



**British Institute of
International and
Comparative Law**

A UK Failure to Prevent Mechanism for Corporate Human Rights Harms

Irene Pietropaoli | Lise Smit | Julianne Hughes-Jennett | Peter Hood

In April 2017, a report by the UK Joint Committee on Human Rights (“JCHR”) proposed that a failure to prevent mechanism, modelled on section 7 of the UK Bribery Act, may be “an appropriate one to apply to business and human rights”. This study considers the legal feasibility of introducing such a mechanism within the UK context, with reference to the framework of the UN Guiding Principles on Business and Human Rights (“UNGPs”).

The study included a survey of businesses to understand their experiences with the current legal landscape and the Bribery Act, and whether there would be benefits if a similar failure to prevent mechanism were to be introduced with respect to human rights. In summary:

- The majority of respondents (68.97%) indicated that existing law does not provide business with sufficient legal certainty about which procedures are required to avoid legal risks for human rights abuses.
- The vast majority of business indicated that additional regulation may provide benefits to business: through providing legal certainty (82.14%); through levelling the playing field, insofar as it will hold competitors and suppliers to the same standards (74.07%); and by facilitating leverage with third parties, including in the supply chain (75%).
- Of those respondents who have experience with section 7 of the Bribery Act, the majority agree that it has provided similar benefits: It has been effective in providing legal certainty (64.71%), in levelling the playing field by holding competitors and suppliers to the same standards (50%), and in facilitating leverage with third parties in the value chain through setting a non-negotiable standard (52.94%).

The study also provides a legal analysis (see centrefold) as to whether and how the legal elements of section 7 of the Bribery Act could be transposed into a failure to prevent mechanism for corporate human rights harms.

Section 7 of the UK Bribery Act	Possible mechanism modelled on Section 7 [Section X]
Failure of commercial organisations to prevent bribery	Failure of commercial organisations to prevent human rights harms
<p>(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—</p> <p>(a) to obtain or retain business for C, or</p> <p>(b) to obtain or retain an advantage in the conduct of business for C.</p>	<p>(1) A relevant commercial organisation (“C”) is liable for damages under this section if C fails to prevent human rights harms:</p> <p>(a) Which it causes or contributes to through its own activities, or</p> <p>(b) Which are directly linked to its operations, products or services by its business relationships, even if it has not contributed to those harms.</p>
<p>(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.</p>	<p>(2) But it is a defence for C to prove that C had in place procedures reasonable in all the circumstances to prevent such harms from occurring.</p>
<p>(3) For the purposes of this section, A bribes another person if, and only if, A—</p> <p>(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or</p> <p>(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.</p>	<p>(3) For the purposes of this section, human rights harms are defined as set out in [Schedule A].</p>
<p>(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.</p>	<p>(4) See section [Y] on a duty on the Secretary of State to publish guidance. [Harms caused, contributed to and directly linked, leverage and procedures reasonable in all the circumstances to be defined with reference to the language of the UNGPs]</p>
<p>(5) In this section—</p> <p>“partnership” means—</p> <p>(a) a partnership within the Partnership Act 1890, or</p> <p>(b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,</p> <p>“relevant commercial organisation” means—</p> <p>(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),</p> <p>(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or</p> <p>(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>and, for the purposes of this section, a trade or profession is a business.</p>	<p>(5) In this section—</p> <p>“partnership” means—</p> <p>(a) a partnership within the Partnership Act 1890, or</p> <p>(b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,</p> <p>“relevant commercial organisation” means—</p> <p>(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),</p> <p>(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or</p> <p>(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.</p> <p>“Foreign subsidiary” means –</p> <p>(a) a commercial enterprise which is not incorporated in the UK, and</p> <p>(b) which does not carry on a business or part of a business in the UK, but</p> <p>(c) is wholly or partially owned by a relevant commercial enterprise as defined above (the “UK parent company”)</p>
Section 9: Guidance about commercial organisations preventing bribery	Section Y: Guidance about commercial organisations preventing human rights harms
<p>(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).</p> <p>(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.</p> <p>(3) The Secretary of State must consult the Scottish Ministers [and the Department of Justice in Northern Ireland] before publishing anything under this section.</p> <p>(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.</p> <p>(5) Expressions used in this section have the same meaning as in section 7.</p>	<p>(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent human rights harms in their own activities or those of their business relationships as mentioned in section [number of possible mechanism above (1)].</p> <p>(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.</p> <p>(3) The Secretary of State must consult the Scottish Ministers [and the Department of Justice in Northern Ireland] before publishing anything under this section.</p> <p>(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.</p> <p>(5) Expressions used in this section have the same meaning as in section X].</p>

It concludes with the following recommendations:

Rights covered: The provision should apply to “human rights”. This term should be defined in a Schedule to the Act, capable of amendment by statutory instrument and would include environmental harms. Our recommendation is that it should be defined to apply to all internationally recognised human rights.

Companies covered: We recommend that any failure to prevent legislative provision should cover companies of all sizes, including SMEs, carrying on business in the UK. Guidance should clarify the recognition that any due diligence processes should be proportionate to their size and the complexity of their operations.

Duty: A failure to prevent mechanism should establish a duty to prevent human rights harms in its own activities and those of its business relationships. This is contingent on the inclusion of a statutory defence of procedures “reasonable in all the circumstances”.

Liability: A failure to prevent mechanism should establish a duty to prevent human rights harms in the company’s own activities and the activities of its business relationships. A failure to prevent such harms would result in possible civil liability for damages to those affected, unless the company could show that it has undertaken the due diligence required in the circumstances. This would not affect any criminal liability which could otherwise arise.

The corporate group and the supply chain: A failure to prevent mechanism should establish a duty to prevent human rights harms in the company’s own activities and the activities of its business relationships. The question as to whether a company should be liable for failing to meet this standard of care will be determined on the facts of each case. The Guidance should elaborate on the concept of leverage with reference to the wording of the UNGPs.

Defence and burden of proof: We recommend that the mechanism includes a defence of procedures “reasonable in all the circumstances”, or “reasonable” human rights due diligence, to prevent human rights harms. This should be accompanied by Guidance elaborating on the meaning of “reasonable” due diligence, with reference to the UNGPs, the concept of leverage, and clarifying that due diligence is accordingly not a “check-box” exercise or a “safe harbour”.

Extraterritorial application to transnational activity: A duty to prevent should extend to harms which take place in the entire value chain of a company, regardless of the jurisdiction of the harm, in accordance with the UNGPs. Guidance should elaborate on the meaning of harms in the company’s own activities and those of business relationships.

Enforcement and remedy: A failure to prevent mechanism should establish a right to civil action by those affected for compensation for damages suffered as a result of a failure to prevent human rights harms. In addition, it could provide for preventative and injunction orders, as well as state-based oversight mechanisms.

This report was authored by Irene Pietropaoli, Lise Smit, Julianne Hughes-Jennett and Peter Hood. BIICL is grateful for the support of Hogan Lovells and Quinn Emanuel in undertaking this project.