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TOWARDS EU-WIDE MANDATORY HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR BUSINESS: A BREAKTHROUGH IN EUROPE AND BEYOND?

Abstract: *In March 2022, the European Commission presented its long-awaited legislative proposal on the EU-wide human rights and environmental due diligence (HREDD) for business. This article argues that the proposed Directive fails to be an effective and innovative legislation in three respects. Firstly, it does not draw lessons from the shortcomings of the to-date regulatory policy relating to business and human rights. It mainly consolidates at the EU level the status quo of extant due diligence legislation in Europe. Secondly, the proposal falls short of the established international standards and its own objectives insofar as it fails to establish instruments for effectively preventing and remedying human rights and environmental harm. Thirdly, the proposal's normative preference for process- (rather than result-) oriented HREDD risks reducing it to yet another compliance instrument. Beside amending these shortcomings, to achieve a breakthrough, the upcoming legislation should in any case define HREDD as the legal standard of care; the compliance with which does not*

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per se exclude civil liability. The general negotiation approach of the Council is not proposing much improvement in that regard. The stakes for the European Parliament's possible role to raise the bar are thus very high.

Keywords: UN Guiding Principles on Business and Human Rights, human rights due diligence (HRDD), human rights and environmental due diligence, HREDD, corporate accountability

INTRODUCTION

On 23 March 2022, the European Commission (EC) presented its long-awaited proposal for a Directive on Corporate Sustainability Due Diligence (draft Directive).¹ As specified in its recital 14, the draft Directive aims to ensure that companies active in the EU internal market contribute to sustainable development and the sustainable transition of economies and societies. To that end, companies are to establish and exercise *human rights and environmental due diligence* (HREDD) with respect to their own operations, that of their subsidiaries, and their value chains.

A legislative proposal on mandatory HREDD for business was one of the initiatives promised by the EC under the European Green Deal² and was announced by the European Commissioner for Justice Didier Reynders in April 2020. Not surprisingly, the burden of the promised green transformation in the EU must also be shared by business actors across all economic sectors. Initially expected in June 2021, the proposal was repeatedly postponed, most notably due to vehement opposition by businesses of the EC's plans to combine in a single legislative act the due diligence initiative together with the envisaged reform of director's duties aimed at countering short-termism.³ The EC has ultimately relinquished its ambitious plans. The draft Directive only clarifies a director's duty of care with respect to sustainability matters, including human rights, climate change, and the environ-

¹ Proposal for a Directive of the European Parliament (EP) and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

² COM(2019) 640 final, notably pt. 2.1.3. The crucial role of business conduct for the Union's successful transition to a climate neutral and green economy is stressed in the explanatory memorandum to the draft Directive, including the need for corporate decision-making to be framed in view of human rights, environmental and climate change concerns. For the analysis of the European Green Deal from a perspective of polycentric governance theory, see J. van Zeven, *The European Green Deal: The future of a polycentric Europe?*, 26(5-6) European Law Journal 300 (2020).

³ Amending company directors' duties to lengthen the time horizon of corporate decision-making was expected to also ensure adequate addressing potential human rights and environmental risks. Arguably, though, a properly constructed mandatory due diligence requirement will significantly change directors' duties in the desired direction. J. Ruggie, *European Commission initiative on mandatory human rights due diligence and directors' duties*, available at: https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf (accessed 30 April 2023).

ment (Art. 25).⁴ Directors of EU companies would have the duty to set up and oversee the implementation of corporate sustainability due diligence, as well as to adapt the corporate strategy taking account of actual and potential adverse impacts identified through due diligence processes (Art. 26). However, even the envisaged limited duties remain contentious for national governments. In its general negotiation approach of 1 December 2022, the Council agreed that such duties would potentially undermine “director’s duty to act in the best interest of the company”.⁵

The expected introduction of a mandatory HREDD for business in the EU is broadly considered to be one of the most important developments in the field of business and human rights. An EU-wide mandatory legislation will provide a strong impetus for regulation at the national level, and very likely other regions of the world.⁶ It could also very quickly render inadequate most if not all of the extant national legislation.⁷ However, this potentially historic development may easily turn into a missed opportunity if the proposed legislation fails to deliver on its ambitious promise. As the article will demonstrate, the stakes for such a scenario are very high. What transpires from the draft directive is that the EC expects the EU-legislator to be either unwilling or not prepared to learn from the experiences of regulating social aspects of business conduct, be it regarding the EU’s own regulatory experience or that gained at national or international (UN, OECD) levels.

This article points to major deficiencies of the EC’s draft Directive pertaining to effectively preventing and remedying human rights and environmental harm, and how these deficiencies could be rectified. In particular, the normative structuring of HREDD under the draft Directive creates a risk of HREDD becoming yet another tick-box exercise for Transnational Companies (TNCs),⁸ notably where substantive

⁴ These are also classified as “non-financial issues” and may additionally embrace governance (e.g. corruption and bribery) considerations. Cf. recital 6 of the Directive 2014/95/EU of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1 (also called the Non-Financial Reporting Directive, NFRD). See also R. McCorquodale, J. Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 *Netherlands International Law Review* 455 (2021), p. 466.

⁵ Council document 15024/1/22 REV 1, p. 10, pt. 31.

⁶ E.g. J.L. Černič, *The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality*, 10 *Global Business Law Review* 1 (2022).

⁷ Especially not very ambitious ones, such as the new Swiss transparency legislation. D. Canapa, E. Schmid & E. Cima, «*Entreprises responsables*»: *limitations et perspectives*, 140(5) *Zeitschrift für Schweizerisches Recht* 558 (2021), p. 579. Since Swiss companies are active on the EU single market, they (at least the large ones) would be subject to new HREDD duties.

⁸ M. Krajewski, K. Tonstad, F. Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6(3) *Business and Human Rights Journal* 550 (2021), p. 558. G. Quijano, C. Lopezi, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 *Business and Human Rights Journal* 241 (2021), p. 254. See also ECCJ, *European Commission’s proposal for a directive on Corporate Sustainability Due Diligence*, ECCJ Legal Brief, April 2022, p. 11.

due diligence obligations fall short of international standards⁹ or an enforcement regime is weak or non-existent.¹⁰ We argue that the defined limitations of HREDD are not inherent in the instrument as such, and hence may be amended through appropriate tailoring.

This article proceeds as follows. Section 1 reconstructs the emergence of business and human rights discourse at the UN and OECD levels and how it has influenced the EU policy measures, initially focused on a purely voluntary approach of corporate social responsibility. Against this backdrop, Section 2 clarifies the origin and current perspectives on the core concept of human rights due diligence (HRDD), extended to environmental concerns (HREDD) in both national and the proposed EU legislation. By applying a comparative lens, Section 3 shows how the draft Directive on corporate sustainability due diligence builds on the already existing legislative, soft law, and judicial instruments under national and international law, but concomitantly fails to improve their shortcomings and/or align with international standards. The article concludes by proposing to disentangle corporate civil liability for negative impacts on people and the environment from the issue of whether business actors adhered to HREDD or not. Such a strict (risk) liability would benefit rights-holders by curtailing corporate abuse of the due diligence defence, while at the same time incentivising business actors to apply HREDD as an effective risk-assessment and prevention instrument.

1. BEYOND VOLUNTARISM: BUSINESS AND HUMAN RIGHTS ON THE AGENDA AT THE UN, OECD AND EU

The issue of regulation of multinationals, notably the capability of States to control powerful private companies, is not new. Since the 1970s, the increasing influence of multinational enterprises on economic, political and social developments, both in developing and developed countries, has raised concerns about the potential abuse of their powers.¹¹ At that time the first NGOs specializing in monitoring

⁹ *E.g.* the German law narrows general due diligence obligations to the company's own activities and that of its direct suppliers. As rightly pointed out by Krajewski et al., *supra* note 8, p. 556 (this "graduated tier-oriented logic" is at odds with the norms of conduct advanced by the UNGPs).

¹⁰ B. Fasterling, G. Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, 116 *Journal of Business Ethics* 799 (2013), p. 808. For example, the existing transparency legislation such as the UK Modern Slavery Act foresees no sanctions for non-compliance.

¹¹ This initiative was triggered by the interference of the ITT Corporation in the domestic policy in Chile that eventually led to the overthrow of the democratically elected President Salvador Allende and bringing Augusto Pinochet to power in 1973. See K.P. Sauvart, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 *Journal of World Investment and Trade* 11 (2015), p. 87. In mid 1980s, a number of delegations to the UN Commission on Trade and Development were of the opinion that "the changing economic situation over the past 10 years had shaped the way in

the activities and bad practices of multinationals were created: e.g. La Déclaration de Berne (now Public Eye) in Switzerland and SOMO in the Netherlands. The first initiatives of international institutions (namely the UN and the OECD) also date from this period. The EU's approach to regulation in this area has been significantly shaped by historical developments. The already intertwined national, transnational and global regulatory frameworks were designed to further interact. In fact, all stakeholders were to benefit from the mutually reinforcing frameworks that would provide better legal certainty for markets and individuals. Thus, it is desirable to ensure that the concepts underlying the existing frameworks (such as HRDD) do not offer mutually-exclusive interpretations of business obligations. This article will show that the emerging national and EU standards fall short of the advocated global standard.

1.1. United Nations

The idea of a UN Code of Conduct on Transnational Corporations (Code of Conduct) was initially proposed in 1972, but it was never concluded.¹² Respect for human rights was included in various drafts of the Code of Conduct, albeit limited to the principle of non-discrimination.¹³ However, in 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy regulating the operation of multinationals, which included references to the Universal Declaration of Human Rights (1948) as well as the International Bill of Human Rights (1966).¹⁴ Further revisions incorporated the concept of corporate responsibility to respect human rights according to the more recent developments in this area within the UN framework.

The issue of regulating business activities was taken up again in the late 1990s by the UN Working Group on the Working Methods and Activities of Transnational

which countries viewed transnational corporations and the effects of their activities". UN Commission on Transnational Corporations, *Report on the 11th Session*, 10-19 April 1985, E/C.10/1985/19, p. 12.

¹² Sauvart, *supra* note 11. See also S. Deva, *From 'business or human rights' to 'business and human rights': what next?*, in: S. Deva, D. Birchall (eds.), *Research Handbook on Human Rights and Business*, Edward Elgar Publishing, Cheltenham: 2020, pp. 3-4.

¹³ Various drafts of the UN Code of Conduct on Transnational Corporations were presented to the UN Economic and Social Council. Art. 13 of 1983 draft included a non-discrimination clause enumerating the following features: race, colour, sex, religion, language, social, national and ethnic origin, and political or other opinion. See <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download> (accessed 30 April 2023). The significant emphasis on the non-discrimination clause was due to the processes of decolonization and combating apartheid in South Africa. One of the recurring issues on the agenda of the UN Commission on Transnational Corporations in 1980s was the collaboration of transnational corporations with racist authorities in South Africa and Namibia. See UN Commission on Transnational Corporations, *supra* note 11, pp. 2-4.

¹⁴ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 16 November 1977.

Corporations. The outcome document, namely the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (UN Norms), aimed to provide a set of mandatory obligations in the area of human rights for enterprises.¹⁵ For this reason, among others, UN Norms were met with resistance from the business sector, including the International Chamber of Commerce and the International Organisation of Employers,¹⁶ and was ultimately abandoned by the UN Commission on Human Rights in 2005.¹⁷ The difficult task of reaching a consensus between the various stakeholders was delegated to Professor John Ruggie, who was appointed as the UN Special Representative for Business and Human Rights.

