The Corporate Justice Coalition response to Defra consultation on 'implementing due diligence on forest-risk commodities' -Schedule 17 of the Environment Act.

11 March 2022

Contents

Introduction

Despite the efforts made by civil society groups, an amendment tabled in the Commons in 2020[1], a series of interventions by Peers[2] during report stage and several amendments being put forwards in the House of Lords, Schedule 17 leaves very significant and concerning gaps in human rights protections due to:

1. The lack of reference in primary legislation to international human rights law obligations.
2. The severely limited 'due diligence system' that is not in step with authoritative frameworks such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), which go beyond risk-mitigation and require preventative and remedial actions.
3. The lack of liability and access to justice for victims.

This is a missed opportunity for rights-holders including indigenous peoples and other forest-dependent communities who will continue suffering human rights violations at the hands of agri-business, such as land dispossession, failure to gain their free, prior and informed consent, and non-respect for their right to self-determination. The lack of human rights protection in Schedule 17 also disregards the dire situation of human rights, land and environmental defenders in tropical forest regions.

It is also a missed opportunity to support poverty reduction amongst smallholder farmers who represent some of the poorest families worldwide – a consequence of unquestioned business models predicated on unfair pricing, trading and purchasing practices. The risk-mitigation approach set down in primary legislation is highly likely to result in unintended negative consequences for

[1] https://corporatejusticecoalition.org/resources/briefing-on-the-environment-bill-amendment-nc5-on-due-diligence-legislation/

[2] See speeches from Lady of Manor Castle and Baroness Sheehan during Second Reading in the House of Lords, 7 June 2021: https://hansard.parliament.uk/lords/2021-06-07/debates/6E1FE4FF-613D-44D6-8668-C8468E87D916/EnvironmentBill

smallholder farmers as downstream actors 'cut and run' to reduce their risks of non-compliance with the law.

We - the Corporate Justice Coalition, an independent UK charity - recognise that there are some opportunities to incorporate some minimal human rights safeguards into secondary legislation and we offer suggestions to this end within the responses to certain questions in the consultation. However, we believe that due to the constraints of the primary legislation, meaningful inclusion of human rights is no longer possible in Schedule 17 and a new law that brings human rights and the environment together from its inception is urgently required.

Given the constraints of this consultation format, our response is being submitted via email in order for the broader human rights considerations and our call for a new UK law to be unpacked in more detail.

Concern with this consultation and over-emphasis on guidance

The practical implementation of Schedule 17 is pivotal to the successful implementation of the law and its ability to deliver on the policy objective to reduce deforestation linked to UK consumption.

As Defra is already aware, there is concern among civil society groups that this consultation has been designed to gather responses to a specific, limited and already defined course of action, rather than gathering responses on how best to implement Schedule 17 as well as to ensure the right balance between secondary legislation and guidance.

Setting out the structure of what is expected under secondary legislation will ensure the key building blocks and requirements under the law are clear and robust enough to stand the test of time. Guidance should be used only to complement the structure set out in the secondary legislation and to clarify details that can be changed over time.

Unfortunately, Defra's Impact Assessment[3] seems to indicate that many important structural elements are being left to planned guidance rather than being set out in the secondary legislation; and it appears that key elements of this would also be left to company choice and judgement.

We consider this to be inadequate and inappropriate as it makes it likely that different approaches, with varying levels of ambition and success, will be adopted. This not only reduces the law's potential positive impact but will also makes enforcement far harder.

The consultation itself does not ask specific questions that are fundamental to detail within secondary legislation, such as:

[3] https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf

1. Which specific categories of national-level law companies must look for when defining which national laws are applicable in their supply chains *(this includes land use, land ownership and customary land tenure)*;
2. What key elements of the 'due diligence system' should look like in practice, such as the proposed country or jurisdictional-level risk assessment, and what methodology should be used to bring this together with individual company supply chain information *(this is essential to ensure consistency)*, and;
3. What safeguards need to be put in place to ensure 'cut and run' does not become a default reaction to the legislation, potentially leaving millions of smallholders to bear the burden.

We are also concerned about the prospective future engagement of rightsholders in future consultations, noting that this and previous consultations have not made it easy for those affected by business in places of production to engage.

Defra's Impact Assessment sets out that it will be, *"important to test the regulatory details and enforcement infrastructure with relevant sectors/stakeholders, including producer countries. This is because another key objective of the legislation is to forge effective partnerships with producer countries, in order to support and help strengthen the legislative frameworks they have in place to protect forests and other natural ecosystems"*. [4]

We consider it vital that Defra moves beyond state-state engagement and defines the applicable law based on objective, expert analysis; and tests the regulatory details and enforcement infrastructure with all relevant stakeholders, including local and international CSOs, indigenous peoples, forest-risk dependent communities and smallholders.

However, it is also important to anticipate that in many contexts, a multi-stakeholder approach is not always successful in enabling less-powerful actors to meaningfully engage.[5] This can be for several different reasons ranging from structural racism, prejudice and discrimination to practical barriers that blocks attendance (meeting locations, lack of internet access, costs involved, language barriers etc.).

If multi-stakeholder approaches are adopted by Defra, power dynamics must be taken into consideration and addressed before the multi-stakeholder consultations begin. This includes ensuring that final decision-making is equally held by different groups in attendance and that the governance model is clear.

