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Towards mandatory human rights due diligence: the European Corporate Sustainability Due Diligence Directive

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Abstract

Questa tesi si inserisce all'interno di un dibattito internazionale di stampo economico-giuridico, ponendosi come obiettivo un'analisi critica del contesto attuale dopo l'introduzione del termine "sostenibilità" associato alle aziende. Prima finalità dell'elaborato è quella di presentare un discorso approfondito sulle motivazioni che dovrebbero spingere le imprese a conoscere i rischi a cui si espongono e, specialmente, a cui espongono l'ambiente circostante con le proprie attività. Per incalzare questa sensibilizzazione, è necessario elencare e descrivere nel dettaglio quali sono gli strumenti legislativi a cui le aziende devono fare riferimento nel quadro giuridico-internazionale e nazionale. L'Unione Europea è sempre stata in prima fila per il rispetto dei diritti umani e da sempre propone misure per rafforzare queste responsabilità ed obblighi con Regolamenti e Direttive, ma come anche con l'inserimento di obiettivi a breve e lungo termine. Indubbiamente, l'oggetto di analisi di questa tesi nasce da un forte interesse verso i diritti umani e la protezione ambientale e come questi aspetti siano regolati a livello giuridico, oltre ad aver maturato un'esperienza sul campo durante un periodo di tirocinio all'estero, per la precisione a Copenhagen. In particolar modo, uno spiccato interesse è nato dalla curiosità di conoscere la regolamentazione dei meccanismi di commercio internazionale e come questi regolino gli impatti aziendali e promuovono un concetto di sostenibilità.

Le crescenti aspettative sociali e l'influenza della società stessa spingono sempre più gli Stati ad adottare misure vincolanti e a ritenere le aziende responsabili dei loro impatti negativi sui diritti umani. Pur riconoscendo i progressi normativi sulla strada per ritenere responsabili multinazionali e imprese, il concetto di bilancio etico, o *due diligence*, per i diritti umani è lungi dall'essere pienamente sviluppato e messo in pratica. Dall'adozione dei Principi guida delle Nazioni Unite su imprese e diritti umani nel 2011 (*United Nation Guiding Principles on Business and Human Rights*) da parte del Segretario Generale John Ruggie (trattasi dell'atto legislativo più autorevole in materia di aziende e diritti umani che, sebbene ancora nella forma di elemento a carattere non vincolante, raccoglie tutte le disposizioni del diritto internazionale dei diritti umani già in vigore) il rapporto tra i diritti umani e la cosiddetta *Human Rights Due Diligence* (HRDD) è stato fonte di incertezza giuridica. Elementi che sono stati criticati spesso negli attuali Principi Guida sono il linguaggio morbido e i termini ambigui utilizzati, nonostante sia presente un dibattito riguardo la natura di questo documento. Effettivamente, i Principi Guida raccolgono tutte le disposizioni di diritto dei diritti umani, che per gli Stati della comunità internazionale sono certamente obbligatorie e parte delle consuetudini internazionali. D'altra

parte, è necessario ricordare che a livello internazionale non esiste alcun documento in materia di diritti umani e ambiente che sia vincolante per le imprese. La frammentazione delle misure di diritto interno e internazionale, oltre all'assenza di un approccio coordinato e condiviso verso l'adozione di misure obbligatorie, ha fatto sì che innumerevoli strumenti internazionali non vincolanti (*soft law)* emergessero nel ruolo di regolatori delle attività imprenditoriali. Questi includono le linee guida dell'Organizzazione per la Cooperazione e lo Sviluppo Economico (OCSE) per le imprese multinazionali, la dichiarazione tripartita dell'Organizzazione Internazionale del Lavoro (OIL) e le numerose iniziative delle Nazioni Unite (ONU). A livello europeo, gli Stati membri sono sempre stati in prima linea, dimostrando intraprendenza in materia di responsabilità sociale d'impresa (RSI). Il concetto di RSI si inserisce nel contesto internazionale a seguito dell'avvento della globalizzazione, un fenomeno che si è dimostrato incisivo nell'abbattere le barriere tra Stati grazie allo sviluppo di nuove tecnologie e all'apertura del commercio. La globalizzazione ha innanzitutto promosso una progressiva integrazione e omogeneizzazione, accentuando il consumismo e l'interdipendenza tra Stati e specialmente tra economie. Con la globalizzazione si sono affermate imprese sempre più grandi e operanti all'interno di un contesto globale, ovvero le imprese multinazionali. Ciononostante, la crescita esponenziale delle multinazionali su scala mondiale ha generato numerose esternalità a discapito delle piccole e medie imprese, dei lavoratori e dell'ambiente circostante. Le multinazionali, infatti, localizzano la loro catena di produzione in più paesi in un'organizzazione definita "a rete" che si affaccia soprattutto ai paesi in via di sviluppo con ancora un settore economico poco sviluppato, alta fragilità politica e, di conseguenza, risultano molto più esposte a rischi di impatti negativi sull'ambiente e abuso di diritti umani. Solamente gli Stati sono considerati soggetti del diritto internazionale e, come tali, sono anche soggetti ad obblighi e responsabilità internazionali, diversamente dalle imprese. Numerosi esperti, ricercatori, organizzazioni non-governative, ma anche amministratori delegati si sono espressi per analizzare il concetto di responsabilità d'impresa fornendo le proprie tesi a riguardo. È vero che nuove misure legislative introdurrebbero risorse e quindi anche dei costi, ma la sfida è che nel lungo periodo un'azienda sostenibile possa guadagnare rendimenti economici migliori anche sul capitale umano e investendo su reputazione e immagine aziendale.

In Unione Europea, grazie all'introduzione del Libro Verde ("*Green Deal*" europeo), l'importanza della sostenibilità d'impresa diventa la strategia per rispondere all'emergenza ambientale e garantire crescita economica combattendo la povertà e la crisi energetica, al

momento amplificate dalla guerra Russo-Ucraina in corso. In ambito aziendale, nel 2014 era entrata in vigore una Direttiva europea volta a garantire la divulgazione tramite report, per la prima volta, di informazioni non solamente di carattere finanziario ma comprendendo aspetti sui diritti umani, aspetti sindacali nella gestione aziendale, diritti dei lavoratori, rispetto dell'ambiente. La Direttiva 2014/95/EU (*Non-Financial Reporting Directive*) ha introdotto in Unione Europea il rapporto di sostenibilità d'impresa con quello che poi si è sviluppato sempre di più come il dovere di diligenza nelle attività aziendali (quest'ultimo già presente), prendendo in esame gli impatti sui diritti umani e l'ambiente e garantendo trasparenza. A quest'ultima subentra una proposta che, il 23 febbraio 2022, è stata pubblicata dalla Commissione Europea per creare una Direttiva con l'obbligo di *due diligence* d'impresa ai fini della sostenibilità in materia di diritti umani e ambiente che, in quanto Direttiva, avrà effetto esecutivo a due anni dall'approvazione, a seguito di consultazioni ed emendamenti tra Parlamento e Consiglio dell'Unione Europea. La direttiva impone ad alcune società, sempre che raggiungano le soglie previste, di adempiere agli obblighi di bilancio etico; in più, essa prevede un meccanismo con possibili sanzioni e responsabilità civili per il mancato rispetto. Esattamente questi punti sono rilevanti, in quanto la criticità dell'applicazione esecutiva di questa proposta sta proprio nella scarsa chiarezza del documento, lasciando interdetti gli Stati e soprattutto gli attori economico-sociali che corrono il rischio di essere perseguiti civilmente. Lo scopo finale della presente tesi è quello di analizzare i punti di forza e di debolezza della Direttiva, evidenziando le modalità in cui quest'ultima influirà sulle società europee e di paesi terzi.

Nel primo capitolo, introdurrò il contesto della *due diligence* nel diritto internazionale con una panoramica sulla responsabilità sociale delle imprese per comprendere il significato e l'importanza di questo termine e come questo bilancio etico venga messo in pratica. Il secondo capitolo è incentrato sui Principi Guida delle Nazioni Unite per imprese e diritti umani, oltre all'analisi di altri strumenti di *soft law* che hanno aperto la via per l'adozione di misure obbligatorie nazionali nei paesi dell'Unione Europea. Nel terzo capitolo, valuterò se la Direttiva ha il potenziale per indirizzare le aziende nella gestione degli impatti negativi sui diritti umani e l'ambiente, contestualizzando il tutto nel quadro dei Principi Guida, oltre a concentrarmi sui punti di dibattito della Direttiva. Infine, nell'ultimo capitolo, analizzerò nel dettaglio i punti critici della Direttiva affrontando l'effetto transnazionale di quest'ultima sul diritto del lavoro nei paesi terzi coinvolti o che investono nel mercato unico europeo. Data la freschezza del documento, il contesto legislativo è in continua evoluzione: in questa parte verranno inseriti

anche gli emendamenti e i commenti proposti rispettivamente dal Parlamento Europeo e dal Consiglio dell'Unione Europea in merito a una proposta che, purtroppo, pecca ancora su numerosi punti. I principali quesiti che mi sono posta per la redazione di questa tesi prendono in esame il concetto di due diligence per la protezione dei diritti umani e la sua rispettiva evoluzione. La tesi indaga come, a livello europeo, si sia sviluppato il concetto di due diligence e se questo sia in linea con gli standard internazionali, come anche se gli obiettivi iniziali volti a garantire responsabilità e protezione dei diritti umani siano stati raggiunti. A questo proposito potrebbero sorgere le seguenti domande: qual è il significato e come viene applicato il concetto di dovere di diligenza d'impresa (due diligence) in Unione Europea per la tutela dei diritti umani e ambientali? Fino a che punto la prossima Direttiva UE coprirà la necessità di creare obblighi aziendali giuridicamente vincolanti nel quadro degli UNGPs? Quali sono le sfide che devono affrontare Stati e imprese?

Introduction

The present dissertation aims to spread knowledge on human rights due diligence obligations in international law, which is useful as it may form the basis for a further clarification of corresponding legal rights of subjects of international law. The relationship between business and human rights is driven by social concerns on sustainability: when there seems to be a general agreement among companies, governments and civil society, the means for achieving this objective are debated. Companies were already enacting due diligence: the news is mandatory human rights due diligence, the obligation ruled by civil liability in order to respond to social pressures to bring to an end human rights adverse impacts by businesses.
Corporate sustainability due diligence is an increasingly important topic in the field of business and environmental responsibility. In the face of growing pressure from stakeholders, including customers, investors, and regulators, companies are expected to integrate sustainability into their operations and to assess and manage their environmental, social, and governance impact, also known as the ESG. In Europe, this issue has become particularly pressing in recent years. The EU has taken a series of steps to strengthen corporate accountability and transparency, including the adoption of the EU Directive on non-financial reporting and the proposed legislation on sustainable corporate governance. The EU has also made it clear that it will continue to push for greater sustainability in business, with the European Green Deal being a clear indication of the EU's commitment to promoting sustainability as an overarching objective. At the heart of this push for sustainability is the concept of due diligence. Sustainability due diligence involves identifying, assessing, and managing the risks and opportunities associated with a company's ESG impacts, both within its own operations and across its supply chain. This process is intended to help companies understand the environmental and social risks and opportunities they face, and to develop strategies to address these risks and leverage these opportunities.
The importance of sustainability due diligence is increasingly recognized in Europe. However, there is still much work to be done to ensure that companies are effectively implementing sustainability due diligence, and that they are doing so in a manner that is aligned with the goals and objectives of the EU's sustainability agenda.
Against this backdrop, this thesis aims to explore the concept of sustainability due diligence, its relevance to European businesses, and the best practices and challenges associated with its implementation. The research will draw upon a range of academic literature, case studies, and

interviews with practitioners and experts in the field, in order to provide a comprehensive analysis of the topic and to offer insights and recommendations for future action. With this objective in mind, this thesis will contribute to the growing body of literature on sustainability due diligence, while also providing practical guidance to European businesses seeking to enhance their sustainability performance and to align them with international standards. By providing a detailed examination of sustainability due diligence, this thesis promotes a deeper understanding of this critical concept and promotes the adoption of effective sustainability strategies and legislation across Europe's business community.

The thesis has been divided in four chapters and each of them describes a part of the process to reach the final treatment of the EU Corporate Sustainability Due Diligence Directive (EU CSDDD). The first chapter is supposed to be theoretical. It provides an analysis of the context and the background in which human rights due diligence is developed, referencing Corporate Social Responsibility (CSR) and Multinational Enterprises (MNEs). Historically, MNEs were recognised under an economic lens rather than as international law subjects. However, their power has increased dramatically to the extent that civil society started to untrust their operations, more often not complying with global standards.

In the second chapter, international standards for the protection of human and labour rights are enlisted and thoroughly described. In the first instance, the successful project of the UN Guiding Principles by prof. John Ruggie turned out to be a driver to change social norms and corporate culture through its "Protect, Respect and Remedy" three-pillar scheme. Additionally, other soft law instruments such as the OECD Guidelines, the ILO Declaration and the UN Global Compact have been treated.

The third chapter will be centered on the study and relationship between EU legislation and international law concerning the protection of human rights. In fact, the EU has recognised the importance of the respect for human rights as a core value upon which the EU is built. Moreover, in the view of a possible adoption of a treaty on business and human rights, although still in progress, international protection of human rights will gain greater importance.

Finally, chapter four will cope with some of the strengths and weaknesses of the EU Commission proposal released in February 2022, assessing some of the critical points concerning the extraterritorial effects of the upcoming legislation.

Research question

What status does Human Rights Due Diligence currently have under European and international soft and hard law instruments for the protection of human and environmental rights?

To what extent will the upcoming EU Directive cover the need of creating legally binding corporate obligations in the framework of the UNGPs? What are the challenges faced by States and companies?

This dissertation aims at analyzing the strengths and flaws of the EU Commission Proposal for a Directive on Corporate Sustainability Due Diligence in the context of international and European law (proposal released on February 23rd, 2022), highlighting the ways this proposal will affect European and third-country companies.

As an upcoming directive, it will become enforceable law. In the first instance, it is related to my study path in European Union Studies and, secondly, I think it represents a current interesting topic to cover since businesses will have to take appropriate measures to comply with the Directive once eventually approved by the Parliament and the EU Council and transposed by the Member States. Moreover, after an internship at a consultancy business firm in Copenhagen, I have been involved in the analysis of the proposal and into a deep-learning journey on the relationship between businesses and human rights. While recognizing the regulatory progress on the path to holding transnational corporations accountable for human rights violations, the concept of human rights due diligence is far from fully developed. I believe it is meaningful to thoroughly examine the concept of HRDD in the view of a better understanding of the EU Directive on Corporate Sustainability Due Diligence.

1. WHAT IS DUE DILIGENCE?

1.1 Background – 1.2 A brief introduction to Corporate Social Responsibility – 1.3 Due diligence in International Human Rights Law – 1.4 History of human rights connected to businesses – 1.5 Due diligence in International Environmental Law – 1.6 Company Law and limited liability – 1.7 Conclusions.

1.1 Background

Human rights due diligence is a key topic in the debates among human rights advocates and the business world. The area of Business and Human Rights (BHR) argues that businesses, states, and individuals present human rights obligations and can result liable for business-related human rights abuses[1].

This relationship has increasingly come under the spotlight over the past few decades, as a result of serious environmental catastrophes and human rights abuses connected to companies; moreover, right-holders have often found it hard to enforce corporate human rights accountability.

This permissive environment for wrongful acts has been provided by a governance gap. Scholars discuss the place of businesses in the international human rights system and on their corporate responsibilities, where human rights have always been conceived in-between the relationship State-individual. In international law, treaties and customs are binding instruments upon States, which are the primary subjects of international law. Indeed, States assume legal obligation when they ratify treaties as well as when they comply with unwritten legal rules, namely customs, which derives from general, uniform, and constant patterns of behaviour, established in the long run and considered in the same way as binding law, with *ius cogens* norms universally recognized by the international community. Nowadays, human rights norms have achieved a fundamental importance in international law. "Sur le plan horizontal, de nouveaux acteurs de la société international sont apparus […] sur le plan vertical, de nouveaux et nombreux domaines sont apparus et ont ainsi élargi la sphère d'influence du droit

[1] J. L. ČERNIČ, *The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality*, Faculty of Government & European Studies and European Faculty of Law, New University, 10 Global Bus. L. Rev. 1 (2022).

international[2]". On the international realm, it can be argued that the role of States is now counterbalanced by the presence of new actors, although they are the only subject that can create international treaties and become part of them.

In order to achieve an objective, for example the ILO Convention on Minimum Age (No. 138) implies that state parties commit and set measures to suppress child labour and adopt policies for raising the minimum age for employment[3]. The implications are overwhelming since, in the case of a breach of international law by an actor different from the state, it will not be the international legal system to directly address the matter. Therefore, States assumed the duty to respect, protect and fulfil human rights and fundamental freedoms[4]. The duty to respect is supposed to give people the freedom to enjoy human rights, providing the right capabilities if lacking; secondly, the duty to protect includes protection against human rights abuses within the State's territory and from jurisdiction by third parties (this includes business enterprises), it also implies a prevention of wrongful acts; eventually, the duty to fulfil human rights implies a long-term compliance.

At the United Nations level, we have different political and legal monitoring mechanisms, which assess compliance with human rights upon states, for example the Human Rights Council and the Committees based on the single Conventions. The Human Rights Committee is the United Nations human rights treaty body composed by 18 experts that is responsible for overseeing implementation of the International Covenant on Civil and Political Rights (ICCPR), through its consideration of State reports, individual complaints, and inter-State complaints, and its preparation of general comments[5]. Although some regional intergovernmental bodies are authorized to consider individual complaints involving fundamental rights or to directly apply human rights treaties, such as the Inter-American Court of Human Rights[6] (IACHR) and the African Court on Human and Peoples' Rights[7] (AfCHPR) it is not already present a Universal Court assessing human rights.

At the European level, the European Court of Human Rights is the only judicial organ which delivers binding judgments on human rights upon States that have ratified the European

[2] D. CARREAU, F. MARRELLA, Droit International, 11ème edition, Paris, Pedone, 2012, p. 59.

[3] ILO Convention on Minimum Age, no. 138.

[4] UN OHCHR J. RUGGIE, *United Nations Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, New York and Geneva, 2011.

[5] OHCHR, HUMAN RIGHTS COMMITTEE, Available at: https://www.ohchr.org/en/treaty-bodies/ccpr

[6] American Convention on Human Rights, it entered into force on 18th July 1978.

[7] African Charter on Human and People's Rights, 27th June 1981, it entered into force on 21st October 1986.

Convention on Human Rights and Fundamental Freedoms[8] (ECHR). The Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) seeks to formulate the basic rules of international law concerning the responsibility of States for internationally wrongful acts[9]. The question arises when human rights responsibility needs to be asserted upon private entities, where the liberalization of world trade and the process of privatization of state functions has definitely strengthened the comparative position of companies and has created an accountability gap.

In the last decades, the increasing awareness of the abuses from corporations came to the surface. As evidence and to give an example, among the countless reports of human rights abuses from corporations, illegal and forced child labour is hyper-present in the chocolate industry, because more than 40% of the world's cocoa supply comes from the Ivory Coast, a country that the US State Department estimates had approximately 109,000 child laborers working in hazardous conditions on cocoa farms[10].

In 2001, Save the Children Canada reported that 15,000 children between 9 and 12 years old, many from impoverished Mali, had been tricked or sold into slavery on West African cocoa farms. Nestlé, one of the most famous multinational corporations in the world and largest buyer of chocolate from the Ivory Coast, is aware of the tragically unjust labour practices taking place on the farms with which it continues to do business. Nestlé and other chocolate manufacturers agreed to end the use of abusive and forced child labour on cocoa farms by July 1, 2005, but they failed to do so[11]. Another scandal arose with the infant formula samples (in 1980s) sold in poor countries where the access to clean water is extremely limited.

This is just one emblematic example of human rights abuses by corporations. There exists significant literature about the "paradox of plenty" or the "resource curse" explaining that the abundance of natural resources in countries lacking good governance may result in a mere

[8] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, it entered into force on 3rd September 1953.

[9] UN, Draft articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two, with commentaries, 2008, Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, [accessed: 27/11/2022].

[10] BUREAU OF INTERNATIONAL LABOR AFFAIRS, United States Department of Labor, *2005 Findings on the Worst Forms of Child Labor - Côte d'Ivoire*, 29 August 2006, available at: https://www.refworld.org/docid/48d748e625.html, [accessed 19 October 2022]

[11] 2005: List of the worst corporate evildoers, Global Exchange, International Labor Rights forum, 12/12/2005, Available at: https://laborrights.org/in-the-news/2005-list-14-worst-corporate-evildoers

exploitation of resources causing pain and disasters for their people[12]. Most of the time, a substantial harm is caused by multinational corporations from the extractive sector, namely oil, mining and gas, especially greedy on "black gold". The Ogoni case in Nigeria caused by the oil giant Shell Oil Company that has been held before the African Commission on Human and People's Rights is exemplary[13].

These events not only resulted in severe harm to people and the environment, but also resulted in a terrible and pitiful image of companies and their public reputation and litigation with NGOs.

As a matter of fact, a current term which is gaining ground against the bad behaviours of corporations is "greenwashing".

The term "greenwashing" was coined in the 1980s to describe the corporate practice of making sustainability claims to cover environmental unsustainable records. This concept was coined by the environmentalist Jay Westerveld in 1986, back when most consumers received their news from television, radio and print media, the same outlets that corporations regularly flooded with a wave of high-priced and slickly produced commercials[14]. Companies may claim that their products are from recycled materials or are energy-saving even though they are not. Therefore, what has been frequently criticized is that economic globalisation cannot be made sustainable even if accompanied by standards for the protection of human rights. The critics argue that corporations desire to wrap themselves in the flag of the United Nations "bluewashing" or "greenwashing" their public image, while at the same time making no effort to change the reality.

1.2 A brief introduction to Corporate Social Responsibility

> "[…] a debate is taking place in the arena of ethics – should corporations be controlled through increased regulation or has the ethical base of citizenship been lost and needs replacing before socially responsible behaviour will ensue? However

[12] Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States*, Berkeley: University of California Press, 1997; see also Karl, *"Understanding the Resource Curse,"* in Covering Oil: A Reporter's Guide to Energy and Development, New York: Open Society Institute, 2005, available at: http://www.soros.org/sites/default/files/osicoveringoil_20050803.pdf.

[13] SHARP PAINE L., C.MOLDOVEANU, M., "Royal Dutch/Shell in Nigeria (A)," HBS Case No. 9-399-126 Boston: Harvard Business Publishing, 2000.

[14] B. WATSON, *The troubling evolution of corporate greenwashing*, The Guardian, 20 August, 2016, Available at: https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies

this debate is represented, it seems that it is concerned with some sort of social contract between corporations and society"[15].

For the purpose of this paragraph, multinational corporations will be taken into account, as in the history of Corporate Social Responsibility they were upfront in the public eye.

In the twentieth century, corporations started to be held accountable for their damages to the environment and the people living in it: as a result, companies developed a responsibility towards society called *corporate social responsibility.*

The American economist Howard R. Bowen is generally considered the father of Corporate Social Responsibility (CSR) when, in 1953, he published his landmark book "Social Responsibilities of the Businessman" advocating business ethics and responsibility[16]. CSR in those years was conducted only for-profit maximization. His book focuses on how CSR can help businesses reach social justice and economic prosperity through welfare, beyond merely corporations and shareholders. Bowen approached the social responsibility doctrine as a sort of "third way" between laissez-faire and socialism; according to him, social responsibility is something innovative that worth an explanation since it has the potential to address the failures of the free market while representing an alternative to socialism[17]. Bowen suggested that corporations were not only producers of services, but also workplace conditions and are responsible for the enhancement of the well-being of workers. Today, CSR can be related to a business model which makes a company socially and environmentally accountable to itself, its stakeholders, and the general public.

It is definitely a hard task to agree on a common interpretation of CSR. As Archie B. Carrol argued in 1979: "one of the factors contributing to the ambiguity that frequently shrouded discussions about social responsibility were the lack of a consensus on what the concept really meant[18]". This is the reason why he proposed a "Three-Dimensional Model" for corporate performance, included into the definition of what social responsibility should cover. He explains that the obligations a business has to society must embody the economic, legal, ethical,

[15] D. CROWTHER, G. ARAS, *Corporate Social Responsibility*, 2008, Available at: www.bookboon.com.

[16] ACCP, *Corporate Social Responsibility: a brief history*, Available at: https://accp.org/resources/csr-resources/accp-insights-blog/corporate-social-responsibility-brief-history/

[17] J. P. GOND, introduction to *Social Responsibilities of the Businessman* (by Howard R. Bowen), University of Iowa Press (USA), 2013 copyright, (original copyright in 1953).

[18] A. B. CARROL, *A Three-Dimensional Conceptual Model of Corporate Performance*, Academy of Management, University of Georgia, 1979.

and discretionary categories of business performance[19]. Carrol concludes that corporate social performance requires (1) responsibility to be assessed, (2) social issues to be identified, and (3) the need to choose a response philosophy.

Given the wide range of definitions for the concept of CSR, it may be helpful to start analyzing the word "responsibility", in the sense that the corporation has not only economic and legal obligations, but also responsibilities to society and, lately, the environment. An example of responsibility can be the engagement of corporations in charity donations, even though at some point this philanthropy was insufficient according to the social community and action was strongly required. Until recent times, the prevailing view of international organizations such as the UN, ILO, OECD and the EU[20] was that corporate social responsibility is better addressed by self-regulation in the industry, and as such, the supervisory activity or standard setting required should have been bound to a voluntary nature only[21]. This approach was also obviously advocated by the corporate sector itself.

In 2000s CSR became a central strategy oin the political economy of the EU[22]. According to the European Commission (2001), CSR "is the process whereby enterprises integrate social, environmental, ethical and human rights concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"[23]. Later, in 2011, the European Commission declared a renewed definition of CSR into the *new policy on corporate social responsibility*[24] as "the responsibility of enterprises for their impacts on society"[25]. Moreover, this strategy brings on the table the implementation of an agenda for actions, for example the increase of visibility of CSR through the adoption of policies, education and training.

According to the United Nations Industrial Development Organization (UNIDO): "Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders.

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[19] *v. supra,* nota 11.

[20] *Promoting an European Framework for Corporate Social Responsibility*, European Commission Green Paper (2001), Available at: www.europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf.

[21] M. T. KAMMINGA, *Corporate Obligations under International Law,* In *Report of the 71st Conference of the International Law Association* (pp. 422-427), International Law Association, Maastricht, 2004.