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs),¹⁸ which marked a milestone in developing the international standards for HRDD. Contrary to the UN Norms, the negotiations on the UNGPs led by John Ruggie were backed by an extensive process of consultations and pilot programmes.¹⁹ Therefore, the principles laid down in the UNGPs have become universally accepted norms of conduct²⁰ and are considered as a turning point in the debate on business and human rights.²¹

¹⁵ L.C. Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 *Columbia Human Rights Law Review* 101 (2005), p. 111; D. Kinley, R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6(3) *Human Rights Law Review* 447 (2006); J. Oldenziel, *The added value of the UN Norms. A comparative analysis of the UN Norms for Business with existing international instruments*, SOMO Centre for Research on Multinational Corporations, Amsterdam, 2005.

¹⁶ ECOSOC, *Joint written statement submitted by the International Chamber of Commerce and the International Organization of Employers, non-governmental organizations in general consultative status*, 29 July 2003, E/CN.4/Sub.2/2003/NGO/44. See also a position of Shell: E. Rabin, *In the Hot Seat: Shell VP Robin Aram*, GreenBiz, 21 June 2004, available at: <https://www.greenbiz.com/article/hot-seat-shell-vp-robin-aram> (accessed 30 April 2023).

¹⁷ The Commission declared that the UN Norms had “no legal standing”, see Deva, *supra* note 12, p. 4.

¹⁸ The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. For discussion, see e.g. M.K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights*, 14(1) *Human Rights Law Review* 133 (2014).

¹⁹ For multi-stakeholder consultations between 2007-2010, see <https://tinyurl.com/us5ffjry> (accessed 30 April 2023).

²⁰ J.G. Ruggie, J.F. Sherman, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice*, 6(3) *Journal of International Dispute Settlement* 455 (2015), p. 459. The authors construe the UNGPs as “global norms”. Cf. also J.G. Ruggie, J.F. Sherman, *The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28(3) *European Journal of International Law* (2017), p. 923.

²¹ A. Sanders, *The Impact of the “Ruggie Framework” and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation*, in: J. Martin, K.E. Bravo (eds.), *The Business and Human Rights Landscape. Moving Forward, Looking Back*, Cambridge University Press, Cambridge: 2015, p. 288.

Despite being merely a soft law instrument, the UNGPs have triggered an impressive uptake in both policy and practice.²² The norms they concretize, such as the corporate responsibility to respect human rights, may (at least at this stage) be expressed in terms of social rather than legal norms.²³ The perceived limited ambition of the UNGPs to establish new substantive legal standards has been subject to strong criticism in business and human rights scholarship.²⁴ Moreover the specific obligations that may arise for enterprises from HRDD remain unclear. The interpretation of any such obligations requires a context-specific approach that builds on the developments in international human rights law. Therefore, the UN treaty bodies appear to be the most suitable to spearhead this process. So far, the intersection of business and human rights has been comprehensively assessed by the Committee on the Rights of the Child (CRC Committee) (General Comment No. 16 adopted in 2013) and the Committee on Economic, Social and Cultural Rights (ESCR Committee) (General Comment No. 24 adopted in 2017). These two Committees also formulated a number of recommendations related to the adoption of a binding normative framework on HRDD. Their content is briefly analysed in Section 2 so as to expound the salient elements of the HRDD concept.

1.2. Organisation for Economic Cooperation and Development

As an economic organization of developed countries, the OECD constitutes a geopolitically appropriate forum for initiatives aimed at regulating the operation of multinational enterprises. Generally speaking, companies based in the developed Global North are deemed responsible for the abuses of human rights and the environment in the developing Global South.²⁵ In 1974, the OECD highlighted the need to systematically address global challenges related to capital movements, competition, and taxation, but was also concerned about the instability of employment and wages as well as the impact of transfers of technology from developed to developing countries.²⁶ The two latter issues also fall within the scope of the international human rights framework, in particular the UN International Covenant on

²² Governments are adopting National Action Plans on business and human rights. Some countries, in Europe and beyond, are adopting binding legislation. The UNGPs are said to have achieved the alignment of standards and “facilitated the socialisation of human rights norms among businesses, a prerequisite to ensuring corporate respect as well as corporate accountability for human rights [violations]”. Deva, *supra* note 12, p. 4.

²³ Ruggie, Sherman, *supra* note 20.

²⁴ See e.g. Fasterling, Demuijnck, *supra* note 10, p. 800.

²⁵ C. Bradshaw, *Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court*, 32(1) *Journal of Environmental Law* (2020), p. 139.

²⁶ OECD Observer, no. 69, April 1974.

Economic, Social and Cultural Rights²⁷ (ICESCR), as well as instruments adopted by the UNESCO²⁸ and the ILO.²⁹

It took only two years for the OECD to negotiate the Declaration on International Investment and Multinational Enterprises (1976), which was accompanied by the Guidelines for Multinational Enterprises³⁰ (OECD Guidelines). The document was aimed mainly at achieving a transparent environment for international investment and did not make any clear references to human rights standards. In the following decades, mainly due to the developments within the UN system, the OECD Guidelines were widened to include a new chapter on human rights, the provisions of HRDD, and also elevate the protection of workers vis-à-vis the internationally recognized core labour standards.³¹ Beside regionally adopted measures (see below), the OECD Guidelines constitute the only multilaterally agreed standards on responsible business conduct which governments have committed to promoting.

Since 2010, the OECD as well as the UN and EU have taken various, mutually reinforcing, initiatives aimed at defining sector-specific standards. The OECD developed six sector-specific due diligence guidebooks relating to: minerals extracted in conflict and high-risk areas (2016); agriculture (2016, developed together with the FAO); the extractive sector (2017); garments and footwear (2017); the worst forms of child labour in mineral supply chains (2017); and the financial sector (2017).³² This process culminated in the adoption of the cross-sectoral Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance) in 2018,³³

²⁷ Art. 6 ICESCR relates to the right to work, Art. 7 enumerates the right of everyone to the enjoyment of just and favourable conditions of work, and Art. 15 concerns rights in the field of science, in particular the right to benefit from scientific progress and its applications.

²⁸ See e.g. Art. 2 of the Declaration of Principles of International Cultural Co-operation indicates that nations should establish a harmonious balance between technical progress and intellectual advancement, therefore suggesting some form of technology transfer. Concomitantly, Art. 4(4) of the Declaration stressed that peoples from all parts of the world should enjoy the benefits of science. See: UNESCO, *Declaration of Principles of International Cultural Co-operation*, 4 November 1966, CFS.67/VII.4/A/F/S/R.

²⁹ Prior to 1974, the ILO had adopted 51 Conventions related to labour rights, notably unemployment (C002 in 1919), minimum wage-fixing and protection of wages (C026 in 1928, C095 in 1949, C099 in 1951, C131 in 1970), minimum age (C058 in 1936, C138 in 1973), social security (C102 in 1952), discrimination (C111 in 1958), employment policy (C122 in 1964).

³⁰ OECD, *Declaration on International Investment and Multinational Enterprises*, OECD/LEGAL/0144. For guidelines see Annex I. During the negotiations, some delegations indicated that “they would like this agreement to be the first step towards more binding rules” (OECD Observer, no. 82, July/August 1976, p. 13).

³¹ OECD, *The OECD Guidelines for Multinational Enterprises*, June 2001, latest update 2011. The Guidelines highlight that enterprises should respect human rights (section IV, pt. 1), avoid causing or contributing to adverse human rights impacts and address such impacts when they occur (pt. 2), seek ways to prevent or mitigate adverse human rights impacts (pt. 3), adopt a policy commitment to respect human rights (pt. 4), carry out human rights due diligence (pt. 5), and ensure remediation of adverse human rights impacts (pt. 6).

³² For sector-specific guidebooks, see <https://www.oecd.org/industry/inv/mne/> (accessed 30 April 2023).

³³ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018.

inspired by the UNGPs. This document was meant to provide more detailed guidance than that which was available at the time of the adoption of the UNGPs (e.g. on the essential elements of HRDD).³⁴

The OECD Guidelines are implemented primarily through National Contact Points (NCPs), which are currently established in 50 countries.³⁵ Their competencies include promotion of the Guidelines as well as providing a grievance mechanism to resolve cases of alleged non-compliance with their provisions. The role of NCPs has been endorsed by the UN Working Group on Business and Human Rights,³⁶ which perceives them as an important element in strengthening access to remedies.³⁷ Since 2000, NCPs have handled over 500 cases. Out of this number, 37% were related to human rights³⁸ and emerged mostly in the following sectors: manufacturing (42 cases); mining and quarrying (33 cases); financial and insurance activities (28 cases); and agriculture/forestry/fishing (21 cases). Nevertheless, the efficiency of this mechanism remains disappointing³⁹ – for instance, only one out of 14 cases filed in 2020 resulted in an agreement.⁴⁰

1.3. European Union

Due diligence as a legal standard of care for business actors is a well-established concept in EU law and in the jurisprudence of the Court of Justice of the European Union (CJEU).⁴¹ Business enterprises operating within the EU Internal Market are expected to exercise due diligence in multifarious areas of their activities, the most relevant of which – from the perspective of this article – pertain to business-to-consumer relationships under the Unfair Commercial Practices Directive.⁴²

³⁴ *Ibidem*, pp. 16-19. For UN characteristics see: UNGA, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, 16 July 2018, A/73/163, pp. 4-6. The Working Group has indicated that these characteristics correspond with the essential elements included in the OECD Due Diligence Guidance.

³⁵ OECD, *National Contact Points*, available at: <http://mneguidelines.oecd.org/ncps/> (accessed 30 April 2023).

³⁶ See UNGA *supra* note 34.

³⁷ *Ibidem*, para. 75.

³⁸ According to the OECD's Database of specific instances (<https://mneguidelines.oecd.org/database/>), cases dealing with human rights were the third most frequently filed. The only two areas that are more frequently challenged are employment and industrial relations and general policies (both were invoked in 52 per cent of cases).

³⁹ K. Otteburn, A. Marx, *Seeking remedies for corporate human rights abuses: what is the contribution of OECD National Contact Points?*, in: A. Marx, G. Van Caster, J. Wouters (eds.), *Research Handbook on Global Governance, Business and Human Rights*, Edward Elgar Publishing, Cheltenham: 2022, p. 252.

⁴⁰ OECD Watch, *State of Remedy 2020*, OECD Watch Briefing Paper, June 2021.

⁴¹ See I. Jędrzejowska-Schiffauer, *Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?*, 46 *European Law Review* 481 (2021).