Omission of human rights in Schedule 17

The Global Resource Initiative (GRI) – a government-convened multi-stakeholder group including civil society groups, business and government, brought together with the express intent of advising on UK environmental policy - recommended that, *"The government urgently introduces a mandatory*

[4] https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf, page 15
[5] https://www.cifor.org/knowledge/publication/8057/

due diligence obligation on companies that place commodities and derived products that contribute to deforestation on the UK market and to take action to ensure similar principles are applied to the finance industry".[6]

In the text following this recommendation it clearly states that, *"The mandatory due diligence obligation should require companies to analyse the presence of environmental and human rights risks and impacts within their supply chains".*

Despite this guidance, Schedule 17 only addresses the GRI recommendation in part. The UK Government should set out a timeline and plan for how it intends to respond fully to the recommendations set out by the GRI to introduce human rights due diligence.[7]

In the summary of responses to Defra's first consultation on primary legislation in 2020, 85% of respondents specified that the proposal's environmental focus needs to go hand in hand with human rights.[8]

A Freedom of information request by the NGO Earthsight shows that some of the largest players in the agricultural sector clearly indicated their preference for human rights inclusion in Schedule 17.

Unilever encouraged the UK Government to use existing frameworks as a starting point, referring directly to the UNGPs, and discouraged the UK Government from, "taking a narrow approach in comparison to the EU's more comprehensive approach" and by doing so risking "additional burdens on businesses".

Nestlé cited the need for a level playing field and expressed that, "incorporating human rights elements is a vital measure for mandatory environmental due diligence regulation and this is one key aspect that we feel should be brought out more overtly in the proposals".

Cargill, one of the world's largest traders of agricultural commodities, indicated its understanding was that due diligence is inclusive of human rights.

UK civil society groups are proposing a Business, Human Rights and Environment Act[9]: a horizontal law that would adopt, from inception, a rights-based approach that would go, *"beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders"*[10].

It would require a combined human rights *and* environmental due diligence, reflecting widespread recognition that an integrated approach is necessary. This sentiment, that human rights and the

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876465/gri-taskforce-executive-summary.pdf

[7] "The mandatory due diligence obligation should require companies to analyse the presence of environmental and human rights risks and impacts within their supply chains", page 6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876465/gri-taskforce-executive-summary.pdf

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933985/due-diligence-forest-risk-commodities-government-response.pdf

[9] https://corporatejusticecoalition.org/wp-content/uploads/2021/10/CJC-Principles-UK-Duty-to-Prevent-Law-1.pdf

[10] https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, Page 18

environment need to be considered simultaneously, was the central message in an open letter published ahead of COP26, endorsed by over 180 indigenous peoples' organisations, civil society groups - including human rights, environmental and conservation organisations - and human rights, land and environmental defenders, as well as academics and experts from 58 countries.[11]

As noted by the GRI, *"Policy makers, business and finance leaders are recognising that the choice between environmental protection, economic growth, human rights and livelihoods, health and food production is a false one. These aims can be achieved simultaneously, in fact they can only be achieved together".*[12]

There are opportunities in the secondary legislation to incorporate some minimal human rights safeguards, such as ensuring the enforcement agency has a third-party complaints mechanism; however, due to the constraints of the primary legislation, full inclusion of human rights is no longer possible in Schedule 17 and a new law is urgently required.

A new UK law is needed – calls for a Business, Human Rights and Environment Act

The Corporate Justice Coalition and partners are calling for a new UK law – a Business, Human Rights and Environment Act – backed by 57,000 members of the British public who have signed a petition.[13]

This 'mandatory human rights and environmental due diligence' law with liability provisions based on the duties to prevent tax evasion and bribery found in the Criminal Finances Act 2017 and the Bribery Act 2010, has been called for by the Joint Committee on Human Rights.[14] Such a law has been found to be legally feasible by the British Institute of International and Comparative Law.[15]

This approach is modelled on ground-breaking provisions in UK law, while aligning with the spirit and intent of internationally recognised frameworks, the UNGPs and the OECD guidelines. It is further informed by the text and negotiations on the UN Binding Treaty for Transnational Corporations.[16]

Along with 34 of our partners, including Amnesty International, CAFOD, Friends of the Earth, Forest Peoples Programme, The Fairtrade Foundation, Fauna and Flora International, Global Witness, the Environmental Justice Foundation and Unison we have set out the principal elements of such a law.[17]

Our joint proposal is clear: companies of all sizes and sectors, as well as investors and public procurement, should be obliged to undertake Human Rights and Environmental Due Diligence

[11] https://corporatejusticecoalition.org/wp-content/uploads/2021/10/signatory-letter_english.pdf
[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876465/gri-taskforce-executive-summary.pdf, page 2
[13] https://corporatejusticecoalition.org/
[14] Human Rights and Business 2017: Promoting responsibility and ensuring accountability - Joint Committee on Human Rights - House of Commons (parliament.uk)
[15] A UK Failure to Prevent Mechanism for Corporate Human Rights Harms (biicl.org)
[16] https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally
[17] https://corporatejusticecoalition.org/wp-content/uploads/2021/10/CJC-Principles-UK-Duty-to-Prevent-Law-1.pdf

(HREDD) with the express aim of preventing harm and achieving positive outcomes for people and the environment.

But is not only civil society groups and the general public who are calling for such a law in the UK. In October 2021, 36 UK businesses and investors, including Mars, Nestle, Mondelez, Unilever, Twinings, Tony's Chocolonely, Tesco and the Co-op released a statement in which they state that they want the UK government to, *"...introduce a new legal requirement for companies and investors to carry out human rights and environmental due diligence"*, and that this, *"…needs to be accompanied by consequences that will be strong enough to ensure that businesses that fall within the scope of the legislation carry out HREDD to a high standard and that victims have access to justice"*.

It is unsurprising that these companies are beginning to speak out about the need for a broader, horizontal law in the UK. Companies likely to be in scope of Schedule 17 will be looking simultaneously at requirements under the EU's proposal for a Sustainable Corporate Due Diligence Directive[18] that places obligations on companies in relation to both human rights and the environment, the EU's proposed regulation on deforestation-free products, which notably covers both legal and illegal deforestation, as well as other relevant laws in the US and beyond.[19]

In June 2020, in an Oral Question to the Government, Baroness Sheehan asked what plans the Government had to introduce human rights due diligence to businesses in the context of keeping pace with developments in the EU.[20] Lord Callanan, Undersecretary of State for the Department of Business, Energy and Industrial Strategy responded to say that there were no plans to make human rights due diligence mandatory because existing law in the UK is sufficient in holding businesses to account.