[22] D.S. Dion, *The Lisbon Process: a european odyssey*, in the European Journal of Education, vol. 40, 2005, p. 295 e ss.

[23] COMMISSION OF THE EUROPEAN COMMUNITY, 2001.

[24] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, *A renewed EU Strategy 2011-14 for Corporate Social Responsibility*, Brussels 25th October 2011, COM (2011), 681.

[25] *v. supra* alla nota 16.

CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives ("Triple-Bottom-Line-Approach"), while at the same time addressing the expectations of shareholders and stakeholders"[26].

In addition, on the OECD website it is reported that CSR is "businesses' contribution to sustainable development. Today, corporate behaviour must also […] respond to societal and environmental concerns[27]". This definition considers the word sustainability, which became a popular topic from the 1960s until today, when corporations' power and behaviour towards the environment started to be intolerable for the social community and in recent decades, thanks to the numerous treaties signed for the protection of human and environmental rights, there seems to be a global agreement that corporations should employ and apply CSR practices. Examples of these practices are the application of codes of conduct, voluntary standards and verification schemes, initiatives from stakeholders and public or private entities. Overall, there is a new challenging notion of CSR that has become popular rather than the past, a new notion that is threatening the neo-liberal opponents of CSR. Why should governments be interested in CSR? First, business efforts can help governments to meet policy objectives, not only related to sustainable development but also on foreign policy goals (such as human development), on a voluntary basis.

Secondly, CSR policies may appear attractive to complement hard-law regulations in cases where new regulations result infeasible, in particular at international level[28].

Why should corporations comply with CSR practices?

It can be inferred that workers' productivity increases, the reputation of the company would be better worldwide, and the brand image would also benefit. Eventually, customers tend to be more loyal to a company that proves its responsible commitment.

Corporate Social Responsibility is increasingly understood as a management process, which inspires process-oriented laws. This has obviously been the struggle between voluntary and mandatory practices, a reflection of the lack of agreement about the role of law in corporate responsibility.

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[26] *v. supra* alla nota 16.

[27] OECD website, *Corporate Social Responsibility: Partners for Progress*, 2001. Available at: https://www.oecd.org/cfe/leed/corporatesocialresponsibilitypartnersforprogress.htm

[28] J. LOZANO, T. YSA, *Public policies on Corporate Social Responsibility: the Role of Governments in Europe, Journal of Business Ethics*, 2010, da R. STEURER, *The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe,* in: Policy Sciences, 43/1, pp. 49-72.

As argued above, CSR did not only provide a 'toolbox' for implementation, but an overall frame and language to process human rights, which for many companies appeared as overly conceptual, abstract and confusing[29].

Despite the nebulous range of answers, there would be much more things to consider, but for the purpose of this dissertation it is important to insert this theme into the wider topic in the view of clearly defining a basis for the following paragraphs.

1.3 Due Diligence in International Human Rights Law

Previously, the concept of CSR has been briefly analysed in order to introduce the core concept that is developed throughout this dissertation.

According to scholars, due diligence applies specifically to some branches of international law, such as environmental law, while other groups believe it is an international obligation of customary international law.

> "Due diligence is a standard of good governance, assessing whether a state has done what was reasonably expected of it when responding to a harm or danger. This standard is in-built in a series of rules of conventional and customary international law applying generally to inter-state relations or specifically to fields such as the environment, human rights, international humanitarian law, cyberspace and, most notably, global public health. These rules typically impose obligations of conduct requiring States to prevent, stop and/or redress a range of internal or transboundary harms, or the risk thereof. But some are coupled with procedural obligations of result, such as risk assessments and information-sharing[30]".

Another definition of due diligence, given by the Black's Law Dictionary, reads as follows: "diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation".[31]

[29] L. J. OBARA, K. PEATTIE, *'Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies'* (2016) 53:6 Journal of World Business 781.

[30] A. COCO, T. DE SOUZA DIAS, Prevent, Respond, Cooperate, State due diligence duty vis-à-vis the Covid-19 pandemic, Journal of International Humanitarian Legal Studies, EJIL: Talk!, 9 December 2020.

[31] Black's Law Dictionary, 8th edition (2006).

The UN presented a double definition, both defining due diligence as the "process for risk management by firms" and as a "standard of conduct[32]". The coexistence of the meanings was due to the fact that business was more familiar to governments, business and lawyers. The concept of due diligence was already present inside companies and undertaken in the process of risk management, while the UN gave due diligence a human rights connotation defining it as a standard of conduct. According to the UN Office of the High Commissioner for Human Rights, human rights due diligence is "a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved".[33] Hence, it can be assumed that the notion of human rights due diligence implies two possible meanings: due diligence as a standard of conduct given by an individual actor to discharge an obligation and as a process for business risk management. Due diligence has been developed to operationalise the corporate responsibility to respect human rights, in order to maximize the positive impact on the protection of human rights in a proactive way and through a risk-based approach. There is a distinction between obligations: positive obligations imply 'to do something' in order to provide a proactive contribution, for example the protection of human rights. On the other hand, negative obligations refer to a duty 'not to act', a passive contribution as it is, for example, to refrain from action that would hinder human rights[34]. It includes the assessment of activities for possible human rights violations:

> "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed"[35].

In fact, compliance would be the consensus of the word, the following of the mandatory rule. It is generally required by a government, and it is also a goal in the short-term. Rather, and importantly, due diligence is not mandated, it may be part of a company or organization's

[32] UN OHCHR J. RUGGIE, *Guiding Principles on Business and Human Rights*, Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011.
[33] *v. supra,* note 33.
[34] https://www.unodc.org/e4j/zh/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html#:~:text=In%20summary%2C%20positive%20obligations%20are,that%20would%20hinder%20human%20rights.
[35] *v. supra,* alla nota 25.

policies, but it is considered a proactive action[36]. The most emerging difference lays on compliance's aim for uncovering wrongful behaviours in the past record of a company, a checklist-style auditing (tick-box approach[37]), while the goal of due diligence is to achieve a management-systems approach to social performance emphasizing continual improvement[38]. The tick-box approach is focused narrowly on satisfying the legal requirements without any concern about concrete results[39].

The concept of due diligence in international law pledges the management of risks. Risk management lies at the heart of due diligence obligations and, at the same time, beyond the obligations of conduct and result (particularly present in environmental law), due diligence obligations are also used as a regulatory framework. The liability risk attached to business and human rights laws may undermine the CSR engagement and undermine efforts to achieve the SDGs precisely in those countries and regions, which are most dependent on it[40]. In the following chapters, the accountability and regulatory perspective of due diligence will be addressed, while giving a perspective on Multinational Corporations.

1.3.1 Multinational Enterprises

At this point, and in order to have a deeper understanding of the European Corporate and Sustainability Directive, it is necessary to identify the meaning and differences between Small and Medium Scale Enterprises (SMEs), which are a fundamental part of any supply chain in any industry although they are working at a relatively lower level in comparison to big Multinational Enterprises (MNEs). Multinational enterprises activities are difficult to control and it is even more difficult to validate their responsibility in relation to human rights abuses when their operations are fragmented all over the world. Although many MNEs regulate their activities with codes of conduct and seem to adhere to general rules for the protection of workers

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[36] M. PHELPS, *Five differences between compliance and due diligence*, August 5, 2019. Available at: https://marcyphelps.com/five-differences-between-compliance-and-due-diligence/

[37] The 'tick-box approach' or 'tick-box culture' is when an organization monitors its processes and policy using checklists to show both the internal organization (employees, management, board, etc.) and the outside world (customers, industry regulators) that processes are in tip-top condition and fully compliant with legislation and regulations. DRILLSTER (Netherlands, France, Spain), *'What is a tick-box culture'*?, Available at: https://drillster.com/what-is-a-tick-box-culture/

[38] SAI, Social Accountability Standard, available at: https://sa-intl.org/programs/sa8000/

[39] WETTSTEIN, F., *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights*, University of St Gallen Institute for Business Ethics, St Gallen, Switzerland, Business and Human Rights Journal, vol. 6, published by Cambridge University Press, UK, 2021, pp. 312-325.

[40] *v. supra*, nota 30.

and territories, they also appear to be more and more mistrusted. Currently, there is no legally and universally accepted definition of multinational enterprises, but the UN, the ILO (International Labour Organisation) and the OECD (Organisation for Economic Cooperation and Development) employed a conception of MNEs (or as well TNCs, transnational corporations) with some slight differences. According to the United Nations *Draft Code of Conduct on Transnational Corporations*, the term "transnational corporations" is used to define "an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates through one or more decision-making centres[41]".

The ILO draft Tripartite Declaration on Multinational Enterprises and Social Policy of 1977 and then amended in 2000, provides a non-binding explanation of multinational enterprises as "enterprises, whether they are public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based[42]". The term "business enterprise" refers to the range of corporate structures including corporations, joint ventures, consortium, franchises, etc.

In the OECD Guidelines on Multinational Enterprises, it is reported that MNEs are "companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways[43]".

Today, the corporate form represents the body inside which all the economic activity is organised. Their development is linked with the rise of American MNEs first, thanks to Henry Ford's form of production where many productive processes started to be divided into smaller ones. For the purpose of identification, a multinational enterprise acts globally and part or the majority of its production is "glocalised[44]", it means that the productive chain is established in more than one country and that the products used for the global market are adapted to the local ones. Although a single product emerges at the end, productions networks are multi-sectoral and lay upon inputs from several sectors simultaneously[45]. The leading firm establishes product and process standards that then fall across its network and the supply chain.

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[41] UNITED NATIONS, *Draft Code of Conduct on Transnational Enterprises*, 1983, 1.

[42] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 1977.

[43] OECD *Guidelines for Multinational Enterprises*, 2000, Concepts and Principles, p. 3.

[44] Combination of the words 'globalization' and 'localization'.

[45] RUGGIE, J. G, Kennedy School of Government, Harvard University, Cambridge, *Multinationals as global institution: Power, authority and relative autonomy*, Regulation and Governance, John Wiley & Sons Australia, Ltd., MA, USA, 2018, p. 317-333.

Especially in the last decades, corporations have failed to respect human rights, multinationals in particular:

> "It can happen in any number of ways, for example in the area of footwear and apparel it is often overseas suppliers who don't adhere to recognise Labour Standards or don't pay overtime. In the area of extractive industries, mining and oil and gas the problems are often in relation to communities in which the companies operate adverse impacts whether it's environmental or otherwise, communities' protests escalate, security forces are called in and people get hurt and the company ends up being accused of complicity in the harm that's done[46]".

Corporate human rights obligations derive from the indirect effect of human rights norms imposed by the States; therefore, the only generally accepted subject of international law is the State. As main subject of international law, States choose to confer duties and rights and so to consider or not an international legal person[47]. Turning to MNEs, they are fundamental actors on the international realm and in today's globalisation and, actually, regulating businesses has become more and more challenging, especially due to the huge size of these enterprises and their operations abroad. However, despite MNEs influential role they have always been denied the recognition of international legal personality since it is difficult to consider multinational corporations as unitary entities if they are fragmented in different national firms[48]. Fortunately, MNEs status under international law has evolved since urgent regulation was needed due to corporate abuses on human rights[49].

Nevertheless, we can find a reference of legal personality of companies in the definition provided by Directive 2013/34/EU[50] Annex I and II.

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[46] OECD, *Prof. John Ruggie on business and human rights*, 2011, Available at: https://www.youtube.com/watch?v=dVDupBFJiqE&ab_channel=OECD

[47] C. FOCARELLI, Diritto Internazionale, seconda edizione, Padova, Cedam, 2012, p. 26.

[48] v. supra, note 45.

[49] D. CARREAU, F. MARRELLA, Droit International, 11éme edition, Paris, Pedone, 2012.

[50] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (OJ L 182, 29.6.2013, p. 19).

1.3.2 History of human rights connected to businesses

Historically, during the period of European colonialism, the approach of international law to business-human rights dynamics was supporting four principal actors: the home state of the transnational enterprise (which retained the greatest power), the host state for the enterprise's activities (where the home state exercised direct control), the individual investor, and the affected population of the host state (they were marginal)[51]. Therefore, this relationship could be regarded as colonial, where economic exploitation was the primary objective, while the population into local communities received little economic benefits and was not able to complain[52].

The colonial legacy based its relationship with the host state through the so-called "concessions", especially in Africa and the Middle East. On the other hand, the same practice was performed with respect to the developing world, notably in Latin America, where in order to protect economic interests the European countries and the United States intervened on governments conduct and covert operations. The marginal role played by the host state population conceived also a lower enjoyment of rights compared to the home state or the transnational enterprises. After World War II, states had to accept that developing and developed worlds shared a legal link based on equality and sovereignty of the newly independent states. International law has been the talisman for the protection of human rights.

The essence of human rights and decolonisation are basically the same thing: the struggle for freedom against the abuse of power. During decolonisation, developing countries were claiming their rights to independence and self-determination. Especially in Latin America, the right to self-determination of peoples placed its roots on boundary delimitation on the basis of pre-existing colonial administrative boundaries. In Roman Law, this principle is called *uti possidetis juris* (UPJ, in Latin: "as you possess"), established to ensure the stability of newly independent states whose colonial boundaries were often drawn arbitrarily[53].

According to the ICJ in the *Frontier Dispute (Burkina Faso/Mali)* Case:

> "[UPJ is a] general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent

[51] S. R. RATNER, *Corporations and Human Rights: A Theory of Legal Responsibility*, The Yale Law Journal, Dec., 2001, Vol. 111, No. 3 (Dec., 2001), pp. 443-545.

[52] *v. supra,* note 45.

[53] Enciclopedia Britannica*, uti possidetis*, Available at: https://www.britannica.com/topic/uti-possidetis [Accessed on 18/11/2022]

> the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power…Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored".[54]

The end of World War II in 1945 can certainly be considered a pivotal moment for the international community, when the most bloody and destructive conflict in our history came to an end. It also represents a starting point embodied by the need for the protection and recognition of basic human rights, not only at the intra-state level, but on the international realm through what will quickly become an internationalisation process of human rights recognition. The obligation to respect human rights has been addressed only upon States, and as such conceived in a vertical dimension where the State had the first duty to respect and safeguard[55]. From this perspective, it seems like only states must comply with international human rights regulations and guarantee their respect. However, during the last decades, globalization produced a change in this field, shifting the focus on corporations.

The growing interdependence of non-state actors, among which corporations, permitted new centres of power to emerge, while the state began its fall in the exercise of effective control over human activities, in its territory and abroad. Despite a global economic environment favourable to corporations, around the 1960s the need to regulate businesses gained ground and, during the decolonisation era, States started to sign treaties and introduce regulations. An attempt to draft a legally binding international instrument to govern enterprises dates back to the UN Code of Conduct in 1970s, which after a decade of negotiations was officially abandoned[56].

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[54] INTERNATIONAL COURT OF JUSTICE, Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Judgment, 22 December 1986, in Riv. Giuridica dir. Int., *LII, Legal Information Institute*, available at: https://www.law.cornell.edu/wex/uti_possidetis_juris#:~:text=uti%20possidetis%20juris%20(UPJ)%20is,wider%20application%2C%20notably%20in%20Africa, [accessed on 18/11/2022].

[55] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, p.81, in M. Nordio, V. Possenti, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007.

[56] RUGGIE, J. G, Kennedy School of Government, Harvard University, Cambridge, *Multinationals as global institution: Power, authority and relative autonomy*, Regulation and Governance, John Wiley & Sons Australia, Ltd., MA, USA, 2018, p. 317-333.

Chile led an initiative within the UN Economic and Social Council (ECOSOC) to adopt a resolution and create a study group on the role of multinational companies in the developing countries, after the revelations of the U.S. ITT Corporation (International Telephone and Telegraph) financial involvement in the coup d'état of 1973, which replaced Salvador Allende with the dictator Pinochet, interfering in the internal political leadership of Chile. Consequently, the General Assembly adopted a program of action for the regulation and control of the activities of transnational corporations[57] which resulted in the establishment of the UNCTC (United Nations Centre on Transnational Corporations) and the ICTC (Intergovernmental Commission on Transnational Corporations). However, both institutions were merged into other UN organs and finally closed in 1994. The ICTC was integrated in the UNCTAD (United Nations Conference on Trade and Development)[58].

In the 1990s the collapse of the Soviet Union raced the globalization of trade. Global trade has been marked by a fragmentation of business production (delocalization). Theoretically, thanks to the increase in global trade, the poverty level has decreased, but not for everyone. Many actors were left out and subject of human rights harms. What are human rights? According to the Enciclopedia Giuridica Treccani: *"Si intendono come d.u. le situazioni giuridiche riconosciute come fondamentali della persona umana e tali che neppure lo Stato può comprimere nella loro essenza, ovvero ostacolare nella loro realizzazione*[59]*".* Human rights derive from natural rights, which belongs to human beings from birth and as such they are therefore generally absolute. The essence of rights is that they are considered entitlements, not granted by the grace or at the discretion of others. Hence, international human rights instruments speak of "recognizing" rights, not creating them[60]. Human rights also cover groups rights (indigenous people rights) and collective rights (the exhaustion of basic needs).

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[57] The UN General Assembly adopted on the 1st of May 1974 the Declaration on the Establishment of a "new International Economic Order" (3201 Resolution (S-VI)) and the Program of Action on the establishment of a new International Economic Order (3202 Resolution (S-VI)). See *A Brief History of the Development of Human Rights & Business at the UN,* available at: https://www.escr-net.org/sites/default/files/a_history_of_un_progress_towards_developing_human_rights_business_standards.pdf

[58] UIA, Global Civil Society Database, Open Yearbook, Yearbook of the International Organizations (YBIO), 1996. Available at: https://uia.org/s/or/en/1100059616.

[59] TRECCANI, Diritti umani, voce Dizionario di Storia, in Enc. Treccani, available at: https://www.treccani.it/enciclopedia/diritti-umani_%28Dizionario-di-Storia%29/#:~:text=Si%20intendono%20come%20d.u.%20le,ovvero%20ostacolare%20nella%20loro%20realizzazione, [accessed on 18/11/2022].

[60] J. G. RUGGIE, Just Business: *Multinational Corporations and Human Rights*, New York; London: W. W. Norton & Co, 2013, p. 75–76.

The original notion of human rights referred to "those rights that the individual might assert against the organized power of the state"[61]. The U.S. Declaration of Independence, in 1776, took it to be "self-evident" that everyone is "endowed by their Creator with certain inalienable rights," and thirteen years later, the French declaration of "the rights of the man" asserted that "men are born and remain free and equal in rights.[62]" According to the Office of the High Commissioner for Human Rights (OHCHR): "Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are interrelated, interdependent, and indivisible" (OHCHR)[63]. Universal human rights are expressed and guaranteed by law in the form of treaties, customary international law, and general principles. International Human Rights law covers the obligations of Governments to promote and protect human rights and fundamental freedoms of individuals of groups, it is a state-centric law indeed and human rights are rights per se[64].

International human rights instruments highlight that human rights must be 'recognised' and not 'created'. In Paris, on 10th December 1948, the United Nations proclaimed the Universal Declaration of Human Rights (UDHR), a milestone universally recognized document, which paved the way for the adoption of more than seventy human rights treaties, such as the two main instruments into which it has been codified: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESC). Together, these international law sources form the 'International Bill of Human Rights', including also the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The ICCPR covers the so-called 'first generation' of rights, that is to say it encompasses civil and political rights including the right to life, to freedom of expression, equality before the law and so on. Instead, the second Covenant encompasses the economic, social, and cultural rights also including, for example, the right to education. Eventually, we can identify a third generation of rights, arose in the view of new needs, such as the right to self-determination, which is now a fundamental pillar pursuit by the United Nations.

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[61] Sir N. RODLEY, *International Human Rights Law* (see *International Law*, edited by Malcolm Evans, Fifth edition), Oxford University Press, 2018.

[62] A. SEN, *Elements of a Theory of human rights*, 2004, by Blackwell Publishing, Inc. Philosophy & Public Affairs, no. 4.

[63] *v. supra,* alla nota 33.

[64] *v. supra,* alla nota 33.

The responsibility of States to respect human rights is enshrined in treaties, which are binding agreements only upon States and not on corporations. However, the longstanding 'laissez faire' neoliberal attitude was causing huge impacts on companies' surroundings and on the community itself. Moreover, a large number of companies operates across borders, so the issue of businesses' impact on human rights was placed on the agenda of the United Nations (Constructive Campaigning, 2013).

An attempt to formulate the UN Draft Code of Conduct on Transnational Corporations was abandoned in the late 1980s and followed by polarising discussions over the Draft UN Norms on Human Rights Responsibilities of Transnational Corporations and other Business Enterprises (UN Economic and Social Council, 2003)[65]. The Norms represent a soft law instrument, a first non-voluntary attempt to codify the principles of international law that companies must reflect in the fields of human rights, environmental protection, prevention of corruption etc. The document was not introducing new binding obligations, but simply restating existing ones. "Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law including the rights and interests of indigenous peoples and other vulnerable groups[66]". The Norms had the specific task to serve as a non-binding foundation for the elaboration of a future binding treaty, they were not enforceable at the international level. The business world felt annoyed that negative impacts produced by corporations required regulation at the international level[67]. To overcome the strong debate on rules for companies and create a ground for a more constructive dialogue than existed in 2004, when the UN Commission on Human Rights rejected the Draft UN Norms, the mandate of the Special Representative of the Secretary General on Human Rights and Business (SRSG) was created in 2005[68]. In 2008, the United Nations Special Representative John Ruggie presented the UN Framework 'Protect,

[65] B. FARACIK, (Human Rights Expert), M. LERCH (Official Responsible), D. ADORNA Editor Assistant, *Implementation of the UN Guiding Principles on Business and Human Rights*, Trans European Policy Studies Association (TEPSA), Belgium, 2017, Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf

[66] UN, Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626. See more *Development and international Economic Cooperation: transnational Corporations*, UN doc. E/1990/94.

[67] DE JONGE, A., *Transnational Corporations and international law. Accountability in the global business environment, Corporations*, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011.

[68] *v. supra,* alla nota 47.

Respect and Remedy' addressing the specific relation and influence of different stakeholders on human rights.

As a result, in 2011, the United Nations Human Rights Council adopted the United Nations Guiding Principles on Business and Human Rights (UNGPs[69]) which are soft law global standards based on the fundamental normative values of human rights. The UNGPs became the first universally accepted standard on the responsibilities of states and businesses for preventing and addressing business-related human rights abuses, plus the first authoritative reference point for those committed; not only it became a common framework with, *inter alia*, a shared language, but also a broadly supported tool and a "comprehensive template" (UNHRC 2011b). Indeed, the SRSG (Special Representative of the Secretary General) was surely correct when he stated in June 2011 that the UNGPs:

> "Normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved" (United Nations Human Rights Council 2011b, introduction, para 14)[70].

The resolution was endorsed on the 16 June 2011 when the UN decided to "Establish a forum on Business and Human Rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles"[71].

The codes of conduct are the most popular standards addressed to corporations and they are also endorsed on a voluntary basis.

However, in the case of a violation of the code of conduct, it would be hard to prosecute or sanction a corporation. It goes without saying that some concerns arose, especially from NGOs which criticized the non-binding character of the UNGPs, together with the absence of a central

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[69] RUGGIE J., *The Guiding Principles on Business and Human Rights* refer to the responsibility of "business enterprises" to respect human rights. UN, OFFICE OF THE HIGH COMMISSIONER on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31, June 2011.

[70] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, J. RUGGIE, UN HUMAN RIGHTS COUNCIL, A/HRC/17/31, 2011. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

[71] UN Forum on Business and Human Rights, 2011.

mechanism to ensure their implementation. Traditional human rights advocacy groups have argued for legislation and implementation of norms[72]. As the Directorate-General for External Policies of the EU Parliament reports, the reliance on states and businesses willingness and capability to respectively protect international human rights and, for corporations to invest their resources on ensuring that they do not harm human rights is other than obvious.

Nevertheless, the UNGPs laid the foundation for a paradigm shift in the way NGOs can approach situations where a business causes, contributes to, or is linked to adverse human rights impacts. It moves from a paradigm of 'naming and shaming' to a constructive dialogue with a company translated into a 'knowing and showing' approach, in order for the business to achieve the objective of respecting human rights and for NGOs to cooperate, instead of "bashing"[73] companies.

The Lundbeck case is a Corporate Social Responsibility (CSR) dilemma involving the Danish pharmaceutical company Lundbeck selling their medical drug Nembutal in the US. In fact, in 2011 it emerged that to induce the death penalty and so to sedate prisoners, United States authorities had begun giving the lethal injections of pentobarbital (Nembutal). Lundbeck's product is licensed for treatment of epilepsy and for usage as an anaesthetic, thus for a very different purpose[74]. The watershed shows the breach into avoiding human rights violations or retaining distribution of the substance and then impeding access to the medicine for those patients who need it. Reprieve, an NGO focused on the abolition of death penalty and Amnesty International urged the Danish company to not make the substance available to US authorities in prisons. The company had a duty to respect human rights and to refer to the UNGPs, a proposal that was infant in that period. Lundbeck was member of the UN Global Compact (different from the UNGPs), even though the document was not precise enough to address the human rights question. Eventually, Lundbeck applied the process presented in the UNGPs, changing the distribution of Nembutal in the US and recognizing their responsibility to respect human rights, bringing the jurisprudence to another level[75].

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[72] FORSYTHE, D. P., Human Rights in International Relations, Second edition, Cambridge University Press, New York, 2006, p. 257.

[73] Bashing means using costumer/public pressure to push for a change in corporate behavior.

[74] B. KARIN, "*Damned if you do, damned if you don't? The Lundbeck case of pentobarbital, the guiding principles on business and human rights, and competing human rights* responsibilities" © 2012 American Society of Law, Medicine & Ethics, Inc., Cambridge University Press (2021).

[75] S. S. THORSEN, *Constructive Campaigning,* Copenhagen, Denmark.

Therefore, the case can demonstrate how the approach of "knowing and showing" creates a constructive-dialogue environment between the NGOs Reprieve and Amnesty International and the pointed company Lundbeck.

1.5 Due Diligence in International Environmental Law

This paragraph is intended to explain the development of environmental due diligence, at first showing the fundamental principles and Conventions in place of environmental law upon States, then how corporations and companies should be concerned.

International Environmental Law is a branch of international law which covers several issues: conservation of rivers, protection of biodiversity, pollution, climate change, reduction of nuclear damage etc. It is based on conventions (which are binding), on principles and customary rules, for example every state is obliged to conduct an impact assessment, which takes the forms of a report. International environmental law is mainly composed of soft law instruments and has taken hold in the twentieth century, especially during the 1960s and 1970s after the Stockholm Conference in 1972 where the United Nations Environment Programme was adopted (UNEP).