⁴² Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

In response to the developments at the UN and OECD, most recently the concept of HRDD has been endorsed by the EU institutions. Its distinct character from that of corporate due diligence is well acknowledged in legal scholarship and generally concerns risks and responsibilities to rightsholders rather than risks and responsibilities to the business itself.⁴³ Importantly, unlike the UNGPs, the EU⁴⁴ (and OECD⁴⁵) instruments extend business responsibilities to concerns relating to the environment and most recently also climate change.⁴⁶ By way of example, under the Environmental Impact Assessment Directive,⁴⁷ when a public or private project (i.e. construction work or other interventions in the natural landscape, including mining) is likely to have significant effects on the environment (Art. 1(1, 2a) (Art. 3), a formal impact assessment procedure must be completed prior to its authorisation. Such environmental impact assessment “shall identify, describe and assess [...] the direct and indirect effects of a project on the following factors: (a) human beings, fauna and flora; (b) soil, water, air, climate and the landscape; (c) material assets and the cultural heritage; (d) the interaction between [these] factors” (Art. 3). Environmental concerns have also been endorsed in the draft UN Treaty on business and human rights⁴⁸ (currently under negotiation) by reference to *the right to a safe, clean, healthy and sustainable environment* (Art. 1(2)). This corresponds to the growing awareness of the direct link between environmental harm and human rights violations, as evidenced by the increasing number of human rights-based complaints filed against TNCs for environmental harm across multiple jurisdictions.⁴⁹ In the same vein, more attention is given to the impact of climate change

⁴³ R. McCorquodale, *Human rights due diligence instruments: evaluating the current legislative landscape*, in: A. Marx, G. Van Caster, J. Wouters, *supra* note 39, p. 123.

⁴⁴ See the specific instruments quoted *infra* and Art. 1(2, 3) and Art. 25(1) of the Corporate Sustainability Due Diligence Directive, *supra* note 1.

⁴⁵ OECD Guidelines, *supra* note 31, Chapter VI - Environment.

⁴⁶ Recent NCP cases have addressed corporate contributions to climate change. See, in particular, *Dutch NGOs v. ING Bank*, filed 8 May 2017, available at: <https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/>. In its 2022 “Stocktaking report on the OECD Guidelines for Multinational Enterprises” (available at: <https://mneguidelines.oecd.org/stocktaking-exercise-on-the-oecd-guidelines-for-multinational-enterprises.htm>) (both accessed 30 April 2023), the OECD noted that “greater clarity and effectiveness might be needed in light of developments since 2011” in relation to “[e]nvironmental impacts of business activities including climate change, biodiversity, and animal welfare. In particular, the Guidelines are seen to lack clear expectations on climate mitigation, adaptation or just transition principles”.

⁴⁷ Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26, p. 1-21.

⁴⁸ OEIGWG, Legally binding instrument to regulate, in International Human Rights Law, the activities of transnational corporations and other business enterprises, 3rd draft of 17 August 2021, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (accessed 30 April 2023).

⁴⁹ See e.g. *Case Vedanta Resources PLC v. Lungowe* [2019] UKSC 20, brought before the UK Supreme Court by a group of 1,826 Zambian citizens whose health and livelihoods were destroyed due to repeated discharges of toxic matter from the Nchanga Copper Mine into local watercourses. For discussion, see Bradshaw, *supra*

on the enjoyment of human rights,⁵⁰ and the emerging trend of climate litigation⁵¹ may be expected to increase in the future.

The EU has already adopted human rights and/or environment-related due diligence legislation for specific sectors. The Timber Regulation⁵² seeks to reduce illegal logging by ensuring that no illegally harvested timber or timber products can be traded in the EU. It requires business operators to exercise due diligence when placing timber or timber products on the EU market for the first time, embracing information, risk assessment, and risk mitigation measures (Art. 6). In addition, it requires those who buy or sell timber and timber products already on the EU market to keep records of their suppliers and customers in order to make timber easily traceable (Art. 5). The Conflict Minerals Regulation⁵³ establishes supply chain due diligence obligations for EU importers of tin, tantalum, tungsten, their ores and gold originating from conflict-affected and high-risk areas. The risk management processes that are to be implemented by EU importers (Art. 5) must be apt to ensure that the minerals they are buying have not been produced in a manner that contributes to funding a conflict or other related illegal practices. The most recent Anti-Torture Regulation⁵⁴ prohibits any export, import, transit as well as trading and advertising of goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

Prior to and alongside the aforementioned legislative measures, social and environmental concerns related to business operations have been addressed within the framework of corporate social responsibility (CSR). Despite being a purely voluntary approach on the part of enterprises, CSR has evolved and gained significance for EU regulatory bodies as a supporting tool for business-led initiatives within a

note 25; J. Hartmann, A. Savaresi, *Corporate actors, environmental harms and the Draft UN Treaty on Business and Human Rights: History in the making?*, 83 *Questions of International Law, Zoom-in 27* (2021).

⁵⁰ Climate change is said to produce negative impact on various rights, including right to life, health, adequate food and water and the right of indigenous peoples to self-determination. Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 15 January 2009. See also J.H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 *Harvard Environmental Law Review* 477 (2009); A.O. Jegede, *Arguing the Right to a Safe Climate under the UN Human Rights System*, 9 *International Human Rights Law Review* 184 (2020).

⁵¹ See the landmark judgment in case *Milieudefensie v Royal Dutch Shell*, the Hague District Court (*Rechtbank Den Haag*), ECLI:NL:RBDHA:2021:5339, para. 4.4.13. The Court ordered Royal Dutch Shell to reduce CO2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy.

⁵² Regulation (EU) No 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295/23.

⁵³ Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1.

⁵⁴ Regulation (EU) 2019/125 of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2019] OJ L 30/1.

“smart mix” policy.⁵⁵ In particular, the last decade was marked by intensified CSR legislative and policy measures. In 2011, the European Commission announced its new 3-year EU CSR strategy in accordance with which all national governments were expected to elaborate, implement and update their National Action Plans (NAPs) on business and human rights aimed at implementing the UNGPs into domestic law.⁵⁶ The EC invited EU Member States to develop such plans by the end of 2012,⁵⁷ which later inspired the UN Guidance on NAPs (2014).⁵⁸ A substantive change is also reported with respect to the very concept of CSR under the new EU strategy (conceived as “the *responsibility* of enterprises for their impacts on society” (emphasis added), as well as explicitly acknowledged connections between CSR, business and human rights (BHR, the concept introduced by the UN) and sustainability.⁵⁹ This visible alignment with the second pillar of the UNGPs is not surprising insofar as CSR and BHR (and even RBC – responsible business conduct) share the common starting point of recognising that businesses have responsibilities beyond profit-maximizing and wealth creation.⁶⁰ Their ultimate objectives remain divergent however, as CSR stands for voluntary, business-led initiatives aimed at promoting socially responsible business practices, whereas BHR has in its immediate horizon mandatory obligations for corporate actors and binding regulation.⁶¹ Hence, BHR is, in many respects, a response to CSR and its perceived failure.⁶²

To sum up, in pursuit of noble goals both the EU and the UN have proven to be open to more than just exchanging best practices. Whilst the Timber Regulation predates the endorsement of the UNGPs, the Non-Financial Reporting Directive

⁵⁵ It involves both mandatory and voluntary measures, with the latter not being designed to substitute mandatory legislation. EC, *Green paper – Promoting a European framework for Corporate Social Responsibility*, COM/2001/0366 final, point 22. For the recognition of human rights dimension of CSR, see e.g. pt. 52. See also *Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress*, SWD(2019) 143 final, p. 2.

⁵⁶ On the presumed positive duties of states to adopt such legislation, see CESCR GC No 24 § 16; E. Schmid, *Exigences internationales de prendre des mesures législatives: La Suisse doit-elle légiférer dans le domaine des “entreprises et droit humains”?*, 8 *Actuelle Juristische Praxis* 930 (2017).

⁵⁷ Communication from the Commission: *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final.

⁵⁸ UN Working Group on Business and Human Rights, *Guidance on NAPs on Business and Human Rights*, December 2014, available at: https://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf (accessed 30 April 2023).

⁵⁹ C. Navarra, *Corporate due diligence and corporate accountability. European added value assessment*, European Parliamentary Research Service Study, PE 654.191 – October 2020.

⁶⁰ Deva, *supra* note 12, p. 1; F. Wettstein, *The History of ‘Business and Human Rights’ and its Relationship with ‘Corporate Social Responsibility’*, in: S. Deva, D. Birchall (eds.), *supra* note 12, p. 33.

⁶¹ Cf. Wettstein, *supra* note 60, p. 34. The author argues that a more progressive strand of CSR research recognizes limitations of its own approach in terms of weak institutions and governance gaps. Still, the “typical” CSR mindset is more obstructive than complementary to the advancement of BHR and can be counter-productive to the BHR agenda (*ibidem*, p. 23-24).

⁶² *Ibidem*, p. 35. See also A. Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14(2) *Journal of Human Rights* 237 (2015).

(NFRD),⁶³ the Conflict Minerals Regulation, and the Whistleblowing Directive⁶⁴ seek to partly implement the UNGPs into the EU legal order. The NFRD does so with respect to transparency and reporting obligations, whereby enterprises with over 500 employees are required to publicly report measures they take to avoid negative environmental, social, and human rights impacts. To further improve the impact of this instrument and address identified deficiencies in the quality of reporting, on 21 April 2021 the EC, following a public consultation, put forth a proposal for a Corporate Sustainability Reporting Directive (CSRD).⁶⁵ In force as of 5 January 2023, CSRD has amended the NFRD by extending the scope of entities subject to the reporting obligation and introducing mandatory EU sustainability reporting standards. Also, the Whistleblowing Directive (which was to be implemented by Member States by 17 December 2021), bears resemblance to grievance mechanisms under the UNGPs, notably with regard to its dual external and internal reporting channels, which enable the entity's workers to report information on breaches of EU law (e.g. rules on confidentiality, a reasonable timeframe to provide feedback, diligent follow-up addressing the reported breach, etc.).

The EU regulatory activity aimed at addressing the negative impacts of businesses on human rights and the environment has gained momentum with the latest EC draft Directive proposing cross-sectorial mandatory sustainability due diligence obligations for large companies. Before examining the substance of this draft Directive, we shall first elucidate the conceptual and normative anchoring of HRDD as a central instrument of the EC's proposal.

2. HOW IS *HUMAN RIGHTS DUE DILIGENCE* CONCEPTUALISED?

As a legal standard of care, due diligence relating to human rights has been well-defined in legal writing⁶⁶ and court practice⁶⁷ with regard to states' obligations. The latter have been specified from the tripartite classification perspective of *respect*, *protect*, and *fulfil*, including for extraterritorial human rights obligations.⁶⁸ In recent

⁶³ *Supra* note 4.

⁶⁴ Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.

⁶⁵ COM/2021/189 final, [2022] OJ L 322, p. 15-80.

⁶⁶ See e.g. N. McDonald, *The Role of Due Diligence in International Law*, 68 *International and Comparative Law Quarterly* 1041 (2019); R.P. Barnidge, *The Due Diligence Principle Under International Law*, 8 *International Community Law Review* 81 (2006).

⁶⁷ In the EU context, the CJEU's case law bases Member States' obligation of diligence on Art. 4(3) TEU (e.g. Case C587/17 P *Kingdom of Belgium v Commission*, EU:C:2019:75, para. 67. Earlier case law based on Art. 5 EC or EEC Treaty, inter alia, Case C-34/89 *Italy v Commission* [1990] ECR I-3603, para. 56; Case C-28/89 *Germany v. Commission*, EU:C:1991:67, para. 31; Case C-277/98 *France v Commission*, EU:C:2001:603, para. 40.