We believe this assertion to be wholly incorrect. An independent review of the Modern Slavery Act, which deals only with one subset of human rights, recognised that an estimated 40% of eligible companies are not complying with the legislation at all (Para 15, Page 13). Those who do are offering little substance and detail.[21]

Lord Callanan further set out the Government's position that it prefers the approach of *"… encouraging businesses to follow the voluntary framework of the UNGPs".*

However, the UN Working Group for Business and Human Rights have clarified that *"The UNGPs set out the legal and policy implications for how to operationalize this duty [to protect against human rights abuse by business] through a "smart mix" of measures that include legally binding measures, particularly where voluntary measures continue to leave significant gaps in human rights protections.".*[22]

We agree with the analysis offered by law firm Herbert Smith Freehills - a position shared by several MPs we have spoken to – that *"There is a risk… that the UK's approach could lead to a patchwork of*

[18] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145
[19] https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en
[20] https://hansard.parliament.uk/Lords/2021-07-20/debates/5F00DDB9-24F9-4691-BAB4-5670FF5EC286/details
[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf
[22] https://www.ohchr.org/EN/Issues/Business/Pages/MandatoryHRDD.aspx

rules that impose a greater compliance burden on businesses. This approach risks being less effective in terms of the underlying ESG goals than a more comprehensive and consistent approach contained within a single piece of legislation."[23]

It is clear from the unrelenting number of reports related to the violations of human rights globally by businesses, across numerous sectors, that voluntary initiatives have not achieved the desired effects.

Although the Environment Act is a small step in the right direction in relation to deforestation, it is now of great urgency that the UK Government regains its pioneering spirit towards business and human rights and translates this into a much-needed new UK law. Civil society groups stand ready to work with the UK Government and Parliament to help develop the practical elements required for an effective new law called for by civil society groups, business and the UK public alike.[24]

Implementing the due diligence requirements

Q21. Should we lay secondary legislation at the earliest opportunity?

Yes.

Forest Risk Commodities

Q23. Can you provide any further evidence on commodities that drive deforestation?

The Impact Assessment and consultation indicates that the commodities under consideration are cattle (beef and leather), cocoa, coffee, maize, oil palm, rubber, and soy.[25]

The State of the World's Forest's report (2020) indicates that commercial agriculture drives 40% of deforestation, and mining drives 7% of deforestation; combined, these sectors represent almost half of all deforestation worldwide.[26]

Research related to the lasting negative impacts of mining on forests globally can be found in the 2019 World Bank Group report, Forest Smart Mining: Identifying Factors Associated with the Impacts of Large-Scale Mining on Forests. The report estimates that nearly 1/3 of all forests worldwide are impacted by large-scale mining projects that are either under development, in operation or currently not operational. It explains that mining is the world's fourth-largest driver of deforestation and that this immediate impact is "dwarfed by the far more wide-ranging indirect impacts".[27]

---

[23] UK Government opens consultation on "world-leading" due diligence law | Herbert Smith Freehills | Global law firm

[24] https://corporatejusticecoalition.org/wp-content/uploads/2022/02/CJC-joint-statement-EU-tabling-FINAL-1-1.pdf

[25] The JNCC indicators, that track the environmental impacts embedded in commodity consumption by the UK, show that cattle (beef and leather) are the highest volume deforestation-risk commodity in the UK, https://commodityfootprints.earth/

[26] https://www.fao.org/3/ca8642en/online/ca8642en.html

[27] Forest Smart Mining_LSM REPORT_0.pdf (profor.info)

This lucrative sectors profits from deforestation while people living in areas of extraction are left to absorb hidden costs. These include human rights impacts resulting from other environmental harms, including degradation and pollution, as well as systemic human rights abuses stemming from the initiation of such commercial activities on customary lands - without the free, prior and informed consent of indigenous peoples and other forest-dependent communities.

We believe that a forest-risk commodity law that obliges both the agricultural and mining sectors to undertake similar obligations would have been a logical approach, signalling seriousness in addressing commercial activities that drive deforestation. Instead, Schedule 17 of the Environment Act purposely limits the future inclusion of commodities that should have been included from the beginning; a fact noted by Baroness Hayman of Ullock and Lady Bennett of Manor Castle during the Report Stage of the Environment Bill in the House of Lords.[28]

The definition of 'forest-risk commodity' in paragraph 1 (2)[29] of the primary legislation means that metals, minerals, oil and natural gas extraction cannot be included under the scope of this law now or in future revisions due under the review clause (17A). The commodities listed that are potentially in scope are limited – of note is the lack of inclusion of sugar.

Further, paragraph 7 (b) sets out that the Schedule does not apply to commodities in scope where "the use of the commodity is for the purpose of making renewable transport fuel". In January 2019, 236 Indonesian NGOs and civil society leaders raised concerns to the European Commission that the biofuel industry's high land usage marginalizes small-scale farmers and contributes to ecological damage, highlighting how the industry infringes on both human rights and biodiversity.[30]

Excluding agricultural commodities that are used to produce bioethanol (maize) and biodiesel (soya, oil palm, animal fats)[31] suggests that the UK Government is failing to take an integrated and consistent approach to environmental and climate change policy.

Deforestation occurs regardless of the intended end-use of the commodities or the method with which they are produced or extracted. It is short sighted to have excluded both commodities that are obtained through extraction and agricultural commodities that are used to produce renewable fuels.