In 1992, after the Rio Conference, two main conventions were adopted: the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change. During the "Earth Summit" in Rio, the objective was to produce a blueprint agenda for environmental law, introducing fundamentals principles for international cooperation and development policies: states' leaders, diplomats, scientists and NGOs concluded that the concept of sustainable development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level[76]. On that occasion, the precautionary principle was adopted in order to avoid risks of environmental damage in the case of a dangerous project.

Principle 15 of the Rio Declaration entails that:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious

[76] UNITED NATIONS Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, Available at: https://www.un.org/en/conferences/environment/rio1992.

> or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation[77]".

The European Community has always stood at the forefront in enforcing environmental principles. Nowadays, the precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union. The aim is ensuring a higher level of environmental protection through preventive decision-taking in the case of risk, therefore recourse to the principle belongs in the general framework of risk analysis and risk management[78]. In order to clarify the application of the principle, the EU Commission stresses that it can only be invoked when three preliminary conditions are met: 1) identification of potentially adverse effects; 2) evaluation of the scientific data available; 3) the extent of scientific uncertainty[79], then the authorities responsible for risk management may decide to act or not. In addition, general principles remain applicable when the precautionary principle is invoked: proportionality, non-discrimination, consistency, examination of the benefits, review of the measures.

The no-harm principle, or the principle of prevention, has been articulated in several Conventions, for example the Stockholm and Rio Declaration, while it is present in seminal cases such as *Trail Smelter*[80] and *Pulp Mills*[81]. The International Court of Justice (ICJ) stated that the principle of prevention is now a customary rule "under the principles of international law". According to the ICJ, in the Trail Smelter case addressed that:

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[77] P. 15, RIO DECLARATION, 1972.

[78] EUR-LEX, Access to European Union Law*, The precautionary principle*, Communication (COM(2000) 1final) on the precautionary principle, Available at: https://eur-lex.europa.eu/EN/legal-content/summary/the-precautionary-principle.html

[79] *v. supra*, alla nota 56.

[80] TRAIL SMELTER CASE, (*United States v. Canada*), International Court of Justice, Convention of Ottawa, April 16, 1938 and March 11, 1941. The United States sought damages from Canada by suing them to the ICJ and also required an injunction for air pollution in the State of Washington by the Trail Smelter, a Canadian corporation which is domiciled in Canada. In this case the principle of no harm is applied through compensation of damages by Canada to the United States (responsibility of States).

[81] PULP MILLS, (*Argentina v. Uruguay*), ICJ, 2006. On 4 May 2006, Argentina filed an Application instituting proceeding against Uruguay concerning alleged breaches by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by the two States on 26 February 1975 (hereinafter "the 1975 Statute") for the purpose of establishing the joint machinery necessary for the optimum and rational utilization of that part of the river which constitutes their joint boundary. In its Application, Argentina charged Uruguay with having unilaterally authorized the construction of two pulp mills on the River Uruguay without complying with the obligatory prior notification and consultation procedures under the 1975 Statute. Argentina claimed that those mills posed a threat to the river and its environment and were likely to impair the quality of the river's waters and to cause significant transboundary damage to Argentina (Overview of the case, International Court of Justice). The prevention and precautionary principles were applied in this case.

> "No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, where the case is of serious consequence and the injury is established by clear and convincing evidence[82]".

As a matter of fact, the concept of prevention has assumed great significance. "The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident"[83]. As other due diligence duties, the no-harm principle does not require States to prevent or stop the harm from happening. Instead, "it requires States to *attempt* to do so, or to minimize the risk thereof, to the best of their abilities".[84] The "harm" caused is intended towards people, property and the environment, it could be "transboundary" when the harm risks to be caused in the territory under the jurisdiction of another state different from the State of origin, whether or not the two share a common border[85]. Furthermore, the exhaustion of the duty should be undertaken through monitoring or supervision, risk assessments, legislation, administrative policies and regulation, enforcement action and, most notably, international cooperation. The no-harm principle requires States to act regardless of who is responsible for the harm: a State or a non-State entity.[86]

"Do no harm" means to avoid exposing people and the environment to additional risks through our actions. "Do no harm" implies the mitigation of potential negative effects on the social realm, the economy, and the environment. The principle of "do no harm" has been used as a touchstone in corporate human rights obligations since at least 2002 and is a surprisingly suitable standard for developing a structure for general obligations[87]. In today's global society,

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[82] INTERNATIONAL COURT OF JUSTICE, TRAIL SMETLER CASE (*United States v. Canada*), *v. supra note 59.*

[83] INTERNATIONAL LAW COMMISSION (ILC), *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentary*, 2001.

[84] UN INTERNATIONAL LAW COMMISSION, *Draft Articles on Prevention*, (Article 3), Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 153-154.

[85] ART. 2 (c), *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentary* (2001): "'Transboundary harm' means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border".

[86] *v. supra*, note 22.

[87] G. A. CADORNA, Emerging voices: *"Do no Harm" and the Development of General Corporate Human Rights Obligations*, Opinio Juris, in association with the International Commission of Jurists, 2015, Available at:

the respect of the rights of others is a common social expectation. Principle 11 of the UN Guiding Principles reports that also corporations have the responsibility to "do no harm". The development of the corporate responsibility to "do no harm" is parallel to the growing moral of the community at a specific time. It became difficult to hold corporations accountable for human rights abuses since they operate from different jurisdictions, thus private remedies could not apply efficiently. "Do no harm" became then a social expectation from businesses, at least considered a moral obligation or a social norm and, indeed, companies are urging the European Union to adopt binding legislation on the topic. The respect for human and environmental rights embodied as a "do no harm" norm is a self-standing norm, that is to say a business should respect those rights even if the state does not. "Do no harm" is broader than what the state defines as legal compliance. It is from the expected standard of conduct that a liability emerges if the business fails to meet the standard; nevertheless, it may result in a limitation of the already "limited liability" norm, that is accepted in various legal systems. At the same time, the urge for binding legislation leaves the hope for a transition from a societal to a legal norm, from due diligence practices to mandatory due diligence.

1.6 Company law and limited liability

Company law is the branch of law which rules the activities of companies. It shapes companies' structure according to the fundamental principles they must fulfil, and the most important sources of legislative order are the Companies Act and the Code on Corporate Conduct[88]. The first modern company act was passed in England in 1844, namely the Joint Stock Companies Act. Nowadays, the United Kingdom company law lies on the 2006 Companies Act. Existing corporate law literature tends to equate the CSR duty with part of directors' fiduciary duty. This tendency is attributable to the influence of common law jurisdictions. For instance, the UK Companies Act 2006 requires directors to consider the interests of employees, consumers, suppliers, the environment, and the community when pursuing the interests of shareholders.

Recently, the Danish Government adopted legislation requiring larger companies to report on their CSR programme. The Danish Companies Act[89] is coming into force in phases, the first

http://opiniojuris.org/2015/08/28/emerging-voices-do-no-harm-and-the-development-of-general-corporate-human-rights-obligations/

[88] M. G. CUCCA, *Principles of Danish company law*, LUISS Guido Carli, February 2013.

[89] Part of Act no. 470 of 12 June 2009 on Public and Private Limited Companies (the Danish Companies Act) came into effect with Executive Order no. 172 of 22 February 2010 on partial commencement of the Danish Act on Public and Private Limited Companies (the Danish Companies Act).

one in March 2010. As the 1972 Danish Corporate Act, it provides strong protections for external stakeholders, the employee representation on the board of directors and a new definition of corporate group with regard to accounting obligations. The New Companies Act starts describing limited liability, distinguishing into private and public limited companies.

It is important to briefly explain a technical and basic part of company law, that is that it revolves around two basic concepts: corporate separate personality and limited liability. A company's limited liability is the direct consequence of its separate personality: corporate separate personality brings a division between the shareholders, the directors, the employees etc., and the company itself. As far as the law is concerned, a company exists, and as such it can sue and be sued, it can hold its own property and can be liable for its own debts.[90] This is a crucial part, since this concept allows the limited liability for shareholders as the debts belong to the legal entity of the company, therefore they will lose their first investment in the company but they will not be held responsible for the debts of the company, unless it is an unlimited liability company. However, it is a double edge sword, as the same discourse is applied to assets: it means that company's assets belong to the corporation and not to its members.

Limited liability in public companies denotes that "the rights of the company's creditors are confined to the assets of the company and cannot be asserted against the personal assets of the company's members (shareholders)"[91]. From this definition we can infer that the corporate loss will not exceed the amount a partner has invested in it, therefore limited liability is a prerogative of the shareholders and not of the company in the case of debts.

Companies can be either private or public. One of the key distinctions is that, according to the law, the investment in private companies is largely provided by the founding members, while in public ones the greatest amount is raised from the general public[92].

To refer back to our relation between companies and law, it can be inferred that companies are direct subject of national law and indirect subjects of international law. Multinational corporations for instance, seek to avoid international liability for their actions by claiming they are not subjects of international law, since only States are directly touched by treaties. However, national boundaries become meaningless for a company operating around the world.

In domestic law, legal persons and so, companies, have legal obligations and can be liable for breaches of these obligations and sanctioned, for example through fines. Nevertheless, in

[90] A. DIGNAM, J. LOWRY, *Company Law*, 2006, p. 27.

[91] *V. supra*, alla nota 67.

[92] *V. supra*, alla nota 67.

international law there is no general rule to held companies responsible for internationally wrongful acts. International criminal liability is assessed by the International Criminal Court (1998). It might be useful to pick what the International Criminal Court – unable and unwilling of States.

1.7 Conclusion to the first chapter

In this chapter we sought to introduce a first approach to business and human rights. First, the aim was to trace a scatterplot of the history of corporate social responsibility and the relation between business and human rights, while creating the groundwork for treating the core topic of the dissertation, namely mandatory human rights due diligence. Secondly, due diligence has been defined into the business context in order to understand what is required by the international community from businesses today. Moreover, we sought a definition of MNEs (multinational corporations) and their role on the international realm. Then, due diligence has been analysed in international human rights law, introducing the most important document for the regulation of companies: the UNGPs, the international standard provided by the Office of the High Commissioner for Human Rights, prof. John Ruggie, which will be further and thoroughly developed in the following chapter.

Thirdly, due diligence has been analysed in the context of environmental law, showing the most important principles and agreements that safeguard the environment. Eventually, the basic concepts of company law have been explained to gain a better understanding of more technical parts of the dissertation concerning the internal organization of enterprises.

2. THE CONCEPT OF HUMAN RIGHTS DUE DILIGENCE IN SOFT LAW

2.1 Literature and practice – 2.2 The United Nations Guiding Principles on Business and Human Rights – 2.3 The UNGPs and the European Union with National Action Plans (NAPs) – 2.4 The OECD Guidelines – 2.5 The ILO Declaration and Labour Rights – 2.6 The UN Global Compact and other soft law instruments – 2.7 Conclusions

2.1 Literature and practice

> "Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply. Indeed, history teaches us that markets pose the greatest risks - to society and business itself - when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability[93]" (A/HRC/8/5).

While the still prevailing theories argue that business and markets exist in separate economic bubbles from society and our ecosystem[94], not taking seriously the striking data of business adverse impacts on human rights and the environment, there is evidence of reality in which those subjects of the economic system are tightly interconnected. In the previous chapter, it

[93] Human Rights Council, A/HRC/8/5, Art. 2., United Nations General Assembly, Geneva, 7 April 2008.
[94] See also SJÅFJELL, B., *How company law has failed human rights*, Cambridge University Press, 2020.

was highlighted how the ever-growing power of business concerns the global community. The governance gap created by globalization does not provide adequate protection and reparation from adverse impacts of economic forces and, as a result, thousands of people are experiencing human rights abuses and the consequences of environmental damages without being able to be awarded with effective remedies. Then, the definition of human rights due diligence has been investigated for the purpose of this dissertation, representing a fundamental point to understand the upcoming European Corporate Sustainability Due Diligence Directive (ECSDDD), the main parts of which are thoroughly analysed in the following chapters.

Beyond the literature cluster, the document of the UNGPs is explored, as the reference point for business and human rights relationship, also by placing an emphasis on the gaps left in practice. In addition, it is important to stress that the UNGPs are not supposed to introduce new binding international law provisions. Rather, the Principles recollect all the international human rights law obligations and are used as a reference point to follow the global minimum standard. Specifically, regarding businesses, the Committee on Economic, Social and Cultural Rights has further stated that: "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host States under the Covenant[95]." Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties, in particular businesses, registered in their territory[96]. Secondly, the Principles are placed into relationship with the European Union, showing the concrete implementation of part of them in two case studies, namely the France Corporate Duty of Vigilance Law[97] and the Dutch Child Labour Due Diligence Law[98], plus looking at the Italian case. On the overall, the aim is to demonstrate the growing enforcement of hard law instruments for the application of due diligence using the UNGPs as a general framework for human rights law and a shared standard. Furthermore, the following paragraphs mention and show the OECD

[95] UNITED NATIONS, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, Committee on Economic, Social and Cultural Rights, Forty-sixth session, Geneva, 2-20 May 2011.

[96] UNITED NATIONS, International Convention on the Elimination of all Forms of Racial Discrimination.

[97] LOI no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1), Journal Officiel de la République Français, n° 0074 du 28/03/2017, 28 Mars 2018, NOR : ECFX1509096L, available at: https://www.legifrance.gouv.fr/download/pdf?id=9aawcYcwvkntYs2UUCMWL4iX_erjixoTD_Jy3AVXRFk= [accessed 3/12/2022].

[98] Child Labour Due Diligence Law, (Eerste Kamer der Staten-Generaal), 2016-2017, 34 506, Dutch version available at: https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vkbklq11jgyy/f=y.pdf

Guidelines (Organization of Economic Cooperation and Development) as a supplementary instrument to the UNGPs and the main points of the ILO Declaration, together with additional soft law instruments (ISO 26000) and strategies, namely the Global Compact and the SDGs (Sustainable Development Goals).

The analysis of the literature cluster concerning the UNGPs (the majority) provides reflection on the progress of corporate implementation of its provisions and its outcomes. Nevertheless, the literature shares important insights on the need of new binding legislation, with inquiries on whether the UNGPs are capable of ensuring corporate responsibility on human rights.

On the other hand, some scholars agree on the plethora of initiatives provided by the UNGPs and put into practice in all sectors, although according to them, the results do not match the ambitions prefixed.

However, the collection of scholars reviews is not supposed to be exhaustive, but useful for the purpose of this chapter. Research was made selecting documents on the Ca' Foscari University library, through the online research system of the Sistema Bibliotecario di Ateneo (SBA).

According to Wettstein, "it is this discrepancy between ambition and results that has recently led to a shift in implementation measures from predominantly voluntary initiatives to a push towards binding legislation[99]". In other words, the UNGPs in 2011 had the maximum credit with plenty of initiatives, but at the same time the practice demonstrated a lack of real change for those impacted by business activities[100]. Moreover, Wettstein suggests a proactive and positive contribution from the companies and not a merely abstention from causing human and environmental harm.

Santoso (2017), McPhail and Adams (2016), equally perceive the UNGPs as a revolutionary and "robust regime[101]" we have ever seen in the CSR practice. According to Wettstein, CSR is not an adequate frame to ensure respect for human rights. In fact, "business and human rights (BHR) scholars have long argued that BHR should not be looked at as a subset of CSR, but rather as a critical response to its perceived failure"[102]. On the other hand, in spite of the shared

[99] WETTSTEIN, F., *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights*, v. supra, note 40.

[100] SHERMAN, J., III, *Beyond CSR: the Story of the UN Guiding Principles on Business and Human Rights, Corporate Responsibility Initiative*, Harvard Kennedy School, March 2020, Working Paper No. 71.

[101] SANTOSO, B., *"Just Business" – Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuses by Transnational Corporations?,* Human Rights Abuses by Transnational Corporations, German Law Journal, published online by Cambridge University Press, UK, 2017.

[102] v. supra, note 100.

all these scholars equally criticize the limited account and weak binding language of the UNGPs for corporate human rights responsibilities.

Santoso (2017) especially raises criticism about the language used in the UNGPs:

> "If TNCs [Transnational Corporations] are only 'encouraged, but not obliged' not to violate human rights, and society only has an expectation–not a claim–against them, non-violation of human rights moves from an absolute, 'perfect duty of justice' to an imperfect obligation, analogous to Corporate Social Responsibility ('CSR'). Deterrence is therefore compromised, as GP 11 fails to impose clear, unconditional human rights obligations on TNCs, thereby merely perpetuating the status quo[103]".

As it is shown in the following paragraph, Principle 11 claims that business enterprises should respect human rights. In fact, it is the word 'should' instead of 'must' that also supports Santoso's theory according to which even the most robust regulatory instrument is inefficient in taking transnational corporations accountable for their operations, as mechanisms are not perceived as legally binding and the UNGPs need an effective theory of compliance. The failure of CSR is a common perception among scholars as well as the concern of the presence of still inadequate soft law standards for assessing compliance. As long as corporations do not understand their impact on society and feel committed to corporate sustainability, little results will emerge.

Björn Fasterling and Geert Demuijnck in 2012 argued that the UNGPs "provide guidance for the implementation of the United Nations' 'Protect, Respect and Remedy' framework and they will probably succeed in making human rights matters more customary in corporate management procedures[104]". However, they also underline that "the effectiveness of human rights due diligence is dependent upon the moral commitment of corporations[105]".

Rasche and Waddock (2021), contribute to this literary field by reviewing the literature landscape on the UNGPs and giving their personal final thesis, according to which, the UNGPs are a fundamental starting point for advocating social sustainability although its non-binding

[103] SANTOSO, *v. supra*, note 102.

[104] FASTERLING, B., and DEMUIJNCK, G., *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights,* Journal of Business Ethics, 2013.

[105] *v. supra*, note 102.

nature is inadequate to guarantee the right protection and prevention for human rights abuses, therefore there is still the need for binding measures.

These scholars in their own research discovered that corporations are aware of their abuses on human rights and, consequently, they find themselves accountable for adverse impacts. Moreover, the corporate discourse promotes and upholds human rights[106].

Several scholars investigating the field of business and human rights argue that there is a gap that fosters human rights abuse to take place. This stated gap is reflected in the question concerning which actors possess the main responsibility to ensure respect for human rights[107]. Further, the gaps are represented within actual regulation and compliance, in the absence of a binding monitoring mechanism to assess it.

2.2 The United Nations "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"

The "Guiding Principles on Business and Human Rights" (UNGPs) were developed by the United Nations Special Representative of the Secretary-General (SRSG) on the issue of human rights, transnational corporations and other business enterprises in order to address the existent governance gap and point a specific role for both business and governments[108] to tackle this gap and avoid a mixing up of their tasks and duties. The document was annexed to the final report to the Human Rights Council (A/HRC/17/31) which endorsed the Guiding Principles in its resolution 17/4 of 16th June 2011, therefore without possessing the same legal bond of the UN General Assembly's declarations.

As we have previously introduced, the UNGPs are the first global authoritative guidance for managing adverse impacts on human rights for States and businesses, but they are also addressed to all stakeholders, including investors, who must align their business conduct with the standard[109]. However, their non-binding nature makes the Guiding Principles a soft law

[106] LUNDBERG, S., *Closing the gap? An Analysis of the UN Guiding Principles on Business and Human Rights and the UN Sustainable Development Goals in Business Operations*, Lund University, Sociology of Law Department, 2022.

[107] *v. supra*, note 105.

[108] UNITED NATIONS, OHCHR RUGGIE J., *The Guiding Principles on Business and Human Rights* refer to the responsibility of "business enterprises" to respect human rights. UN, OFFICE OF THE HIGH COMMISSIONER on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31, June 2011, [hereinafter Guiding Principles].

[109] GLOBAL CSR, *Discussion brief on: global minimum standard for socially responsible investments,* Copenhagen, Denmark.

instrument, a sort of human rights' global platform aimed at creating universal consensus and a practical contribution on the relationship between business and human rights. Nevertheless, there is still a debate concerning the nature of the UNGPs since it provides a collection of the measures concerning human rights which already exist under human rights law and are binding in nature upon States.

Although it is commonly agreed that the primary duty to protect and respect human rights lies on States, the 2003 *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[110] reports that transnational corporations and other business enterprises, have to comply with this duty as "organs of society".

The UNGPs introduce the construct of human rights due diligence as the main tool for corporations to respect human rights, even though it represents a responsibility of corporations to do so instead of an obligation. The process includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking the effectiveness of the responses and communicating how impacts are addressed[111], on their operations and business relationships, but also on their value chain.

Due diligence brings to the light the concern of affected stakeholders (employees, suppliers, customers and communities) in the corporate decision-making process.

To align their businesses, corporations must adopt a policy commitment, have in place human rights due diligence and ensure adequate access to remedies[112]. The Guiding Principles are grounded on three fundamental points built on the Ruggie's "Protect, Respect and Remedy Framework" of 2008, which addresses 'what' should be done, while the Guiding Principles show 'how' to do it: the State's obligations to respect and fulfil human rights and fundamental freedoms, the role of business enterprises required to comply with all applicable laws and respect human rights and, finally, the need for rights and obligations to be matched to appropriate and effective remedies when breached[113]. In the first place, it is necessary to underline that businesses do not explicitly 'violate' human rights, since only States are able to

[110] UN SUBCOMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (55th session), *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (Draft*), Doc. n. E/CN.4/Sub.2/2003/12/Rev.2, Geneva UN, 26 Aug. 2003, p. 2.

[111] RUGGIE, J. G., REES, C., DAVIS, R., *Ten years after: From UN Guiding Principles to Multi-fiduciary Obligations"*, Business and Human Rights Journal, 6 (2021), pp. 179-197.

[112] *v. supra*, note 109.

[113] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

do that. Rather, they have 'adverse impacts' on human rights and on the environment while performing their activity (which is specifically highlighted in the Principles).

Although they are placed under the umbrella of Corporate Social Responsibility, the UNGPs differ from voluntary initiatives and self-regulation. The Guiding Principles were the first and, up to the present day the only, authoritative document issued for States and business to deal with violations and adverse impacts on human rights, without the purpose of introducing new international law obligations binding upon States and responsibilities upon corporations. Therefore, in the narrow sense of the words, the UNGPs are more a framework than a standard, since corporations do not sign up to them or become participants, but the framework the UNGPs provide is relevant for specifying and operationalizing the human rights obligations under international law that are defined by voluntary initiatives[114].

The UNGPs consist of thirty-one Guiding Principles integrated with commentary and the principles are divided according to the three-pillar scheme in recognition of:

a) "States' existing obligation to respect, protect and fulfil human rights and fundamental freedoms;
b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
c) The need for rights and obligations to be matched to appropriate and effective remedies when breached[115]."

A couple of years after the publication of the UNGPs, John Ruggie noticed positive reactions from companies. An expansion of voluntary initiatives addressing human rights was recorded overall, which was facilitated thanks to a supporting industry and broad dissemination efforts by entities like the UN Global Compact[116].

One scattering element of the UNGPs is the discussion about human rights due diligence, a concept that has been investigated in chapter one. It is therefore not surprising that human rights due diligence has received much scholarly attention and it will be further resumed in Pillar II.

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[114] RASCHE, A., WADDOCK, S., *The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research*, Business and Human Rights Journal, February 2021, Available at: https://www.researchgate.net/publication/349029663.

[115] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, 2011, v supra, note 109.

[116] WETTSTEIN, F., *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights, v. supra, note 40.*

The following analysis of the UNGPs tripartite structure is focused on the innovative Pillars and their context of development, especially the first and the second ones. This chapter has also the goal to describe the practical application of the UNGPs into different national orders and international organizations, in this case how the European Union applied the standard.

2.2.1 PILLAR I – The State Duty to Protect Human Rights (UNGPs 1-10)

The first Pillar of the UNGPs concerns the State duty to protect human rights. It focuses on how States can take appropriate measures to prevent, investigate, punish and redress abuses within their territory and/or jurisdiction by third parties, including business enterprises[117]. It reaffirms the foundational elements of the State duty to protect, described in the Framework (2008). To address such abuses, the state is required to adopt effective policies, legislation, regulations and adjudication[118] as well as it has the duty to refrain from human rights abuses and ensure their protection. As it is reported in Principle 1: "States *must* protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises[119]". It is interesting to highlight the use of the word "must" instead of "should", suggesting the expression of an obligation. As already mentioned, the Guiding Principles recall (especially regarding State's duties) existing international human rights law norms, therefore the language is the one of hard law in this case. However, the document perse is an instrument of soft law. The GPs remind states of the need to enforce existing laws, especially for the regulation of businesses (such as labor, nondiscrimination, and criminal law), and to review whether these laws provide the necessary coverage in light of evolving circumstances (GP 3a)[120]. It is underlined that the State duty to protect is a standard of conduct, and, therefore, States are not responsible for human rights abuses by private actors, but they must exercise human rights due diligence in some circumstances though[121]. Nevertheless, the State is responsible under international human rights law if the abuses can be attributed to them, or where they fail to

[117] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, p. 3, *v supra*, note 109.
[118] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v supra,* note 109.
[119] RUGGIE, J., Principle 1, UNGPs, *v. supra*, note 109.
[120] RUGGIE*, Just Business, Multinational Corporations and Human Rights,* Norton & Company, New York, London.
[121] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

exhaust their obligations to prevent such abuses. Moreover, the expectation that business enterprises respect human rights should be set out clearly by States (point 2).

Thereby, in the commentary of Principle 2 prof. Ruggie admits the difficulty to enforce the principle of extraterritoriality, namely the extraterritorial jurisdiction of States. In fact, he excludes the international law obligation for the State to regulate activities abroad of the parent companies, but he also states that "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis[122]".

Furthermore, the State should ensure business respect for human rights in conflict-affected areas, where they are required to engage at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; they are required to provide assistance, […] deny access to public support and services for a business enterprise involved with gross human rights abuses which refuses to cooperate and, eventually, the State is required to ensure that current policies, legislation, regulations and enforcement measures are effective in addressing the risks[123] (point 7).

In what we could call a first phase of implementation in the years following the publication of the UNGPs, National Action Plans (NAPs) on business and human rights became the main instrument through which states outlined the shape and trajectory of their respective set of instruments and measures[124].

2.2.2 PILLAR II – The Corporate Responsibility to Respect Human Rights (UNGPs 11-24)

The UNGPs formulate both foundational as well as operational principles for all the three pillars. The foundational principles of Pillar II is preventative, it establishes and defines the corporate responsibility to *respect* human rights which is extended to all internationally recognized rights included, at a minimum, the International Bill of Human Rights. The responsibility to respect means that all enterprises, regardless of size, sector, operational

[122] WETTENSTEIN, *v. supra*, note 40.