⁶⁸ Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social, and Cultural

years however, the academic and policy discourse on business and human rights contributed to an increased awareness that certain legal loopholes enable enterprises (notably those operating internationally) to avoid liability for human rights violations committed by themselves, their subsidiaries, or their foreign suppliers,⁶⁹ as they are claiming not to be duty bearers under public international law and the domestic law of their headquarters.⁷⁰ To address such concerns, the concept of HRDD has been introduced to refer to non-state actors' responsibilities to *respect* human rights, notably concerning business enterprises.⁷¹

The first impulse was set by the UNGPs.⁷² Within their framework, HRDD has become the core requirement of business enterprises in meeting their responsibility to respect human rights.⁷³ Under Guiding Principle 17 of the UNGPs, HRDD is defined as the *process* of identification, mitigation and accounting for adverse human rights impacts by business enterprises. Since human rights risks tend to change over time as a company's operations and operating contexts evolve (Guiding Principle 17c), HRDD is conceived as "an ongoing *management process* that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights"⁷⁴ (emphasis added). The HRDD process – which has been recently construed by the UN Working Group as "a bundle of interrelated processes" – should include four core components, namely: 1) identification and assessment of actual or potential adverse human rights impacts; 2) integration of findings from impact assessments across relevant activities of the company; 3) tracking the

Rights (General Principle no 3). For discussion, see S. Skogly, *Global human rights obligations*, in: M. Gibney et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations*, Routledge, New York: 2021, pp. 25, 100; O. De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 *Human Rights Quarterly* 1084 (2012).

⁶⁹ G. LeBaron, A. Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8(S3) *Global Policy* 15 (2017), p. 19; D. Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1(2) *Business and Human Rights Journal* 179 (2016), pp. 179ff; C. Methven O'Brien, O. Martin-Ortega, *EU human rights due diligence legislation: Monitoring, enforcement and access to justice for victims*, Briefing No 2, PE 603.504-June 2020.

⁷⁰ On the attribution of responsibility to multiple duty-bearers (including non-state actors) and its distribution among them in a policentric governance, see G.M. Türkelli, *Extraterritorial human rights obligations and responsibility under international law*, in: Gibney et al. (eds.), *supra* note 68, pp. 40, 45ff.

⁷¹ For obligations of transnational corporations going beyond the duty to respect, see e.g. E. Pribytkova, *Extraterritorial obligations in the United Nations system: UN treaty bodies*, in: Gibney et al. (eds.), *supra* note 68, pp. 95, 100.

⁷² McCorquodale, Nolan, *supra* note 4, p. 458.

⁷³ C. Methven O'Brien, *Business and Human Rights. A Handbook for legal practitioners*, Council of Europe, 2018, p. 83.

⁷⁴ OHCHR, *The Corporate Responsibility to Respect Human Rights. An Interpretative Guide*, HR.PUB.12.2_En 2012, p. 6, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf (accessed 30 April 2023). See also McCorquodale, *supra* note 43, pp. 122-123.

effectiveness of measures and processes to address adverse human rights impacts; and 4) communicating, in particular to affected stakeholders, how these impacts are being addressed and what policies are implemented.⁷⁵

Following its endorsement in the UNGPs, HRDD has been integrated into various international soft law documents (i.e. by OECD, ILO, International Finance Organisation (IFC))⁷⁶ and national law (see below). Concomitantly, the UN treaty bodies have taken an active role in anchoring HRDD for business in the core international human rights treaties, in particular the ICESCR and the Convention on the Rights of the Child (CRC). In 2017, the ESCR Committee indicated that the state's obligation to protect "entails a positive duty to adopt a legal framework requiring business entities to exercise *human rights due diligence* in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights" (emphasis added).⁷⁷ The ESCR Committee emphasised the role of consultations with indigenous populations and cooperation with them in good faith,⁷⁸ and encouraged the imposition of criminal or administrative sanctions and penalties for non-compliance with due diligence obligations,⁷⁹ as well as incentives to enterprises that adopted robust and effective HRDD mechanisms,⁸⁰ and the inclusion of due diligence clauses in public procurement regimes.⁸¹ It is worth noting that the impact of General Comment No. 24 on the ICESCR reporting procedure has been significant, as 16 recommendations related to HRDD have been adopted in Concluding Observations since 2017.⁸² Further references to HRDD appeared in General Comment No. 25 on human rights and science, adopted by the ESCR Committee in 2020. According to the Committee, legal frameworks regulating

⁷⁵ UNGA, *supra* note 34, para. 10.

⁷⁶ For detailed account, see McCorquodale, Nolan, *supra* note 4, p. 458ff.

⁷⁷ CESCR Committee, General Comment No. 24 (2017) on State obligations under the ICESCR in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 16. For extraterritorial dimension of national legislation in the area of BHR, see e.g. E. Schmid, *Le champ d'application spatiale des législations nationales en matière de conduite responsable des entreprises*, 128 *Revue trimestrielle des droits de l'homme* 853 (2021).

⁷⁸ CESCR, *supra* note 77, para. 17.

⁷⁹ *Ibidem*, para. 15.

⁸⁰ *Ibidem*, para. 31.

⁸¹ *Ibidem*, para. 50.

⁸² CESCR Committee, *Concluding observations from 2020 to periodic report of Norway* (E/C.12/NOR/CO/6, para. 12), *Switzerland from 2019* (E/C.12/CHE/CO/4, paras. 10 and 11), *Denmark from 2019* (E/C.12/DNK/CO/6, paras. 18 and 19), *Kazakhstan from 2019* (E/C.12/KAZ/CO/2, para. 16), *Germany from 2018* (E/C.12/DEU/CO/6, para. 7), *Spain from 2018* (E/C.12/ESP/CO/6, paras. 8 and 9), *Mexico from 2018* (E/C.12/MEX/CO/5-6, para 10 and 11), *Colombia from 2017* (E/C.12/COL/CO/6, para. 12 and 13), *South Korea from 2017* (E/C.12/KOR/CO/4, paras. 17 and 18).

the operation of big technology companies should include measures that require business to prevent discrimination in the context of artificial intelligence and other related technologies – both at the input (training datasets) and output (decisions taken by algorithms)⁸³ levels. Furthermore, the ESCR Committee’s draft General Comment on land and economic, social and cultural rights highlights that the obligation to protect may imply imposing due diligence obligations on investors to ensure that any land they purchase has not been acquired in violation of international norms.⁸⁴ In addition, due diligence regulatory measures should prevent an increased concentration of land ownership.⁸⁵

Generally, the present international landscape shows an inclination to interpret HRDD through the prism of specific business “obligations” (consequently expressed in terms of “responsibilities” in soft law documents⁸⁶). These are either sector-specific (as in the case of OECD⁸⁷) or group-specific (e.g. the CRC Committee focusing on the rights of the child).⁸⁸ The CRC Committee recommended introducing the concept of *child-rights due diligence* into the domestic legislation of various countries.⁸⁹ Moreover, in the recently adopted General Comment on children’s rights in the digital environment, the Committee indicated that States should require businesses to undertake child rights impact assessments when introducing new digital services.⁹⁰ To date however, the ESCR Committee appears to be spearheading the process of embedding corporate HRDD in international human rights law. This is not surprising, as its mandate corresponds to the high-risk areas where violations of human rights frequently take place.

⁸³ CESCR Committee, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the ICESCR), 30 April 2020, E/C.12/GC/25, para. 75.

⁸⁴ General Comment No. 26 (2021) on land and economic, social and cultural rights (Advance Edited Version), 3 May 2021, E/C.12/69/R.2, para. 42.

⁸⁵ *Ibidem*, para. 32.

⁸⁶ The discourse of the UNGPs serves as the primary example, with its second pillar specifying the corporate *responsibility* to respect human rights. See also OECD Guidance, *supra* note 33, notably p. 17, 75.

⁸⁷ These include, inter alia, conflict minerals; extractive, garment and footwear, agricultural and financial sectors. See <https://www.oecd.org/corporate/mne/du-diligence-guidance-for-responsible-business-conduct.htm> (accessed 30 April 2023).

⁸⁸ For the concept of *child-rights due diligence*, see CRC Committee, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, 17 April 2013, CRC/C/GC/16.

⁸⁹ CRC Committee, *Concluding observations from 2018 to the periodic report of Argentina* (CRC/C/ARG/CO/5-6), *Spain from 2018* (CRC/C/ESP/CO/5-6), *New Zealand from 2016* (CRC/C/NZL/CO/5), *United Kingdom from 2016* (CRC/C/GBR/CO/5), *France from 2016* (CRC/C/FRA/CO/5), *Monaco from 2013* (CRC/C/MCO/CO/2-3).

⁹⁰ Committee on the Rights of the Child, General Comment No. 25 (2021) on children’s rights in relation to the digital environment, 2 March 2021, CRC/C/GC/25, para. 38.

The lens of specific business obligations (or, where appropriate, responsibilities) allows for defining corporate HRDD in terms of a norm of (expected) conduct.⁹¹ In the landmark case *Milieudefensie v Royal Dutch Shell*, the Hague District Court made a direct reference to the substance of corporate responsibility to respect human rights under the UNGPs, explaining that it is a *global standard of expected conduct* for all business enterprises wherever they operate. Its normativity is independent of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. It has primacy over and above compliance with national laws and regulations protecting human rights.⁹² As the Court emphasised, "it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility [to respect human rights]".⁹³

While HRDD is still in the early stages of its development,⁹⁴ efforts to shift its focus from soft law to binding legal obligations are multiplying. The methods applied to this end involve the extensive interpretation of existing binding instruments (as observed by the UN Treaty bodies), as well as adopting new legislation (see Section 4), thus opening paths to justiciability of the new standards of care. Judicial recognition of a business duty of care to exercise HRDD is considered as yet another way forward.⁹⁵ Such a duty of care could be made enforceable under common law by tort suits for negligence,⁹⁶ or corresponding judicial instruments in civil law systems. In civil law countries new or revised substantive rules may be necessary, notably where international law is not directly applied. When applied in this sense, HRDD is evocative of the already established standards of a common law duty of care and analogous concepts in civil law.⁹⁷ Arguably this was a deliberate tactic by the UNGPs' drafters, since the concept of HRDD is familiar to public authorities, human rights experts, and business people, although with different meanings for each.⁹⁸

Against this backdrop, concerns are being voiced as to the limitations of the HRDD approach to address serious human rights violations. As indicated above,

⁹¹ Cf. UNGA, *supra* note 34, para 20, 24.

⁹² Cf. *supra* note 51.

⁹³ *Ibidem*.

⁹⁴ A. Griffith, L. Smit, R. McCorquodale, *Responsible Business Conduct and State Laws: Addressing Human Rights Conflicts*, 20 Human Rights Law Review 641 (2020), p. 651.

⁹⁵ Cassell, *supra* note 69.

⁹⁶ *Ibidem*.

⁹⁷ See in this sense A. Ruehmkorf, L. Walker, *Assessment of the Concept of 'duty of care' in European Legal Systems for Amnesty International*, European Institutions Office, September 2018, as cited by McCorquodale and Nolan, *supra* note 4, p. 459.