Q26. Do you have any further comments regarding the order in which we introduce key forest risk commodities?

[28] See Baroness Hayman of Ullock's speech during the Report Stage debate in the House of Lords of the Environment Bill, 15th September 2021: https://hansard.parliament.uk/lords/2021-09-15/debates/80644939-CEDB-4691-9BDE-EC3F7C3E7B2D/EnvironmentBill

[29] "the regulations may specify only a commodity that has been produced from a plant, animal or other living organism"

[30] https://www.transportenvironment.org/wp-content/uploads/2021/07/Open-Letter-to-EU-Commission-final.pdf

[31] The commodities in brackets represent the commodities that are in consideration under the Schedule at present.

It is unclear what the justification for a phased-in approach is given the law relates only to illegal deforestation, as defined under national-level law. Companies should already be compliant with national-level laws and, as such, we believe it is not necessary to require a long or phased implementation period to demonstrate compliance.

Questions also arise around why such gradual approach to implementation is required when the decision has been taken to take such a narrow, risk-based and environmental focus only – rather than a combined human rights and environmental due diligence approach as recommended by the GRI to Government.[32]

The pace of implementing the requirements of the Schedule should be proportionate to the issue at hand and the urgency of action required. The obligations should come into effect as soon as possible – even if this has higher resourcing implications than anticipated by government.

Q28. Should businesses fall in scope of the requirements if they exceed the turnover threshold in the previous financial year?

Yes

Q34. Do you have any further comments regarding businesses in scope?

This consultation has given the option to choose between companies with a (global) turnover threshold of above either £50m, £100m and £200m to be considered in scope of the law. This appears to require an arbitrary decision and no justification has been provided to explain why these thresholds have been selected.

Small- and Medium- sized Enterprises (SMEs) are not exempt by their size from having deforestation or human rights violations within their supply chains; there is no direct correlation between the size of a company and reduced risk of deforestation or human rights violations in their operations or supply chains.

All businesses, regardless of turnover, as well as finance and public procurement, should have been included in the initial scope of this legislation, as recommended by the GRI who envisioned the introduction of a mandatory due diligence obligation to cover business and finance, it also considered the need to *"strengthen and extend mandatory public procurement requirements"*.[33]

We strongly support the inclusion of public procurement, which would have been a powerful demonstration to the private sector of Government leading by example. In its 2017 report, the Joint Committee on Human Rights sets out the expectation, in relation to human rights and business, that

[32]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881395/global-resource-initiative.pdf

[33]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876465/gri-taskforce-executive-summary.pdf, page 3

the UK Government should demonstrate *"…at least the same level of commitment in its own procurement supply chains"* that it requires of business. [34]

We strongly support the inclusion of UK-based financial institutions, which have been the single biggest source of international finance for six of the most harmful agribusiness companies involved in deforestation in the climate-critical forests of Brazil, the Congo Basin and Papua New Guinea, providing £5 billion over the last six years[35].

Exemption

Q41. Do you have any further comments on the exemption?

Exemptions should not apply because the ultimate objective of this policy, as set out by Defra in its Impact Assessment, is to *"reduce deforestation associated with the production of agricultural commodities"*.[36] Focusing on exemptions in the consultation distracts focus from the key issue of addressing deforestation and how that can be best achieved.

As it is likely that some form of exemption will be applied in the secondary legislation, the proposal to "give businesses the freedom to choose which methodology they use to calculate volumes"[37] is concerning.

Due diligence system

Q45. Should businesses in scope be required through secondary legislation to 'eliminate risk or reduce risk to as low as reasonably practicable'?

No

It is unclear what the wording *"as low as reasonably practicable"* means in practice and it is therefore open to wide interpretation. This could result in businesses eliminating risk using approaches that may not be appropriate but could still be argued to be satisfying the due diligence requirement. This includes over-dependence on certification as proxy for due diligence (see response to Q47).

[34] https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44311.htm
[35] https://www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/
[36] https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf, page 9
[37] wording from guidance to question 37 in the online consultation

The requirements related to the due diligence system, what level of risk would be deemed acceptable (we suggest negligible), as well as what is required to prove legality in each country of production, should be set in secondary legislation, not left to guidance.

It would be necessary to also set out in this framework the criteria that would ensure safeguards for indigenous peoples, other forest-dependent communities, and smallholders when businesses create supplier exclusion criteria as a response to eliminating risk from their supply chains.

The 'due diligence system' that forms part of the Schedule has been envisioned in a far simpler way than set out in authoritative frameworks from the UN and OECD. This represents a lost opportunity to move away from an approach based purely on risk mitigation, to one that includes crucial preventative and remedial measures.

Since the UNGPs were unanimously endorsed by the Human Rights Council in 2011, 'Due diligence' has become widely understood to refer to an iterative, continuous improvement process that seeks positive outcomes for people. Yet the 'due diligence system' adopted under this Schedule represents a highly limited risk-mitigation approach based on compliance with national-level laws that are not in keeping with authoritative frameworks that businesses should already be implementing, albeit voluntarily.

The Corporate Justice Coalition and partners are calling for the introduction of a new 'Business, Human Rights and Environment Act', which would oblige companies, investors and public procurement to undertake 'mandatory human rights and environmental due diligence'. This proposed law would include liability provisions based on the duties to prevent tax evasion and bribery found in the Criminal Finances Act 2017 and the Bribery Act 2010, as has been called for by the Joint Committee on Human Rights.[38] Such a law has been found to be legally feasible by the British Institute of International and Comparative Law.[39]

This approach is modelled on provisions in UK law, as well as aligning with the spirit and intent of internationally recognised frameworks, the UNGPs and the OECD guidelines. It is further informed by the text and negotiations on the UN Binding Treaty for Transnational Corporations.[40]

Although the approach being called for here is not one that the Environment Act can now emulate – given the constraints of primary legislation – there are some opportunities to ensure that secondary legislation sets out a useful framework that at the very least offers some safeguards for rights-holders such as indigenous peoples, forest-dependent communities and smallholders.