[123] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109, p. 8.

[124] WETTENSTEIN, *v. supra*, note 40.

context, ownership and structure[125] "should avoid infringing on the human rights of others and should address adverse impacts with which they are involved[126]". On this topic it is interesting to relate the concept of license to operate, as Ruggie also mentions in his Framework. The scope of this duty he claims is defined largely by 'social expectations' and the notion of a company's 'social license to operate[127]' (SLO).

The term was first coined in 1997 and then applied in the mining sector to define the "level of tolerance, acceptance, or approval of an organization's activities by the stakeholders with the greatest concern about the activity[128]". It includes local residents, employees, stakeholders, NGOs, opinion leaders etc[129]. Obtaining the social license to operate is fundamental for companies to conduct their projects, even though it is a factual rather than a legal concept. The wider definition of "license to operate" in the CSR field indicates, generally, "the limit of behaviour established for a company to undertake a business activity subject to regulation or supervision by the licensing authority[130]". In order to operate on a State's territory, multinational enterprises must comply with the national laws of that specific country. In fact, compliance does not automatically imply the respect for human rights, since very often the national laws of the receiving State are not suitable with international standards, perhaps if the State has not ratified international treaties.

From the previous statement, one can infer that the requirement for corporations to operate is one of negative responsibility, differently from the duty of states. The negative responsibility requirement envisages the only duty to respect human rights and does not encompass the fulfilment or promotion of human rights, in the sense of *doing no harm[131]* without causing or contributing to adverse impacts, while the positive responsibility to protect human rights is addressed only to States that have to proactively take measures. As an example, scholars have

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[125] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[126] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[127] UNITED NATIONS, 2008a, para. 54.

[128] RIGAUDEAU, B., McCONAUGHEY, E., DUGGAL, K. (ed), *Social License to Operate*, Jus Mundi, 2022. See BOUTILIER, R., BLACK, L., and THOMSON, I., *From metaphor to management tool – how the social license to operate can stabilise the socio-political environment for business*, International Mine Management Conference, Melbourne, Australia, 2012.

[129] NIELSEN, A. E., *License to Operate*, In: Idowu, S.O., CAPALDI, N., ZU, L., GUPTA, A. D. (eds), Encyclopedia of Corporate Social Responsibility, Springer, Berlin, Heidelberg, pp. 1585-1591.

[130] SANTOSO, *v. supra*, note 102.

[131] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

pointed what Article 7 of the ICESCR "safe and healthy working conditions" point entails. According to Santoso (2017), corporations cannot simply refrain from imposing dangerous working conditions, as it is provided in the Article. Instead, they must "do something that provides some good or material as required by the right", for instance, positively providing safe conditions[132].

Moreover, as a fundamental point, companies' responsibility to respect already exists, *prima facie*, over and above compliance with national laws. Even if the State does not provide national laws on human rights, this does not limit the responsibility of businesses to respect.

In the Framework (2008), prof. Ruggie claimed how this concept differs from legal duties, specifying that this responsibility is already a well-established social norm[133], which, despite it can become law over time, the main purpose of social norms is that they exist independently from one state's ability or willingness to fulfill its own duties. Therefore, two external governance systems can be identified: the public law system which is translated into the authoritarian ruling system of governments and the civil system, grounded in the relations between corporations and their external stakeholders.

To meet their responsibility, corporations ought to implement a human rights due diligence process in order to identify, prevent, mitigate and account for how they address their human rights impacts.

According to GP 15, a business should express their commitment through policies and processes appropriate to their size and circumstances, including: a) a policy commitment to respect human rights, which requires a public statement where the company declares its commitment to put into practice sustainability measures and its respect for human rights, b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights, c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute[134]. As commented previously with the Lundbeck's case, the means for companies to "know and show" that they respect rights is precisely by exercising human rights due diligence: "The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed[135]". The potential adverse impacts

[132] SANTOSO (2017), note 102.

[133] RUGGIE, *Just business*, *v. supra*, note 120, p. 97.

[134] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[135] *v. supra*, note 120, p. 98.

require prevention or mitigation, since they present a risk to occur, whereas the actual adverse impacts are already in place, therefore they require remediation. Business enterprises should also "prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships[136]". In this sense, the term "business relationship" includes all those links a company has with its business partners and entities in its value chain, as well as any non-State or State entity directly linked to its business operations, products, or services[137]. Whether or not a company is causing or contributing to an adverse impact, it should either way check on the links its operations in its value chain may present and, if the company's leverage results insufficient to cease the impact, the latter should consider terminating the relationship (GP 19, Commentary).

Eventually, external communication to stakeholders constitutes a fundamental mean to be transparent, as transparency provides information from the company to the stakeholders involved, which can obtain an insight into the relevant issues they are involved or concerned.

2.2.3 PILLAR III – Access to remedy (difficulties in enforcing the principle)

Principle 2 of the UNGPs claims that:

> "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations[138]".

The UNGP's third pillar (from GPs 25 to 31) includes the provision of effective access to remedies and grievance mechanisms for human rights violations at state and corporate levels[139]. Under international law, victims of human rights abuses have the right to access an effective remedy; this means victims should always have recourse to judicial remedies where other remedial schemes, such as administrative remedies, are not sufficient[140]. This has been explicitly recognized by various UN bodies, as well as in the regional context. To be effective,

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[136] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[137] SHERMAN, J.*, v. supra,* note 101, p. 10.

[138] UNGPs, Principle 2.

[139] SANTOSO 2017, *v. supra*, note 102.

[140] SKINNER G., McCORUODALE R., DE SHUTTER O., with case studies by LAMBE A.*, The Third Pillar*, Access to Judicial Remedies for Human Rights Violations by Transnational Business, coordination of the project by ICAR, CORE, ECCJ, December 2013, available at https://corporatejusticecoalition.org/wp-content/uploads/2014/02/The-Third-Pillar-FINAL.pdf [accessed on 30/11/2022].

remedies must be capable of leading to a prompt, thorough, and impartial investigation; cessation of the violation, if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition[141].

The third Pillar assesses the need for greater access by victims to effective remedy, both non-judicial and judicial[142]. On the one hand, non-judicial mechanisms imply, for instance, agreements between the parts or mediation of external subjects.

On the other hand, the judicial remedies include access to the judicial process, which becomes extremely complicated in the case of MNEs when the the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary[143]. Among them we can mention the United States tort civil liability which has been applied upon companies through, for example, the federal Alien Tort Claims Act[144]. Under the ATCA businesses can be civilly liable for general torts because they are considered "legal persons." It calls into play the foreign direct liability, which is the responsibility of the holding or parent company responding for the acts committed by the subsidiary companies, even though this responsibility clashes with the limited liability of the parent company.

However, there are different approaches used to overcome the hurdle of companies limited liability, among which the "piercing the veil" approach, which applies on individuals[145]. Piercing or lifting the corporate veil refers to a situation in which courts put aside the limited liability of a company and hold a corporation's shareholders or directors personally liable for the corporation's actions or debts[146]. Nevertheless, the problem still exists in the application of extraterritorial jurisdiction. In 2013, perhaps the most significant barrier to accessing judicial

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[141] UNITED NATIONS General Assembly, *United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, art. 3, U.N. Doc. A/RES/60/147 (March 21, 2006). See also Economic and Social Council, *United Nations Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, U.N. Committee H.R. Res. 2005/81, Principle 31, U.N. Doc. E/CN.4/2005/102/Add.1 (April 21, 2005).

[142] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[143] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[144] The Alien Tort Claims Act is a US law on the jurisdiction of US courts in cases concerning violations of public international law. It allows for non-US citizens to bring civil actions before US courts in certain situations. This applies even if the events in question occurred outside the United States. Source by the European Center for Constitutional and Human Rights, available at: https://www.ecchr.eu/en/glossary/alien-tort-claims-act-atca/ [accessed on 5/12/2022].

[145] A. DIGNAM, J. LOWRY, *Company Law*, 2006, p. 38.

[146] LLI, Legal Information Institute, available at: https://www.law.cornell.edu/wex/piercing_the_corporate_veil [accessed on 5/12/2022]. See also A. DIGNAM, J. LOWRY, *Company Law*, 2006, p. 27.

remedies for human rights violations that occur in a host State arose from the *Kiobel v. Shell* case, where the U.S. Supreme Court ruled against the Alien Tort Statute for severe extraterritorial human rights abuses by multinationals (it was the first time). Nonetheless, the thorough analysis of the topic is not necessary for the purpose of the present dissertation.
This is the point where Pillar I and Pillar II meet: in the first instance, the State must adopt action for the abuses committed by companies against the individual's interests inside its territory and jurisdiction and companies should comply with the measures adopted. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy[147].

> "Effective judicial mechanisms are at the core of ensuring access to remedy […] States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable […][148]"

In spite of these established duties, significant barriers to access to judicial remedy for transnational human rights violations remain in place[149]. The lack of access to judicial remedies has a huge impact on human rights, especially when it is hindered by the home State or if the latter is not able to exhaust effective remedies for individuals affected by the activity of a company; this is even more complicated when it occurs extraterritorially. Most of the time, costs may be prohibitive, especially without legal aid; claims may be blocked by statutes of limitations, but this specific topic will be further covered in the following chapters.
However, there is a silver lining in the field. Alongside the UNGPs, a number of human rights treaties monitoring bodies have established positive obligations on the part of States, such as to undertake actions to improve the mechanism, which can lead to investigation of potentially dangerous situations for human rights, even outside the State's borders.

[147] UNGPs, GP 25.
[148] UNGPs, GP 26.
[149] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

In common law countries, the United Kingdom for instance, the court may dismiss the case based on *forum non conveniens*[150] grounds, which means that there is a more appropriate forum to decide on the issue. As these obstacles may deter claims, for the victim the right to remedy is difficult to enforce[151]. The European Court of Justice has rejected the application of the *forum non conveniens* doctrine in the European Union. In the EU the Brussels I Regulation mandated the national courts to recognize jurisdiction especially on human rights matters. However, the Regulation is no longer in force and has been replaced by **Regulation 1215/2012**[152] which envisages that Member State have jurisdiction to decide on a civil and commercial dispute where there is an international element. The Regulation further provides that a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required and it applies also to Denmark[153].

2.3 Implementing the UNGPs in the EU with National Action Plans (NAPs)

In the following paragraphs the experiences of the European countries are extremely useful to show the effort made in the relationship between business and human rights and the progress achieved in the application of the UN Guiding Principles in the European Union, therefore these paragraphs also aim at analysing the scope of different country-specific case studies. The challenge is trying to understand if the UNGPs are a suitable instrument for the implementation for corporate human rights due diligence and the protection of human rights and whether or not the domestic laws adopted are aligned with the standard.

Since the adoption of the UN Guiding Principles on Business and Human Rights the relationship between human rights due diligence (HRDD) and corporate liability has been a source of legal uncertainty[154]. Following the end of the Secretary General's mandate in 2011, the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Entities was established in order to promote the 'dissemination and

[150] https://www.diritto.it/il-forum-non-conveniens-e-il-giudice-italiano-giudice-dellunione-europea/

[151] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[152] The Regulation replaces Regulation 44/2001 (the Brussels I Regulation) which, however, continues to apply to proceedings instituted before Regulation 1215/2012 comes into application on 10 January 2015 (for further details see Article 66 of Regulation 1215/2012).

[153] REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R1215-20150226&from=EN [accessed on 8/12/2022].

[154] WETTENSTEIN, *v. supra*, note 40.

implementation' of the UNGPs[155] and, as a result, States were encouraged to develop National Action Plans (NAPs) on BHR, where the European Union has been at the forefront. Alongside international human rights law provisions and the content of the UNGPs three-Pillar scheme, the NAPs emerged as policy documents where States commit themselves to articulate priorities and actions and uphold their duty to prevent corporate-related human rights abuses (as enshrined in the first Pillar on the State duty to protect). The purpose of NAPs is to provide strategic orientation, outline specific measures and activities to implement national and international obligations and policy commitments[156].

When the European Commission called on its member states to develop NAPs for the implementation of the UNGPs (and then the Human Rights Council reiterated it again in 2014), NAPs quickly became the central point of early efforts and the EU countries the global leaders in terms of quantity of measures that were put into practice. The first NAPs were released in 2013 by the governments of the UK and the Netherlands[157].

At the international level, the Organization of American States (OAS) has encouraged its Member States to implement the UNGPs, while the African Union (AU) is currently drafting a policy framework on business and human rights[158]. Despite the implementation of NAPs has committed governments on the BHR agenda, it has remained rather empty, and governments avoided explicit commitments to the new legislation across the board, unleashing civil movements and campaigns pushing for binding legislation. As an example, Ecuador and South Africa moved a resolution before the UN Human Rights Council to enter new negotiations for a BHR treaty. Although the signing of a treaty is relatively long, some impactful developments can be noted, where several countries have adopted legislation on human rights due diligence contributing to a continuous 'hardening' of the UNGPs.

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[155] AUGENSTEIN, D., DAWSON, M., & THIELBÖRGER, P. (2018*), The UNGPs in the European Union: The open coordination of business and human rights*, Business and Human Rights Journal, 3(1), 1-22, available at: https://doi.org/10.1017/bhj.2017.30, [accessed 21/11/2022], see Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Entities', A/HRC/RES/17/4 (6 July 2011).

[156] WETTSTEIN*, v. supra*, note 40.

[157] RUGGIE, J., Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/L.17/31, *v. supra*, note 109.

[158] See, AFRICAN UNION, Validation Workshop of the African Union Policy on Business and Human Rights, March 21, 2017, Available at: https://au.int/web/en/pressreleases/20170321/validation-workshop-african-union-policy-business-and-human-rights [accessed on 8/12/2022].

For example, on September 13, the Japanese government published its Guidelines on Respecting Human Rights in Responsible Supply Chains[159]. This is a mirroring document of the UNGPs and the OECD Guidelines adopted by Japan to address how businesses should behave to prevent and manage human rights impacts. It not only includes companies inside the country, but also any company from outside conducting activities inside the country is expected to comply.

At the European level, in trying to make the process more feasible the UN Working Group on Business and Human Rights, the Danish Institute for Human Rights (DIHR)[160] and the International Corporate Accountability Roundtable (ICAR) developed two international guidelines to help States implementing and reviewing NAPs, namely the Guidance and the Toolkit on National Action Plans on Business and Human Rights. The overall goal of this Toolkit is to promote implementation of the UNGPs and other relevant business and human rights frameworks by states and businesses[161]. First, it provides guidance on how to undertake a national baseline assessment (NBA) in order to check how the three-pillar scheme is implemented. Secondly, it suggests how to undertake a fact-based analysis with follow-up on to establish the primary actions and fields of intervention and, eventually, establishes a monitoring mechanism to report on NAPs. The Toolkit is addressed to Governments, human rights institutions, businesses, multilateral and bilateral development agencies as well as media or researchers. To minimize their adverse impact on human rights, businesses can align their activities with the standards and play an additional role in the implementation of the guidelines and frameworks, adopting sustainable practices.

Again, the DIHR developed a Human Rights Impact Assessment Guidance and Toolbox for those committed in conducting human rights impact assessments (HRIA) of business projects and activities, providing guidance and practical tools[162] also consistent with the UNGPs. HRIA

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[159]THE INTER-MINISTERIAL COMMITTEE ON POLICY PROMOTION FOR THE IMPLEMENTATION OF JAPAN'S NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS*, Guidelines on Respecting Human Rights in Responsible Supply Chains*, September 2022, Available at: https://www.meti.go.jp/english/policy/economy/biz_human_rights/1004_001.pdf [accessed 15/12/2022].

[160] The DIHR is Denmark's National Human Rights Institution (NHRI), with an international mandate to promote and protect human rights and equal treatment in Denmark and abroad. Source from DIHR and ICAR, National Actions Plans on Business and Human Rights Toolkit, 2017 Edition, Available at: https://globalnaps.org/wp-content/uploads/2018/01/national-action-plans-on-business-and-human-rights-toolkit-2017-edition.pdf

[161] GÖTZMANN N., BANSAL T., WRZONCKI E., POULSEN-HANSEN C., TEDALDI J., AND HØVSGAARD R., The Danish Institute for Human Rights, Human Rights Impact Assessment, Guidance and Toolbox, available at: https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf

[162] *v. supra*, note 109.

is an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights. HRIAs provide a reasoned, supported and comprehensive answer to the question of "how does the project, policy or intervention affect human rights?[163]". Their fundamental purpose is to help prevent negative effects and to maximize positive effects. According to the UNGPs, the process of impact assessment includes assessing actual and potential impacts, act upon the findings, tracking responses and communicate the efforts to stakeholders. The purposes of establishing an HRIA practice include the effective application of human rights due diligence, the identification and address of adverse human rights impacts through the engagement with stakeholders, data gathering and analysis, prevention, mitigation and remediation[164]. In this particular phase it is important to engage in meaningful dialogue with stakeholders and ensure transparency. The impact assessment may be integrated into other types of assessment according to current legislation in place (e.g., environmental, social, economic impact assessments).

Various domestic legislative measures address value chain due diligence, but they are often sector- or issue-specific, which result in several difficulties in harmonizing due diligence measures at the European level.

2.3.1 French Corporate Duty of Vigilance Law

The most comprehensive and far-reaching law was adopted in France in 2017. The French Corporate Duty of Vigilance Law establishes human rights due diligence obligation for large French companies (at least five thousand employees in France or ten thousand globally at the end of two consecutive financial years[165]) which are required to implement a vigilance plan designed to identify and prevent severe impacts on human rights, the safety of people and the environment and to open channels for civil litigation against offending companies. Up to the present date, it is the only legislative example which requires domestic mandatory due diligence for human rights and environmental impacts[166]. Specifically, Article 1 enshrines that a company must implement an effective vigilance plan (par. I) and outlines the due diligence measures a

[163] *v. supra*, note 109.

[164] *v. supra*, note 162.

[165] *v. supra*, note 98, art. 1 L. 225-102-4, Trade and Industry Code, Paris, 29 November 2016. Available at: https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf [accessed: 21/11/2022].

[166] SMIT L., BRIGHT C., MCCORQUODALE R., BAUER M., DERINGER H., BAEZA-BREINBAUER D., TORRES-CORTÉS F., ALLEWELDT F., KARA S., SALINIER C., AND TEJERO TOBED H., *Study on due diligence requirements in supply chains,* delivered to the European Commission, January 2020.

company should implement to allow risk identification, namely: mapping risks, assess the situation of stakeholders with an established commercial relationship, take appropriate action to prevent or mitigate the risks, develop an alert mechanism and a monitoring scheme to follow up on the measures[167]. Eventually, the plan should be publicly disclosed.
Paragraph II also states that:

> "When a company does not meet its obligations in a three months period after receiving formal notice to comply with the duties laid down in I, the relevant jurisdiction can, following the request of any person with legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties[168]".

Moreover, companies who fail to comply with the duties specified in Article L. 225-102-4 of the code are considered liable and obliged to compensate for the harm. The sources to establish civil liability also make reference to the French Commercial Code, as the due diligence plan makes part of it. Nevertheless, there are not decisions by French courts on the application of this Law yet and there is no guidance on how to implement the Vigilance Obligations so, unfortunately, a number of companies still approach the vigilance plan as a tick-box exercise and stakeholders have identified weaknesses in consultation[169].
A non-well clarified part of the Law focuses on the corporate forms of companies falling within the scope of the Vigilance Law, since the Vigilance Law does not list such corporate forms. They can only be identified based on the location of the Vigilance Law's provisions in the French commercial code[170]. Another challenge may be embodied by the identification of companies *ratione personae* ("by reason of the person concerned"), since the vigilance plan should cover not only the activities of the company and its subsidiaries, but also suppliers and subcontractors with whom there is an established commercial relationship[171]. These points will be recovered during the analysis of the European Commission proposal on the Due Diligence

[167] *v. supra*, note 98.
[168] *v. supra*, note 98, par. II.
[169] SAVOUREY E., BRABANT S., *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, in *Riv. dir. int*., Business and Human Rights Journal, Cambridge University, 2021, pp. 141-152, doi:10.1017/bhj.2020.30.
[170] AUGENSTEIN, D., DAWSON, M., & THIELBÖRGER, P. (2018*), The UNGPs in the European Union: The open coordination of business and human rights, v. supra, note 58.*
[171] v. supra, note 170.

Directive. In relation to the first vigilance obligation, which consists of establishing a vigilance plan, the United Nations Guiding Principles on Business and Human Rights ('UNGPs') are used as a guidance and result well transposed into the French Duty of Vigilance Law.
For instance, the Vigilance Law provides that the plan should "identify risks and prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons and the environment"[172]. Despite being based on the UNGPs, the Vigilance Law needs to be further aligned with the authoritative standard; in fact, according to research[173], the reporting approach of French companies is inconsistent and still focused on managing risk on businesses instead of risks towards people, as the UNGPs report.

2.3.2 The Netherlands

The Netherlands have introduced a Child Labour Due Diligence Law which is a clear example of the application of mandatory human rights due diligence. According to the act, child labour includes any forms of work performed by individuals under the bar of eighteen years old enlisted in the ILO Convention on the Worst Forms of Child Labour[174] (1999). The companies affected are the ones in The Netherlands as well as companies trying to sell goods from abroad. Those companies will be required to conduct due diligence related to child labour and submit a statement to the relevant authority. The investigation needs to be carried out also on the supply chain.

> "[t]he company that […] investigates whether there is a reasonable presumption that the goods and services to be supplied have been produced using child labour, and that draws up and carries out an action plan in case there is such a reasonable presumption, conducts due diligence[175]".

[172] *v. supra*, note 98.
[173] SHIFT, HUMAN RIGHT S REPORTING IN FRANCE, Two Years In: Has the Duty of Vigilance Law led to more Meaningful Disclosure? Shift, New York, December 2019. Available at: https://shiftproject.org/wp-content/uploads/2019/11/Shift_HumanRightsReportinginFrance_Nov27-1.pdf
[174] INTERNATIONAL LABOUR ORGANIZATION, ILO Convention on the Worst Forms of Child Labour, No. 182, 1999.
[175] Article 5, Child Labour Due Diligence Law, (Eerste Kamer der Staten-Generaal), Dutch version available at: https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vkbklq11jgyy/f=y.pdf

There are sanctions and fines for failure to submit the statement. Moreover, the company's director risks incurring in criminal prosecution if the company in question is found to have committed the same violation within a time span of five years[176].

2.3.3 Italy

The Italian Legislative Decree 231/2001 (*Decreto Legislativo 8 giugno 2001, n.231*) on Administrative Responsibility of Legal Entities, Companies and Associations[177] applies to all "corporate entities and companies and associations, regardless of whether they have legal personality[178]" and not to the State. It establishes the so-called "*231 Model*" that concerns risk mitigation measures in case a company were to be found as having committed a crime and it is binding[179]. The Act has been adopted aligning national legislation with the international conventions on the liability of legal persons, specifically the Brussels Convention on the protection of the European Communities' financial interests of 26 July 1995[180] and the OECD Convention on Combating Bribery of Foreign Public Official in International Business of December 1997[181]. It addresses corporate liability for specific human rights violations such as slavery, human trafficking, forced labour, environmental crimes etc. Although the due diligence requirement is not expressly mentioned and required, the L.D. No. 231/2001 established corporate responsibility for crimes for the first time in Italy, strengthening corporate self-assessment system as required by human rights due diligence. Historically, in the Roman law tradition, the principle of *societas delinquere non potest*[182] (legal persons cannot commit crimes) has always prevailed. However, since legal entities are subjects of our modern legal system

[176] HOFFS, A., *Dutch Child Labour Due Diligence Law: a step towards mandatory human rights due diligence,* Oxford Human Rights Hub, OxHRH Blog, June 2019, available at: https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/ [accessed 6/12/2022].

[177] G. U., D.lgs. 231/2001, *Italy's Administrative Responsibility of Legal Entities*, Companies and Associations Act, June 2001.

[178] Art. 1, c.1, *Italy's Administrative Responsibility of Legal Entities*, Companies and Associations Act.

[179] K. NOTI, LL.M. (Columbia), Prof. Federico M. MUCCIARELLI, Prof. Carlo ANGELICI, Dr. Virginia dalla POZZA, Mattia PILLININI, *Corporate Social Responsibility (CSR) and its implementation into EU Company Law*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, EUROPEAN PARLIAMENT, PE 658.541, November 2020.

[180] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127(03)&from=EN

[181] OECD, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED INSTRUMENTS, Information sheet on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 2000, available at: https://www.oecd.org/governance/ethics/2406452.pdf

[182] ENCICLOPEDIA TRECCANI, "La persona giuridica, come non può essere valida destinataria di precetti penali, così non può essere soggetto attivo di reato".

and assume rights and obligations, they can also commit offenses, so the L.D. No. 231/2001 introduces sanctions against legal persons. As an enforceable law, companies have the duty to demonstrate that they have effectively adopted compliance programs called "models of organisation, management and control" with the aim of identifying, preventing and mitigating the risk of commission of crimes in relation to business activities[183].

2.3.4 Conclusions on NAPs

Following these different acts, it is reasonable to believe that the nature of mandatory human rights due diligence duty is imposed by legislative act(s). However, these acts may apply to different areas of law, as for instance happens with the Dutch Act that is a consumer protection law. On the other hand, the French *Loi de Vigilance* represents civil and company law. Although the UNGPs apply to all business enterprises, these Acts apply in accordance with thresholds, such as company's size. The French *Loi* refers only to large companies with more than 500 employees, a number that the upcoming EU Sustainability Directive will adopt as its scope. Moreover, the regime of protection may cover only specific values as the Dutch Act, concerning child labour, but at the same time it can also expand its scope and be complemented with environmental protection for example provided by documents in place presenting a different nature. Nevertheless, it is up to the legislator to decide which values and rights include in the mandatory human rights regime and which duties place upon companies, such as a reporting duty (as the Non-Financial Reporting Directive will do). Furthermore, there is an ever-fundamental point that is the civil liability enforcement, which must put forward civil liability for harm. To undertake due diligence obligations does not mean avoiding risks, rather, it is fundamental for companies to bear with their own responsibilities. The UNGPs worked as a framework for the harmonization of soft law instruments. Future research focuses more on the complementary effects between the UNGPs and the OECD *Guidelines for Multinational Enterprises*[184].

