4.2 A modern slavery act or a duty of vigilance law?

It is an ongoing debate which legislative model to choose for a potential Norwegian law on business and human rights. The government's political platform expresses a desire for a modern slavery act like the MSA.[188] The political landscape is otherwise divided between the British and the French legislative models, and likewise is civil society. In August 2018, several civil society organisations, including the Rafto Foundation, launched an initiative for a modern slavery law,[189] while Amnesty International (Norway) has launched a campaign for a law resembling the French Vigilance Law in referencing the UNGP and mandating due diligence.[190]

In November 2018, an opposition Member of Parliament proposed a modern slavery law[191] resembling the MSA. The proposal requested the government to promote a law on modern slavery that requires business and the State to report on risks and measures to avert and

[185] Ibid., 20-21.
[186] Ibid.
[187] Ibid.
[188] Regjeringen, 2019:38.
[189] The Rafto Foundation (24 August 2018).
[190] Amnesty International (Norway) (2019).
[191] Dokument 8:41 S (2018-2019) *Representantforslag om en lov mot moderne slaveri.*

uncover modern slavery in their operations and supply chains in Norway and globally.[192] [193] Additionally, in August 2018, the government appointed an expert committed to investigate the potential for a law on ethics information and a right to information on companies' human rights impacts.[194] In November 2019, the Committee published a report proposing a draft act on supply chain transparency, the duty to know, and obligations of due diligence and disclosure of findings.[195]

Against this background, this chapter will address the second research question: *which of the two models are most suitable for a Norwegian legal regulation of the business and human rights field?* Given the discussion in chapter three, which concluded that the Duty of Vigilance Law seem the most adequate model to regulate the field, it will particularly discuss this legislative model's suitability in a Norwegian context.

4.2.1 A wide scope

A broader due diligence law, like the French, that applies to all industries and is not limited to certain rights, could cover both modern slavery *and a lot more* on human rights and the environment. This is important, as a narrow focus on only one specific right or a specific group of rights may lead to ignorance of other human rights and the environment in business operations.[196] As illustrated above, Norwegian MNCs can, and often do, impact on a wide range of human rights and the environment. Therefore, to ensure best possible protection of human rights and the environment, applying a wide scope like the Duty of Vigilance Law and the UNGP should be considered, which the Ethics Information Committee's draft act Article 3 rightly suggested[197], and not a narrow scope like the MSA and the Norwegian Modern Slavery Act suggestion[198].

[192] Ibid., 3.
[193] As of November 2020, the suggestion is under consideration in the Parliament's Justice Committee.
[194] Etikkinformasjonsutvalget (2018).
[195] Etikkinformasjonsutvalget, 2019.
[196] Ibid., 30.
[197] Ibid., 44-45, 55.
[198] Dokument 8:41 S (2018-2019):3.

4.2.2 Mandatory due diligence, supply chains and liability

Considering the impacts Norwegian MNCs may have upon a wide range of human rights in a variety of contexts, mandatory due diligence can force companies to address and act to mitigate those risks. Mandatory due diligence, like the Duty of Vigilance Law, can require businesses to elaborate, disclose and effectively implement plans and measures to mitigate risks and remediate harm in their operations, including in supply chains. It can thus force businesses to address the risks their operations, either directly or indirectly, pose towards human rights and the environment. A coverage of supply chains is important, as this is usually where the most significant risks towards human rights and the environment lies. Supply chains are also one of the most difficult areas to effectively regulate. A law modelled after the French, could therefore force business to consider supply chains in their due diligence processes and thus cut across separate legal personalities.