These considerations relate to:

1. Supply chain traceability and transparency
2. Determining high, medium and low risk
3. Risk mitigation
4. Determining applicable law – particularly land use, ownership and customary tenure

[38] Human Rights and Business 2017: Promoting responsibility and ensuring accountability - Joint Committee on Human Rights - House of Commons (parliament.uk)
[39] A UK Failure to Prevent Mechanism for Corporate Human Rights Harms (biicl.org)
[40] https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally

5. Enforcement (refer to Q60)

Supply chain traceability and transparency

Full supply chain transparency is the fundamental building block necessary for the 'due diligence system' to be put into practical application. Supply chain mapping of direct and indirect suppliers – and the public disclosure of this in a spreadsheet format - is vital.

Many downstream brands are already undertaking this type of traceability and this legislation could be crucial to incentivising this for other commodities, as well as ensuring retailers undertake this in relation to their own-brand goods.

For those affected by deforestation, being able to link deforestation happening in their local area with the companies buying from that place provides an invaluable tool for accountability and improved corporate behaviour.

Ensuring that supply chain mapping is required to the place of production, and inclusive of direct and indirect suppliers will ensure that the traceability and transparency elements are fully aligned with Defra's intended objectives of this policy - set out by Defra in its Impact Assessment. Requiring this in secondary legislation is necessary.[41]

Determining high, medium and low risk

In the guidance notes to Q46, it notes that: *"Guidance on the due diligence system would, for example, include information on metrics to help businesses determine whether there is a low, medium, or high risk of illegal land use and land ownership in a source country or sub-national region. This could include indicators on land use change, deforestation rates, and governance. This assessment could then help businesses to determine what mitigation systems to put in place."*

At a minimum, any risk-rating system as proposed here would need to be at first-level jurisdiction and the criteria would need to be set in order that all companies were using the same metrics and methodology.

The criteria applied to how a jurisdiction is categorised as "low, medium or high" should go beyond quantitative analysis alone, to include qualitative information from the locality of production – this includes, but is not limited to: CSO reports, 3rd party complaints and national and local media stories.

Furthermore, this sub-jurisdiction data needs to be brought together with a company's individual supply chain data to truly understand where risk is "high", "medium" and "low".

It is vital for consistency that the first-level jurisdiction data and supplier data is brought together using the same methodology for each company. If companies are left to determine their own criteria and methodology it is highly likely to result in the scenario where companies in scope of this law will end up classifying the same supplier differently due to their use of different criteria and metrics. This

[41] https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf, page 9

would prove to be a highly ineffective approach and almost impossible for the Enforcement Agency to monitor unless there are plans for the regulator to maintain its own centralised supplier lists.

It is also true that suppliers with a "high-risk" of illegal deforestation, and non-compliance with other local laws, in their operations and supply chains may be present in a so-called "low risk" region, while there may be "low risk" suppliers in a "high-risk" region. The framework set out under secondary legislation should thus set out what it means to reduce risk to negligible levels in these different scenarios.

This clarity of expectation on companies will help support better compliance and ensure a level playing field between companies.

Risk mitigation

It would be a notable failure if this UK law encourages a simplistic approach to risk mitigation that leads to unintended negative consequences for rights-holders on the ground.

Smallholders

The move by companies to disengage from badly performing suppliers has grave consequences for smallholder farmers, who are already among some of the poorest in the world and disadvantaged in terms of access to markets, investment and training.

A likely scenario resulting from this law is that there will be a rush to increased purchasing from large commodity production estates that are certified. This not only disincentivises smallholder inclusion and reduces the potential for poverty reduction in some of the poorest areas of the world.

The law must be nuanced enough to ensure it does not inadvertently incentivise a "cut and run" approach. Once the incentive to engage with a purchaser has been removed, there is not enough incentive for suppliers to act.

Automatically disengaging from suppliers is against the intentions of the UNGPs, which set out the need for businesses to use their leverage, and in some cases increase their leverage, to properly address human rights impacts. The commentary to Guiding Principle 19 expands on this and makes clear that companies are expected to take into consideration *"…whether terminating the relationship with the entity itself would have adverse human rights consequences"* and *"be prepared to accept any consequences – reputational, financial or legal – of the continuing connection"*.[42]

We believe that requirements set out in secondary legislation should encourage suspending rather than ending contracts, alongside ensuring meaningful supplier-engagement programmes with clear objectives that need to be met in a set timeframe, with contract termination being seen as a last resort or applicable only whether other approaches to risk mitigation are not available. The Enforcement Agency would need to play an active role in monitoring progress.

Indigenous peoples and other forest-dependent communities

[42] https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, page 22

Land used for agricultural production is often already subject to conflicting claims to ownership, and due to the lack of protection for customary rights to land in many countries, it is of paramount importance that risk mitigation does not drive further land dispossession or drive the consolidation of land ownership into fewer and fewer hands.

Forests managed under collective legal titles have been found to have lower deforestation rates, higher carbon storage, and higher biodiversity conservation than government-protected areas.[43]

The rights of indigenous peoples and other forest-dependent communities must be considered a necessary element of proving compliance with this law. Companies should be required to identify, obtain, and verify information in relation to customary tenure rights and the right to free, prior and informed consent, which they are already obliged to do under the UNGPs and OECD Guidelines.

Further, adequate and verifiable information obtained via independent sources and appropriate consultation processes should be sought to ensure that the land used for commodity production is not subject to any claims on the basis of indigenous, customary or other legitimate tenure rights or subject to any dispute regarding its use or ownership.