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[183] See FIDH, HRIC, ECCJ*, ITALIAN LEGISLATIVE DECREE No. 231/2001: A model for Mandatory Human Rights Due Diligence Legislation?,* N° 741a, November 2019, available at: https://media.business-humanrights.org/media/documents/files/documents/report_231_2001_ENG.pdf

[184] RASCHE A., WADDOCK S., *The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research*, Business and Human Rights Journal, February 2021, Available at: https://www.researchgate.net/publication/349029663

2.4 The OECD Guidelines

The Organisation for Economic Co-operation and Development (OECD) was officially born in 1960[185], since it was initially called the Organization for European Economic Cooperation (OEEC) and started after World War II to run the Marshall Plan. The efforts of the US, Canada, and eighteen European countries (now thirty-eight) formed an organization which should have focused on the promotion of development globally. Its members and key partners form the 80% of world trade and investment. The OECD passed its *Guidelines for Multinational Enterprises*[186] (hereafter, the Guidelines) in 1976, which state that:

> "The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in and from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards[187]".

The Guidelines are a soft law instrument, as it is clarified in the preface under the term "recommendations" which enunciates non-binding principles and standards for responsible business conduct that are consistent with applicable existing law. They were recently revised in 2011, after years of revisions and next to the adoption of the UNGPs. Moreover, the Guidelines recall the concept of human rights due diligence among the general policies, describing the actions an enterprise should undertake, placing emphasis on environmental due diligence. According to the Guidelines, "due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems[188]" and has to be understood as an ongoing exercise. Human rights form the bedrock of social sustainability and Ruggie's mandate was restricted to cover social sustainability only. When the OECD in late 2010, based on the draft of the UNGPs, decided to update its Guidelines, the organisation turned to Prof. Ruggie, who applied the drafted UNGPs, Pillar 2, for the OECD update. Hence, the UNGPs are the source of the OECD, although the

[185] OECD website, available at: http://mneguidelines.oecd.org/ncps/ [accessed on 6/12/2022].
[186] OECD Guidelines for Multinational Enterprises, 2011 edition, available at: http://www.oecd.org/daf/inv/mne/48004323.pdf
[187] *v. supra*, note 187, p. 3.
[188] *v. supra*, note 187.

OECD update chose to apply the drafted system for managing impacts on social sustainability to include adverse impacts on environmental and economic sustainability as well[189].

As an enhancement and a practical support to enterprises on the implementation of the Guidelines the OECD adopted in 2018 the *Due Diligence Guidance for Responsible Business Conduct* which provides practical examples of due diligence application and promotes a common understanding among governments and stakeholders on due diligence for responsible business conduct on the supply chain[190].

The Committee implementing the 1976 OECD Declaration is the Committee on International Investment. The most concrete commitment to the Guidelines by each member of the OECD is the creation of National Contact Points (NCPs), which are offices tasked with the promotion of the Guidelines ensuring the observance of multinational enterprises and the resolution of issues providing promotional activities and handling enquiries for non-observance of the Guidelines. In Denmark, in relation to the OECD NCPs, not only one can complain about a company, but also about its subsidiaries, meaning the business partners or entities in the supply chain[191].

2.5 The ILO Declaration on Fundamental Principles and Rights at Work

The International Labour Organisation (ILO) is the championing organization dealing with the rights of workers, awarding the adoption of countless Conventions concerning the rights of workers. The ILO Declaration was adopted in 1998 and the values inside represent a global consensus on social and labour issues and serve as the major reference point in this field[192]. The Declaration commits the member States which are part of the Declaration to respect the principles in four areas, whether or not they have ratified the specific Conventions. Those four areas are: freedom of association and collective bargaining; the elimination of forced labour, the elimination of child labour; and the elimination of discrimination in respect of employment and occupation[193]. Moreover, the ILO adopted the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977*[194]. The MNEs Declaration is

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[189] S. S., THORSEN, Attorney at Law at GLOBAL CSR, *Comments on the EU Commission proposal for a Corporate Sustainability Due Diligence Directive (CSDDD)*, GLOBAL CSR blog, Submitted 24 May 2022.

[190] OECD *Due Diligence Guidance for Responsible Business Conduct,* May 2018.

[191] Section 3, Danish Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct.

[192] INTERNATIONAL LABOUR ORGANIZATION website, *History,* available at: https://www.ilo.org/declaration/thedeclaration/history/lang--en/index.htm

[193] *v. supra*, note 193.

[194] INTERNATIONAL LABOUR OFFICE, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Fifth Edition, Geneva, March 2017, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf [accessed 9/12/2022].

the only ILO instrument that provides direct guidance to enterprises (multinational and national) on due diligence and social policy for a responsible and sustainable workplace practices[195]. The aim of the Declaration was to collect the international regulatory instruments of MNEs and assess the behaviour of these enterprises with the host countries. Together with the UNGPs and other human rights frameworks, the Tripartite Declaration is fundamental to enrich the development of business self-assessment.

2.6 The UN Global Compact and other soft law standards

At the World Economic Forum in Davos in January 1999, the UN Secretary General Kofi Annan proposed forming a compact between the United Nations and business promoting shared values and the role of business for the protection of human rights. It is a voluntary initiative based on corporations' commitment to implement universal sustainability principles[196]. The Global Compact requires business to put into practice a set of ten principles in the areas of human rights, labour, the environment, and anti-corruption derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work[197], the Rio Declaration on Environment and Development[198], the United Nations Convention Against Corruption[199]. As a result, by signing up these principles, corporations accept to report their activities annually, filling specific indicators and redacting a Communication on Progress (COP). If the company adhering fails to report its activity, its participation at the UN Global Compact might cease. The development of the Global Compact follows the path of improving knowledge about human rights responsibilities of business, in the area of *soft law*[200]. The Global Compact has been successful in attracting a large number of participants, estimated to more than 16,000 companies in 145

[195] *v. supra*, note 195.
[196] The UN Global Compact, available at: https://www.unglobalcompact.org/ [accessed on 6/12/2022].
[197] INTERNATIONAL LABOUR ORGANIZATION, ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up : adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.
[198] UNITED NATIONS, Rio Declaration on Environment and Development, New York, 1992, Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.
[199] UNITED NATIONS Office on Drugs and Crime, High-level Political Conference for the Signature of the United Nations Convention against Corruption, 9-11 December 2003, Mérida, Mexico = Conférence politique de haut niveau pour la signature de la Convention des Nations Unies contre la corruption, 9-11 décembre 2003, Mérida, Mexique = Conferencia Política de Alto Nivel para la Firma de la Convención de las Naciones Unidas contra la Corrupción, 9-11 de diciembre de 2003, Mérida, México.
[200] J., NOLAN, *The United Nations' compact with business: hindering or helping the protection of human rights?,* The University of Queensland Law Journal, Vol. 24 No. 2, 2005.

countries[201]. The Compact operates as a membership scheme where companies have to sign up and the criteria for self-assessment are the ten principles each of which envisages an explanation to help the business understand the relevance for its own activity. The UN Global Compact and the UN Guiding Principles are complementary instruments within the UN system, since both are concerned with advancing human rights protection and sustainability in a globalised world. Unlike the Global Compact, the UNGPs do not only address the corporate responsibility to respect human rights, but they also rule the State duty to protect human rights and provide a system of access to remedy. Above all, the UNGPs constitute the first universally applicable standard and apply to all companies, everywhere, regardless of whether or not they have signed up to the UN Global Compact[202].

Thereby, one cannot overlook the catalyst effect produced by the UNGPs on the question of corporate responsibility to respect human rights, even though harsh criticism of voluntarism arose, especially concerning the UNGC. The critics focus on the lack of legal accountability in case of failure to comply with the framework.

Although the OECD Guidelines represent a prime example of complementation with the UNGPs, there is more evidence of the use of the UNGPs in soft law instruments directed at multinational enterprises. It includes, for instance, the voluntary standards elaborated by the International Organization for Standardization (ISO)[203]. The Organization is an independent, non-governmental organization composed by a global network of national standard bodies, which provide internationally agreed standards for products making, service delivery, process management etc. For corporate social responsibility, the certification ISO 26000 has been adopted in 2010 and inspired by the Guiding Principles. The standard seeks to promote a common understanding of social responsibility while complementing, but not replacing, other existing tools and initiatives[204].

In addition, the Sustainable Development Goals (SDGs) are a UN blueprint initiative to achieve sustainable objectives by 2030. The adoption of the 2030 Agenda for Sustainable Development

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[201] The UN Global Compact, available at: https://www.unglobalcompact.org/participation/join/commitment#:~:text=The%20UN%20Global%20Compact%20encourages,of%20the%20UN%20Global%20Compact.

[202] OXFAM, SHIFT, GLOBAL COMPACT NETWORK OF NETHERLANDS, *Doing business with respect to human rights, a guidance tool for companies*, 2nd edition, 2016, available at: https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf [accessed on 9/12/2022].

[203] International Organisation for Standardization (ISO), available at : https://www.iso.org/about-us.html.

[204] https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100258.pdf

in September 2015 recognizes the role of business as a major actor for economic growth and infrastructure, explicitly calling for businesses to operate in accordance with the UNGPs[205]. The SDGs include 17 goals on thematic issues related to poverty, climate change, inequalities, education, infrastructure, cooperation, etc. Every year, the UN Secretary General presents a SDG Progress report, developed in cooperation with the UN System and based on national data and regional information.

2.7 Conclusions to the second chapter

This second chapter set out to elucidate the plethora of soft law norms already in place with the aim to regulate business activity. The successful project of the UNGPs by prof. John Ruggie turned out to be a driver to change social norms and corporate culture through its "Protect, Respect and Remedy" three-pillar scheme. Corporate governance internalizes elements of public law and civil governance and then shapes its own strategies and policies. Jurisdictional comparative analysis demonstrates that, due to the lack of enforcement, the current reporting system is inadequate to provide effective protection and remedy for corporate human rights and environmental abuses. Hence, corporate responsibility is gradually gaining ground with corporate self-regulation, through the harmonization and complementarity of soft law instruments, but the need for management of adverse impacts caused by multinational enterprises is stronger than ever. The UNGPs showed that a dynamic mix of approaches and collaboration by States would be needed to transform how business behave on a global scale[206]. Collaboration was facilitated by interactions and adoptions of standards based on the UNGPs by other international entities such as the OECD, which gave complementarity to Pillar II into its Guidelines for Multinational Enterprises. Other partners beyond the EU have been the International Labour Organization (ILO) and the International Standard Organization (ISO), but there exist far more, such as the International Finance Corporation (IFC) which performs standards for its clients and of course all the UN initiatives as the UN Global Compact. We have briefly explained how the European Union is at the forefront of the sustainable project with the implementation of National Action Plans, even though many countries overseas have adopted Modern Slavery Acts, for example in California and Canada, let alone the UK Modern

[205] UN, Agenda 2030, the 17 Goals, Sustainable Development Goals (SDGs), 2015.
[206] *v. supra*, note 109.

Slavery Act[207]. However, the implementation of due diligence among Member States is fragmented and still sector-specific, where just a few countries envisage a mechanism of criminal law proceedings or sanctions in the case of failure to comply with the due diligence requirement, such as France or the Netherlands. On the other hand, in countries like Italy the due diligence requirement is not yet in place but is indirectly working. In the next chapters the existing European Union legislation concerning corporate responsibility is analysed as a way to introduce the European Corporate Sustainability Due Diligence Directive.

[207] Modern Slavery Act, the National Archive, UK Government, 2015, available at: https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

3. THE CONCEPT OF MANDATORY HUMAN RIGHTS DUE DILIGENCE IN THE EUROPEAN UNION: THE EU DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE AND SUSTAINABILITY REPORTING

3.1 Introduction – 3.2 Policy Commitment, Code of Conduct and Audit – 3.3 COM/2022/71 final, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence – 3.4 Due diligence in established business relationships – 3.5 Is the Directive aligned with international standards? – 3.6 Conclusions

3.1 Introduction

According to Pillar II of the UN Guiding Principles on Business and Human Rights, thoroughly analysed in the previous chapter, companies have a responsibility to undertake human rights due diligence on adverse human rights impacts that they may cause or contribute to, or which may be directly linked to their operations. Importantly, due diligence is supposed to be an ongoing process, that is yearly update, since human rights risks may change over time as the business enterprise's operations and context evolve[208]. The II Chapter showed a brief review of existing domestic frameworks and the lessons learned from them, especially the cases of France, Italy and The Netherlands. It was showed, inter alia, the ineffectiveness of transparency laws and the advantages of certain elements of existing HRDD laws. Therefore, it can be inferred that along with the UNGPs, the OECD Guidelines and other soft law instruments, the previously discussed national laws significantly informed the drafting process of the EUCSDD Initiative[209].

The Corporate Human Rights Benchmark (CHRB) is part of the World Benchmarking Alliance (WBA). It has been assessing the human rights disclosures of some of the largest global companies since 2017 to rank the top listed companies on their human rights policy, code of

[208] RUGGIE J., *The Guiding Principles on Business and Human Rights* refer to the responsibility of "business enterprises" to respect human rights. UN OFFICE OF THE HIGH COMMISSIONER on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31, June 2011.

[209] SMIT L., *et al.*, *Study on Due Diligence Requirements through the Supply Chain: Final Report*, Study for the European Commission Directorate General for Justice and Consumers, Publications Office, 2020, pp. 97–98, 218–221.

conduct, process and performance, especially on the riskiest part of their operations, that is to say the supply chain[210]. WBA assesses companies across seven critical system transformations, namely decarbonisation and energy, food and agriculture, nature and biodiversity, digital, urban, financial and social system transformations, while the CHRB is a collaboration led by investors and civil society organisations dedicated to creating the first open and public benchmark of corporate human rights performance that narrowly focuses on high-risk sectors[211]. This means that the organization monitors companies and their relationship with suppliers in order to identify the riskiest sectors where severe adverse impacts on human rights may occur.

This year, the initiative has assessed the 127 largest companies in food and agricultural products, ICT manufacturing and automotive manufacturing sectors evaluating their approach to human rights, such as Coca-Cola, Apple, General Motors and so on.

Under scrutiny, companies have improved their scores and accountability, even though the path is still slow and the CHRB relies on companies' public reports that are not always close to reality. In 2022, the average score of these companies overall was 17.3% for their human rights performance based on the UNGPs, of which only one company scored above the 50%, while the greatest majority scored below the 30%[212]. The indicators particularly include human rights' categories that are much at risk, such as child labour and women's rights. Moreover, stakeholders' consultation is still not embedded in the steps of the due diligence process so companies fail to disclose information. Only the 11% tracks the effectiveness of the results.

Therefore, across the three sectors, companies that improved their scores on human rights due diligence (HRDD) did so only on the initial steps of a due diligence process, namely identifying, assessing, prioritizing and taking action on human rights risks and impacts, by considering which human rights risks are relevant for their business, while they still lack ability on tracking, mitigating and communicating human rights-related actions[213].

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[210] WBA, Official Website, available at: https://www.worldbenchmarkingalliance.org/publication/chrb/ [accessed on 12/12/2022].

[211] World Benchmarking Alliance (WBA), Corporate Human Rights Benchmark (CHRB), *Core UNGP Indicators For companies in all sectors*, September 2021, available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/05/CHRB-Methodology_COREUNGP_2021_FINAL.pdf [accessed on 12/12/2022].

[212] *v. supra*, note 209.

[213] World Benchmarking Alliance (WBA), Corporate Human Rights Benchmark (CHRB), *Insights Report*, November, 2022, available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf [accessed on 12/12/2022].

The stakeholders group usually includes businesses and their directors, employees, subsidiaries, any individuals or group or community impacted by the operations of these businesses and their value chains, investors and their organizations, trade unions, public authorities, international organizations, auditors, research and data providers etc.

Civil society is now seizing the opportunity to require companies, especially large companies, to undertake human rights due diligence and establish legal liability on those who fail to identify, prevent, mitigate and communicate adverse human rights impacts on their own operations and the value chain. The value chain was defined as "the upstream and downstream life cycle of a product, process, or service, including material sourcing, production, consumption, and recycling[214]". The global value chain framework shows *how* a sector covers the steps required to bring a product or service from its initial conception to production and sales[215], it represents the process itself; slightly different is the supply chain which represents every stage inside the process. It includes the creation, manufacturing, transportation and sale of a product.

The idea of value chain comes from Michael Porter that in 1985 used this term to prove companies how to add value to their raw materials and sold them to the public. The value chain can be divided in upstream (suppliers) and downstream (clients, retailers etc.).

In Chapter I, the human rights agenda has been moved from a "naming and shaming" position to "knowing and showing". This concept refers to HRDD, whereby companies get to know their risks of impacts and show how they manage such risks, and, in the name of RBC (responsible business conduct), they require such operation to their business relationships: that they know their human rights risks and show the same to any other business relationship[216]. It is worth to clarify that the UNGPs do not require businesses to provide transparency through "mapping" their supply/value chain, which is time-wasting and not pragmatic, plus not required by the UNGPs which only expects companies to take actions on severe adverse impacts on their value chain.

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[214] EUROPEAN COMMISSION, Directorate-General for Justice and Consumers, TORRES-CORTÉS, F., SALINIER, C., DERINGER, H., et al., *Study on due diligence requirements through the supply chain : final report*, Publications Office, 2020, available at: https://data.europa.eu/doi/10.2838/39830.

[215] HERNÁNDEZ, R., MARTINEZ, J. M., MULDER, N., *Global value chains and world trade: Prospects and challenges for Latin America*, ECLAC, Books, No. 127, (LC/G.2617-P), Santiago, Chile, UN Economic Commission for Latin America and the Caribbean (ECLAC), 2014.

[216] SKADEGAARD THORSEN T., SKADEGAARD THORSEN S., BONI A., NORMAN O., BLOMSTROM E., *Transparency in Value Chains*, Discussion paper, Global CSR, 22 February 2022.

For transparency, according to the UNGPs, companies have to undertake regular operational impact assessment to reveal the concrete risks for that company. Moreover, companies are responsible and not liable for an impact in their full value chain and foundational principle 13 determines that the responsibility should be engaged where the company may cause or contribute to adverse impacts on human rights, it shall act to prevent or mitigate such impacts, and secondly, where the company is merely linked to adverse impacts through its business relationships, it shall seek to prevent or mitigate the impacts[217].

In fact, many European companies fully understand the importance of becoming more sustainable and addressing risks that can occur in their supply chains. Consequently, as we have previously seen, European countries such as France, Germany and the Netherlands are promptly demonstrating their engagement adopting requirements that entail liability or just the disclosure of information with regard to mandatory human rights due diligence, while others like Italy or Switzerland are on their way proposing initiatives. Outside Europe, we can mention the Guidelines adopted by the Japanese government that we have already reported, but also many other Acts adopted in Australia or Canada for instance, or the US California Transparency Act[218] which requires the disclosure of efforts to eliminate modern slavery and human trafficking on large companies' supply chain. Moreover, we can mention the UK Bribery Act[219] of 2011, where also extraterritorial jurisdiction in the case of companies' corruption is embedded.

According to a research conducted by the British Institute of International and Comparative Law (BIICL) and the London School of Economics (LSE), included in the final report delivered to the European Commission[220] in 2020, several calls for mandatory due diligence legislation have started to emerge, especially from multinational corporations. From this report, it is interesting to highlight the survey responses concerning current due diligence practices as envisaged in the UNGPs, costs and benefits of these activities and perceived impacts on possible regulatory options on individual companies. The survey has been divided between a "business survey" (with 334 responses) and a "stakeholders' survey" (with 270 responses), receiving a total amount of 631 responses. The majority of respondents are multinational enterprises (in the report they are referring to enterprises with more than 1,000 employees), but

[217] RUGGIE, J., UNGPs, principle 13, v. supra, note 209.

[218] California Transparency in Supply Chains Act, January, 2012.

[219] Bribery Act, 2010, c. 23, UK Public General Acts, available at: https://www.legislation.gov.uk/ukpga/2010/23/contents [accessed on 13/12/2022].

[220] v. supra, note 215.

also SMEs are represented (250 or less employees)[221] and large companies which operate in the EU and around the world, while a small percentage represents business respondents only within or only outside the EU. They have been chosen across many sectors (namely manufacturing, automotive, IT, consumer goods, agriculture etc.).

"Survey respondents were asked questions about whether companies are currently undertaking due diligence for human rights and environmental impacts, and if so, how they are doing this within their own operations and supply chains[222]" and, among business answers, in 2020 the 37.14% was currently undertaking due diligence for human and environmental impacts, but without covering the entire value chain, while only the 16% did.

These trends are similarly reflected in respondent companies with over 1000 employees, 42.98% of which conducts human rights and environmental due diligence. Another issue at stake is climate change due diligence, implying air pollution and greenhouse emissions which presents different theories of application: there are companies already considering climate change under the same umbrella of due diligence obligations, while other companies not taking it into consideration at all.

The survey notes that currently which requires companies to undertake mandatory due diligence at the EU level. In a second step, survey respondents were asked about their view on the current regulatory landscape, whether they agreed or disagreed on its effectiveness, efficiency and coherence according to the criteria of the EU Better Regulation Guidelines[223]. The majority of both groups answered that the current legal landscape is not effective, while a percentage of 19-25% of business and large business respondents felt that laws are efficient and coherent. The rest did not know. The majority of SMEs was not aware of how current laws are applied.

Another poll result showed the support of the stakeholders for the introduction of a general binding requirement to undertake mandatory due diligence in their operations and in their supply chain. However, interviewees differed with respect to liability and the enforcement method for implementation[224].

Subsequently, the question concerned the possible benefits of a general due diligence requirement at the EU level, providing a harmonized EU level standard instead of a mosaic of

[221] See more on Study on due diligence requirements through the supply chain, Final Report, v. supra, note 215.

[222] v. supra, note 215.

[223] EUROPEAN COMMISSION, *Better Regulations Guidelines*, SWD (2021) 305 final, Brussels, 3rd November 2021, available at: https://commission.europa.eu/system/files/2021-11/swd2021_305_en.pdf.

[224] v. supra, note 215.

different measures. The large majority of business respondents (75.37%) agreed that this kind of regulation would provide benefits to business through creating a single harmonized standard, while only the 9.7% of respondents rejected the proposal[225]. The EC study also revealed that industry organizations are generally less favourable to regulatory reforms than individual business respondents. Most industry organization respondents (45.83%) were of the view that some new regulation would not be beneficial to business by introducing a non-negotiable standard[226].

Furthermore, the respondents also indicated that regulation may benefit business by contributing to legal certainty, since companies face various legal risks under different jurisdictions around the EU. In fact, leveling the playing field would put companies under the same binding standard and would be also beneficial for competition. On the overall, there is a stronger preference for hard law application of a due diligence standard of care than taking no action, and there is an agreement about the enough amount of voluntary guidance[227].

Which are the implications? Why do we need a due diligence obligation under the law? Uncertainty deriving from the spectrum of too many different approaches in the field of BHR prevents companies to know what is expected from them. Moreover, the meaning of due diligence is becoming clearer and clearer and more recognizable before a judge.

Nevertheless, stakeholders are not 100% convinced when speaking of legal liability engagement and make use of due diligence as a sort of "defense" discourse. Stakeholders across the spectrum highlighted that companies should be able to escape liability if they can demonstrate that they have, in fact, undertaken due diligence as required in the circumstances. However, businesses must not be ignorant, because this is not what society expects from them, but they must actively seek information about their human rights risks and means of prevention. Moreover, as the commentary to Guiding Principle 17 of the UNGPs reports: "[…] business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses[228]". Businesses should ensure that they took all the reasonable steps to avoid human

[225] v. supra, note 215.

[226] L. SMIT, C. BRIGHT, I. PIETROPAOLI, J. HUGHES-JENNETT, P. HOOD, *Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies*, Business and Human Rights Journal, Volume 5, Issue 2, published by Cambridge University Press, July 2020, pp. 261-269.

[227] See more in EUROPEAN COMMISSION, *Sustainable Corporate Governance Initiative, summary report – public consultation*, DIRECTORATE-GENERAL JUSTICE AND CONSUMERS Directorate A, Unit A3: Company law, 26 October 2022 until 8 February 2022.

[228] UNGPs, Commentary to Principle 17, *v. supra*, note 209.

rights impacts undertaking due diligence. Moreover, the solution lies on the disclosure of information. This concept of due diligence as a defense has been considered also by the EU Commission in drafting the proposal for a Corporate Sustainability Due Diligence Directive (hereafter, the EU CSDDD).

According to Rachel Davis, who assisted the draft of the UNGPs side by side with prof. Ruggie, there would be some elements to take into consideration: as an example, how to avoid transforming human rights due diligence into a "tick-box" approach and who should bear the burden to establish or disprove such a due diligence defense[229].

Arguably, some businesses may have an impact on an indigenous minority with their operations, engaging in business activities on land that has traditional significance to the peoples that inhabit the area, and this can give rise to impacts on their right to self-determination.

Companies recognise the advantages of a harmonised EU framework on due diligence, which is also applicable to third-country companies operating in the EU. However, key conditions must be met related to workability, proportionality, legal certainty and level playing field[230]. Due diligence should be recognised as a launching pad, as a positive process which guides companies and helps them on finding solutions without jeopardising their reputation, on the contrary, to preserve the latter. Therefore, international and European initiatives focusing on how to understand the process of due diligence are welcomed by companies, notwithstanding they provide real change and coherent measures according to international standards.

As it was already highlighted, the UNGPs recollect all human rights law provisions, but the document only calls companies to be responsible on their operations, without enforcing any new measure beyond the already existing ones. Nevertheless, in 2014, a resolution drafted by Ecuador and South Africa was adopted by the UN Human Rights Council, which established an open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights whose mandate was to "elaborate an

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[229] Rachel Davis, Beyond Voluntary: What it Means for States to Play an Active Role in Fostering Business Respect for Human Rights (February 2019), available at https://www.shiftproject.org/resources/viewpoints/beyond-voluntary-states-active-role-business-respect-human-rights/ (accessed on 21/12/2022].

[230] BUSINESS EUROPE, *Comments Paper*, 31 May 2020, available at: https://www.confindustria.it/wcm/connect/1f5587ec-41b3-48e7-9375-2200aff5e14f/2022-05+BusinessEurope+Comments+Paper+Corporate+Sustainability+Due+Diligence.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-1f5587ec-41b3-48e7-9375-2200aff5e14f-o4Feoug [accessed on: 13/12/2022].

international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises[231]". After several sessions, the first official draft, the "Zero Draft[232]", of the legally binding instrument on business and human right (which is now under consideration and debate by companies, governments and the civil society) was released in 2018 by Ecuador's Ambassador to the UN acting as Chair Rapporteur of the OEIGWG. On 16 July 2019, the OEIGWG published a Revised Draft[233] of the business and human rights Treaty. The terminology in the proposal perfectly reflects the language of the UNGPs but establishes domestic liability obligations upon States and require them to mandate human rights due diligence by transnational corporations[234]. In 2020, a Second Revised Draft was released and, in 2021, we have the Third Revised Draft[235]. According to Art. 3 concerning the scope of the Treaty: "The Treaty applies to all business activities, domestic and transnational, and covers all internationally recognised human rights and fundamental freedoms binding on the State Parties of the Treaty[236]". However, without going into details, the Third Revised Draft aims at clarifying certain ambiguities compared to the previous ones, but it still fails to enhance access to remedy and reparation.