⁹⁸ McCorquodale, Nolan, *supra* note 4, p. 459. See also J. Bonnitcha, R. McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28(3) European Journal of International Law 899 (2017).

the UNGPs endorse a risk management perspective of HRDD.⁹⁹ HRDD integrated in the corporate risk management systems is expected to go beyond identifying and managing risks to the company itself and include risks to rightsholders.¹⁰⁰ Thus “the moral commitment of a corporation or lack thereof becomes a decisive factor for the importance and means that a corporation will attribute to its [HRDD] process”.¹⁰¹ Where public enforcement is weak, companies are likely to exercise less care.¹⁰² However, even solid legal pressure may not be sufficient in instances when legislation implementing HRDD conceives it as having exculpatory function.¹⁰³ Thus companies will not focus on discharging a duty owed to rightsholders, but on demonstrating that they exercised due diligence so as to avoid risks to their own businesses in the form of civil liability. A question arises, therefore, whether the said limitations are inherent in the concept of HRDD or should rather be attributed to the manner in which HRDD is structured in the emerging national and EU legislation. The following Section will address this question, extending the argumentation to environmental concerns.

3. NORMATIVE SUBSTANCE OF THE COMMISSION’S PROPOSAL

The Commission’s draft Directive visibly draws on the extant national legislation and practice, as well as partly on the EP’s recommendations. The following sections briefly outline and evaluate those alignments and discrepancies, including from the perspective of the expected HREDD standards. Adherence to the latter would be a way forward in the complex landscape of divergent requirements under various jurisdictions.¹⁰⁴ However, the draft Directive neither delivers on this point, nor does it draw lessons from the shortcomings of the regulatory policies to-date relating to responsible business conduct, including the EU’s own ineffective CSR measures.

3.1. Companies Subject to the New Due Diligence Obligations

The draft Directive covers large EU-based companies (more than 500 employees) with a net worldwide turnover of more than EUR 150 million in the previous financial year. These thresholds are lowered (to more than 250 employees and a net

⁹⁹ *Ibidem*; see also Fasterling and Demuijnck, *supra* note 10, p. 809.

¹⁰⁰ UNGPs, *Commentary to GP 17*.

¹⁰¹ Fasterling, Demuijnck, *supra* note 10, p. 808.

¹⁰² This has been demonstrated by the weak transparency legislation, such as the UK’s Modern Slavery Act and the EU Non-Financial Reporting Directive.

¹⁰³ G. Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 *Washington & Lee Law Review* 1769 (2015), pp. 1828-1830. See also Fasterling, Demuijnck, *supra* note 10, p. 809.

¹⁰⁴ Cf. Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 550.

worldwide turnover of more than EUR 40 million) for EU enterprises operating in the high-risk sectors, including food, clothing and extractive industries, providing they generate at least 50 per cent of their net worldwide turnover in those sectors (Art. 2(1)). The draft Directive would also apply to third-country companies with a net EU turnover of more than EUR 150 million and those operating in high-risk sectors with a net EU turnover between EUR 40-150 million, provided that at least 50 per cent of their net worldwide turnover is generated in those sectors (Art. 2(2)). Lower thresholds would be introduced gradually, after two years (Art. 30(1)). Thus, in contrast to the 2017 French Corporate Duty of Vigilance Law (French Law)¹⁰⁵ and the 2021 German Law on Supply Chain Due Diligence (German Law),¹⁰⁶ the draft Directive covers not only EU-based companies or subsidiaries of foreign companies in the EU, but all large companies which offer goods or services in the EU internal market, provided that their business operations attain a substantial volume specified in terms of turnover, including in high-risk sectors. This is in line with the EP's recommendations for the draft Directive (Art. 2(1-3)), adopted on 10 March 2021.¹⁰⁷ Corresponding solutions have been adopted in the 2019 Dutch Child Labour Due Diligence Law¹⁰⁸ and the proposed Dutch Responsible and Sustainable International Business Conduct Act (the proposed Dutch RSIBC Act)¹⁰⁹ as well as the Norwegian Transparency Act (Norwegian Act).¹¹⁰

While the thresholds set by the draft Directive are lower than that of the German Law¹¹¹ and the French Law,¹¹² they do not correspond to the expected standard under the UNGPs, which stipulate that all enterprises have a responsibility to respect

¹⁰⁵ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017.

¹⁰⁶ *Lieferkettensorgfaltspflichtengesetz (LkSG)*, BGBl 2021/I, Nr 46, 22 July 2021, p. 2959.

¹⁰⁷ EP Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, P9_TA-PROV(2021)0073.

¹⁰⁸ *Wet zorgplicht kinderarbeid*, available at: <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0plzezawy> (accessed 30 April 2023). It is not yet known when the law will enter into force.

¹⁰⁹ *Wet verantwoord en duurzaam internationaal ondernemen*, available at: [parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0pgfv1mso](https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0pgfv1mso). It proposes to repeal the Dutch Child Labour Due Diligence Law and introduce broad due diligence legislation encompassing human rights, labour rights and the environment (Art. 4(1)). The aim of the the proposed Dutch RSIBC Act is to set a legal minimum standard for international responsible business conduct, Explanatory Memorandum, p. 1, <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0pgfv1mso> (both accessed 30 April 2023).

¹¹⁰ See Section 2 of the Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99. Unofficial English translation available at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> (accessed 30 April 2023)

¹¹¹ As of 1 January 2023, the law will apply to companies with more than 3,000 employees in Germany (including employees posted abroad) and, as of 2024, to companies with 1,000 employees (§1(1)).

¹¹² The law applies to French companies that either employ at least 5,000 people themselves and through their French subsidiaries, or companies that employ at least 10,000 people themselves and through their subsidiaries located in France and abroad. French Commercial Code, art. L. 225-102-5, as introduced by the Vigilance Law, available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/ (accessed 30 April 2023).

human rights, irrespective of their size, sector, operational context, ownership and structure.¹¹³ Since a negative impact on people or the environment may occur irrespective of the size of the business activity, notably in high-risk sectors, the approach adopted in the draft Directive is insufficient,¹¹⁴ particularly given that small and medium-sized enterprises (SMEs) represent 99% of all businesses in the EU.¹¹⁵ Therefore, a feasible alternative would be to further lower the employee threshold (e.g. to 50 employees as in the Norwegian Transparency Act¹¹⁶) and, as a minimum, impose new HREDD obligations on all enterprises operating in high-risk sectors (as in the EP recommendations, which additionally covered publicly listed SMEs (Art. 2(2, 3)). Since micro and small enterprises may encounter structural and financial difficulties to implement HRDD as required under due diligence legislation, EU legislators could also consider the solution adopted under the proposed Dutch RSIBC Act, which establishes the duty of care for all enterprises (Section 1.2), whereas specific HRDD obligations related to risk management and reporting are imposed exclusively on large enterprises.¹¹⁷

It seems that the Commission decided to take a middle path. Based on Art. 14(1, 2) of the draft Directive it can be assumed that SMEs present in the value chains of companies subject to the new due diligence obligations would also be required to fulfill at least some of those duties (e.g. through contractual cascading, Art. 7(2b, d, 4)). This is confirmed by the current praxis of implementing the French Law.¹¹⁸ Therefore, pursuant to the quoted provisions, Member States should provide necessary information and assistance to SMEs (e.g. through dedicated websites or platforms, and optionally financial support) so that they can fulfill their new due diligence duties.

Scholars have criticised the exclusion of public buyers from the draft Directive's scope. According to this criticism, the draft Directive thereby holds corporations

¹¹³ UNGPs, *GP 14*. See also Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 553.

¹¹⁴ See e.g. OHCHR, *Feedback on the draft Directive on Corporate Sustainability Due Diligence of 23 May 2022*, at 3, available at: <https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr.pdf>. Critically also Human Rights Watch, *Commentary of February 28, 2022*, available at: <https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence>, (both accessed April 2023).

¹¹⁵ https://ec.europa.eu/growth/smes/sme-definition_pl (accessed 30 April 2023).

¹¹⁶ See Section 3(a) of the Act. Annual turnover or balance sheet total are more suitable thresholds than the number of employees notably for the IT sector.

¹¹⁷ That is enterprises which fall under two of the following three categories: a balance sheet greater than €20 million, net revenue over €40 million, or an average of 250 employees or more (Art. 2.1).

¹¹⁸ S. Brabant et al., *Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)*, *VerfBlog*, 15 March 2022, available at: <https://verfassungsblog.de/due-diligence-around-the-world/> (accessed 30 April 2023), p. 1. The authors state that up to 80 per cent of French SMEs (which are not directly subject to the law) are required to implement at least some HREDD measures when they supply to companies covered by the law.

to higher standards than the states.¹¹⁹ This interpretation appears not well-founded though. Private entities with state capital are covered by the draft Directive. Public buyers are primary duty bearers under, and thus bound by, human rights law. No new legislation at EU level is required to hold them to account. Still, adding explicit references to international human rights and environmental standards to the EU public procurement law could serve as a useful vehicle to better implement state duties.

An aspect which may be of concern, however, are possible exceptions for the financial sector (the Commission's proposal) or even its exclusion from HREDD obligations (the Council's general approach leaves the ultimate decision to Member States).

3.2 Subsidiaries and Value Chains

The Commission's draft Directive lays down obligations for companies regarding negative socio-environmental impacts not only with respect to their own operations, but also that of their subsidiaries as well as business partners within their value chain (Art. 1(1a)). Three aspects of this article require attention.

Firstly, it explicitly covers the activities of subsidiaries, even if they are not part of the supply chain of a parent company. This is vital to adequately challenge the "legal separation principle" under which subsidiaries are regarded as autonomous entities,¹²⁰ which hinders the attribution of responsibility for their actions to their parent company, even if it effectively (legally and/or economically) controls them. This principle has long constituted the major obstacle for claimants from abroad to settle their cases before courts in home countries of TNCs.¹²¹ While under the French Law and the Norwegian Act corporate operations encompass the activities of their subsidiaries irrespective of where they are based (thus breaking with the

¹¹⁹ C. Methven O'Brien, J. Hartmann, *The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes*, EJIL: Talk!, May 19, 2022, available at: <https://www.ejiltalk.org/the-european-commissions-proposal-for-a-directive-on-corporate-sustainability-due-diligence-two-paradoxes/> (accessed 30 April 2022). Legal scholarship also points to certain incoherence regarding the possibility to use EU public procurement law as a vehicle to promote socially responsible business conduct. See L. Ankersmit, *The contribution of EU public procurement law to corporate social responsibility*, 26 *European Law Journal* 9 (2020).

¹²⁰ A. Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 *Human Rights Review* 109 (2021), pp. 110, 117, 122.