Determining applicable law - particularly land use, ownership and customary tenure

The scope of applicable laws needs to be broad and comprehensive, including land use and land ownership laws.

It is necessary to provide guidance for companies within secondary legislation on the category of laws under which they need to search for relevant local laws. Some examples include:

- Indigenous and customary land tenure
- Land use, including Usufruct rights
- Land titling and ownership
- Rights relating to consultation and consent
- Bribery, fraud and corruption
- Commercial lease rights and permits for production
- Benefit sharing
- Environmental protection/conservation/restrictions
- Evictions and resettlement
- Contractual and tax
- Restrictions related to land ownership
- Agricultural

Subsequent guidance should detail specific laws which are relevant in each country, as well as the legal obligations that fall under them.

Defra's Impact Assessment sets out that it will be, *"important to test the regulatory details and enforcement infrastructure with relevant sectors/stakeholders, including producer countries. This is*

[43] https://www.fao.org/documents/card/en/c/cb2953en

because another key objective of the legislation is to forge effective partnerships with producer countries, in order to support and help strengthen the legislative frameworks they have in place to protect forests and other natural ecosystems". [44]

We consider it vital that Defra moves beyond state-state engagement and defines the applicable law based on objective, expert analysis; and tests the regulatory details and enforcement infrastructure with all relevant stakeholders, including local and international NGOs, indigenous peoples, forest-risk dependent communities and smallholders.

However, it is important to also anticipate that in many contexts, a multi-stakeholder approach is not always successful in enabling less-powerful actors to meaningfully engage. This can be for several different reasons ranging from structural racism, prejudice and discrimination to practical barriers that blocks attendance (meeting locations, lack of internet access, costs involved, language barriers etc.).

If multi-stakeholder approaches are adopted by Defra, power dynamics must be taken into consideration and addressed before the multi-stakeholder consultations begin. This includes ensuring that final decision-making is equally held by different groups in attendance and that the governance model is clear.

Q46. Which of the following should we provide information on in guidance to support businesses to establish effective due diligence systems? Please tick all that apply.
Other.

As discussed under the introductory section and in response to question 45 of the consultation, many structural elements of the law that we consider to be important are being left to planned guidance, rather than being set out in the secondary legislation.

It is our view that setting out the structure of what is expected under secondary legislation will ensure the key building blocks and requirements under the law are clear and robust enough to stand the test of time. Guidance should be used only to complement the structure set out in the secondary legislation, and to clarify details that are appropriate to be changed over time.

To reiterate, the areas that should be dealt with in secondary legislation are:

1. Which specific categories of national-level law must companies look for when defining which national laws are applicable in their supply chains *(this includes land use, land ownership and customary land tenure)*;
2. What key elements of the 'due diligence system' should look like in practice such as the proposed country-level risk assessment and what methodology should be used to bring this together with individual company supply chain information *(this is essential to ensure consistency)*; and,

[44] https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf, page 15

3. What safeguards need to be put in place to ensure 'cut and run' does not become a default reaction to the legislation, potentially leaving millions of smallholders to bear the burden.

It is also important to note that authoritative guidance on what due diligence is and how to implement it is already extensively covered by the UNGPs and OECD guidelines. OECD-FAO guidance for responsible agricultural supply chains is also already extensively used by businesses.[45]

Guidance will be required to clarify that human rights due diligence should be undertaken by businesses and which elements of the 'due diligence system' implemented due to Schedule 17 can be used by business as a starting point for their human rights due diligence.

Q47. Should we set out in guidance how businesses may use existing certifications and standards to help meet the due diligence requirement?

Certification is not the same as - and should not be equated to - proper and meaningful due diligence. At best certification should be regarded as complimentary to due diligence. Furthermore, certification schemes are voluntary tools and are not intended to displace legal obligations.

We strongly believe that there must not be a reliance on certification because of serious governance and implementation shortcomings related to existing certification schemes.[46] This includes an over reliance on self-reporting by suppliers, which often results in incomplete answers and data, and a serious lack of meaningful and independent verification of supplier information as well as audit results.

There is also a prevalent issue around the falsification of documentation pertaining to legality. This is particularly evident in relation to land use and ownership rights, leading to overlapping claims and resulting conflicts regarding who truly owns the lands on which commodities are produced.

Many of the monitoring and verification methodologies in use today are not effective in identifying suppliers who are non-compliant with the laws in their country of operation. The inclusion of data from community-based monitoring as well as media reports and other information from local or international civil society organisations with direct links to affected communities is an essential tool to help evaluate whether supplier declarations correspond with the real legal position.

Further evidence to inform due diligence system requirements

Q50. Can you provide any evidence on the cost of carrying out due diligence? Please provide details including how this relates to business size

The consultation asks a concerning number of questions dedicated to the cost of carrying out due diligence to businesses and the benefits of doing so for business. This is particularly evident given

[45] https://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm
[46] PublicEye_Report_Respecting-Rights_1-22.pdf (ecchr.eu)

there are no questions attempting to gain an understanding of the real costs of deforestation, biodiversity loss and consequent human rights impacts felt now and by future generations.[47]

It is well accepted that the 'externalities', or negative effects of business to people and the environment, are disproportionately and most detrimentally borne by the most marginalised in 'producer countries' such as women, indigenous peoples, other forest-dependent communities and local communities.

There is also particular concern regarding the potential disproportionate burden and costs that will be placed on smallholders to try to demonstrate legality and the consequences of disengagement with suppliers who source from a large number of smallholders.

In relation to estimated costs for human rights due diligence, research conducted by the European Commission outlines that recurrent company level costs for implementing due diligence do vary in line with business size: for SMEs, the additional recurrent company level costs for implementing full human rights due diligence are estimated to be around 0.14% of their revenue, and, for larger companies, around 0.009%.[48] This could well be altered however with sufficient guidance and support for SMEs from a regulatory body for due diligence implementation.