In December 2019, the European Commission released the European Green Deal (EGD)[237], which is a strategy focused on the green transition, the management of resources in a sustainable way to push economic growth, with the aim to stop greenhouse gases emissions by 2050 and becoming climate neutral. The Green Deal highlights that sustainability should be "further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and

[231] GA, A/HRC/RES/26/9, Human Rights Council, twenty-sixth session, Resolution adopted by the Human Rights Council 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014.

[232] Zero Draft Treaty, 2014.

[233] Revision of the Draft Treaty, 2018.

[234] John Sherman III, *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights, Corporate Responsibility Initiative*, Harvard Kennedy School, Working Paper No. 71, March 2020, p. 24.

[235] OHCHR, OEIGWG CHAIRMANSHIP, *LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES*, Third Revised Draft, 17 August 2021, Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf [accessed on: 20/12/2022].

[236] Third Revised Draft, 2021.

[237] EUROPEAN COMMISSION, COM(2019) 640 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, *The European Green Deal,* Brussels, 11.12.2019, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF [accessed on 18/12/2022].

sustainability aspects[238]". In fact, the Deal fosters companies to offer consumers re-usable and durable products to reduce waste, to be transparent discouraging the implementation of green washing marketing and regulating the disclosure of corporate activities' information.

The Green Deal follows the Agenda 2030 of the UN and envisages policies for green energy supply, the digital transition involving the participation of the whole society and corporate sustainability. A clear goal includes the establishment of a binding EU Regulation concerning climate change[239]. This was adopted in 2021 steering national politics and enhancing an ongoing revision of National Actions Plans, making explicit references to the Paris Agreement, which includes the long-term goal on reducing global warmth, setting a limit of 1,5 °C to tackle climate change.

As a survey demonstrates, the question *"would you be willing to spend more on a product if you could be sure it had been ethically sourced and/or produced?"* was made to over 25,000 consumers across 12 countries (UK, Germany, France, Spain, Italy, USA, Canada, Brazil, Japan, India, Singapore and Australia) to look at how the ethical sourcing of a product impacts consumers' expectations on product's delivery. The results of the survey by OpenText were published on the magazine Forbes on the 5th of October 2021.

[238] *v. supra*, note 238.

[239] O.J.E.U, L 243/1, REGOLAMENTO (UE) 2021/1119 DEL PARLAMENTO EUROPEO E DEL CONSIGLIO del 30 giugno 2021 che istituisce il quadro per il conseguimento della neutralità climatica e che modifica il regolamento (CE) n. 401/2009 e il regolamento (UE) 2018/1999 («Normativa europea sul clima»), Italian version available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32021R1119&from=IT [accessed on 16/12/2022].

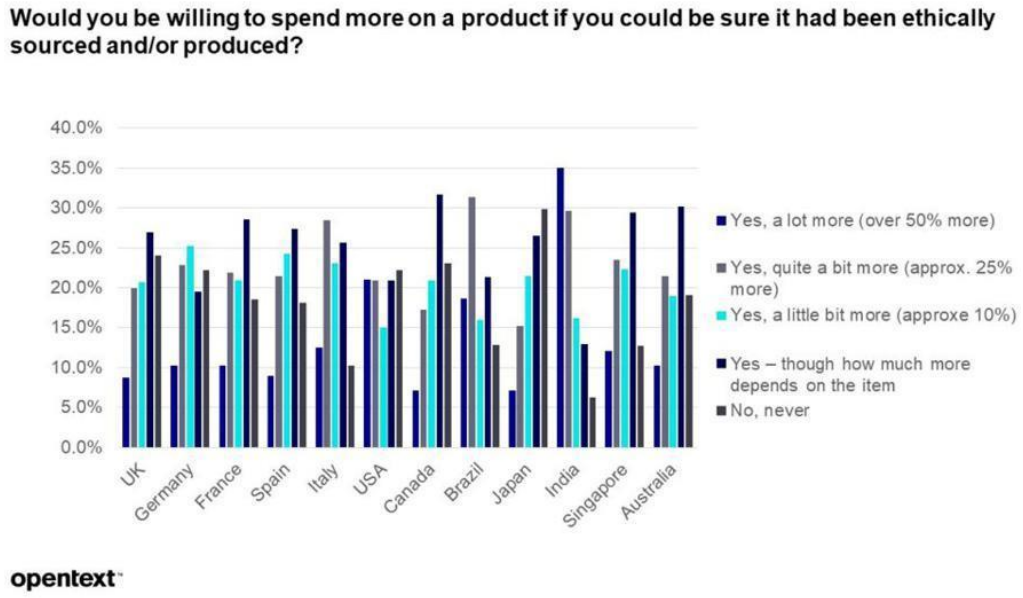

Fig.1[240]

From the picture we can infer that consumers are concerned about the original source of companies' material supply and on the potential impacts on human rights and the environment their choices may present. On the overall, people would be willing to spend something more if they are purchasing ethically, meaning that consumers are ever more looking at human rights and environmental standards. From this survey, it also emerged a shared willingness for binding measures to be introduced by governments to regulate their impacts on society and their transparency through the disclosure of information.

As we have analyzed in the previous chapters, there is a substantial difference among States on the implementation of due diligence legislation. Some laws apply to specific human rights issues, while others are more comprehensive or are different in the form. Mandatory due diligence laws can be distinguished for their purpose: they can include disclosing provision, due diligence provisions and/or liability ones. As an example, the US California Transparency in Supply Chains Act (2010) contains only disclosure provisions and it does not entail neither due diligence nor civil (or criminal) liability. On the other hand, the French Duty of Vigilance Law instead establishes a remediation mechanism and criminal liability in the case of a breach of this law [241].

[240]BANKER, S., *Do consumers care about ethical sourcing?*, Forbes, 5 October 2020, available at: https://www.forbes.com/sites/stevebanker/2021/10/05/do-consumers-care-about-ethical-sourcing/?sh=3491e9ed5f50 [accessed on 12/12/2022].

[241] BUENO, N., *Mandatory human rights due diligence legislation*, University of Zurich, originally published in New York, 2019.

The 23rd of February 2022, the European Commission released a long overdue Directive Proposal with the aim to enclose due diligence and remediation mechanisms. This chapter will thus present the proposal COM/2022/71 background and the practical changes this will bring at the European level, after some clarifications on the instruments used nowadays by corporations to assess their sustainability commitments.

3.2 Policy Commitment, Code of Conduct and Audit

According to the UNGPs Reporting Framework, companies should focus their human rights reporting on "salient human rights issues[242]". The introduction of the report envisages that "Enterprises can affect the human rights of their employees and contract workers, their customers, workers in their supply chains, communities around their operations and end users of their products or services[243]". The concept of salience is classified into an impact assessment according to risks towards people as the very first point, since the stronger is the risk to the people, the greater could be to the business. An impact assessment collects evidence (including evaluation results) based on indicators and must include description of the social, economic and environmental impacts the company presents and an explicit statement if any of these are not considered significant. In fact, impacts can be classified into different levels if a company causes, contributes or is linked to the impact. This is important because "appropriate action will vary according to: whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; the extent of its leverage in addressing the adverse impact[244]". In order to draw an impact assessment for a business enterprise, the impacts can be enlisted as follows: 1) negative impacts, 2) potential impacts, 3) actual impacts, 4) most severe impacts on the social (working conditions, health, human rights), environmental (air emissions, pollution, waste etc.) and economic assessment (affecting trade, investment, consumer prices etc.). The negative relies on the fact that no impact can occur in relation to the activities of that particular business and the focus is placed on the avoidance of harm to human rights. The

[242] SHIFT and MAZARS, UN Guiding Principles Reporting Framework, *Salient Human Rights Issues*, New York: Shift, 2022, available at: https://www.ungpreporting.org/resources/salient-human-rights-issues/ [accessed on 15/12/2022].

[243] REES, C., KARMEL, R. (leaders of the initiative), The Reporting Framework has been developed through the Human Rights Reporting and Assurance Frameworks Initiative (RAFI). RAFI is co-facilitated by Shift and Mazars through an open, global, consultative process involving representatives from over 200 companies all over the world.

[244] UNGPs, Principle 19.

second one indicates those impacts that are likely to occur, while the actual impact indicates those impact that are currently occurring, for which the company has to undertake due diligence. Finally, the most severe impacts are based on how widespread the impact is and how hard it would be to resolve the harm. Companies have to follow specific indicators and update them on progresses.

How can companies communicate to the public their commitments for a sustainable corporate governance system? Companies can do so disclosing fundamental documents and rendering them available to the public upon their own willingness.

As scholars report "non è stato creato, a livello comunitario, nessun tipo di hard law e la soluzione del problema dell'effettività della responsabilità sociale d'impresa viene lasciato alla discrezione delle imprese transnazionali[245]". The most frequently used due diligence actions include contractual clauses, codes of conduct and audits. Corporate codes of conducts are, for instance, soft law documents with ethical standards to which a corporation aims to adhere, introduced by governments and NGOs. However, these are not binding and do not address a specific field.

Moreover, companies can adopt policy commitments aiming as a public statement to communicate stakeholders and shareholders, but also to civil society, how they commit for the respect of human rights. While codes of conduct are internally directed, policy commitments are headed externally but the commitments need to be reflected into internal policies and practices. A policy commitment provides a somewhat constant reference point over time for individuals within and outside the company[246]. Those responsible for developing the human rights policy commitment and processes will need to know which human rights the enterprise is most likely to have an impact on (the salient impacts[247]). For example, a food company is more likely to have the risk of impact on consumer's health, water or land's exploitation. At this point, a company would be benefited by the presence of human rights expertise. Obviously, policy commitments of SMEs are different from those of large companies. The latter in fact would need additional internal human rights policies, while for small enterprises it would be sufficient to set a meeting with the whole staff.

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[245] F. MARRELLA, *Imprese Multinazionali e responsabilità per violazioni dei diritti umani*, in M. NORDIO, V. POSSENTI, Governance Globale e Diritti dell'Uomo, Reggio Emilia, Diabasis, 2007.

[246] BUENO, N., *v. supra*, note 242.

[247] UNITED NATIONS OHCHR, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS, An interpretative guide, New York and Geneva, 2012 available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf

According to Guiding Principle 16:

> "As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
> (a) Is approved at the most senior level of the business enterprise;
> (b) Is informed by relevant internal and/or external expertise […][248]".

Moreover, proactive stakeholder consultation is essential for policy preparation. A good policy development implies openness and participation through the exchange of information.
According to the EU Better Regulation Guidelines: "Stakeholders provide contributions to support evaluations, impact assessments, and the preparation of initiatives and political decisions. It is good practice to plan consultations using a simple, concise strategy that identifies relevant stakeholders and targets them with a range of activities, in order to gather all relevant evidence (data, other information and views)[249]".
Audits is one of the most frequently used operations to work with human rights in the supply chain. Companies make regular audits on suppliers. The Economic Times provides a definition for audits:

> "Audit is the examination or inspection of various books of accounts by an auditor followed by physical checking of inventory to make sure that all departments are following documented system of recording transactions. It is done to ascertain the accuracy of financial statements provided by the organisation[250]".

Audits can be done internally or externally, by employees or head of departments or by external firms and actors. Contractual clauses and codes of conduct, and audits, respectively, were also the top two actions for due diligence in the upstream and downstream supply chain[251].

[248] UNGPs, Principle 16.
[249] EU Better Regulations, v. supra, note 224.
[250] The Economic Times, *What is an 'Audit'*, December, 2022, available at: https://economictimes.indiatimes.com/definition/audit
[251] v. supra, note 215.

3.3 COM/2022/71 final, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence

3.3.1 Background and legal basis

To draw a background on the EU existing measures concerning due diligence obligations it is useful to start with the description of some pieces of legislation in place and then move forward with the initial analysis of the Proposal, mentioning the legal basis, the subject matter and the scope, the meaning of "established business relationships" as a problematic topic and then a first assessment on the alignment between the Directive and the international standards already in place.

The EU Taxonomy Regulation[252] was published on the EU Official Journal in June 2020 and adopted in July 2020 and amends Regulation (EU) 2019/2088. The EU Taxonomy Regulation creates the world's first-ever 'green list', that is a classification system of economic activities contributing to environmental objectives to facilitate sustainable investment and tackle greenwashing. Article 2 provides definitions of key elements of the Regulation, in order to deliver a clear understanding of the content. "Environmentally sustainable investment" means an investment in one or several economic activities that qualify as environmentally sustainable under this Regulation[253]. Article 8 entails obligations at entity level, meaning on large companies to disclose their level of alignment to the taxonomy[254]. This classification of sustainable investments envisages a minimum social safeguard included in Article 18[255] as the explanation for companies on how to be aligned with the international minimum standards. Like the Non-Financial Reporting Directive and the proposal for the Corporate Sustainable Reporting Directive, which will be further analysed in this chapter, the Taxonomy Regulation does not impose substantive duties on companies other than public reporting requirements, and investors can use such information when allocating capital to companies. Articles 5, 6 and 7 and 9 provide the disclosure process a company must follow to ensure transparency and the environmental objectives to achieve, with a substantial contribution to climate change mitigation and adaptation in Articles 10 and 11.

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[252] O.J.E.U., REGULATION (EU) 2020/852 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2020, EU Taxonomy Regulation, 22 June 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R0852&from=EN

[253] Art. 2, (1), *v. supra*, note 253.

[254] PLATFORM ON SUSTAINABLE FINANCE, *Final Report on Social Taxonomy*, February 2022.

[255] Art. 18, REGULATION (EU) 2020/852.

Beyond mandatory reporting, investors pressure to report on human rights performance has grown also by investors themselves. Sustainability topics, including Environmental, Social, and Governance (ESG) factors, are now extremely important to them and account for a huge increase of investment funds that use ESG criteria, which are as well based on the global standard of the UNGPs. The Social factor implies "how well a company manages its risk to people connected with its core business[256]". However, a potential challenge for ESG investing is the under-conceptualization and the lack of well-established human rights standards[257].

Furthermore, the SFDR (Regulation EU 2019/2088) of 2019 lays down sustainability-disclosure obligations for financial advisers and manufacturers of financial products[258]. The SFDR requires financial-market participants to disclose information on the principal adverse impacts (PAIs) of their investment (i.e., environmental and social aspects)[259].

Sustainable investment is the primary objective of today's society. In fact, there is a growing awareness by investors that sustainability issues can hinder the financial performance of a company, putting its reputation at risk, but at the same time there is a pressure from the market, where investment products try to conform to certain sustainability standards.

An important way to direct financial and capital flows to sustainable investment is improving data availability of companies' and financial institutions' disclosure of non-financial information.

The adoption of Directive 2014/95/EU on the disclosure of non-financial and diversity information referred to as the 'Non-financial Reporting Directive[260] (NFRD) set the EU on a clear path towards greater business transparency and accountability on social and environmental issues, since civil society and investors are demanding more information from

[256] RUGGIE, J. G., MIDDLETON, E. K., *Money, Millennials and Human Rights: Sustaining 'Sustainable Investing'* (2019) 10(1) Global Policy 144, available at: https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/CRI69_FINAL.pdf [accessed on 18/12/2022].

[257] v. supra, note 255.

[258] SUSTAINABLE FINANCE DISCLOSURE REGULATION, Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability- related disclosures in the financial services sector, OJ L 317, 9.12.2019.

[259] v. supra, note 259.

[260] NON-FINANCIAL REPORTING DIRECTIVE, Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ L 330, 15.11.2014, p. 1–9). The NFRD is therefore an amendment of the Accounting Directive, i.e., of Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013).

companies about their social and environmental impacts[261]. Therefore, beyond financial information, the news for large companies is the reporting of information on five compulsory areas, namely the environment, social and employee-related matters, human rights, anti-corruption and anti-bribery matters[262]. For instance, concerning environmental matters "undertakings must disclose details of the current and foreseeable impacts of their operations on the environment, health and safety, on the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution[263]."

Sustainable corporate governance has been addressed through reporting requirements on companies with more than 500 employees. Substantially, with the release of Directive 2014/95/EU, Member States gained a common minimum standard for the disclosure of non-financial information, helping also stakeholders to perform quicker analysis on businesses. The NFRD resulted in some positive impacts, but the majority of companies has not finally been responsible for the adverse impacts generated in their value chains and opposed to the disclosure of such information.

This is the reason why the Directive was revised and then superseded with the Commission's proposal for a Corporate Sustainability Reporting Directive (CSRD[264]) in April 2021, while a provisional political agreement has been reached between the Parliament and the Council (with the approval of the COREPER) on the 30th of June 2022, in order to extend the scope of the companies covered (including large companies and SMEs) and, importantly, empowering the Commission to adopt sustainability reporting standards[265]. The CSRD will have a strong impact on how companies report their ESG performance and contributes to the objectives set out into the Green Deal. It is intended to apply in 2024 after transposition by States (for those companies already subject to the NFRD), therefore companies will likely start reporting the information of the 2023 fiscal year.

First, this Directive would add a corporate duty to perform due diligence to identify, prevent and mitigate external harm derived from adverse impacts as well as require the disclosure of

[261] NFRD, Directive 2014/95/EU, available at : https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf

[262] v. supra, note 261.

[263] NFRD, Directive 2014/95/EU, Recital 7.

[264] EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM/2021/189 final).

[265] EUROPEAN COMMISSION, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022, COM/2022/71 final 2022/0051 (COD).

plans and strategies that have to be in line with sustainable economy and the provisions set out in the Paris Agreement. In the second place, the document would cover the last steps of due diligence making reporting more effective (with a higher quality of the information reported) and in line with the EU sustainability reporting standards, introducing an EU audit assurance of the sustainability information[266]. The Directive might be seen as an EU rule governing sustainability reporting, as well as the EU Taxonomy but with a mandatory requirement of reporting. The CSRD serves as the major reporting obligation associated with the CSDDD. The CSRD has now been approved by the European Union Council, the last legislative obstacle after the endorsement from the Parliament, therefore with this approval on 28 November 2022, the CSRD is now officially adopted into EU law and Member States will have to transpose it into their national legal systems in 18 months[267].

However, for the purpose of this dissertation, the EU CSDDD will be analysed.

The Commission had first announced its intention to introduce due diligence legislation on human rights and environmental impacts in April 2020. After some unexpected delay, the European Union legislators felt the need to issue a landmark Directive in 2022 including, finally, mandatory due diligence. To make everything clearer, "the two EU directives outlined are meant to work together and be applied in parallel by corporate entities: the first as a framework for *what* due diligence obligations certain corporations will bear, and the second as a framework for *how* companies will be required to report on these obligations[268]".

3.3.2 Subjects and methodology

On February 23rd, 2022, the European Commission proposed the Corporate Sustainability Due Diligence Directive[269] (hereafter, the CSDDD or *the Directive*) which follows a European Parliament draft law[270] on the same topic and through which the European Union has taken laudable steps to ensure that member states meet their existing obligations under international human rights law. This Directive amends Directive 2019/1937/EU and would introduce an

[266] https://www.levinsources.com/knowledge-centre/insights/eu-csdd-eu-csrd-mining

[267] KELLY, M., European Council approves CSRD: Sustainability reporting requirements overcome final hurdle, MJ HUDSON, December 2022, available at: https://mjhudson.com/european-council-approves-csrd/ [accessed on 18/12/2022].

[268] *v. supra*, note 268.

[269] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, *v. supra, note* 266.

[270] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL), https://www.europarl.europa.eu/doceo/document/TA-9- 2021-0073_EN.html (accessed 20 December 2022).

environmental and human rights due diligence duty for financial and non-financial companies within the scope of the directive as well as a civil liability for non-compliance with the due diligence process. The choice of the legislative act of the directive is given to the presence of 27 Member States in the EU with different legal systems. A directive sets out a goal that all the Member States are required to achieve by devising their own laws and means[271]. The proposal will follow the ordinary legislative procedure.

Both proposals of the Commission reference the UNGPs and the OECD Guidelines as authoritative standards and due diligence frameworks, but further in the following paragraphs it will be easier to understand if the Directive is actually aligned with these standards. The CSDDD finds its legal basis in Article 50 (which is *lex specialis* for corporate governance measures adopted in order to obtain freedom of establishment[272]) and Article 114 of the Treaty on the Functioning of the European Union (TFEU[273]), which contains provisions on regulations that have as their object the internal market. Article 50(1) TFEU and in particular Article 50(2)(g) TFEU provide for the EU competence to act in order to attain freedom of establishment as regards a particular activity[274], in particular:

> "by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or forms within the meaning of the second paragraph of Article 54 TFEU with a view to making such safeguards equivalent throughout the Union[275]".

Art. 1 lays down the subject matter of the Directive:

> "Obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and liability for violations of the obligations mentioned above.

[271] EUROPEAN UNION Official Website, *Types of legislation*, available at: https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en [accessed on 20/12/2022].
[272] EU COMMISSION, *v. supra*, note 270.
[273] O.J.E.U., CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU), Brussels, 26th October 2012.
[274] *v. supra*, note 274.
[275] TFEU, Art. 50 (2)(g).

> The nature of business relationships as established shall be reassessed periodically, and at least every 12 months[276]".

As we have previously discussed, due diligence has been applied into the domestic legal system of Member States through different kinds of plans at different levels. For instance, the French *Loi relative au devoir de vigilance* (Duty of Vigilance Law) implies legal liability for the violation of an obligation, while the German Supply Chain Act does not engage liability, but only a disclosure provision. For this reason, the playing field among EU Member States needs to be levelled.

The proposed Directive aims at establishing a horizontal framework (applicable to all Member states) to foster the contribution of businesses operating in the single market towards the achievement of the Union's transition to a climate-neutral and green economy[277].

The preamble of the proposal contains all the information regarding legal basis, the disclosure matters and the scope of the Directive. Then the introduction is composed of 71 recitals, which are non-binding by nature but offer interpretative guidance.

In the first instance, there is a disclaimer on subsidiarity, explaining why the EU is legislating in this field. As a matter of facts, Member States' legislation alone has proved to be insufficient with regards to diverging requirements (which leads to an uneven playing field) and specific transboundary problems, such as pollution or climate change that often present cross-border effects. Usually, many companies operating EU-wide or globally, have their own value chain expanded also to third countries.

Secondly, the disclaimer goes on proportionality, assuring that the burden on companies to comply with this Directive has been adapted to the size, the resources available and the risk profile[278]. Plus, the text also includes a 1-year *'vacatio legis'* period between the end of the transposition period and the application of the rules of the proposed Directive (Article 30)[279].

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[276] EU COMMISSION, Art. 1 (1), *v. supra,* note 266, p. 46.

[277] PERMANENT REPRESENTATIVES COMMITTEE, No. Cion doc.: 6533/22, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022/0051(COD), Brussels, 30 November 2022, available at: https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf [accessed on 21/12/2022].

[278] EU COMMISSION, v. supra, note 266.

[279] EU COMMISSION, CSDDD, Art. 30.

3.3.3 Scope of the COM/2022/71 final

All enterprises have a responsibility to respect human rights. However, a large enterprise will have more employees, typically undertake more activities and be engaged in more relationships than a small one and present an increased risk of adverse impact on human rights[280].

The scope of the Directive can be divided in personal and material scope.

As regards the personal scope of the due diligence obligations, SMEs and micro companies that account for 99% of all companies in the Union are excluded from the due diligence duty, which then results in only the 1% of large companies falling under the scope[281]. The small and medium size enterprises would be exposed to too many costs, notwithstanding they are exposed through business relationships, as companies are required to identify adverse impacts also on their suppliers.

Article 2 of the CSDDD establishes the criteria to determine the companies that would have to perform due diligence obligations. The Directive's criteria refer to the number of companies' employees and the net worldwide turnover for EU but also non-EU companies. Furthermore, the criteria stretch on high-impact sectors that are covered by existing sectoral OECD Guidelines, except for the financial sector.

According to Art. 2 (a), the Directive applies to companies with "more than 500 employees on average and a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared[282]". The second group, for those companies that did not reach the first threshold, covers companies with more than 250 employees and a net turnover of EUR 40 million, provided that at least 50% of this net turnover was generated in one or more of the following sectors: manufacturing of textiles and clothing, manufacturing of food products, agriculture, forestry and fishery and also the wholesale trade of those products, the extraction of mineral resources regardless whether they are extracted and the fabrication of metal products[283].

Moreover, the scope of Article 2 applies to third-EU country which generate a turnover of more than EUR 150 million in the European Union or generate a turnover of EUR 40 million (but not more than 150 million) and at least 50% of the net is generated in one or more sectors listed

[280] https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf, p. 19.
[281] EU COMMISSION, CSDDD, *v. supra*, note 266.
[282] EU COMMISSION, Art. 2(a), v. supra, note 266.
[283] See more at Art. 2(b), (i), (ii), (iii).

before. Eventually, the Member State competent is the one in which the company has its registered office[284].

The material scope of the Directive covers human rights and environmental adverse impacts stemming from international Conventions and envisages corporate due diligence obligations. Article 3 suggests a range of definitions essential for the comprehension of the document, while Art. 4 provides a list of actions on human rights and environmental due diligence that Member States should ensure companies to comply with:

> "1. Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 ('due diligence') by carrying out the following actions:
> (a) integrating due diligence into their policies in accordance with Article 5;
> (b) identifying actual or potential adverse impacts in accordance with Article 6;
> (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8;
> (d) establishing and maintaining a complaints procedure in accordance with Article 9;
> (e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10;
> (f) publicly communicating on due diligence in accordance with Article 11.[285]"

Those actions are demonstrated pursuant to Articles 5-11 as the essence of the due diligence practice envisaged in the Directive.

3.3.4 Due Diligence in 'established business relationship'

This Directive will apply through civil liability and sanctions taking different approaches. In fact, the Directive introduces responsibility to provide access to remedy when a company is merely "linked to" adverse impacts, while in other cases it entails civil liability. Art. 20 establishes rules on sanctions related to the breach of the provisions of this Directive, that Member States should lay down proportionately (based on the company's turnover)[286].