¹²¹ The legal impossibility of prosecuting French companies following the Rana Plaza tragedy in 2013 (a collapse of eight-story factory manufacturing for European and American brands and retailers in Dhaka, Bangladesh, with more than 1,130 people killed and 2,500 injured) fuelled the motivation of NGOs to push the Duty of Vigilance law. More recently the legal separation objection was raised by Total in a pending case before the French courts concerning the relocation of rural communities in Uganda by its subsidiary in connection to the expansion of company's oil wells (Schilling-Vacaflor, *supra* note 119, p. 117). On the lawsuit against the company under the Duty of Vigilance Law, see <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/> (accessed 30 April 2023).

separation principle), doubts were raised as to whether the German Law covers activities of subsidiaries outside the supply chain of a parent company.¹²²

Secondly, by applying a broader concept of the “value chain” (rather than the “supply chain”),¹²³ the draft Directive (aligning with the EP’s recommendations, Art. 1(1-3), Art. 4(4ii, 7)) goes a notable step further than the initiatives within the ILO, OECD and UN. This could significantly extend the scope of a company’s due diligence obligations to downstream activities of actors that purchase, distribute or dispose of its end products or services. In its general negotiation approach, however, the Council agreed to substitute “value chain” with the concept of a “chain of activities” and limit company HREDD obligations to downstream activities of its business partners to the extent that they are performed for or on behalf of that company (Art. 1.1a, Art. 3g). While corporate due diligence obligations cover the totality of the supply chains under the Norwegian Act (Art. 3d)¹²⁴ and the proposed Dutch RSIBC Act (Arts. 1.1(g) and 2.1(2)), the German Law focuses on the first tier of a supply chain (direct contractual partner). It requires companies to systematically identify and address the human rights and environmental risks of their own activities and those of their direct suppliers. Precautionary actions (risk analysis) regarding indirect suppliers will be required only if facts that indicate risks were notified or discovered (§9 (3) speaks of “substantiated knowledge”).¹²⁵ The French Law is not fully explicit whether the risk assessment under the vigilance obligation refers to the first or additional tiers along the supply chain (it only mentions “the subcontractors or suppliers with whom an established business relationship is maintained”).¹²⁶ This provision resonates with the approach adopted under the draft Directive, whereby the company’s obligations concerning upstream and downstream value chain operations are limited to entities with whom it has an “established business relationship” (Art. 1(1a)).

¹²² See Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 556.

¹²³ A value chain covers the full life cycle of a product or service, including material sourcing, production, use and disposal/recycling processes. Cf. e.g. Collaboration, innovation, transformation. Ideas and inspiration to accelerate sustainable growth – A value chain approach. World Business Council for Sustainable Development (WBCSD) 2011, p. 3, <https://docs.wbcsd.org/2011/12/CollaborationInnovationTransformation.pdf> (accessed 30 April 2023).

¹²⁴ Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 556.

¹²⁵ *Ibidem*. See also G. Holly, C. Methven O’Brien, *Human Rights Due Diligence Laws: Key Considerations*, The Danish Institute for Human Rights 2021, p. 16.

¹²⁶ French Commercial Code, Art. L. 225-102-4-I, para. 3. The concept of an “established relationship” appears in the French Code (Art. L. 420-2 and L. 442-1) also relating to breach of contract and has a jurisprudential definition based on three criteria: regularity, significance and stability. The National Assembly’s ‘information report’ points out this notion could be interpreted differently under the Vigilance law. See https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/115b5124_rapport-information# (accessed 30 April 2023).

The proposed definition of an established business relationship is problematic in many respects. It may be expected that in the event of disputes it would be for the courts to determine whether a relationship is “lasting” and whether or not it represents “a negligible or merely ancillary part of the value chain” (Art. 3f). This provision would also give incentive for businesses to manage human rights impacts¹²⁷ in their supply chains instead of preventing them, e.g. by stronger reliance on seemingly incidental business partnerships.¹²⁸ From the perspective of international standards, it is the very occurrence of – and not necessarily the intensity of – negative impacts that requires an appropriate due diligence response by a company. Finally, the said definition goes against the current understanding of “business relationship” under the UNGPs and OECD Guidelines. The Guidelines broadly define “business relationship” to include “relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services”. This definition is much wider than that contained in the draft Directive. This divergence was noted in March 2022 by the OECD, ILO, and OHCHR in their joint response to the draft Directive, in which the three international bodies stated that “[c]oherence with the substantive elements of international standards can help bolster the impact and effectiveness of the EU’s efforts”.¹²⁹ It is therefore welcome that in the aforementioned general approach the Council agreed to give up the concept of “established” business relationships and apply that of “business partners” instead (Art. 3e).

3.3. Substantive Scope of Due Diligence Obligations

Under the draft Directive, corporate sustainability due diligence obligations embrace adverse human rights and environmental impacts. Unlike the EP’s recommendations, the draft Directive does not lay down due diligence obligations regarding potential structural impacts that business activities may have on good governance, including the public authorities’ capacity to protect human rights and the environment. This is regrettable, as such obligations would constitute one of the few possible innovations that the draft Directive could put forth, thus demonstrating EU’s capacity to show leadership in the global efforts to induce socially responsible business conduct. Mandatory good governance measures should in any case

¹²⁷ Scholarly input on this approach differs, from seemingly neutral (Brabant et al., *supra* note 118, p. 2; Bonnitcha, McCorquodale, *supra* note 98) to critical (Fasterling, Demuijnck, *supra* note 10, pp. 801, 809f).

¹²⁸ Brabant et al., *supra* note 118, p. 5; OHCHR, *supra* note 114, pp. 3-4; M. Flacks, M. Songy, *European Union Releases Draft Mandatory Human Rights and Environmental Due Diligence Directive*, Center for Strategic and International Studies, 11 March 2022, available at: <https://www.csis.org/analysis/european-union-releases-draft-mandatory-human-rights-and-environmental-due-diligence> (accessed 30 April 2023).

¹²⁹ ILO, OECD and OHCHR, *Letter to President von der Leyen*, 7 March 2022, available at: <https://mneguidelines.oecd.org/ilo-ohchr-oecd-response-to-eu-commission-proposal.pdf> (accessed 30 April 2023).

also address the problem of undue corporate influence on political and regulatory spheres, which is to blame for watering down some national and also the discussed EU due diligence legislation.

The draft introduces a catalogue of negative human rights and environmental impacts through an Annex to the draft Directive.¹³⁰ Its Part I lists possible “violations of rights or prohibitions”, followed by a record of 22 human rights conventions. Part II enumerates “violations of internationally recognized objectives and prohibitions included in environmental conventions”. At first glance, the Commission’s approach (possibly inspired by the German Law, §2(2)(3)) may seem conducive of legal certainty.¹³¹ However, the enumerative approach may prove problematic in terms of the justiciability of certain rights before European courts, notably where the Annex fails to refer to the core regional instruments such as the European Convention on Human Rights (applicable in all EU Member States) and the EU Charter of Fundamental Rights. This is arguably a paradox, particularly when adjudication before European courts would concern impacts (whether by EU or foreign-registered companies) occurring inside the EU.¹³² Indeed no rational explanation can be given for the said omission of European instruments – not even the limited applicability of the EU Charter (Art. 51) – since not only EU institutions, but also Member States shall apply it when implementing EU law. It is also argued that legal certainty could be better served by a more limited catalogue of rights, and “especially one that is clarified by decades of legal adjudication, rather than multiple instruments [including non-binding ones] which, while overlapping, are not fully aligned in their substantive content”.¹³³

Interestingly, while due diligence obligations do not explicitly extend to adverse climate impacts,¹³⁴ the draft features a “combating climate change” clause under which large companies¹³⁵ should adopt a plan to ensure that their business model and strategy are suitable for the transition to a sustainable economy and the limiting of global warming to 1.5°C in accordance with the Paris Agreement. Such plan should also specify “the extent to which climate change is a risk for, or an impact of, the company’s operations”. Where such risks or impacts occur, the company’s plan should specify emissions reduction objectives.

¹³⁰ Annex to the proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

¹³¹ In contrast, the French law refers generally to human rights, fundamental freedoms and environment (Art. 1). Brabant et al, *supra* note 118, p. 2.

¹³² Methven O’Brien, Hartmann, *supra* note 119.

¹³³ *Ibidem*.

¹³⁴ See recital 70 of the draft Directive.

¹³⁵ Over 500 employees and a net worldwide turnover exceeding EUR 150 million for EU companies and the same threshold of net turnover in the EU for third-country companies (Art. 2(1a) and Art. 2(2a)).

The concept of due diligence is instrumental in determining the standard of care owed by companies to rightsholders in a given operational context. HREDD, as laid down in the draft Directive (Arts. 4-11), constitutes a visible effort to endorse the accepted international standards in terms of the processes it encompasses.¹³⁶

Firstly, companies covered would be required to develop a HREDD policy and integrate it into their activities (including by way of a code of conduct for the company's employees and subsidiaries). This policy should be updated annually and describe the processes put in place by the company to implement HREDD, and how it verifies compliance with its code of conduct and extends its application also throughout its established business relationships.

Secondly, companies would need to identify actual and potential adverse human rights and environmental impacts arising from their own operations, those of their subsidiaries, and their value chains, albeit only with regard to their established business relationships. Companies operating in a high-risk sector would be required to identify only *severe* adverse impacts which are *relevant to the sector* (Art. 6(2) – emphasis added). The rationale behind this limitation of HREDD obligations (concerning large companies) is unclear.¹³⁷ Its application in practice could prove difficult¹³⁸ or even pose additional hurdles for victims in substantiating their claims of a company being in breach of its HREDD obligations, while allowing that company a targeted due diligence defense. Furthermore, contrary to the Norwegian Act (Section 4e), under the draft Directive consultation with potentially or actually affected individuals or groups (workers and other stakeholders) is not mandatory. Art. 7(2) and Art. 8(3b) merely stipulate that companies shall consult “where relevant”, which in practice may leave companies considerable leeway over whether to commit to such consultations. This not only neglects the importance of stakeholder participation,¹³⁹ but also undermines the correct conduct of HREDD, which should be informed by engagement with stakeholders.¹⁴⁰

The main purpose of embedding HREDD processes in companies' activities is to prevent negative impacts. To this end, companies would be required to undertake measures appropriate to specific circumstances and the severity and likelihood of negative impacts, including prioritization of actions in complex cases (Art. 3(q)). The mandatory HREDD measures include: (i) developing and implementing (in consultation with affected stakeholders) a prevention action plan specifying a timeline for action and “qualitative and quantitative indicators for measuring improvement”;

¹³⁶ Cf. the six-step process of the OECD Due Diligence Guidance for RBC.

¹³⁷ Brabant et al, *supra* note 118, p. 4.

¹³⁸ OHCHR, *supra* note 114, p. 3.

¹³⁹ Cf. Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 555, critically about the German Law. The French and Dutch laws contain no explicit provisions in that regard.

¹⁴⁰ OECD, *supra* note 33, p. 18.

(ii) seeking contractual assurances from business partners, including down the supply chain (contractual cascading), on compliance with the company's code of conduct and (where relevant) its negative impact prevention plan; and (iii) verifying compliance by business partners, including through industry initiatives and private audits.

Impacts that could not be prevented should be mitigated. If the company could neither prevent nor mitigate potential negative impacts arising in its value chain, it should (i) exercise leverage on the business partner linked to that impact by temporarily suspending commercial relations with it, providing improvement may be expected in the short-term; or (ii) terminate the business relationship in question if the impact is severe (Art. 7(5a, b)). However, the obligations to suspend and terminate are made conditional on such options being available under the law governing such business relationship. As a minimum, the company is required "to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen".

Moreover, under HREDD companies would be required to bring identified adverse impacts to an end or, where impossible, to minimise the extent of such impacts, including by offering adequate remedies. The latter may involve the payment of damages to the affected persons and/or financial compensation to the affected communities (Art. 8(3a)). Other action required from companies in cases of actual impacts correspond to those regarding potential impacts, save for the development and implementation of a *corrective* action plan. Companies would also need to enable affected persons, trade unions, and other workers' representatives as well as civil society organisations to submit complaints. Under the complaints procedure, the company should enable the complainants to meet with the company's representatives and provide appropriate follow-up on complaints. When specifying complainants' rights, Art. 9(4b) requires that potential or actual adverse impacts that complainants wish to discuss with the company's representatives are *severe*. Whilst misuse of complaint procedures cannot be excluded, what constitutes a severe impact may be highly disputable and thus result in companies automatically dismissing claims on grounds that they are not well-founded.