A well-designed mandatory due diligence regime has potential to drive positive change and produce better outcomes for both people and companies, the latter in terms of levelling the playing field and provide greater leverage with business partners in seeking to address human rights risks.[199] However, for mandatory due diligence to be effective, there should be risks of liability for noncompliance, which both the Vigilance Law and the UNGP recognised. The French law requires companies to adequately and effectively implement vigilance plans, in which they may be liable for damages that a vigilance plan could have mitigated. Given potential consequences of noncompliance, mandatory due diligence and liability could therefore enhance compliance. A law modelling the French and the UNGP should likewise recognise the often insufficiency of self-regulation and soft law, and introduce sanctioning options to enforce compliance, *i.e.* opt for hard law to regulate the field.

4.2.3 Referencing the UNGP

Referencing existing expectations, instruments and standards in the potential legal regulation can provide predictability for business.[200] The Vigilance Law references the UNGP, and if a Norwegian law also chose such, it could entail several benefits. Great flexibility and a wide scope of the French law may be a strength, but it may also complicate interpretation of the

[199] Shift, 2020:2.
[200] Etikkinformasjonsutvalget, 2019:30.

law. A benefit is therefore its referencing of the UNGP, which thoroughly describes the obligations due diligence entails for business. The UNGP is developed for *both* States and business and is well-known and acknowledged by many businesses around the world, including many Norwegian companies. Such is contrary to many other instruments, which primarily are for States to observe. Applying the UNGP as the key framework for interpretation and implementation of the potential legislation, could thus assist companies in developing highly flexible and effective solutions to minimise their risks.[201] The UNGP covers a wide range of internationally recognised human rights, and describes steps and measures business may take to ensure respect for these.[202] The standards of the UNGP are furthermore well-known to civil society, who often reference these when reviewing companies' practices.[203]

An argument applied in favour of a Norwegian modern slavery act is harmonisation of legislations across borders to ease the burden upon companies affected by different national legislations, illustrated by the approximately 12 Norwegian companies that are already reporting under the MSA.[204] A modern slavery law could harmonise the new legislation with States like the UK, Australia and California. However, a due diligence law referencing the UNGP may be more suitable in the Norwegian context. It could harmonise business and human rights legislation with individual States, and potentially with the EU if it adopts a due diligence law. Given the large volume of trade between Norway and the EU, it is reasonable to expect that the EU legislation will likely affect many Norwegian companies. A legislation modelled after the French and the UNGP would therefore likely be the option entailing the least amount of extra work for many companies and would to a larger extent harmonise the potential legislation with other relevant legislations. Furthermore, all Norwegian companies are already expected to act responsibly, know of and comply with the UNGP, irrespective of whether they are private or public companies, and irrespective of where operations take place.[205] This latter point should be a strong argument in favour of a due diligence model, which seems the most predictable and clear option to Norwegian businesses. Hence, a due diligence law would also harmonise the potential legislation with existing expectations.

[201] Triponel & Sherman (17 May 2017).
[202] UNGP Principles 11-24.
[203] B&L evolution & edh enterprises pour les droits de L'Homme, 2018:5.
[204] Dokument 8:41 S (2018-2019):3; Norad, 2019:18.
[205] Utenriksdepartementet, 2015:9.

4.3 Specific challenges to consider

Given the strengths of the Vigilance Law highlighted in this chapter and the previous, the Vigilance Law seem the most suitable option in a Norwegian context. It seems more adequate than the MSA to overcome challenges in achieving corporate accountability and it brings potential of having a real impact in regulating business and human rights. Additionally, as this chapter highlighted, it might be the most suitable option in terms of what is already expected of and familiar to Norwegian companies and in the Norwegian context. However, the Vigilance Law also has its flaws, which should be addressed in order to ensure best quality of the potential Norwegian law.