[284] EU COMMISSION, Art. 2(c), v supra, note 266.
[285] Art. 4(1), *v. supra*, note 266,
[286] Art. 20, *v. supra*, note 266.

According to Art. 22 of the Directive, civil liability will be triggered if the company fails to comply with its due diligence obligations (under Articles 7 and 8), which appear to be limited to the company's own operations, those of its subsidiaries (a 'controlled undertaking[287]') and the "value chain operations carried out by entities with whom the company has an *established business relationship*[288]". The terminology "established business relationship" comes without an interpretation yet in international standards, presenting the closest definition possible as the one of "business relationship", while the term "established" brings a veil of ambiguity. According to the OHCHR:

> "Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures[289]".

"Established business relationship" departs from the UNGPs terminology of crucial and non-crucial business relationships, and there is also a reference of the term into the French *Loi de Vigilance*. It is difficult to fully understand this terminology: the Commission proposed that the term "established" covers both direct and indirect business relationships (it refers to contractual and non-contractual) which, to be established, imply a notion of intensity or duration, so it is expected that business reassessed them periodically (at least every 12 months), while these relationships must not represent an "ancillary part of the value chain"[290]. This ambiguity about whether a business relationship is established or not conflates with the real severity of the risk that may be obscured because judges would then focus on the level of intensity, or if a business relation is long-lasting, in order to know how to qualify it. On the other hand, companies would try to bypass this requirement 'restructuring' their business relationships into, for instance, less intense ones. Nevertheless, the Directive clarifies that the entities with whom the company has an established business relationship cover both upstream and downstream operations of the

[287] PATZ, C., The EU's draft corporate sustainability due diligence directive, a first assessment, Business and Human Rights Journal.
[288] *v. supra*, note 266, Art. 1(1)(a).
[289] UNITED NATIONS, OHCHR, *The Corporate Responsibility to Respect Human Rights, An interpretative guide*, New York and Geneva, 2012, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf
[290] *v. supra*, note 266.

value chain, which represents a significant improvement[291]. Therefore, Art. 8 in general establishes the obligation for Member States to ensure that companies take appropriate measures to bring to an end actual adverse impacts pursuant to Article 6[292].

The Directive further explains that, as regards established business relationships, where adverse impacts cannot be brought to an end, companies should minimize the extent of such impacts or, as Art. 8(6) envisages:

a) "Temporarily suspend commercial relationships with the partner in question, while pursuing efforts to bring to an end or minimize the extent of the adverse impact, or
b) Terminate the business relationship with respect to the activities concerned, if the adverse impact is considered severe[293]."

Furthermore, in drafting the proposal, the European Commission has been seeking for the views of a broad range of stakeholders, engaging in public consultations in order to collect data on the initiative for a law on sustainable corporate governance[294].

3.4 Is the proposed Directive consistent with global international standards?

As the world's largest trading bloc, the EU has a unique opportunity to promote more sustainable and responsible business practices in Europe and beyond, especially given the prestige of its internal market worldwide. The Union is founded on the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights as enshrined in the EU Charter of Fundamental Rights[295].

According to lawyers and scholars, the purpose of the Directive is aligned with international standards since the document also makes reference to the UNGPs and the OECD Guidelines. However, there is still a percentage of ambiguity and doubt, which creates uncertainty for companies under the scope of the Directive. Considering that the UNGPs form the global minimum standard for RBC, it is extremely important that the CSDDD does not deviate too

[291] *v. supra*, note 288.
[292] v. supra, note 266, p. 24.
[293] *v. supra*, note 266, Art. 8(6).
[294] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en
[295] O. J. E. C., CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, (2000/C 364/01), C 364/3, 18th December 2000.

drastically from it. In the first instance, the Directive fails to report the effective dynamic process brought by due diligence, limiting its engagement at specific actions to take "where relevant"[296].

The most evident deviance concerns terminology and some definitions. Under the UNGPs, an "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. Under the proposed directive, on the other hand, adverse impacts refer to "violations" of this restricted list of human rights of "protected persons", potentially excluding numerous relevant business-related human rights harms[297]. As a consequence, there is a misleading use of the term "violation" of human rights.

> "Given that States, not companies, are the primary bearers of obligations under the listed conventions, this could be taken to imply that a "violation" would require some breach by a State actor. The lack of clarity on this important point is concerning. If some violation of human rights by a State actor is indeed necessary to establish the presence of an 'adverse human rights impact,' then many adverse impacts that would be detected and analysed under a UNGPs-compliant process would seem to fall outside the scope of companies' human rights due diligence obligations under this proposed directive[298]".

Furthermore, Article 5 of the CSDDD conflates the UNGPs Policy Commitment requirement with a Due Diligence Policy requirement[299]. The due diligence policy shall contain: "a) a description of the company's approach, including in the long term, to due diligence; b) a code of conduct describing rules and principles to be followed by the company's employees and subsidiaries; c) a description of the process put in place to implement due diligence[300]". The policy must also be updated annually. The Directive misses the communication of the results of due diligence to impacted stakeholders (at minimum), as well as it fails to provide an effective framework for stakeholder consultation as the UNGPs require. Moreover, the personal

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[296] PATZ, C., *v. supra,* note 288.

[297] UNITED NATIONS, OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 23 May 2022.

[298] *v. supra*, note 289.

[299] Companies may *cause*, *contribute to* or be *linked to* adverse impacts in their operations or value chain. SKADEGAARD THORSEN, S., Comments on the EU Commission proposal for a Corporate Sustainability Due Diligence Directive (CSDDD), Global CSR, Submitted 24. May 2022.

[300] *v. supra*, note 266, Art. 5(1).

and material scopes of the Directive result too limited. The present discussion will be further addressed in the next chapter.

3.5 Conclusions

In conclusion to this 3rd Chapter, the above-mentioned background of the Commission Proposal for a Corporate Sustainability Due Diligence Directive (COM/2022/71 final) rests on the ever-growing necessity for new binding legislation in the European Union, advocated not only by civil society, institutions and NGOs, but also by companies and multinationals themselves, exhausted of the legislative fragmentation as the first survey shows. As evidence, this legislative fragmentation has brought uncertainty towards the obligations States are asked to comply with, firstly with reference to a sort of "linguistic confusion" of definitions included into the EU legislative pieces: Article 2 of the March 2021 European Parliament resolution (2020/2129(INL)) conflates responsibility of companies with the duty of States to protect human rights, deviating from the enunciations given by the UNGPs:

> "[…] It is the responsibility of states and governments to protect human rights and the environment, and this responsibility should not be transferred to private actors[301]".

This III Chapter is explicative in giving that mandatory due diligence ought to be taken as a means to argue for enhanced and continuous human rights protection and not as a threat or a too ambitious standards for companies. In addition, it definitely sets the need for legal clarity.
The next Chapter proposes a further technical-juridical analysis of the upcoming Directive and the challenges it will drag, by considering the comments recently made by the EU Council and some of its treacherous parts, such as the problem of extraterritoriality, concerning also non-EU companies in critical sectors (mining as an example) and labour law.
Sustainability in corporate governance encompasses encouraging businesses to consider environmental (including climate, biodiversity), social, human and economic impact in their business decisions, and to focus on long-term sustainable value creation rather than short-term financial value[302].

[301] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)); Council Conclusions on Human Rights and Decent Work in Global Supply Chains of 1 December 2020 (13512/20).
[302] v. supra, note 288.

4. THE COM/2022/71 final

4.1 Insights on the Commission's proposal – 4.2 Comments by the Parliament and the Council – 4.3 Extraterritoriality and third countries involvement – 4.4 Conclusions

4.1 Insights on the Commission's proposal

The III Chapter was supposed to analyse the drafting of the EU CSDDD and the comprehensive study on due diligence requirements throughout the supply chain that preceded its endorsement, plus the legislative background of the proposal, from the disclosure of non-financial information with the NFRD to the reporting framework of the CSRD. It is important to underline the feedback the Commission received by businesses and NGOs on the need to enforce hard law on the matter. As it was already introduced, the terminology provided in the Directive has left some doubts on its way. Moreover, most of the time the due diligence practice is conflated with corporate governance, even though the two terms present a clearly different meaning. In fact, the objective of undertaking a due diligence practice is included into the corporate governance of a company.

There is a clear distinction between due diligence (the company's responsibility is undertaken externally towards stakeholders) and corporate governance (set of rules from the Board of Directors to the internal structure of the company). In the context of the OECD Guidelines 'due diligence' is understood as the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed[303]. On the other hand, corporate governance is the system of rules that runs a company and through which the company can implement a human rights due diligence process[304].

In this context of legislation development, it should be underlined that the UNGPs represent a point of departure: being a soft law instrument, it may result difficult to expect definitive structural changes inside companies. Nevertheless, as any soft law instrument, the very first objective of the UNGPs is to create a transitional stage in the development of norms with legal force. The current chapter considers the global standards previously analysed to assess the alignment of the Directive.

This fourth chapter also focuses on a study of the proposal with the recent contribution of the amendments and draft opinions presented by the Parliament and the Council. The Parliament

[303] OECD Guidelines, *v. supra*, note 186.

[304] *v. supra*, note 186.

presented the first Draft Opinion on the 12th of October (EU Parliament's Draft Opinion[305]) and the Council embraced its position on November the 30th, 2022 (Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937[306]). At first, the EU Parliament had already endorsed mandatory corporate due diligence accountability legislation in March 2021[307] as a first springboard for the EC Initiative, where the Commission took information to draft its proposal. Lately, the EU Parliament's Committee on Legal Affairs has adopted a Draft Report on the 7th November 2022[308] and further amendments have been delivered on the 6th of December 2022. However, in this dissertation only some main points of the present Directive have been considered relevant for an analysis.

Initially, the Commission established a window period for the general public (which includes business associations, NGOs and companies) from March 28th until May 23rd, 2022, to receive feedback on the proposal as a whole following several consultation activities with stakeholders on the roadmap for impact assessments, that have taken place before the publication. Obviously, it is equally clear that effective legislation in this area is best drafted in close consultation with the business world and the stakeholder community engaged. The overarching majority of feedbacks comes from Belgium followed by Germany and France, according to the statistics[309].

The present paragraph addresses a few deviations concerning the alignment of the proposal with the UNGPs and for this reason the Directive received a cascade of criticism by companies, associations and NGOs. The paragraph also recalls Chapter III and adds insights on the consequences the application of such provisions will bring. According to Allianz Bank

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[305] EUROPEAN PARLIAMENT, DRAFT OPINION of the Committee on Development for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), 12th October 2022.

[306] PERMANENT REPRESENTATIVE COMMITTEE to the COUNCIL, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, File 2022/0051(COD), No. Cion doc. 6533/22, Brussels, 2022.

[307] EUROPEAN PARLIAMENT resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability 2020/2129(INL) Annex.

[308] EUROPEAN PARLIAMENT, Committee on Legal Affairs, WOLTERS, L., Draft Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), Strasbourg, 7th November 2022.

[309] EUROPEAN COMMISSION official website, *Sustainable Corporate Governance, Feedback and statistics: inception impact assessment*, Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback_en?p_id=8270916 [accessed on: 17/02/2022].

(Germany) "it is of the utmost importance that the CSDDD is fully aligned and compatible with all relevant EU legislations[310]". On the overall, with reference to the trend in the submission for the Commission proposal, companies highlighted the need for clarity especially on legal liability provisions that are the riskiest ones and claimed that a very important point is represented by the harmonization of EU legislation among Member States.

According to the analysis provided so far, the Directive aims at improving due diligence practices in order to better integrate sustainability risk management in corporate governance. The instruments that must be put in place are heading towards corporate accountability, a harmonized due diligence framework complementing already existing measures and legal certainty for businesses and stakeholders. However, many specific provisions left a veil of uncertainty and a bit of general disappointment, first of all for the failed alignment with international standards.

4.1.1 Scope too limited

In the first instance, the basic assumption of the UNGPs is that all business enterprises should respect human rights regardless of their size or sector of operation since all businesses are at risk of causing adverse impacts on human rights. Starting from this point, the proposal pursues a different path limiting the material and personal scope of the UNGPs, resulting in an extremely narrow cluster of companies covered and narrower criteria for the impacts addressed. Under Article 2 of the upcoming Directive, companies are divided in two groups: the first one covering companies with more than 500 employees and a net turnover of above 150 million euros and the second one addressing companies between 250-500 employees and a net turnover of more than 40 million euros and which operate in one or more high-impact sectors. The UNGPs underline that the purpose of human rights due diligence is to ensure human rights risk management by business enterprises regardless to their size, sector, operational context, ownership and structure, because all companies have a responsibility to respect human rights[311] but in a proportionate way. In fact, the exercise of due diligence in the UNGPs bears in mind the application of proportionality, where SMEs are not obliged to undertake due diligence using the same measures a multinational would implement[312]. Article 2(3) also considers temporary

[310] v. supra, note 310.

[311] OHCHR, Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 23 May 2022.

[312] HOLLY G., LYSGAARD A., et al., *Legislating for impact analysis of the proposed EU Corporate Sustainability Due Diligence Directive*, The Danish Institute for Human Rights, Copenhagen K, Denmark, March 2022.

workers as employees, which could be misleading and might lead to a situation where a company is covered or not covered by the scope of the Directive only during some months.

Eventually, a selection in terms of numbers will cover the 1% of European and third-country companies operating in the single market since the 99% of companies is composed by SMEs (including micro-companies), amounting for 13,000 EU and 4,000 non-EU companies. As a result, the proposal might discourage SMEs to undertake human rights due diligence; it is doubtful whether the Directive would practically engage SMEs while only addressing large companies. In fact, the proposal perceives large companies to have sufficient resources to comply with the provisions and the idea is that they will bring along smaller companies in their business relationships[313]. However, according to the Danish Institute for Human Rights, "the proposal should ensure sufficient incentives to larger companies to engage with SMEs partners[314]".

The proposal should also be better aligned with international standards and other EU regulations in place (e.g., the CSRD) on human rights. Not only the proposal is not fully aligned with the standards, nor with the 48 human rights included in the International Bill of Human Rights at minimum, but it also conflates the specific range of the single rights, e.g., the right to non-discrimination is rather replaced by "unequal treatment in employment", limiting the recognition of the right to non-discrimination only at the employment level, without considering its relevance, for example, on consumers[315] and external stakeholders.

It is even more difficult for small and medium-sized enterprises to bear the costs of conducting impact assessments: in fact, they are often overwhelmed by the complexity of the legislative reality in the area of sustainability. The present Directive fails to make it feasible for them. Perhaps, SMEs risk to be unable to perceive the importance of due diligence measures if the legislative guidance is not clear in its details, specifying what companies are supposed to do.

The Commission presented the due diligence initiative to the Regulatory Scrutiny Board twice and both times received a negative opinion back. The Scrutiny Board rested on the assumption

[313] v. supra, note 307.

[314] v. supra, note 313.

[315] EUROPEAN COMMISSION, ANNEX to the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, Brussels, 23rd February 2022.

that the problem description was still vague and companies needed a clear guidance in order to undertake the right path[316].

4.1.1.1 High-impact sectors

According to the Directive, the selection of companies based on size or sector is necessary to regularly conduct human rights due diligence efficiently and the designation of certain high-impact sectors includes those sectors covered by the OECD Guidelines (textile and leather manufacture, clothing, agriculture and forestry, fishery, extractives). However, the financial sector remains excluded from this category despite the OECD Guidelines address it, so banks are not supposed to undertake due diligence or do not risk to have adverse impacts on human rights. Moreover, the scope of due diligence in the so-called high-impact sectors is also complicated by a derogation provided in Article 6(2) from paragraph 1, Article 2(1), point (b), and Article 2(2)(b), where companies are required to "identify actual and potential severe adverse impacts relevant to the respective sector[317]" they work into. Severe adverse impacts are especially detected in the mining and garment sectors, for which the OECD Sector Due Diligence Guidance has provided a listof serious abuses:

This provision assumes a punitive approach directed to specific sectors and it is likely to create difficulties in practice, especially in relation to goods and services[318]. Where companies operate in such high-impact sectors due diligence applies 2 years after the end of the transposition period of the Directive.

Global CSR, a leading Corporate Social Responsibility consultancy firm in Denmark, notes that the selection of such high-impact sectors reflects considerations of environmental impacts rather than social impacts and excludes some crucial sectors from the list, e.g., the pharmaceutical, security and legal sectors[319]. International standards definitely state that all human rights impacts should be identified, regardless of severity, and only at that a company should assess which impacts need to be tackled with priority, therefore which impacts has to be considered *severe*.

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[316] EU COMMISSION STAFF WORKING DOCUMENT, Follow-up to the second opinion of the Regulatory Scrutiny Board Accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0039&from=EN [accessed on: 18/01/2022].

[317] COM/2022/71 final, Art. 6(2).

[318] OHCHR, v. supra, note 312.

[319] Global CSR, SKADEGAARD THORSEN, S. v. supra, note 190.

4.1.1.2 Supply chain management

Article 3(g) establishes that value chain represents:

> "Activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company[320]".

For the purpose of this Directive, businesses operating in the single market are required to respect human rights and environmental rights in their own operations, subsidiaries and through their upstream and downstream established direct or indirect business relationships in their value chains, by identifying, preventing, mitigating and accounting for their adverse impacts[321]; they should have adequate corporate governance to put measures in place and bring to an end these adverse impacts.

This Directive is supposed to complement existing sectoral legislation already in place, such as the so-called Conflict Minerals Regulation[322] which requires companies to undertake due diligence on their value chains and it is applied to four specific minerals and metals. However, it is certainly complicated for companies to face the difficulties arisen from a deficiency of legal clarity on due diligence obligations, the costs to bear, the complexity of value chains and market pressure[323].

As reported by some comments delivered to the Commission after the publication of the proposal, the definition of "value chain" should be revaluated due to the difficulties for companies to undertake due diligence on the whole value chain, but, as the UNGPs stipulates, it may be reasonable to identify the general areas where the risk of adverse impacts is most significant and prioritize these areas for the practice of human rights due diligence[324].

In fact, the UNGPs require that all companies engage with identified *severe* adverse impacts anywhere in their value chain, while the engagement with *potential* impacts is relatively rare

[320] See more, COM/2022/71 final, Art. 3(g) regarding financial companies.
[321] COM/2022/71 final, p. 4.
[322] Conflict Minerals Regulation
[323] COM/2022/71 final, p. 6.
[324] OHCHR, v. supra, note 312.

since the company's business relationships are required to implement the UNGPs as well and communicate how they manage the impacts[325].

Furthermore, in their public comments appointed to the Commission, companies such as AstraZeneca highlighted the difficulties in engaging with indirect suppliers in regions where data availability is hampered and asked for sufficient time to "ensure compliance, training and resources" for these stakeholders and associated value chains[326].

The EU Parliament's Draft Opinion delivered to the Committee on Legal Affairs by the Committee on Development envisaged the mapping of companies' value chains to efficiently monitor business partner's behaviours[327] and enhance accountability. The provision has been subsequently edited requiring the "mapping of individual higher-risk operations, subsidiaries and business relationships which should be prioritised[328]". Nevertheless, in the last resort of amendments by the Committee, the approach has been finally abandoned due to the major waste of resources that would derive from such practice, that is to say, mapping the value chain is a poorly pragmatic undertaking and the excessive effort placed upon corporations would represent a threat to economic sustainability of SMEs forming part of the value chain. Moreover, as we have already seen, the UNGPs claim that companies should know their impacts and show how they manage them ("knowing and showing" approach). In fact, the document does not require at any time that companies disclose and confront the identity of suppliers and consumers, making totally "transparent" value chain instead of ensure transparency, especially in the case of large companies with a value chain disseminated all over the world.

4.1.1.3 Established Business Relationships

Further in Article 3, the term "established business relationships" has raised many concerns among businesses and NGOs. In the proposal, this is defined as a "business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration[329]". According to Article 3, "the relationship is established with a contractor, subcontractor or any other legal entity ('partner'):

[325] As it was previously mentioned the UNGPs apply to all companies regardless of size, sector and operations.
[326] AstraZeneca, comment to the Commission, official website, v. supra, note 7.
[327] EU PARLIAMENT Draft Report, v. supra, note 306.
[328] EU PARLIAMENT Draft Report, v. supra, note 306.
[329] COM/2022/71 final, Art. 3(f).

i) With whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or

ii) That performs business operations related to the products or services of the company for or on behalf of the company[330]".

International standards do not provide such a definition. In fact, the common practice should require companies to conduct a risk-based approach on the behalf of the severity of the risk rather than the closeness of the business relationships. In fact, in those cases it will be difficult to understand how far the due diligence duty extends and, what's more, to avoid overlooking severe risks on human rights. Companies may be incentivized to terminate certain business relationships due to the lack of clarity in the definition of the latter and because of the effort required by the company to identify and address actual and potential adverse impacts in those business relationships. Indeed, the Directive refers to business relationships as direct and indirect without eventually distinguish the nature of the two relationships. Moreover, Recital (20) reports that:

> "The nature of business relationships as 'established' should be reassessed periodically, and at least every 12 months. If the direct business relationship of a company is established, then all linked indirect business relationships should also be considered as established regarding that company[331]".

This last definition is rather doubtful when it claims that, once a company has identified one of its suppliers as an established relationship, then all linked indirect business relationships are to be considered as established. This last part risks to become confusing when civil liability is enforced: the responsibility of companies to assess and prevent adverse impacts even on indirect business relationships does not result clear enough to rest easy. Moreover, there is no support or guidelines on how a company has to effectively carry out due diligence on those business relationships, but the Proposal only suggests exercising leverage over those relationships in order to bring to an end adverse impact.

[330] COM/2022/71 final, Art. 3(e).
[331] COM/2022/71 final, Recital (20), p. 33.

4.1.2 Conditions for third-country companies (and fragmentation)

The proposal presents a strong external dimension. An ever-growing number of non-EU companies (companies domiciled outside the Union) operates in the EU market and global value chains transcend the frontiers of Member States and vice versa. Companies which have a direct link with the EU market are covered by the scope of the Directive, in accordance with the thresholds established in Article 2.

Existing national rules create indirect effects with diverging due diligence requirements. The proposed act is supposed to prevent and remove such obstacles to free movement and distortions of competition by harmonising due diligence requirements for companies and, therefore, level the playing field[332].

> "Harmonised conditions would be beneficial for cross-border establishment including company operations and also investments, since it would facilitate comparison of corporate sustainability requirements and make engagement easier and thus less costly[333]".

However, the current proposal fails to provide a level-playing field for third countries operating in the EU single market. In the first instance, the thresholds for non-EU companies are disadvantageous compared to those for EU companies. In fact, non-EU companies' net turnover of EUR 150 million criteria applies inside the EU market, while for EU companies the same net turnover threshold applies worldwide. Moreover, the instrument of the Directive per se requires States to ratify such rules and at the same time to choose the means for implementing it, which results in a risk of different and uneven national implementations across Member States legal systems and, as a consequence, this will not level the playing field.

The challenge arises when companies have suppliers in third countries (whereas the company has an established business relationship) that reveal weak human rights protection and neglect social, labour and environmental rights. In fact, third countries that are expected to be the most impacted include the main EU trading partners, most of the time these are countries where sustainability standards are lower[334].

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[332] COM/2022/71 final, p. 11.

[333] COM/2022/71 final, p. 12.

[334] EUROPEAN PARLIAMENT, Corporate sustainability due diligence, Initial appraisal for an impact assessment, October 2022, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/734677/EPRS_BRI(2022)734677_EN.pdf

4.1.3 Stakeholder engagement

As due diligence is an ongoing and proactive process, the meaningful dialogue between individuals and companies is the most important means to achieve effective human rights due diligence.

Stakeholder engagement is, first of all, an expectation of responsible business conduct. The OECD Guidelines set out that governments have to provide a National Contact Point of references for enterprises and for stakeholders. Meaningful stakeholder engagement refers to ongoing engagement with stakeholders that is two-way, conducted in good faith and responsive[335]. The development of CSR has historically been related to the public image of the company and as a useful tool for directors to avoid risks and maximize their profits, hence, to keep the company's reputation safe. The directors' approach has consequently shifted its focus from a "shareholder approach" to a "stakeholder approach" and, with the adoption of the UNGPs, the stakeholder approach took a human rights perspective.

Moreover, the development of the UNGPs was couched on "discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities"[336]. Proactive and meaningful stakeholder consultation is a key element to understand the views coming from external sources and related to one company's adverse impacts. This is a fundamental practice in human rights due diligence. Articles 7 and 8 of the proposal provide, due to the complexity of the prevention of an impact or the difficulties to bring it to an end, companies are required to develop a "corrective action plan". Beyond the ambiguities floating around the nature of the action plan, the development of the latter should be engaged with stakeholders' consultation "where relevant[337]". Therefore, as the European Coalition for Corporate Justice[338] argue in their paper, stakeholders' engagement should be a general rule instead of a sporadic practice. In addition, stakeholders' engagement should be part of "every step of the due diligence process[339]" while there is no mention of stakeholder consultation in Article 10 for example, concerning the monitoring of the measures taken to address the adverse impacts. It completely deviates from Guiding Principle 20 that expressly

[335] OECD, Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector, Draft for comment, April 2005, available at: https://www.oecd.org/daf/inv/mne/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf [accessed on: 10/01/2022].

[336] UNGPs, Introduction, para. 10.

[337] COM/2022/71, Arts. 7(a), 8(b).

[338] EUROPEAN COALITION FOR CORPORATE JUSTICE REPORT, European Commission Proposal for a directive on Corporate Sustainability Due Diligence, a comprehensive analysis, April 2022.

[339] ECCJ REPORT, *v. supra*, note 339.

calls for companies to draw on feedback from affected stakeholders in order to better track the effectiveness of their responses[340].

Eventually, even though under international standards the company is responsible to identify adverse impacts and to undertake stakeholder consultation, the Directive results to be inefficient and this risks to create a slow uptake.

4.1.4 Network of Supervisory Authorities

Article 17 sets out a supervisory and investigative function on corporations. The administrative supervision is required as one of the principal instruments to ensure compliance by companies within the due diligence legal framework and it is tasked to establish a grievance mechanism. Here, "the supervisory authority designated by each Member State shall be that of the Member State in which the company has its registered office[341]" or, for the cases pursuant to Article 2(2), one of the companies' branches.

These Supervisory Authorities are independent, must guarantee transparency and, as a result, they manage an amount of power. This power is translated in the possibility to request information and carry out investigations related to compliance[342], establish the cessation of infringements and the access to remedy, impose pecuniary sanctions based on turnover[343] while adopting measures to prevent the occurrence of the risk of severe harm, but also grants a company an appropriate period of time to take action[344]. According to Article 18(3), inspections shall be conducted with prior warning to the company. However, if the prior notification hinders the effectiveness of the inspection, it shall not be communicated[345]. A Member State Supervisory Authority that wishes to start an investigation in another Member State shall request assistance from the supervisory authority of that Member State.