In line with the OECD Due Diligence Guidance, the draft Directive also requires companies to monitor the effectiveness of their own due diligence processes, as well as those of their subsidiaries and within their value chains, with respect to their established business relations. Companies' due diligence policy should be updated accordingly to the results of such periodic (at least annual) assessments (Art. 10). Finally, companies would have to publicly communicate on their due diligence policy and action, including by publishing a report on their websites.

At first glance the design of HREDD under the draft Directive may give the impression of a robust process safeguarding qualitative change in the business approach.

But the adoption of codes of conduct by companies, the use of specific contractual clauses with suppliers as well as private audits and industry initiatives are well-known to businesses as CSR-related measures, whose effectiveness has proven limited or even none. Not surprisingly, the reliance of the draft Directive on such measures has met with criticism from civil society organisations¹⁴¹ and concern by international bodies.¹⁴² The HREDD obligations laid down in the draft Directive are “obligations of means” rather than “obligations of results”, which has far-reaching consequences for civil liability under the current regime (see below).¹⁴³ Companies are not required “to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped” (recital 15). They shall, however, take measures that can reasonably be expected of them under the circumstances to prevent or minimise the adverse impacts. This implies that to live up to their HREDD duties companies need to commit to results, not processes. Overreliance on the latter risks maintaining the status quo of companies concentrating on risks to business (notably excluding liability through the due diligence defence¹⁴⁴) rather than addressing potential or actual risks to people or the environment.

3.4. Enforcement measures

In contrast to some national legislation,¹⁴⁵ the Commission’s draft Directive contains only administrative (not penal) enforcement measures. Another enforcement mechanism consists of judicial enforcement through civil liability of companies for breaches of their due diligence obligations.

3.4.1. Administrative sanctions

The mandate and powers of the supervisory authorities (to be designated by Member States) are broadly set out in the draft Directive.¹⁴⁶ They would be tasked with assessing whether companies comply with their new HREDD duties. To that end, the authorities should be empowered to request information, carry out investigations

¹⁴¹ See press release from Sherpa, ActionAid France, Friends of the Earth France, Amnesty International France, CCFD-Terre Solidaire, Collectif Ethique sur l’Étiquette, Notre Affaire à Tous, Oxfam France, available at <https://www.asso-sherpa.org/directive-on-corporate-sustainability-due-diligence-the-proposal-finally-unveiled-by-the-commission-must-be-improved> (accessed 30 April 2023). See also ECCJ Legal Brief, *supra* note 8, pp. 11–12.

¹⁴² OHCHR, *supra* note 114, p. 8, ILO, OECD and OHCHR, *supra* note 129.

¹⁴³ S. Brabant et al., *Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence* (Part 2), VerfBlog, 16 March 2022, available at: <https://verfassungsblog.de/enforcing-due-diligence-obligations/> (accessed 30 April 2023), p. 3.

¹⁴⁴ Methven O’Brien, Hartmann, *supra* note 119.

¹⁴⁵ The Dutch Child Labour Due Diligence Law foresees, apart from high fines (up to 10 per cent of the company’s annual turnover (Art. 7(3)), also penal enforcement measures for repeat offenders. Responsible directors of enterprises fined twice within five years, and that contravene the Dutch Law a third time during this period, may be charged with a ‘criminal offence’ and face penalties such as community service and imprisonment (Art. 9). The punitive sanctions regime was also foreseen in the Dutch proposed RSIBC Act.

¹⁴⁶ OHCHR, *supra* note 114, p. 10.

and, in case of identified breaches of corporate duties, impose pecuniary sanctions, order appropriate action on the part of that company, and adopt interim measures to prevent irreparable harm (Art. 18(1, 5)). The draft Directive requires sanctions to be effective, proportionate and dissuasive. The decision on whether to impose sanctions and their severity should take account of the company's commitment to the remedial process, and pecuniary sanctions should be determined based on the company's turnover (Art. 20(1-3)).

Under Art. 19(1) any natural or legal person may submit "substantiated concerns" to the authority when, based on objective circumstances, they have reasons to believe that a company is potentially breaching its HREDD obligations. The authority would have discretion to decide whether or not to act (Art. 18(2)), at least with regard to the assessment of whether the threshold for "substantiated concerns" has been met.¹⁴⁷ While the German Law obliges the authorities to act upon "substantiated concerns" only by the affected individuals (Art. § 14(2)), in practice any natural and legal person may refer a matter to the authority, which in such circumstances acts on due discretion.¹⁴⁸

Since the enforcement relies on administrative law, where national law does not foresee administrative sanctions the draft Directive provides for the possibility to have sanctions imposed on the motion of a supervisory authority, by a competent national court (Art. 18(6)). By way of example, enforcement by court order has been established under the French Vigilance Law. When a company called upon to comply with its vigilance obligations does not meet them within three months, the competent court may, at the request of any person proving an interest, order the establishment, disclosure, and effective implementation of vigilance measures, including under penalty of payment (Art. L. 225-102-4-II).¹⁴⁹

Under the draft Directive, it is the role of the public authority to provide effective oversight and enforcement of the new HREDD rules. Ideally, such authority should have expertise in both corporate governance and human rights and additionally "function as an enabler for consumers, civil society, and investors to hold businesses accountable".¹⁵⁰ To avoid fragmentation of the enforcement measures, the draft Directive foresees the establishment of a European Network of Supervisory Au-

¹⁴⁷ Brabant et al., *supra* note 143, p. 2.

¹⁴⁸ For a partly diverging view, see *ibidem*.

¹⁴⁹ Following the publication of the EP resolution of 10 March 2021 recommending similar competences to the authority as that featured in the Commission's draft, the French association Sherpa criticised this idea of administrative sanctions insofar as they could jeopardise the judicial logic of the duty of vigilance. See <https://www.asso-sherpa.org/wp-content/uploads/2021/05/2021.04-Note-Autorite%CC%81-de-Contro%CC%82le-DV.pdf> (accessed 30 April 2023).

¹⁵⁰ R. Chambers, A.Y. Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21(2) *Chicago Journal of International Law* 323 (2021), p. 327.

thorities. Composed of representatives of the national supervisory authorities, the Network would be tasked to “facilitate the cooperation of the supervisory authorities and the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices of the supervisory authorities and, as appropriate, sharing of information among them” (Art. 21).

3.4.2. Civil liability

Civil liability is the cornerstone of the broader concept of corporate accountability, which in turn is one of the primary objectives of introducing HREDD. The Commission’s draft Directive links the civil liability of companies with their failure to “comply with” their due diligence obligations. These consist in preventing adverse human rights and environmental impacts in the operations of the company, its subsidiaries and established business partners or, as the case may be, mitigating and bringing such impacts to an end. Importantly, a causal link between non-compliance with the due diligence obligations and the damage that occurred is required (Art. 22(1)). Exercising due diligence thus has an exculpatory function for the company.¹⁵¹ It will be exempted from liability for damages caused by adverse impacts providing its actions were adequate in the circumstances of the case (Art 22(2)). Moreover, the due diligence required under the cited provision would be a reasonable diligence, i.e. the diligence that a reasonable and prudent person under given circumstances might be expected to exercise in the examination and evaluation of risks affecting a business transaction.¹⁵² This means that businesses are not expected to deploy exhaustive efforts.¹⁵³

On the one hand, this approach to civil liability is mainstream in both common law and civil law systems. In common law countries, a company will not be liable for a breach of its duty of care if it demonstrates that it reasonably exercised its duties and it was not negligent.¹⁵⁴ Analogous standards are applied in civil law systems. For example, tort attribution under German civil law foresees liability to compensate the injured party for damage caused to their life, health, freedom, property, etc. through intentional or negligent conduct (Bürgerliches Gesetzbuch, Art. 823(1)).¹⁵⁵ Thus,

¹⁵¹ Generally the thrust of due diligence in legal regimes is excluding liability of the defendant who can demonstrate a requisite standard of care. Fasterling, Demuijnck, *supra* note 10, p. 806-807. See also L. Smit et al., *Study on due diligence requirements through the supply chain: Final Report* (EC 2020), p. 262.

¹⁵² Merriam-webster dictionary, available at: <https://www.merriam-webster.com/dictionary/due%20diligence#legalDictionary> (accessed 30 April 2023).

¹⁵³ *Ibidem*. In that sense also the case law of the CJEU, see e.g. case C-47/16 *Veloserviss*, ECLI:EU:C:2017:220, para. 39. For further discussion, see Jędrzejowska-Schiffauer, *supra* note 41.

¹⁵⁴ The duty of care is judicially enforceable through tort suits for negligence by victims “whose potential injuries were reasonably foreseeable”. Cassel, *supra* note 69, pp. 180ff.

¹⁵⁵ Similar solutions can be found under Arts. 1382 and 1383 of the French and Art. 2043 of the Italian Civil Code.

even though in the last stage of the legislative process civil liability provisions were removed from the German *Lieferkettengesetz*¹⁵⁶ (reportedly as a result of pressure from the business sector), this does not exclude such liability under the existing duty to compensate for damages in accordance with the above quoted German civil law. The manner in which civil liability for breaches of HREDD is conceived under the French Law is analogous. The claimant seeking compensation for damage before the court has to demonstrate a breach of the duty of vigilance, the adverse impact (damage) suffered, and a causal link between them.¹⁵⁷ Providing evidence to sustain their claims may thus pose a real challenge for victims seeking remedy.¹⁵⁸ In recognition of such challenges, the initial Duty of Vigilance bill provided for a reversed burden of proof from the victims to companies, but intense business lobbying eliminated this provision from the adopted text.¹⁵⁹

The experience of tort-based litigation shows that barriers to effective access to justice for victims are not resolved by the very establishment of civil liability.¹⁶⁰ Even good substantive rules and ample remedial orders do not address the problem of lawsuits being expensive and beset by a range of legal and practical limitations.¹⁶¹ The latter may be related to power and knowledge asymmetries between local communities and TNCs, including “the question of what constitutes a valid evidence and how to prove the causality between the practices of headquarters of TNCs and local impacts in distant places”.¹⁶² Collecting conclusive evidence on corporate conduct – like bribery or the division of local communities to undermine their resistance – could amount to an insurmountable hurdle for claimants.¹⁶³ The reversed burden

¹⁵⁶ <https://www.bundestag.de/dokumente/textarchiv/2021/kw23-de-lieferkettengesetz-845608> (accessed 30 April 2023).

¹⁵⁷ Sherpa, *Vigilance Plans Reference Guidance*, February 2019, available at: https://www.assosherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf (accessed 30 April 2023). See also the decision of the French Constitutional Council of 23 March 2017, ECLI:FR:CC:2017:2017.750. DC.

¹⁵⁸ Schilling-Vacaflor, *supra* note 120, p. 122.