4.3.1 Supply chains

The term 'established commercial relationship' and its corresponding definition in the French Law, means that the law covers relationships that are stable, regular and ongoing, with a certain volume of business. Such may limit the scope and impact of the law, as parent companies may want to limit their extent and communication with certain subsidiaries to ensure that those relationships cannot be considered 'established commercial relationships'. A narrow approach where the scope is limited to a small circle of business relationships, likely leaves out many risky tiers deep in the supply chains.[206] This does not assist companies in capturing areas where human rights risks generally are more severe, as risks are often higher for suppliers that provide small amounts of business to the companies or do not have an 'established' relationship with the company,[207] *i.e.* those tiers that parents most easily can limit their communication with. This requirement, that vigilance plans are limited to cover only suppliers and subcontractors with whom the company has a lasting and established commercial relationship to, risks exclude high-risk tiers. This is contrary to the UNGP, which propose a complete assessment that covers all risks.[208] [209]

The UNGP's due diligence requirements would have necessitated enhanced communication within corporate groups and business partners, instead of requiring 'established

[206] Shift, 2020:4.
[207] Triponel & Sherman (17 May 2017).
[208] Etikkinformasjonsutvalget, 2019:148.
[209] The Ethics Information Committee's draft act suggested that supply chain coverage should include all goods- and service providing companies that deliver products or input factors to a business (Article 3) (Etikkinformasjonsutvalget, 2019:55), thus applying a wider scope than the French law.

relationships.'[210] The UNGP requires knowledge of human rights issues and rejects the notion that more influence equals more responsibility. Rather, what matters is whether an impact occurs in a company's supply chain and how the company is connected to that impact. According to the UNGP, human rights due diligence is best structured when it captures impacts that are directly linked to the company's operations, products or services, regardless of the type of business relationship and of where the risks are located in the supply chain.[211] Company action will differ depending on its involvement with risks and harm, but due diligence processes should include prioritisation of risks, and companies should prioritise building leverage to prevent severe human rights impacts that are buried deep in the supply chain, regardless of the type of relationship. The UNGP approach thus intends to focus where harm can be the greatest.[212]

4.3.2 Liability and enforcement

The issue of accountability for meeting a new legal standard is a major source of concern and confusion in debates regarding business and human rights.[213] Liability is not a new concept, but it is less familiar in the context of business' failure to conduct human rights and environment due diligence beyond a parent company's own activities.[214] The issue of liability is illustrated by many initiatives relating to business and human rights, including the MSA, where lack of liability is often highlighted as a major hurdle to effectiveness in achieving corporate accountability. Given these experiences, liability should be considered to ensure an effective law on business and human rights. Mandatory due diligence needs to be accompanied with consequences strong enough to incentivise compliance of a high enough standard by business.[215] How liability should best be crafted in any new mandatory due diligence legislation therefore requires a robust debate.[216]

The MSA did not introduce judicial mechanisms or civil liability, to which a review by the UK Home Office suggested increased enforcement and sanctioning as lack of sanctioning

[210] Fasterling, 2020:30.
[211] Triponel & Sherman (17 May 2017).
[212] Ibid.
[213] Shift, 2020:2
[214] Ibid., 3.
[215] Ibid., 2.
[216] Ibid., 4

options were among the reasons for low compliance and impact of the Act.[217] Despite this, the MP suggestion for a Norwegian Modern Slavery Act questions whether sanctions are appropriate at all, at least for the first three years, suggesting that reputational risks for noncompliance is enough to ensure compliance.[218] An common issue, which is illustrated by this Norwegian Modern Slavery Act proposal[219], is that discussions of liability is often approached solely from the perspective of the risks it would pose to business, despite the importance of considering the reality faced by affected stakeholders. For those experiencing human rights harms, access to remedy remains a widespread challenge, as they often face a range of legal and practical barriers.[220] Civil liability for failures of due diligence thus constitute a much-needed avenue to seek remedy for harm.