The interesting point of this provision is that the mechanism welcomes any concern submitted by any legal person in the community and the system is supported by a European Network of Supervisory Authorities. In this case, the concerted action embodied by a network of authorities represents a way to tackle fragmentation among different legislative systems and the means to strengthen a coordinated European approach. According to Article 19:

[340] UNGP 20, p. 22.
[341] Article 17(1), COM/2022/71.
[342] Article 18(1), COM/2022/71.
[343] Article 18(5)(b) and Article 20.
[344] Article 18(4).
[345] Article 18(3).

> "Natural and legal persons are entitled to submit substantiated concerns to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive ('substantiated concerns').[346]"

However, the situation may worsen when not only stakeholders but even all natural legal persons could access the complaints procedure and hold directors accountable for the company's adverse impacts enlisted in the proposal. Beyond the due diligence duty on companies, the duty of care placed upon directors (Article 26) makes them liable for damages under Article 22 and it creates a context of constant monitoring[347]. The effectiveness criteria set out in Guiding Principle 31, which provides non-judicial mechanisms for "substantiated concerns" relevant to business respect for human rights is not particularly aligned[348].

4.1.5 Corporate civil liability

As long as voluntary actions or financial sanctions do not provide access to remedy for victims of human rights abuses, civil liability for harm is the only possible solution. There exist many distortions on civil liability in supply chains that differ among Member States. The Directive proposal does not mention a common jurisdictional approach, therefore in the current European regime diverging national laws will inevitably create fragmentation.

For instance, civil liability can be prescribed in legislative acts of civil law upon business-related human rights abuses. In a mandatory human rights due diligence regime, like the Dutch Child Labour Act, liability for harm is very weak, expecting the payment of administrative fines and providing criminal liability in the case of continuous violation of the same rights within five years and if the company is managed by the same director. The French *Loi de Vigilance* makes reference to parts of the French Commercial Code and it is pivotal in the enhancement of civil liability in Europe. In the French Law, the civil liability burden of proof is placed upon the victim, which presents difficulties when it is time to gather evidence to prove the tort, mainly because one company's data are difficult to disclose. On the other hand, the Commission

[346] Article 19, COM/2022/71.

[347] FELICETTI, R., MOSCO, G.D., The EU's Corporate Sustainability Due Diligence Directive: An Excessively Diligent Proposal, Oxford Business Law Blog, 7 September 2022, available at: https://iris.luiss.it/retrieve/ff3ccd4f-09da-4f96-b330-dd52a8c5e85f/The%20EU%e2%80%99s%20Corporate%20Sustainability%20Due%20Diligence%20Directive%3a%20An%20Excessively%20Diligent%20Proposal%20%7c%20Oxford.pdf [accessed on 5/01/2022].

[348] OHCHR, v. supra, note 312.

advances the liability system shifting the burden of proof. The victim still has to prove the harm, but a company may recourse to due diligence defense.

As a result for harms derived from due diligence failures, the proposal has included civil liability and administrative supervision. The last chapters have demonstrated that human rights due diligence is included in all the three pillars of the UNGPs: the third Pillar provides access to remedies for victims from Guiding Principle 26 to 31, expressly underlying judicial mechanism should aim at reducing legal and practical barriers[349].

Through civil liability remedies are delivered to people affected by companies' adverse impacts according to Article 22(1), which sets out the requirement for Member States to include rules governing civil liability:

> "Member States shall ensure that companies are liable for damages if:
> (a) they failed to comply with the obligations laid down in Articles 7 and 8 and,
> (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimized through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage[350]".

Respectively, and pursuant to the paragraph in Article 22(2), Articles 7 and 8 establish the obligations for Member States to prevent, mitigate and end potential or/and actual adverse impacts that not only they have identified pursuant to Article 6[351] but also that they should have identified in their direct and indirect business relations. This is a focal point which had created turmoil due to its broad scope, since Article 8 provides that if an actual impact identified in an established business relationship cannot be brought to an end, the company has to "temporarily suspend commercial relationships with the partner in question" or even, as a last resort, "terminate the business relationship" (disengagement).

This approach can potentially uprise liability for any harm that should have been foreseen and not correctly addressed with the due diligence practice[352]. There is a dangerous mix of liability of companies for their own acts and responsibility for the acts of others, especially with the presence of ambiguous conception of direct and indirect established business relationships.

As regards damages occurring at the level of established business relationships, a company:

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[349] GP 26, UNGPs.
[350] Art. 22(1), COM/2022/71.
[351] COM/2022/71 final, p. 25.
[352] v. supra, note 307.

> "shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact[353]".

According to scholars, the definition leaves room for interpretation, fosters uncertainty and generates a risk of excessive litigation in the case of companies with complex supply chains. From the paragraph, it can be inferred that there is a risk for companies to incur in liability engagement if they were not able to foresee an adverse impact also in their business relationships.

Nevertheless, the company has the opportunity to waive its liability for the activities of their indirect partners if there is evidence that the company has undertaken all due diligence measures to prevent the impact and, in particular, contractual assurances from their business relations along with a mechanism to verify compliance[354]. The role of contractual assurances involves the use of due diligence as "defense", meaning that liability has been offloaded on third parties. However, this exoneration will not apply if it was "unreasonable to expect that the action would be adequate" to address the adverse impact. However, non-EU based companies will not be sued before EU courts, even if they fall under the provisions of the Directive.

Although several issues remain quite uncertain, the introduction of civil liability at the community level will certainly ease a multi-jurisdictional access to effective remedy and to claims in order to enforce accountability on companies for their adverse impacts on the environment and on human rights. With the Directive, victims of companies' adverse impacts, especially foreign ones seeking remedies within the EU, should be able to hold the company accountable claiming the civil liability provision for harms[355]. The only doubt remains the

[353] COM/2022/71 final, Art. 22(2).

[354]PANTAZI, T., GRMELOVA, N. (ed), *The proposed Corporate Sustainability Due Diligence Directive and its provisions on civil liability and private international law in particular* in Perspective of Law in Business and Finance, ADJURIS.

[355]HO-DAC, M., Brief Overview of the Directive Proposal on Corporate Due Diligence and PIL, European Association of Private International Law (EAPIL), 27 April 2022, available at: https://eapil.org/2022/04/27/brief-overview-of-the-directive-proposal-on-corporate-due-diligence-and-pil/ [accessed on: 21/01/2023].

private enforcement of the different Member States in the various legal systems, since discrepancies may weaken the EU Directive effectiveness.

4.2 Comments by the Parliament and the Council

Up to the present day, both the Parliament and the Council expressed their negotiating position on the draft Directive. In this step, the two institutions have adopted comments and amendments on the draft proposal. In the first instance, the Council has expressed its opinion especially modifying some of the trickiest provisions of the Directive.

Scope (Art.2)

The Council has maintained the similar thresholds to the Commission's proposal. However, the rules of the proposed Directive shall first apply to very large companies that have more than 1,000 employees and EUR 300 million net worldwide turnover, or 300 million net turnovers generated in the Union for non-EU companies 3 years from the entry into force. To further clarify the scope of the proposed Directive, the list of high-risk sectors (Article 2(1)(b)) was supplemented with a new annex[356].

In relation to non-EU companies, a new provision has been added in Article 21(1a) that would require the Commission to set up a secured system of exchange of information about the net turnover generated in the Union by non-EU companies without a branch in the EU or having branches in multiple Member States, with the objective of determining the competent Member State.

Definitions (Art. 3)

The definition of "established business relationship" as proposed by the Commission was deleted from Article 3, point (f) since the whole concept was abandoned. Instead, only the definition of 'business partner' in Article 3, point (e), is used ('business relationship' as proposed by the Commission). The "value chain" was replaced by the definition of "chain of activities[357]".

The risk-based approach was strengthened in the proposal, mainly by amending Article 6 (mapping and in-depth assessment of adverse impacts) and introducing a new Article 6a on prioritization of adverse impacts.

[356] PERMANENT REPRESENTATIVE COMMITTEE, *General Approach*, *v. supra*, note 307.

[357] See more, Permanent Representative Committee, *Chain of activities*, Comment on Article 3(g), p. (B)(18).

Civil Liability (Art. 22)

Article 22 has been amended significantly in order to achieve legal clarity, certainty for companies and to avoid unreasonable interference with the Member States' tort law systems[358]. Further, clarifications of the joint liability of a company and a subsidiary or a business partner and the overriding mandatory application of civil liability rules were made. All of these clarifications and precisions allowed to delete the safeguard for companies that sought contractual assurances from their indirect business partners after a strong criticism of this provision due to its heavy reliance on contractual assurances.

Article 22 revised:

> "Member States shall ensure that a company can be held liable for a damage caused to a natural or legal person, provided that:
>
> (a) the company intentionally or negligently failed to comply with the obligations laid down in Articles 7 and 8, when the right, prohibition or obligation listed in Annex It is aimed to protect the natural or legal person; and
>
> (b) as a result of a failure as referred to in point (a), a damage to the natural or legal person's interest protected under national law was caused.
>
> A company cannot be held liable if the damage was caused only by its business partner in its chain of activities[359]".

Other Articles

In the Draft Report of November 2022, the Parliament changed several formulations of the Recitals. Moving on, the thresholds provided under the scope of the EU Commission Directive have been furtherly lowered:

> "The company did not reach the thresholds under point (a), but had more than 50 employees on average and had a net worldwide turnover of more than EUR 8 million in the last financial year for which annual financial statements have been prepared, provided that at least 30% of this net turnover was generated in one or more of the following sectors […][360]"

[358] EUROPEAN COUNCIL, v. supra, note 307.

[359] EUROPEAN UNION COUNCIL, v. supra, note 307.

[360] EUROPEAN PARLIAMENT, Draft Report, Amendment 52, v. supra, note 306.

Moreover, the list of high-risk sectors is more comprehensive by adding the animal products and the marketing of food and beverages and specifying some step in the process of extracting minerals in Article 2, para. 1(b)(iii) of the Directive, while adding new provisions to Article 2. The threshold has been lowered also for third country-companies, from 150 million net turnover to 40 million generated in the EU single market. The lowering of thresholds is significant to enhance the scope of application of due diligence obligations.

In Article 4, para. 1, a new point (fa) was added providing consultancy with affected stakeholders[361] and in Article 5 the consultancy has been extended to trade unions and workers representatives.

With regard to civil liability, the Parliament significantly changed and added some new provisions to ensure clarity. For instance, in its amendment of Article 22 para. 2[362], the Parliament expressly adds a limitation period of ten years to take actions (a), addresses States to provide measures that would limit the costs of the proceedings to avoid prohibitively expenses for claimants (c), addresses States to ensure the participation of trade unions (d) and, when a claimant provides the likelihood of a company's liability, the Court is entitled to require the disclosure of information on such a company (e)[363]. In Article 26, the Parliament nominated the Paris Agreement to take effective action to address climate change, since the Directive poorly references the environmental standard.

At the beginning, the first position of the Parliament was stuck on the so-called "mapping the value chain[364]", but such requirement was abandoned. It would have represented a major waste of resources and a threat to economic sustainability for SMEs forming part of value chains.

4.3 Extraterritoriality and third countries involvement

The OECD establishes that, for 2023, the world GDP will increase for a 2,2%. The GDP indicates the amount of goods and services that a country generates in a year. Its percentage also indicates the growth of a country and, according to this criterion, the 34 members of the OECD represent the most industrialized countries in the world. Beyond the GDP value, the wellbeing of a country is measured by education, employment, life quality and life expectancy.

[361] EU PARLIAMENT, v. supra, note 306, Amendment 87.

[362] EU PARLIAMENT, v. supra, note 306, Amendment 200.

[363] v. supra, note 306, Amendment 200.

[364] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)); Council Conclusions on Human Rights and Decent Work in Global Supply Chains of 1 December 2020 (13512/20).

According to the Financial Times, in 2014 the Chinese economy overtook the economy of the United States and China is, nowadays, the first exporter of goods in the world and the second importer. The international realm is changing with the advent of developing economies especially located in South-East Asia, where potential importer and exporter actors such as South Korea, Japan, India and importantly China are becoming central hubs since a huge proportion of industrial production capacity has been transferred in China. The international realm is experiencing a shift in globalization: from a globalized world to a regional globalization, particularly in the Far East with the fast development of Asian countries orbiting around China, such as Vietnam, Thailand and Bangladesh. Moreover, not only the alarming situation in value chains has been verified due to the Russian war and the zero-Covid policy in China, but also due to the geo-political tensions between China and the US which refuse industrial collaboration initiatives.

That is to say, the measures undertaken by the EU Commission proposal would certainly have an extraterritorial effect on non-EU companies doing business in the EU single market. However, the current context of the European Union shows the negative impacts on human and environmental rights derived from the productive sector, mainly based on the violation of human and labour rights due to child labour, human trafficking, forced labour and modern slavery. With over 240 million workers in the EU, the Union is committed to safeguard labour rights ensuring a minimum wage and safe working conditions[365]. However, it is critical to understand that modern slavery is still present almost in all sectors but especially verified in the mining, garment, food and beverage sectors. In September 2022, the European Commission issued the Forced Labour Regulation[366] to prohibit the import and export of products on the EU market which are made by forced labour and strengthen the legislation mechanisms in place.

With regard to the civil liability regime envisaged in the proposal, each Member State has room to decide how this system will be enforced, hence it is the national law of Member States that determine the jurisdiction of their courts and this is a first worrying discrepancy[367]. As a result, for non-EU companies economically active in the internal market it may become a difficult situation with the private enforcement dependent on the will of Member States, since national

[365] See Article 153 of the TFEU.

[366] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on prohibiting products made with forced labour on the Union market, Brussels, 14.9.2022, COM(2022) 453 final, 2022/0269(COD).

[367] RUGGIE, *Just business, Multinational Corporations and Human Rights,* Norton & Company, London, New York.

different mechanisms enforced do not guarantee equality and there might emerge the risk for victims to not have access to effective remedy. On the other hand, according to Article 16 of the Directive, third-country companies should designate a representative established or domiciled in one of the Member States where the company operates[368], although the proposal lacks a clear explanation of the tasks this figure is required to exhaust. Moreover, assessing the nature of the relationship between companies and partners or companies and subsidiaries on the basis of lastingness (the 'established business relationship') further hinders the context of the application of the provisions, losing sight of the victims and the damage occurred.

With the insights proposed, it may be argued that the extraterritoriality of the upcoming EU due diligence Directive is not legally uniform to ensure its correct application before EU courts when the adverse impacts is caused by non-EU-based companies.

Fortunately, the positions of the Parliament and the Council have brought more clearance on some discussed points of the proposal. For instance, it is expected some positive impact on improved labour and human rights, environmental practices, increased stakeholder awareness and adoption of international standards. In terms of negative impact, there might be some risk of disengagement (termination of the business relationship)[369]. The OECD Guidelines and supporting OECD sector due diligence guidance are fundamental for a company to understand how responsible disengagement can be conducted. Where attempts at preventing and mitigating adverse impacts have been performed without success, a company should consider terminating the business relationship and perform disengagement on its supply chain. If the business relationship is exposed to severe adverse impacts (any forms of torture, inhuman and degrading treatment, forced labour, child labour etc.) it is necessary to suspend engagement with suppliers. Nevertheless, disengagement should be responsible, which means that a company must comply with national laws and international standards and give the supplier notice of this ending[370].

European companies are already operating in a challenging global supply chain context, not least due to the outbreak of the Covid-19 pandemic in 2020 and the war of Russia in Ukraine during February 2022 which has aggravated the situation even further[371]. With lockdowns and

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[368] Article 16, COM/2022/71.

[369] EUROPEAN PARLIAMENT, GIRARD, V., *Corporate sustainability due diligence, Initial Appraisal of a European Commission Impact Assessment,* Impact assessment (SWD(2022) 42, SWD(2022)43 (summary)) accompanying a European Commission proposal for a directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937(COM(2022) 71), PE 734.677, October 2022.

[370] OECD Conference Centre, Responsible Disengagement, Global Forum on Responsible Business Conduct, 30 June 2017.

[371] OECD Website, Ukraine hub, available at: https://www.oecd.org/ukraine-hub/en/.

China closing the exchange of supplies, businesses dependent on inputs from China had to stop production and fire workers. Moreover, Covid-19 hitches significantly affected the GDP of worldwide countries, particularly hitting those countries relying on consumer goods.

The pandemic has caused a disproportional business's loss of revenue and harm particularly hitting those groups of vulnerable workers, such as women, young people, refugees, persons with disabilities and indigenous people[372].

Especially for women, according to the ILO data, "Alarming trends that threaten to exacerbate existing disparities and eliminate the modest gains achieved in recent years in terms of gender equality in the labor market[373]." In Cambodia for instance, a country which relies on revenues made for the 78% by the textile sector, female workers find are hardly getting back into their jobs risking not being paid regularly, according to a report[374].

Moreover, the European Commission report on *Employment and Social Development review in Europe* (ESDE) of 2022[375] reveals how young people were the most affected by job losses due to the economic crisis brought by the pandemic.

China, as the hugest Asian economic power and one of the most important trading partners of the EU, claims to put some focus on ESG compliance.

According to a survey commissioned by the Chinese Chamber of Commerce to the EU (CCCEU) that involved around 150 companies. Chinese companies are concerned that the new rules on corporate accountability may lead to market fragmentation[376] and that important costs would be applied to the textile sector.

On the other hand, the Commission states that it is precisely the lack of EU-wide rules which increases legal and financial uncertainty[377]. China is ever-more becoming an extremely important actor for global supply chains when production is *glocalized*. The electronic and automotive industries, as well as the infrastructure require a large quantity of raw materials[378].

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[372] UNITED NATIONS, OHCHR, Business and human rights in times of Covid-19, October 2020, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/BusinessAndHR-COVID19.pdf.

[373] ILO, ILO Monitor: COVID-19 and the world of work. Fifth edition: Updated estimates and analysis (June 2020), p. 1, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/briefingnote/wcms_749399.pdf.

[374] VOSS, H., Implications of the COVID-19 pandemic for human rights and modern slavery vulnerabilities in global value chains, Transnational Corporations, Volume 27, n.2, 2020.

[375] EU COMMISSION, official website, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4482

[376] EURACTIV, https://www.euractiv.com/section/economy-jobs/news/chinese-companies-worried-about-eu-due-diligence-proposal-survey-finds/

[377] *v. supra,* note 379.

[378] SHIFT, https://power-shift.de/wp-content/uploads/2020/01/Factsheet-China-And-Supply-chain-due-diligence.pdf

Large companies have started to invest in ESG (Environment, Social, Governance) compliance, often to protect their reputation, but also to prevent that human rights or environmental abuses occur on their value chain. Volkswagen (Germany) recently appointed a new human rights officer considering the allegations on its production in China. The specific concern is the plant at the Urumqi location in the western province of Xinjiang, which is operated together with the Chinese state-owned company SAIC[379]. China has been criticized for years for its treatment of its Muslim Uyghur minority. Amnesty International and the long-awaited UN report by the OHCHR revealed hundreds of thousands of people under forced labour and experiencing other human rights abuses in Xinjiang since 2017. The breakthrough of the EU due diligence Directive is crucial to protect global supply and value chains. The failure to provide restrictions on domestic companies from importing forced labour goods from the Chinese region has consequences. Nevertheless, the OECD and the UN are engaged with the Chinese government to enhance capacity building and hopefully compliance with international standards[380].

In the context of Covid-19, the provisions set out in the UNGPs are a fundamental leading point. The first pillar of the UNGPs focuses on the State Duty to Protect Human Rights that is grounded in States' existing human rights obligations[381]. To supposedly meet their duty to protect, the needs of people should have been put at the heart of response efforts involving business, for instance ensuring the protection of workers, especially vulnerable ones. Moreover, States should have efficiently supported companies with a mix of legal and policy measures to alleviate the economic impact, while cooperating with other States to tackle the pandemic[382]. It goes without saying that companies are also required to address human rights impacts as they have a responsibility to respect human rights under Pillar II of the UNGPs. Primarily during the pandemic, careful assessments of companies' impacts were fundamental: some companies managed to shift their production lines and developed equipment to ensure a job and a minimum wage for their employees and adjusted suitable working hours. Protection of workers and their families includes safety conditions at work, social safety nets, health and unemployment insurance, etc.

The context-situation nowadays has been aggravated even more with the invasion of Russia in Ukraine. The humanitarian crises and the flow of people fleeing from bombs has created a

[379] Euronews.next, Volkswagen CEO defends operations in China's Xinjiang, Handelsblatt reports, 30/05/2022.
[380] *v. supra*, note 376.
[381] UNITED NATIONS, OHCHR, Business and human rights in times of Covid-19, v. supra, note 374.
[382] *v. supra*, note 374.

dangerous field for the protection of human rights and it is now more than ever imperative for companies to conduct human rights due diligence to avoid further abuses.

4.4 Conclusions to the fourth chapter

In conclusion to this fourth chapter, the dissertation has investigated certain articles of the EU Commission proposal for a Corporate Due Diligence Directive (EU CSDDD) in the first place, then followed by the Council and Parliament amendments. Finally, the chapter analyzed the extraterritorial effect of the proposal on third countries and businesses, in a framework characterized by a health-economic crisis caused by the outbreak of Covid-19 plus a humanitarian and energetic crisis due to the war initiated by Russia in Ukraine.

The European Commission Proposal as it was presented has proved to be inadequate to avoid fragmentation and ensure the harmonization of the legislative systems among the Member States, lacking legal clarity in the first place. Firstly, the scope of companies covered is still too limited, accounting for the 1% of the Union's companies. Secondly, the Proposal provides hardly in-depth definitions which create even more uncertainty. However, the amendments delivered by the Parliament and the Council represent a silver lining for the draft, with the removal of ambiguous definitions such as 'established business relationships', amendments on the list of high-impact sectors and an enlargement of the scope of the Directive. On the overall, the proposal result to be inadequate for States' enforcement now, and only further consultations and amendments by the respective European institutions, namely the Parliament and the Council, will ensure a definitive and clear delivery of the rules businesses need to follow in order to effectively apply sustainability measures.

Conclusions

In this part, the dissertation aims to find a response to the initial questions that I presented.

In conclusion, it can be assessed that human rights due diligence was developed to integrate human rights considerations into companies' decision-making processes. In the lack of an international binding treaty envisaging company's responsibilities on human rights abuses, the UNGPs (written by prof. John Ruggie) as the most authoritative standard combined the business notion of due diligence, therefore that of risk management, with that of international human rights law, in which due diligence is considered a standard of conduct.

Companies have always aimed at maximizing profits. The switch into human rights due diligence implies a moral duty of conduct but is doubtful if companies will be ready for that: it should be further assessed whether there is the willingness to prioritize human rights as a company's core value over economic interests. As far as this thesis in concerned, research has shown that companies' concerns around the topic of human rights and environmental protection have grown over the years as the awareness of company's abuses on human rights gradually improved over the decades. Moreover, risks to undergo punishments became real and this goes beyond a pure damage of the company's image. In fact, the concept of human rights due diligence is incrementally turning into a mechanism which exceeds the notion of compliance, eclipsing a tick-boxing approach which only aims at complying with legal requirements and discharging responsibilities. However, on the one hand companies might try to escape responsibility for human rights violation if they demonstrate that the due diligence practice was implemented. On the other hand, liability is also problematic if we consider a strict standard of conduct, especially in the case of SMEs which, most of the time, possess greater economic limitations due to their size and a risk to become overburdening.

Due diligence resulted to be an ongoing process that companies are required to comply with in order to identify, prevent and mitigate their adverse impacts on human rights, following what Ruggie explains in the UNGPs as the core of the Principles "to discharge the [corporate] responsibility to respect [human rights]".

The central topic of the dissertation investigated how the concept of due diligence has been implemented within legislation in the European Union, so as to ensure and enhance the goal of sustainable development, as enshrined in the European Green Deal. According to scholars, some patterns and parallelism have been identified between what companies need to know to behave responsibly and what the different pieces of EU legislation require them to do. In the

first instance, with the 2014 Non-financial Reporting Directive (NFRD) what companies needed was a means to ensure transparency, including human rights reporting beyond financial information disclosure: what they obtained resulted in a combination of hard and soft law requirements but without a reporting standard and a lack of access to remedy. Opinions from businesses, experts and NGOs reveal a general dissatisfaction over current legislation in the EU and numerous concerns on its future. First, civil society organisations supported a shared requirement regarding harmonization for the enforcement of due diligence legislation in the EU in order to guarantee effectiveness. This requirement emerged given the fact that the instruments applied so far take the form of Directives, which require national transposition; it is fundamental to avoid the creation of an uneven playing field among the Member States. In fact, people are free to move, operate and establish their business activities across the community, notwithstanding compliance with national legislation. Thus, it is particularly important that all the Member States are on the same page on the topic, avoiding the fragmentation that is currently in place (see the French Duty of Vigilance of the Dutch Child Labour Act) and undertaking due diligence also on their supply chain. Moreover, national authorities must ensure the application of civil liability and provide access to remedies for victims, as a prerogative for transparency.

In light of these considerations and as a conclusion of the present analysis, the EU has a role of frontrunner in the sustainability area and, given its influence in global trade, a responsibility to take the lead and establish a framework to clarify what elements are required to carry out due diligence. The feasibility of these factors can be assessed with the establishment of mandatory supply chain due diligence in the long-awaited 2022 European Commission proposal for a Corporate Sustainability Due Diligence Directive which, despite its sustainability goal, still presents several weaknesses. In fact, the proposal has the potential to level the playing field for businesses across the Member States and to promote a more consistent approach to sustainability due diligence in the EU. It aims to provide guidance and clarity for companies, even though the wording of the Proposal is extremely ambiguous. Furthermore, the proposal could potentially lead to an uneven playing field for businesses, as companies operating outside the EU may not be subject to the same standards, and there is a risk that the proposal could create additional bureaucracy and administrative burden for businesses. On the overall, the strengths and weaknesses of the European Commission's proposal for corporate sustainability due diligence highlight the need for continued dialogue and engagement with stakeholders to ensure that the proposal is effective and fit for purpose. It is essential that the proposal is

implemented in a manner that is both practical and effective, and that it serves to promote accountability for adverse human rights impacts in Europe's business community. This will require ongoing collaboration between businesses, policymakers, and civil society, and a commitment to transparency, accountability, and continuous improvement.

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