¹⁵⁹ S. Cossart, J. Chaplier, T. Beau de Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2(2) Business and Human Rights Journal 317 (2017), p. 317. See also G. Delalieux, *La proposition de loi “Devoir de vigilance”: vers la fin de l’impunité des firmes multinationales?*, in: M. Hastings, B. Villalba (eds.), *De l’impunité: Tensions, controverses et usages*. Villeneuve d’Ascq, Presses universitaires du Septentrion, Presses universitaires du Septentrion, Villeneuve d’Ascq: 2017, p. 223.

¹⁶⁰ See e.g. P. Hoffman, B. Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3(1) UC Irvine Law Review 9 (2013).

¹⁶¹ Cf. Cassel, *supra* note 69, p. 201.

¹⁶² Schilling-Vacaflor, *supra* note 120, p. 122.

¹⁶³ *Ibidem*. Reportedly this is the case of Bolivia’s Guaraní communities whose social organizations were weakened by the Total E&P’s employees. Neither the company’s “divide and rule” tactics in Bolivia, nor the less the causality between such corporate conduct and the breach of the duty of care by the parent company can easily be proved in a litigation.

of proof thus appears to be the only promising instrument to break the unequal power distribution in civil litigation.

Against this backdrop, the Commission's draft Directive brings no breakthrough in addressing the major barriers to rightsholders, such as the burden of proof and causality. The thrust of HREDD as a means to discharge a company that can document and demonstrate a certain standard of care, albeit perfectly adapted to the existing corporate liability regimes,¹⁶⁴ does not meet the expected international standard. Under the UNGPs, the company's responsibility for negative human rights impacts is established independently of whether or not it exercised HRDD,¹⁶⁵ thus being only risk- or impact-based.¹⁶⁶ The function of HRDD is to enable the company "to discover whether and how it may become involved in human rights risks (forward looking) or is already involved in an adverse impact (present). [HRDD] includes using the information so gained to craft an appropriate response".¹⁶⁷ Thus, contrary to views expressed in the literature¹⁶⁸, the limits of HREDD are not inherent in the instrument per se, but a matter of approach and normative structuring. In other words, the standard set by the UNGPs requires that civil law, aside from liability for negligence also provides for strict (risk) liability of corporate actors for at least most severe harms caused to people or the environment.¹⁶⁹

Civil liability provisions in due diligence laws "seek to establish a duty of care between a company and potential victims of human rights abuses linked to the activities of the company or its business partners, as such a wide-ranging duty of care might not otherwise exist".¹⁷⁰ Viewed through that lens, the EU-wide rules could serve as a catalyst for extraterritorially applicable provisions on legal remedies for victims of human rights abuses, including those relating to environmental harm. Under Art. 22(5) of the draft Directive, national provisions transposing corporate liability rules would be of "*overriding mandatory application* in cases where the law applicable to claims to that effect is not the law of a Member State" (emphasis added). In accordance with the relevant EU legislation on private international law (Art. 16 of the Rome

¹⁶⁴ FASTERLING, Demuijnck, *supra* note 10, p. 806; Jędrzejowska-Schiffauer, *supra* note 41.

¹⁶⁵ The UNGPs link a company's responsibility to its involvement with an adverse human rights impact. Such company involvement may consist in a) causing the negative impact; b) contributing to it; or c) the impact being directly linked to the company operations, products or services through its business relationships, without causality or contribution occurring on its part (Commentary to GP 19). See RUGGIE, Sherman, *supra* note 20, pp. 926-927.

¹⁶⁶ While not mainstream, this type of corporate liability is present in European legal systems. See Jędrzejowska-Schiffauer, *supra* note 41, p. 486ff.

¹⁶⁷ RUGGIE, Sherman, *supra* note 20, p. 927.

¹⁶⁸ QUIJANO, Lopezi, *supra* note 8.

¹⁶⁹ In this regard the approach proposed in this article goes further than the ECCJ's urging for adopting a risk-based approach in the draft Directive, i.e. using severity and likelihood as central criteria of HRDD processes, allowing for prioritising negative impacts (see ECCJ Legal Brief, *supra* note 8, pp. 5, 10).

¹⁷⁰ HOLLY, Methven O'Brien, *supra* note 125, p. 16.

II-Regulation¹⁷¹), this provision (aligned with the EP's recommendations, Art. 20) would enable victims who are not sufficiently protected by the law of their home country where the harm occurred to bring lawsuits against EU-based parent companies. When combined with Art 1(1a), the provisions in question effectively dismantle the legal separation principle as a possible defense by EU-based parent companies seeking to avoid liability for the operations of their subsidiaries. Concomitantly, precedents on parent company liability under domestic law are present in the Dutch, UK and French jurisdictions. These concern a court decision on the merits of the claim (e.g. a judgment of the District Court of the Hague in the case *Milieudéfensie v Royal Dutch Shell*¹⁷²); decisions determining the threshold for jurisdiction (the UK Supreme Court's landmark decisions on parent company liability under English law for serious environmental damage and related human rights harm, including *Case Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3¹⁷³); or enabling further action for enforcement (e.g. Nanterre Civil Court decision of 25 March 2021, n° 19/06222, in a lawsuit against the Bolloré Group¹⁷⁴). Incidentally, from 25 June 2023, Member States will need to apply the provisions of Directive 2020/1828 on the protection of the collective interests of consumers.¹⁷⁵ In the event of a prolonged and weary legislative process on EU mandatory HREDD, this EU-wide collective redress instrument should facilitate the enforcement of consumer rights and access to justice in situations involving large-scale damage.

CONCLUSIONS

As a global commercial player, the EU can make a meaningful contribution to the improvement of working conditions, respect of human rights and environmental protection within its own borders, the European Economic Area, and worldwide.

¹⁷¹ Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

¹⁷² *Milieudéfensie v Royal Dutch Shell*, *supra* note 50. For discussion, see A. Nollkaemper, *Shell's Responsibility for Climate Change. An International Law Perspective on a Groundbreaking Judgment*, Verfassungsblog 28 May 2021, available at: <https://verfassungsblog.de/shells-responsibility-for-climate-change/> (accessed 30 April 2023).

¹⁷³ E.g. L. Roorda, D. Leader, *Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court*, 6(2) Business and Human Rights Journal 368 (2021).

¹⁷⁴ The Court declined the company's claim that an agreement resulting from the mediation process with stakeholders was confidential. Under this agreement Bolloré committed to implement an action plan for the benefit of the local communities and plantation workers of Socapalm, a Cameroonian palm oil company directly linked to the group, but in 2014 withdrew from its commitments. According to Sherpa, this decision means that the agreement in question can be brought to court for enforcement to provide the communities affected with the expected reparations, <https://www.asso-sherpa.org/bolloré-socapalm-the-judge-rules-in-favor-of-the-ngos> (accessed 30 April 2023).

¹⁷⁵ Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers [2020] OJ L 409/1.

Expectations for a broader impact of the EU standard-setting for responsible and sustainable business conduct are widely expressed.¹⁷⁶ Establishing mandatory HREDD as an EU-wide legal standard of care for business is a feasible way forward. Having regard to EU constitutional principles such as subsidiarity,¹⁷⁷ it appears sufficient for the good functioning of the internal market¹⁷⁸ to conceive EU mandatory HREDD as harmonising a minimum standard rather than imposing a “single meta-authoritative standard”.¹⁷⁹ This leaves Member States the option to apply stricter rules, including on civil liability, as explicitly provided for in the Commission’s draft Directive (Art. 22(4) *in fine*). The laggard states would be forced to legislate to implement the new rules. Less ambitious national legislation (in Germany and Switzerland, the latter country also participating in the internal market) would need to be adapted accordingly. The adoption of HREDD legislation would also facilitate the EU’s restrained engagement in the negotiations of a UN legally-binding instrument by closing gaps in the EU’s external competence.¹⁸⁰ Arguably, once mandatory HREDD is established in the EU, it would be an opportune time for EU legislators to ensure that non-EU companies are not enjoying competitive advantages in markets outside the EU. A binding international instrument could reduce such risks, at least with respect to companies based in signatory countries of such a treaty.¹⁸¹

The adoption of an EU-wide mandatory HREDD would be an important, but not self-contained, step in addressing business impunity for adverse impacts on people and the environment. HREDD can be efficacious only when appropriately tailored and combined with other measures, notably judicial and non-judicial grievance mechanisms and remedies as well as rigid enforcement involving both public authorities and civil society. The draft Directive as proposed by the Commission is far from delivering on what it promises. It mainly builds on the extant legislative, soft law, and judicial instruments, merely consolidating the status quo at the EU level rather than addressing the shortcomings in existing instruments or practice. It

¹⁷⁶ Brabant et al., *supra* note 118, pp. 1, 5; Černič, *supra* note 6, p. 23; Methven O’Brien, Hartmann, *supra* note 119.

¹⁷⁷ Art. 5(3) TEU [2012] OJ C 326, p. 13-390.

¹⁷⁸ The legal base for the EU to legislate on HREDD (Art. 114 TFEU, in connection with Art. 26 TFEU). Legal certainty and level-playing field are named also by business as important reasons to introduce binding legislation. For public consultation, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en (accessed on 30 April 2023).

¹⁷⁹ The term borrowed from N. Walker, *Constitutional pluralism revisited*, 23(3) *European Law Journal* 333 (2016), p. 333, but not with exactly the same meaning.

¹⁸⁰ The EU needs exclusive competence in areas subject to negotiations, otherwise it must be joined by its Member States. M. Krajewski, *BHR Symposium: Aligning Internal and External Policies on Business and Human Rights – Why the EU Should Engage Seriously with the Development of the Legally Binding Instrument*, *Opinio Juris* 11 September 2020, available at: <https://tinyurl.com/5c2m4zas> (accessed 30 April 2023).

¹⁸¹ *Ibidem*.

offers no innovations regarding the requirements for the burden of proof, notably regarding causality. It focuses excessively on the HREDD process rather than its result, thus risking to undeservedly reduce the value of its instruments.¹⁸²

To exert the desired impact on business practice, the expected EU legislation would need to endorse the minimum international standards, notably regarding entities subject to the new obligations, the coverage of supply chains, the involvement of stakeholders in the full cycle of the HREDD process, and linking civil liability to business actors' implication in violations of human rights or environmental harm. The latter tenet is directly linked to the question how HREDD should be normatively structured in order to optimise its corrective capacity with respect to business conduct. Arguably, the most promising avenue to incentivise companies to commit to effective HREDD would be to restrict its function to prevention (rather than exculpation), thus excluding a defence merely on the grounds of compliance with the HREDD process. This would unleash the latent potential of HREDD as a flexible tool allowing enterprises to perfectly shoulder their individual responsibility to respect human rights and the environment. Such arrangement would also be fully in line with the letter of the UNGPs, which link the scope of liability to whether an enterprise has caused, contributed to, or was linked to an adverse impact.¹⁸³ It remains to be seen whether the EU Parliament¹⁸⁴ and Council will use the European and international momentum to adopt HREDD legislation able to live up to its own objectives.

¹⁸² Cf. OHCHR, *supra* note 114, p. 3, 7.

¹⁸³ UNGPs, *Commentary to GP 19*; Ruggie, Sherman, *supra* note 20, pp. 926ff.

¹⁸⁴ The EP adopted its position for negotiations with the Council on 1 June 2023 (adopted text P9_TA(2023)0209). An agreement allowing the adoption of the proposed directive is hoped to be reached before the end of the current Parliament's term in spring 2024.