The UNGP foresaw the relevance of liability in ensuring business' respect for human rights, as Principle 25 requires States to consider the role of liability in setting a foundation for judicial remedy for business-related human rights harms. The commentary to Principle 17 furthermore states that "appropriate human rights due diligence should help business enterprises address the risk of legal claims against them".[221] The Duty of Vigilance Law also consider liability and introduced judicial mechanisms for victims of human rights and environment abuse by French multinationals. Although this is an important inclusion, the law failed to remove barriers relating to the burden of proof. Leaving this burden upon victims likely constitute a continuing hurdle to remediation, as successful litigation is likely very difficult for victims, considering the information deficit they usually suffer and the strict requirements of the law to establish corporate liability. In cases where companies have implemented a vigilance plan, it is upon victims to prove a violation by proving that the plan and its implementation were sub-standard. This task is further complicated by the fact that the law does not clarify what constitutes an 'adequate' due diligence plan.[222] In cases where a company has not implemented a vigilance plan, victims would still have to prove that the loss suffered was due to the absence of a plan.[223] Proving a causal link between the harm caused and the lack of an adequate plan implemented by the MNC is thus likely very difficult, an

[217] UK Home Office, 2019:17.
[218] Dokument 8:41 S (2018-2019):2.
[219] *See* ibid.
[220] Shift, 2020:4.
[221] UN OHCHR, 2011:19, 27; Shift, 2020:3-4.
[222] Fasterling, 2020:27.
[223] Ibid.

issue that could have been avoided if the burden of proof were reversed. The difficulties of seeking compensation for harm may ultimately affect the effectiveness of the Law, as companies are aware of the difficulties in establishing liability. Additionally, the law only requires companies to show proof of effort, not of improvements, which essentially means that companies may not be held liable for harm caused if it had implemented the plan. The displayable existence of a due diligence plan may therefore become more important than assessing the effectiveness of measures to support prevention and mitigation of human rights risks.[224]

Another important feature of sanctioning is enforcement. Although the Vigilance law established a liability regime, no agency to oversee compliance was established. Neither the MSA established such an agency. Both legislations put their faith in investors, civil society and consumers. The Norwegian Modern Slavery Act-proposal also suggests leaving enforcement in the hands of external actors, arguing that pressure from those and reputational risks will ensure the law's intention.[225] Although civil society indeed may exercise substantial influence, the lack of effectiveness of existing initiatives illustrates that this is usually not enough to achieve corporate accountability. On the other hand, the Ethics Information Committee's draft act Article 13 suggested that the Consumer Authority and the Market Council could act as enforcement agencies of its draft act.[226] This suggestion thus account for the need of enforcement agencies, and also illustrates that such not necessarily requires establishing new agencies in the Norwegian context.

The issues of enforcement and liability should be addressed by a potential new law, with special attention paid to the shortcomings of the French Law to ensure effectiveness. Additionally, it is important to consider the role of other measures to incentivize, require and support businesses to carry out due diligence throughout the entire chain of operations in order to create robust due diligence processes and in a best possible manner address the accountability gap currently existing in relation to Norwegian MNCs. Corporate liability is one important form of accountability, while others may include positive incentives, administrative penalties and support.[227]

[224] Ibid., 28.
[225] Dokument 8:41 S (2018-2019):2.
[226] Etikkinformasjonsutvalget, 2019:57.
[227] Shift, 2020:4-5.

4.4 Some benefits of the MSA

4.4.1 Subjects

The criteria applied for defining the subjects of the legislations, means that the MSA covers significantly more companies than the French Law, despite the latter covering all industries. The applicability of the French law only to large companies is a notable difference between the Vigilance Law and the UNGP. Some reviews have suggested that this French threshold for application is set too high, recommending lowering the number of employees required, or apply a different criterion, to cover more companies.[228]

Applying different criteria, perhaps referencing the MSA in setting the threshold according to annual profit and regardless of where the companies are headquartered or registered, could potentially enhance the impact of a Norwegian law.[229] Such requirements for application was in fact suggested by the Norwegian modern slavery act-proposal, which suggested that both Norwegian companies and multinationals operating in Norway should be covered, in addition to the State itself as the public sector is in a significant position to influence human rights and the environment given the large purchases made every year.[230]

4.4.2 Transparency

Subjects to the French Vigilance Law must publish the vigilance plans in their annual Financial Statements, while the MSA requires companies to publish the statements on company websites, or upon request if no website exist. Publication on company websites makes the reports more easily accessible for interested parties, *e.g.* for investors and civil society. Such increases transparency, by accommodating for different actors to evaluate business efforts. Additionally, as due diligence is a continuous process given that operating contexts and risks change over time, publication on websites provides an opportunity for companies to more frequently update their plans.