Annual reporting

Q55. What should businesses be required to report on to enable a regulator to identify areas for further scrutiny?

Businesses should be required to submit a yearly report detailing the following in relation to each commodity:

1. What due diligence system has been established, as well as any changes and improvements to that system over time;
2. How due diligence been implemented over the course of the year;
3. The risks identified and methodology used to undertake the risk assessment (sub-jurisdictional level and individual supplier level);
4. The actions taken to mitigate the risks and safeguards deployed to guard against unintended consequences; and crucially,
5. What the outcomes of these actions have been.

There is a risk, due to how a 'due diligence system' is defined in the primary legislation, that reporting will only touch on the process and risk mitigation elements. It is necessary to highlight that reporting against process-based indicators on the due diligence system is not sufficient and that an outcomes-focused approach is necessary.

It will also be important to make clear that the 'due diligence system' set out under Schedule 17 is a minimum standard and that expectation continues to be that companies will seek to strive for best-practice through the implementation of broader human rights and environmental due diligence as

[47] The Corporate Justice Coalition's response to Q.41 details other fundamental elements that appear to be missing from the consultation questions.

[48] http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf p.14

set out under the UNGPs and OECD guidelines and anchored in internationally recognised human rights and environmental legal obligations.

Annual reporting requirements need to include the following information, as well as signposting where this information is published by the company (e.g., links to the relevant webpages):

- Supplier (direct and indirect) list related to each commodity. This must include geolocation information, country of origin and sub-national jurisdiction of production, parent company names, legal and trading names of the supplier, and any other relevant information. This information should be presented in a format that facilitates further analysis such as in a spreadsheet.
- Grievance list[49] and corresponding action-plans for resolution.
- List of the relevant local laws in each national-level and sub jurisdiction (where relevant), and evidence of compliance with each, with details given in relation to how compliance with land use and ownership laws have not undermined the rights of indigenous peoples and other forest-dependent communities to their customary lands or their free, prior and informed consent.
- Supplier exclusion criteria and how unintended consequences for smallholders have been taken into account.
- A list of the company's products that contain the commodities applicable under the law, this includes a list of products that contain derivatives.

The transparency elements required of companies under secondary regulations is also key to the regulator's success in enforcing the law is having access to relevant information. The regulator plays an important role in ensuring transparent public access to the information disclosed to it by companies in scope of the law. The regulator will need adequate resources to allow for proper oversight and scrutiny. More detail in relation to the regulator is provided under the response to Q.60.

Q: 56. Should non-commercially sensitive information about businesses' due diligence exercises be made public to increase sector transparency and accountability?

Yes

Q: 57. What information should be made public about businesses' due diligence exercises to support accountability and decision making?

All information provided by the company to the regulator should be made publicly available.

[49] A company grievance mechanism should be aligned with Guiding Principle 31 (UNGPs) which sets out effectiveness criteria for non-judicial grievance mechanisms. The UN Office High Commissioner for Human Rights has produced further guidance under its Accountability and Remedy Project on Enhancing effectiveness of State-based non-judicial mechanisms in cases of business-related human rights abuse, available here: https://www.ohchr.org/EN/Issues/Business/Pages/ARP_II.aspx. Note that the grievance list should include all types of grievance and not be limited to deforestation-related grievances alone. This will aid access to justice as well as contribute towards data gathering for evidence-based improvements to the legislation in its subsequent reviews that will occur every two years from the date it enters into force.

Enforcement

Q59. Should the maximum variable monetary penalty be £250,000?

No.

We believe that the maximum penalty set out is not a dissuasive enough sanction for the companies that will fall under the scope of this law. The current proposal is a seemingly arbitrary figure which is not necessarily proportionate to the environmental damage incurred through the act of illegal deforestation, nor the wider impacts – including to human rights and climate – that deforestation contributes to.

The penalty should be sufficient to deprive non-compliant companies of economic benefits derived from their infringements. Any fines collected should be used to cover enforcement activities.

An example in current UK law of a fixed fine being set by percentage of turnover rather than a fixed monetary value is the Data Protection Act (2018), where the maximum fine is £17.5million or 4% of annual global turnover – whichever is greater. This would align the sanction with the EU Deforestation regulation proposal which states (Article 23) that fines should at least be 4% of annual turnover.[50]

However, to be truly dissuasive, there should be no fixed maximum penalty and a fixed percentage of revenue (such as 4%) could be set out as the minimum. Penalties should go beyond fines and should include the temporary disqualification of non-compliant companies from public contracts and other sanctions such as stop notices. Continued and repeated infringements should be met with increased penalties and sanctions, such as the exclusion of businesses from public procurement.

The UK has demonstrated leadership in placing dissuasive sanctions on businesses before, e.g., under the Bribery Act 2010 where the penalty can be up to ten years imprisonment and a fine can be unlimited. Under this law, the severity of the bribery offence is used to determine the length or imprisonment or the fine amount.

The idea that Directors should be held liable for their environmental damage is one that the Chief Executive of the Environment Agency, Sir James Bevan has recently spoken about at the Westminster Energy, Environment and Transport Forum, *"The future model I would like to see would also carry a much bigger stick. It would make regulated industries pay the full cost of their regulation. It would make them pay the full cost of repairing any damage they do to the environment: they currently don't do that either. And the model would carry much tougher punishment for the biggest and worst polluters. In cases of extremely harmful and reckless pollution – and we've seen far too much of that in the last few years – that would include fines so large they would put a major dent in companies' bottom lines and sentences that would put their bosses in jail".*[51]

[50] https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en
[51] https://www.energylivenews.com/2022/01/19/environment-agency-calls-for-jail-sentences-for-bosses-of-polluting-companies/

Q60. Do you have any further comments on the enforcement regime?

