

Companies Coming Out in Public Support of 'Failure to Prevent' Law on Human Rights Obligations

As previous client alerts have set out, momentum is building across a range of jurisdictions toward legalizing companies' obligations to respect human rights and promote ESG issues generally. While in Europe, this has centered on mandatory human rights due diligence proposals (as set out in our previous update, available [here](#)), in the UK attention has focused on adapting the 'failure to prevent' structure as set out in the UK Bribery Act 2010.

This attention continues to build. Most recently, the large retailer ASOS has recently called for the UK Government to specifically adopt the failure to prevent model as set out in a report by the British Institute for International and Comparative Law (BIICL) and Quinn Emanuel's Julianne Hughes-Jennett.

Recent Company Support for Model

A recent [article](#) in *The Times*, published on 28 April 2021, by ASOS CEO Nick Beighton called for the UK to adopt legislation which keeps the UK at the forefront of world-leading ESG regulation. ASOS specifically endorsed the BIICL / QE study as setting a model for best practice UK legislation. ASOS called for making human rights due diligence mandatory, requiring UK-based to "report on their efforts to mitigate risk and protect people in supply chains globally", and to reinforce this through creating liability for companies who fail to prevent human rights (or environmental) harms.

This public support from industry leaders is indicative of the direction of travel on such ESG laws. As well as widespread civil society support, business leaders are now also coming forward to endorse legalizing otherwise voluntary obligations. ASOS' support for such legislation marries with previous support from [105 investors](#) representing over US\$5 trillion in assets under management and in an European context, over [25 other companies](#) including those operating in complex food, beverage and clothing supply chains.

ASOS' adoption of the BIICL / QE approach indicates the value of a failure to prevent law as a way of creating liability, which avoids some of the complex debates on liability which have arisen in the context of European proposals.

Failure to Prevent Laws and Quinn Emanuel Report

The adapted failure to prevent model has been the subject of an extensive feasibility report by the BIICL and Quinn Emanuel's Julianne Hughes-Jennett, available [here](#). That report extensively considers the detail of precisely how the Bribery Act model would apply to ESG claims, and specifically how it would integrate and reflect the UNGPs.

A failure to prevent model is a different way of legalising the obligation on companies to respect human rights as set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs). The debate around transforming the UNGPs into 'hard law' has to a large extent focused on making the "due diligence" obligation on businesses mandatory, and creating legal liability for businesses which do not adequately carry out that due diligence. The failure to prevent model inverts the companies' obligation: a company would have an obligation to prevent specified human rights or environmental harms, with liability accruing *unless* the company could show it had taken appropriate steps to avoid those harms. The key means of showing appropriate steps had been taken would be through meeting best practice guidance, as articulated in the UNGPs.

As a result, in practice once a breach of the obligation was established, the burden of proof would rest on the company to show its due diligence had been appropriate and adequate in order to show it had discharged its obligations.

The BIICL/Quinn Emanuel study and the failure to prevent model has now received additional support from [civil society groups](#), as well as being cited by ASOS in *The Times*. This support emphasizes a point highlighted in the study, namely the broad appeal to businesses of having legal certainty as to their ESG obligations and also in adapting a law many companies operating in the UK will already be familiar with. We consider momentum is likely to build on the UK to act in this area, given the Government's commitment to reinforcing the Modern Slavery Act and expressed interest in remaining a world-leader on ESG and due diligence issues broadly.

Quinn Emanuel's ESG Practice

Quinn Emmanuel has one of the most pre-eminent ESG practices. Our expertise is truly international and cuts across sectors – from telecommunications, technology and artificial intelligence to construction and engineering and the extractive sector. Given our particular experience contributing to the Failure to Prevent study as set out above, we are uniquely well-placed to advise businesses on compliance with emerging ESG obligations.

Led by Chambers ranked London partner Julianne Hughes-Jennett, the team has acted in some of the most important disputes in the field; in prosecutions for corporate complicity in crimes under international law brought by several European states; in “parent company liability” and duty of care cases in the English Courts; in class actions brought under the Alien Tort Statute in the US; and in National Contact Point Communications in several States. Our team has world-class expertise in issues of extra-territorial jurisdiction and conflict of laws - critical to cases which involve the responsibility of multinationals headquartered in North America or Europe for impacts which occur overseas. And we have deep knowledge of the legal issues that can arise when businesses operate in conflict zones.

Crucially, we understand how these disputes play out in the public domain. Our experience allows us to tailor a litigation strategy to your specific context and to ensure that it complements your public relations and wider stakeholder engagement strategies. Where appropriate, we can advise on operational grievance mechanisms which are consistent with international human rights standards and which protect your legal rights.

We have run internal investigations which span multiple jurisdictions, conflict zones and complex corporate structures. Drawing on our deep knowledge of how human rights risk to a business's stakeholders can create legal risk for the business, our advisory practice helps businesses to identify human rights issues in their operations and supply chains and implement practical and effective systems to prevent them from materialising. We carry out human rights impact assessments and human rights due diligence. We support businesses to comply with the growing web of legislation in the field, from the Modern Slavery Act in the UK and Australia to the Duty of Vigilance Law in France. And we guide businesses to anticipate changes in the legislative landscape so that they can plan accordingly. Unlike many law firms, we can go beyond legal compliance and support businesses to substantively engage with human rights issues – thus reducing the human rights risk to rights holders and the legal and reputational risk to the business.

Chambers Global recognises us for our unique mix of disputes and advisory work, describing Julianne Hughes-Jennett as a *"passionate and driven practitioner"* known for her *"great deal of work in dispute resolution and human rights due diligence"* and acknowledges her as a *"very steady hand in guiding clients"* on international human rights issues and liabilities.

If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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