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[228] Sherpa, 2019:27.

[229] The Norwegian Modern Slavery Act proposal suggested a profit-based criterion, based on a turnover to be specified according to what would ensure best possible quality of the law (Dokument 8:41 S (2018-2019):2). The proposal by the Ethics Information Committee suggested that all companies should be affected by the proposed act, as there is not necessarily any correlation between company size and negative impacts on human rights. However, the Committee applied different requirements according to company size, *i.e.* stricter requirements for big business (Etikkinformasjonsutvalget, 2019:43).

[230] Dokument 8:41 S (2018-2019):2-3.

4.4.3 Guidance

The MSA established the Independent Anti-Slavery Commissioner. Although the Commissioner cannot exercise any function in relation to individual cases, the Commissioner can serve several important functions, including support businesses and provide guidance, which may facilitate enhanced compliance. A sort of independent agency like the MSA established, may be relevant to consider in order to provide support and guidance that may ensure adequate and effective implementation of the potential law. This does not necessarily mean establishing a new agency, instead, existing agencies could potentially perform these tasks. For instance, the Ethics Information Committee's draft act suggested the Consumer Authority as an agency that could provide guidance.[231]

4.5 Additional considerations

Neither in France nor in the UK is an official list of companies affected by the laws available, a weakness given the reliance upon external enforcement actors. In adopting a new law, it should be considered to develop and make public such a list, which the Modern Slavery Act-proposal suggested. Even if official enforcement agencies were to be established, civil society still constitute a powerful and influential force. A public list could accommodate for different actors to follow up and evaluate business' effort, thus influencing best practice and generating greater transparency.[232] It is difficult for external actors to evaluate business-efforts without a list of companies affected, particularly in relation to smaller and medium-sized companies that often goes under the radar of civil society. Furthermore, a public registry of plans submitted could contribute to ensure best possible quality of compliance as all plans would be collected in one registry, making it easier for different actors to find and evaluate plans, and see which companies have not complied at all.

[231] *See,* Article 11 (Etikkinformasjonsutvalget, 2019:56).
[232] Dokument 8:41 S (2018-2019):2.

5. CONCLUSION

A debate has emerged regarding regulation of business and human rights against the background of globalization, which have put MNCs in a position to impact upon human rights and the environment. While several legal and policy measures have been adopted, an international treaty is still lacking, and soft law measures have often proven insufficient to regulate the field. As a response, several countries have adopted national legal regulations of the business and human rights field. This thesis has examined two of these, namely the Modern Slavery Act (UK) and the Duty of Vigilance Law (France), in terms of their adequacy to regulate the field, and suitability in a Norwegian context.

To answer the first research question, *to what extent are the UK Modern Slavery Act and the French Duty of Vigilance Law adequate to regulate the field of business and human rights,* the two legislations was compared and examined against eight criteria, concluding that the Duty of Vigilance Law was the most adequate legal regulation of the field. The MSA's criteria for which companies are covered by the Act and the requirement for publication of reports on company websites means that the MSA covers significantly more companies than the French Law and the transparency under the MSA is greater. However, the Duty of Vigilance Law has some significant strengths that more directly affects effectiveness and compliance.

The MSA only suggests what companies may include in their statements, while the Vigilance Law lists specific requirements for vigilance plans. Hence, companies reporting under the MSA can "pick and choose" what to include in their statements, meaning that ultimately, the MSA do not *force* companies to address modern slavery risks in their operations. Contrary, the Vigilance Law's mandated due diligence forces French MNCs to address theirs. The MSA does not expressly require companies to cover overseas supply chains where risks often are most severe, which the Vigilance Law does. The Vigilance Law furthermore covers a wide range of human rights, in all industries, in a variety of contexts. The MSA however, has a limited geographic reach, and applies only to modern slavery offenses, thus ignoring the impact MNCs often have upon a wide range of other human rights and the environment. Neither of the legislations established enforcement agencies, rather, both rely on the voices of external actors. However, the Vigilance Law provided affected parties greater "powers" as it introduced judicial mechanisms in which companies can be deemed liable for harm they contribute to. The MSA in this regard did little more than existing initiatives, relying on self-

regulation and soft law measures, which is often highlighted as a hurdle to effectiveness of the law and a reason for lack of compliance. Additionally, the Vigilance Law chose to reference the UNGPs, which can provide guidance and support for business in implementing the law, to which a similar option is unavailable for companies reporting under the MSA.

Chapter four addressed the second research question, *which of the models are most suitable for a Norwegian legal regulation of the business and human rights field?* This part mainly focused on the Vigilance Law, as this was deemed most adequate to regulate the field, given that the business section of the MSA is basically a soft law instrument, that ignores a wide range of human rights and the environment, does not adequately cover supply chains, does not actually require companies to do anything to address risks, and does not entail real consequences for noncompliance. As such, the MSA in many ways resemble existing initiatives that has already proven largely insufficient to regulate business and human rights. The Vigilance Law, however, to a much greater extent overcomes challenges of regulating business and human rights than the MSA, and thus seem the most suitable legislative model to choose in a Norwegian context.

Of significant importance, does the Vigilance Law cover a wide range of human rights and the environment, it covers supply chains, and can force companies to address and act upon risks their operations pose by requiring due diligence, in which noncompliance may result in corporate liability. Hence, the due diligence-model is deemed the most suitable option, as this model provides a real option to regulate the field of business and human rights and overcome existing hurdles to corporate accountability. Additionally, there are some specific components of the law which are well-suited for a Norwegian context. For instance, referencing the UNGP is of relevance as Norwegian companies are already expected to observe the UNGP in their operations. Hence, much of the requirements due diligence entails, should already be familiar to many Norwegian companies. Furthermore, a due diligence law may potentially harmonise the legislation with other instruments that are of more relevance to Norwegian companies than different national modern slavery acts, where the EU due diligence-law in the making was highlighted. A wide scope in terms of human rights and the environment, covering both modern slavery *and a lot more*, is also important, as Norwegian multinationals can, and often do, impact upon a wide range of human rights and the environment.

Although the Vigilance Law was deemed the most suitable option for a Norwegian legal regulation of business and human rights, care should be taken to avoid inheriting its

shortcomings, which could affect the potential Norwegian law's effectiveness and ability to drive positive change. While the Vigilance Law rightly entails liability, removal of significant barriers should be considered by Norwegian legislators, including *e.g.* reversing the burden of proof and establish an enforcement agency. Also, definitions in the law should be carefully considered to avoid unnecessary limitations, illustrated by the Vigilance Law's inclusion of 'established commercial relationships' which limits its coverage of supply chains. It is important that supply chains are adequately covered to ensure coverage of even the most severe risks, which are often those buried deep in supply chains. As illustrated in chapter four, many of the issues highlighted with the Duty of Vigilance Law could be solved by even greater resonance and referencing of the UNGP by the potential Norwegian law.

Some benefits of the MSA was also highlighted for consideration to ensure greater impact of the potential law, including a lower threshold for application, publication on company websites to increase transparency, and an agency to provide guidance and support for business. Lastly, it mentioned that an official list of companies and a public registry should be considered in order to facilitate greater quality and compliance with the potential law.

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