Details pertaining to the enforcement framework, the role of the regulator, powers given to the regulator and obligations regarding transparency should be set out in secondary legislation as per paragraph 8 of Schedule 17.

The enforcement framework

A dedicated, independent, and well-funded Enforcement Authority (regulator) with sufficient powers to investigate and a mechanism to deal with third-party complaints is necessary to ensure proper implementation of this law.

Experience from the Modern Slavery Act (MSA) shows that dedicated enforcement mechanisms are necessary to ensure compliance. An independent review of the MSA, published in 2019, recognised that an estimated 40 per cent of eligible companies are not complying with the legislation at all and those who do, are offering little substance and detail. Further, limited penalties for non-compliance have not been enforced. [52]

The regulator will need to be comprised of a team with expertise in the environment, human rights, supply chain management, corporate accountability, and law (including land use, land ownership and customary land tenure). Although the legislation does not explicitly address human rights, any Enforcement Agency dealing with the topic of illegal deforestation, in multiple countries worldwide, will be presented with the human rights impacts of deforestation in localities of production.

We believe that an accessible, credible and responsive third party complaints system that offers indigenous peoples, forest-dependent communities, workers and smallholders (as well as civil society groups) a confidential mechanism to make complaints, in their language, is crucial to provide some level of access to justice. This simultaneously serves as a critical source of first-hand information that can help the regulator triangulate with self-reported information provided by companies.

An awareness and sensitivity of potential reprisals needs to be carefully considered. Disclosures related to whistle-blowers should be protected as set out by the Public Interest Disclosure Act 1998.[53] The procedure for receiving, assessing and acting on information – as well as reporting on the outcome any resulting investigation should be publicly detailed by the regulator.

The regulator should develop a robust spot-checking system to verify data provided by companies. It should enable civil liability where non-compliance is evident.

Powers given to the regulator

Bestowing a wide-ranging toolbox of powers, including investigative powers, to the Enforcement Agency will be necessary to ensure it can successfully gather the documentation and evidence

[52]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

[53] https://www.legislation.gov.uk/ukpga/1998/23/contents

needed from companies in-scope of regulation. This should include the powers of entry, inspection, examination, search and seizure.

Regulatory powers can be modelled on those given to the UK's Competition and Markets Authority. This regulator has wide-ranging powers which includes the ability to enter premises with a warrant in order to seize relevant material and the ability to disqualify directors for up to 15 years if they infringe the rules, as well as the ability to issue fines of up to 10% of a company's turnover. Other powers bestowed on this regulator could be considered for this law, in particular empowering it with 'market investigation' powers which would enable it to undertake in-depth investigations when a whole market sector (in this case commodity-specific) does not appear to be working satisfactorily – this shifts the focus on industry wide behaviours and practices rather than the workings of individual companies.[54]

The Enforcement Authority will need to have the powers to investigate on the ground in countries where commodities produced. Visits to producer countries will help ensure proper compliance with the law and facilitate investigations into complex grievances that have been reported. Information gathered during investigations should be shared with affected parties, this will facilitate the pursuit of civil liability in cases where non-compliance has been found by the Enforcement Agency.

The role of the regulator

The regulator's role should involve monitoring compliance through analysis of companies' due diligence reports which are cross-referenced with third party information, undertaking investigations, placing sanctions on non-compliant companies, and collating and publishing materials to support compliance, monitoring (aided by third parties and accessible complaints system) and enforcement.

Enforcement obligations should include requiring companies to complete declarations when importing commodities that adequate due diligence on the commodity has been completed. Monitoring disclosures made by companies should include monitoring the way in which non-compliance is addressed, the improvements made over time and the outcomes achieved.

The regulator should keep (and publish) a register of companies that are covered by the regulation and required to provide due diligence information. The regulator should assess the reports submitted by companies and evaluate whether any non-compliance is evident and publish a list of companies found to be non-complaint with the law.

Guidance should be provided by the regulator and regularly updated to keep up with evolving best practice.

A searchable database of information provided by companies should be maintained by the regulator (more in-depth detail is listed under the next section).

[54] https://www.business-humanrights.org/en/latest-news/report-of-research-into-how-a-regulator-could-monitor-and-enforce-a-proposed-uk-human-rights-due-diligence-law/

The regulator should itself publish an annual report on enforcement actions taken, including complaints/concerns received and actions taken in response, and investigations conducted.

The regulator's obligations regarding transparency

An effective enforcement system is predicated on clear obligations and compliance when it comes to information-sharing and transparency by companies.

The regulator, too, must aid transparency, and in turn support compliance and enforcement, by setting up an easily searchable centralised database of information that brings together information provided by the companies to comply with Schedule.

This would be in line with one of the law's stated objectives: to improve transparency in forest risk commodity supply chains and simultaneously avoids duplication of efforts.[55]

Key information to be made available in this way should include, but not limited to:

- Complaints received, actions taken, and any remediation achieved via the 3rd party complaints system;
- Name, geolocation and other relevant information of the supplier/operator found to be non-compliant with relevant national-level law in the country of production;
- List of companies who fall under scope of the law, and a system to show non-compliance with the UK law;
- Company annual reports - reports should be made public by the relevant authority in their entirety within 28 days of receipt via a central and publicly accessible online database that is searchable by commodity name, company name, date of import, and country of production;
- Volumes traded per commodity per company;
- Lists of the relevant local laws in each national-level and sub jurisdiction (where relevant), and evidence of compliance with each, with details given in relation to how compliance with land use and ownership laws have not undermined the rights of indigenous peoples and other forest-dependent communities to their customary lands or their free, prior and informed consent.
- Supplier exclusion criteria and how unintended consequences for smallholders has been taken into account.

[55] https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf