A STUDY ON POTENTIAL
HUMAN RIGHTS DUE DILIGENCE LEGISLATION IN LUXEMBOURG

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Contents

Executive Summary

This study examines the possibilities for new legislation on due diligence for companies domiciled in Luxembourg, with the aim of guaranteeing respect for human rights and for the environment throughout their value chain. The study was commissioned by the Ministry of Foreign and European Affairs in accordance with the Coalition Agreement (2018) and the updated version of the National Action Plan on Business and Human Rights (NAP II). The study consists of three main chapters responding to eight specific questions and several sub questions identified in the terms of reference (TOR) proposed by the Ministry.

The concept of due diligence describes the steps that companies need to take in order to identify, prevent, mitigate and account for actual or potential adverse human rights impacts that they may cause or contribute to through their own activities, or that may be linked to their operations, products or services by their business relationships (UNGPs 18-21).

International and Foreign Developments

There is an international momentum towards the imposition of mandatory due diligence obligations on companies. Since 2014, negotiations have taken place at the UN level for a legally binding treaty on business and human rights. The draft UN treaty incorporates the due diligence requirements set out in the UNGPs and appears to have a rather expansive scope. It extends to all business activities, covers human rights and environmental impacts, and requires companies to incorporate gender perspectives and to engage in consultations with affected stakeholders. Recently, the EU Parliament has adopted a resolution on corporate due diligence and corporate accountability with recommendations to the EU Commission. The Resolution contains a proposal for a directive which also has a broad scope extending to all large companies (including those providing financial products and services) as well as all publicly listed SMES and high-risk SMEs. The proposal applies to governance risks in addition to human rights and environmental impacts, and contains requirements for stakeholder engagement. Similar to the draft UN treaty, the EU Parliament's proposal recommends companies to integrate gender perspectives into their due diligence processes. The EU Commission has already commissioned a study to investigate the possibility of introducing such legislation at the

EU-level and has launched consultations based on the findings of the study. The Commission is expected to release a legislative proposal in the course of 2021.

In the meantime, various developments in regard to due diligence obligations have taken place at domestic levels. In 2015, the UK Modern Slavery Act entered into force. In 2017, France adopted a Duty of Vigilance Law. This was followed by the Dutch Child Labour Law in 2019. Various legislative initiatives have been launched in several other jurisdictions including, the Swiss Responsible Business Initiative and the Swiss National Council counter-proposal, the German draft on Human Rights and Environmental Due Diligence in Global Value Chains, and the Norwegian Ethics Information Committee draft Law.

All these laws and legislative proposals are based on the due diligence concept defined in the UNGPs and the OECD Guidelines. Nonetheless, they show that there can be diverse ways of designing a due diligence law, notably with regard to material scope (rights that are covered by the law), personal scope (companies that are subject to the law), type of obligations, type of business relationships and implementation mechanisms, including oversight, enforcement and access to remedies.

In terms of ***material scope*** some of the laws focus on a single human rights issue such as child labour (Dutch law) or modern slavery (the UK law), whereas others cover the full spectrum of human rights. The latter approach corresponds better to the standards set out in the UNGPs.

The ***personal scope*** of due diligence laws and legal initiatives also varies. Some limit the applicability of the law to larger companies, based on the number of employees (French law) or on turn-over (the UK). A number of other laws and initiatives rely on more nuanced formulations and use a combination of factors (Swiss counter-proposal). In addition to the criteria based on size, the laws and proposals usually include also specific risk-related criteria, which may mean that some SMEs fall within the personal scope of the instrument even if they would normally be excluded based on their size.

With regard to the ***type of obligations*** covered, the UK law requires companies to "report" or "disclose" their impact on human rights and the environment without imposing substantive due diligence obligations. The other laws and proposals discussed in this study require companies to undertake due diligence in accordance with the UNGPs and other international standards, including the OECD Guidelines. The UN draft treaty and the EU Parliament's proposal, also include an obligation to conduct consultations with stakeholders.

The ***reach of obligations*** is another important element in the design of corporate human rights due diligence legislation, since human rights abuses and environmental harms often take place within complex value chains or as a result of the conduct of overseas subsidiaries of a parent company. The laws and proposals examined generally cover subsidiaries as well as supply chains or value chains but

they define those relationships in different ways. The French law, for instance, applies to the subsidiaries and subcontractors of French companies and to the business enterprises in the supply chain "with which the company maintains an established commercial relationship". The Dutch law applies to the supply chains of all companies "selling goods and supplying services" on the Dutch market.

The ***enforcement*** of due diligence laws can involve administrative, civil, and criminal law mechanisms. The French law relies on civil (private) enforcement and does not establish governmental monitoring and oversight, while the Dutch law and the German and Norwegian proposals envisage administrative enforcement by a regulatory authority.

Sanctions for a failure to comply with due diligence obligations can also take diverse forms. The Dutch law and the Norwegian and German proposals envisage fines for non-compliance, while the German proposal also included a potential exclusion from public procurement. The Dutch Child Labour Law and the Swiss Parliamentary counter-proposal of 2020 impose criminal sanctions.

In terms of ***access to remedies***, the French law creates a direct civil cause of action permitting third parties to bring a claim against a company for a failure to comply with the law. The remedy is based on French tort law, under which a claimant bears the burden of proof to demonstrate that the complaint satisfies all three conditions of a tort: damage, a breach of or failure to comply with the vigilance obligation, and a causal link between the damage and the breach. The Swiss RBI, which also contained civil liability provision, sought to shift the burden of proof to the defendant corporation which would have to prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

In designing a human rights and environmental due diligence law in Luxembourg, the legislator will need to consider all these elements and their interaction, taking into account the specificities of Luxembourg. A comprehensive due diligence legislation that is in accordance with international standards should cover the full spectrum of human rights and impose substantive due diligence obligation, requiring companies to assess actual and potential human rights impacts, act upon the findings, track responses, and communicate how impacts are being addressed. The due diligence obligation should cover all companies domiciled in Luxembourg, as well as companies that are doing business in Luxembourg. The scope of the due diligence obligation should cover not only the company's own activities but also those of group companies and entities within the company's value chain. Reporting obligations could be differentiated based on the size or capacity of companies. Separately, the legislator will have to determine whether to establish a special enforcement regime supervising compliance with the due diligence obligation. In practice, supervising and enforcing a

comprehensive due diligence regime may be complex and resource intensive, and the benefits of an enforcement mechanism would need be to be balanced against other considerations, such as the capacity of the authorities in light of the number of companies to be supervised, and the extent to which such supervision brings additional benefits that would justify the administrative burden, in particular in comparison to avenues of private enforcement.

Due Diligence Legislation in Luxembourg: Legal Considerations

There is currently no explicit general human rights due diligence obligation for companies in Luxembourg law. However, several specific fields of law contain due diligence obligations, including those imposed by directly applicable EU regulations on timber, conflict minerals and data protection.

Various reporting obligations are contained in the Companies Law of 1915. They include non-financial reporting obligations prescribed by the EU Non-Financial Reporting Directive. This law is based on the comply-or-explain principle, which obliges companies to report on due diligence obligations, among others, but do not require them to exercise due diligence as a substantive duty. The Companies Law contains various sanctions for failing to provide the required information.

The X Principles of LuxSE provide general principles, recommendations and guidelines on best practices of corporate governance for listed companies. Explicit due diligence language is missing from the X Principles but there is a general reference to corporate social responsibility.

Luxembourg's environmental law contains various obligations similar to due diligence. There is an obligation to undertake ex-ante assessments based on the precautionary principle to prevent environmental harm. Moreover, if environmental damage nonetheless occurs, the company is required to take remedial measures. Labour law also contains various measures resembling due diligence obligations, for instance in the context of equality and non-discrimination. There is an obligation to conduct consultations with employees in all matters related to health and safety at work. In both environmental law and labour law, the details of certain obligations depend on the nature of the activities and the size of the companies.

A future due diligence law faces several potential legal challenges. One imperative is to ensure legal certainty for companies in matters of civil, criminal and administrative liability. To the extent that specific liabilities will be imposed, key notions such as "due diligence" and "business relationship" will need to be defined with precision.

A potential objection to due diligence legislation might come from an EU law perspective if the imposition of new human rights obligations on companies would be considered a restriction on free

movement within the internal market. However, such restrictions would arguably be justified on grounds of public policy, as long as the requirements of proportionality and non-discrimination would be met.

A question has been raised as to whether new legislation should take the form of a standalone law or an amendment of existing legislation. From a human rights perspective, there is no weighty reason to prefer either option. From a systemic perspective, it would make sense to insert new due diligence obligations in the Companies Law.

Due Diligence Legislation in Luxembourg: Policy Considerations

In addition to various concrete legal issues, the development of draft legislation on corporate due diligence should take into account more general considerations related to the integration of the new law in existing regulatory and policy frameworks.

One of these considerations relates to the implications of a new due diligence law on policy coherence. Adopting new legislation in this field brings an opportunity to coordinate policies across government departments and to formulate a coherent message from different institutions on the importance of corporate human rights due diligence.

Recent debates in Luxembourg have focused on the relative advantages and disadvantages of a legislative initiative at the European level compared to one at the national level, notably with regard to level playing field, legal certainty and timing. This is a relatively unhelpful debate considering that the adoption of domestic and EU legislation are not mutually exclusive. Any future EU legislation will likely take the form of a directive, requiring Member States to adopt implementing legislation. Luxembourg could determine its preferred legislative approach to human rights and environmental due diligence in accordance with international standards, congruent with both its economic reality and its human rights ambitions, and present it to proactively contribute to the developments at the EU level and to prepare its implementing legislation.

A human rights and environmental due diligence legislation would have various impacts on rights-holders, companies, and the authorities. These will vary significantly depending on the requirements imposed by the law and their enforcement.

While it is likely that a corporate obligation to identify human rights and environmental risks will lead to enhanced levels of protection, mandatory due diligence will create various costs for companies depending on their size and the complexity of their value-chain. However, there are also certain long-

term benefits to be expected for companies exercising due diligence, such as a mitigation of liabilities and risks as well as reputational advantages.

The impact of due diligence legislation on Luxembourg's competitiveness is difficult to assess in the absence of comparable scenarios. Concerns have been raised with regard to Luxembourg's financial sector in light of its mobility. It should be noted, however, that the financial sector is already one of the most heavily regulated industries and that it may adapt relatively easy to an extra layer of regulation. There is currently no empirical evidence to demonstrate whether the adoption of mandatory due diligence legislation would encourage financial service providers to migrate to countries where such legislation is lacking.

The impact of due diligence legislation on the authorities would depend on a number of variables. Administrative enforcement by a regulatory body is likely to bring substantial costs, but the scale of the burden would depend on the number of companies subject to the law. New legislation should also consider other opportunities to incentivize or sanction companies, including public procurement regimes as well as export credit and export licensing processes.

Future legislation should strive to strike a balance between the imperative of improving corporate respect for human rights and the practical need to avoid imposing disproportionate burdens on companies and public authorities. At the same time, it should be kept in mind that the potential costs of human rights due diligence are likely to be counterbalanced by benefits, not only for right-holders affected by corporate activity, but also for Luxembourg's companies and for the country as a whole, in accordance with Luxembourg's commitment to protect and respect human rights at home and abroad.

I. Introduction

1.1 General Background

This study examines the possibilities for new legislation on due diligence for companies domiciled in Luxembourg, with the aim of guaranteeing respect for human rights and for the environment throughout their value chain. The concept of due diligence was introduced by the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011 and has become one of the key elements of the corporate responsibility to respect human rights. [1]

Since 2011, the UN Working Group on business and human rights has promoted the implementation of the UNGPs and encouraged states to adopt National Action Plans (NAP). The Government of Luxembourg has published a first NAP in June 2018, and an updated version in 2019. The NAP II states that the Government expects businesses "to respect human rights and avoid adverse human rights impacts to which they may be linked through their economic activities, either at home or abroad". To this end, businesses are expected to "adopt governance instruments, in particular by introducing due diligence systems" and to "address any negative human rights impacts of their activities". [2]

In spite of the various efforts across the globe, several studies have shown that the implementation of due diligence by companies remained limited.[3] There was an increasing understanding that purely voluntary approaches were not sufficient.[4] In response, a number of countries are now developing corporate human rights due diligence legislation. Their drafts and proposals are analyzed in the first

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[1] United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UNGPs), UN Doc. HR/PUB/11/04 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[2] The Government of the Grand Duchy of Luxembourg, 'National Action Plan for the Implementation of United Nations Guiding Principles on Business and Human Rights 2020-2922' (NAP II), 19-20.

[3] See, for instance, Corporate Human Rights Benchmark (2020), concluding that nearly half (46.2%) of world's largest 200 publicly traded companies failed to demonstrate they are conducting human rights due diligence in line with the UNGPs in 2020. Available at; https://www.worldbenchmarkingalliance.org/publication/chrb/.

[4] L. Smit, *et al.,* 'Study on Due Diligence Requirements through the Supply Chain' (EC Due Diligence Study), (February 2020), https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.Study .

chapter of this study, which covers legislative initiatives in the UK, France, the Netherlands, Switzerland, Germany and Norway.

The legislative initiatives for corporate due diligence are often spearheaded by civil society campaigns. In a number of countries, including Belgium, Denmark, Finland, Italy, Ireland, Spain, Sweden, the UK and Luxembourg, campaigns for due diligence legislation have been launched.[5] In Luxembourg, l'Initiative pour un devoir de vigilance (L'Initiative), a group of 17 civil society organizations, has been campaigning for a domestic due diligence law since 2018. In December 2020, the Initiative published the results of an online survey of 505 residents conducted on its behalf by TNS Ilres. According to the survey, 92% of the respondents support the idea of a national due diligence law.[6] Recently, L'Initiative launched a declaration titled "Notre responsabilité dans un monde globalisé: Un appel pour une législation en faveur d'une diligence raisonnable obligatoire en matière de droits de l'homme et de l'environnement". This declaration was signed by 32 companies and the Union luxembourgeoise de l'économie sociale et solidaire (ULESS), which represents around 200 economic actors.[7] In the declaration, the companies express that they "welcome a due diligence law in Luxembourg that paves the way for ambitious regulation at the European level".[8]

Like in the domestic context, the idea of corporate due diligence legislation has gained traction at the European level. Since 2011, the EU has undertaken various actions to progressively ensure the implementation of human rights and environmental due diligence along supply chains.[9] In December 2019, 80 civil society organizations and trade unions called for EU legislation in this field.[10] In

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[5] For a regularly updated list of these initiatives, see; https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/.

[6] See, TNS Ilres and Initiative devoir de Vigilance, L'opinion des résidents vis-à-vis de propositions de lois contre les violations des droits de l'homme' (7 December 2020), https://www.initiative-devoirdevigilance.org/.

[7] https://a19552c1-19b5-4ffa-b609-e76b2641a39a.filesusr.com/ugd/447785_29fb7c4a83114c30884de06d2208d136.pdf.

[8] https://a19552c1-19b5-4ffa-b609-e76b2641a39a.filesusr.com/ugd/447785_29fb7c4a83114c30884de06d2208d136.pdf.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, 25.10.2011 COM (2011) 681 final.

[10] ECCJ, 'A call for EU human rights and environmental due diligence legislation' (December 2019), https://corporatejustice.org/news/final_cso_eu_due_diligence_statement_2.12.19.pdf

November 2020, the EU Commission launched public consultations seeking input on sustainable corporate governance and human rights due diligence. Meanwhile, in March 2021, the EU Parliament adopted a resolution with recommendations to the Commission, including a proposal for a directive on corporate due diligence and corporate accountability. The EU Commission will likely propose a legislative text during the course of 2021, addressing both sustainable corporate governance and human rights and environmental due diligence. It is against this rapidly evolving background that this study has been conducted, analyzing the possibilities for human rights due diligence legislation in Luxembourg.

1.2 The Concept of Due Diligence

The concept of due diligence describes the steps that companies need to take to identify, prevent, mitigate, and account for actual or potential adverse human rights impacts that they may cause or contribute to through their activities or that may be linked to their operations, products or services by their business relationships.[11] According to the UNGPs corporations should:

- ***Identify*** and ***assess*** actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships;
- ***Integrate*** the findings arising from these assessments across relevant internal functions and processes, and ***take appropriate action***;
- ***Track*** the effectiveness of their response (e.g. risk management and mitigation efforts); and
- ***Account*** for how they address their human rights impacts (e.g., through reporting externally).[12]

Companies are familiar with the concept of due diligence in the transactional context, where the notion refers to "what an investor or buyer does to assess a target asset or venture".[13] The important difference with human rights due diligence is that the focus of the latter assessment is not on the risk

[11] UNGPs 17 -21.

[12] UNGPs 18, 19, 20, 21. See also, Office of the UN High Commissioner for Human Rights (OHCHR), 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020) ('Issues Paper'), 2.

[13] J. Ruggie, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', Report to the UN Human Rights Council, UN Doc. A/HRC/11/13, 22 April 2009, para. 71, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/128/88/PDF/G0912888.pdf?OpenElement.

to companies but on actual or potential human rights impacts. According to the UNGPs, due diligence is

[a] comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.[14]

It is

> [a]n ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.[15]

Mandatory due diligence is a requirement for companies to exercise due diligence as defined in a relevant legal instrument. It is different from corporate reporting obligations that focus on "comply or explain" principle and do not contain explicit duties to exercise substantive due diligence. As explained by the OHCHR

> Under mandatory human rights due diligence regimes, liability attaches to the breach of a legal duty of care (and/or the occurrence of harm) rather than the failure to accurately report, and it is not possible for companies to comply with mandatory human rights diligence regimes merely by reporting on the steps that they did or did not take.[16]

Due diligence as a *standard of care* exists in many legal systems. It expresses that

> [a] wrongdoer would be held liable for acts of negligence if he or she had failed to comply with the standard of conduct which would have been exercised in the circumstances by the diligent paterfamilias [or "bon père de famille"].[17]

Since 2011, due diligence has been incorporated into key international policy instruments, including the OECD Guidelines for MNEs (OECD Guidelines)[18] and the ILO MNE Tripartite Declaration on principles concerning multinational enterprises and social policy.[19] In the OECD Guidelines, the due diligence requirement extends to other areas than human rights, including the environment,

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[14] *Ibid*., (emphasis added).

[15] OHCHR, Corporate Responsibility to Respect, An Interpretive Guide (2012) (An Interpretive Guide), 6.

[16] OHCHR, Issues Paper, 3.

[17] EC Due Diligence, Study *Synthesis Report*, 21.

[18] OECD Guidelines for Multinational Enterprises 2011, available at: https://www.oecd.org/corporate/mne/.

[19] ILO, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' last updated March 2017.

employment and industrial relations and bribery. Another difference is that the OECD Guidelines refer to "supply chains", whereas the UNGPs talk about "value chains" that cover the entire life cycle of a product or service and include business relations other than suppliers.[20] The OECD has published extensive guides on due diligence, including the OECD Due Diligence Guidance for Responsible Business Conduct and several sectorial documents.[21]

Stakeholders in Luxembourg use different terms in French to refer to the concept of due diligence. *Diligence raisonnable* seems to be the preferred term of the businesses, judging from the submission of the UEL (Union des entreprises luxembourgeoises) for this study and the statement of the businesses published on the Initiative's website. This is also how the term is used in Luxembourg company law, the NAP and the French translation of the UNGPs. Others use the wording *devoir de diligence* or *devoir de vigilance*.

1.3 Scope and Contents of the Study

This study was commissioned by the Ministry of Foreign and European Affairs in accordance with the Coalition Agreement (2018)[22] and the updated version of the National Action Plan on Business and Human Rights (NAP II).[23] The study consists of three main chapters responding to eight specific questions and several sub questions identified in the terms of reference (TOR) proposed by the Ministry.

Chapter II analyzes developments related to mandatory human rights due diligence at the level of the UN, the EU and in a selected number of European countries. These developments include newly adopted laws and legislative proposals, as well as the EU Commission's study on supply chain due diligence that was published in February 2020. The chapter provides a comparative assessment of the laws and proposals, examining their material scope, their personal scope, that is companies that are subject to the law, the type of obligations imposed, the type of business relationships covered, the

[20] UNGP 13 and the Commentary. This study refers to "value chain" in accordance with the TOR.

[21] OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018).

[22] Government of the Grand Duchy of Luxembourg, 'Accord de Coalition 2018-2023' (2018), 228.

[23] NAP II, *op. cit.*, 27.

applicable implementation mechanisms (including oversight and enforcement mechanisms), and their provisions on access to remedies. It then compares those elements against the standards provided in the UNGPs and draws some lessons for Luxembourg.

Chapter III examines several fields of domestic law in Luxembourg that may be relevant to a future law on corporate human rights and environmental due diligence. The chapter identifies building blocks that already exist, and maps opportunities and potential obstacles for the integration of new due diligence obligations within the framework of Luxembourgish law. The areas of law that are examined include directly applicable EU regulations on specific economic sectors as well as Luxembourgish corporate law, environmental law and labour law. The chapter also addresses other legal questions that were raised in the TOR including concerns for "legal certainty" and more practical issues on how to integrate new provisions in the existing legal framework.

Chapter III addresses broader policy considerations related to the adoption and design of new due diligence legislation. The chapter discusses the future law's contribution to policy coherence, compares the relative advantages of anticipated EU legislation in comparison to domestic legislation, and assesses the potential impacts of such legislation on *right-holders*, on *companies*, on Luxembourg's *competitiveness* and on the *authorities' work*.

1.4 Methodology and Limitations

This study results from a qualitative review of relevant legal materials as well as from surveys and interviews. It draws on a comparative analysis of existing legislation and legislative proposals, supported by a review of scholarly articles and civil society reports. A list of sources used for this study is included in the bibliography.

In addition to the desk-review of legal and scholarly materials, a survey was conducted among companies and stakeholders. Twenty responses to the questionnaire were received (12 companies, seven stakeholders and a response of L'Initiative that filled out the survey on behalf of the 17 organizations that it represents). The questionnaire was based on a survey prepared by the British Institute of International and Comparative Law for the EC Due Diligence Study, adapted to fit the

national context when necessary.[24] The survey sought input only in regard to *mandatory* human rights due diligence, in accordance with the TOR.

A number of concerns were raised by stakeholders regarding the contents of the survey. The UEL stated that the survey questions "présupposent d'emblée une volonté de légiférer au niveau national". Instead of responding to the questionnaire, the UEL, together with the INDR, submitted a statement to express their position, which is largely cited in this study where relevant.

The responses to the survey formed the basis of semi-structured interviews that were conducted between 10 February and 11 March with 22 stakeholders (eight interviews with companies or stakeholders representing businesses, six interviews with public authorities or government representatives, four interviews with civil society organizations, and four interviews with experts in different fields of law).

The interviews and surveys were conducted on a confidential basis, and the quotes and observations in the study are not attributed to specific persons or organizations unless their permission was obtained.

The research underlying this report was undertaken between the second half of November 2020 and the first half of April 2021. During this period, a number of relevant developments took place. These include the EU Parliament's Resolution of 10 March 2021 in which the Parliament submitted a proposal to EU Commission for a EU Directive on Corporate Due Diligence and Corporate Accountability, the German Government's draft law on *Corporate Due Diligence in Supply Chains* which was passed by the federal cabinet on 3 March 2021 and is currently pending before the German Parliament, and a proposal submitted by four political parties to the Dutch Parliament on 11 March 2021 on a *Responsible and Sustainable International Business Law*. The latter two texts could not be addressed in-depth in this study but are concisely described in the comparative table annexed to the report. The EU Parliament's proposal is discussed in the main text because of its likely relevance to future EU legislation.

[24] EC Due Diligence Study, *op. cit.*.

II. International and Foreign Developments

This chapter analyses various developments at the UN, EU and domestic levels in regard to mandatory human rights due diligence. It starts with examining the ongoing negotiations at the UN level for a legally binding treaty on business and human rights, focusing on due diligence obligations in the draft treaty.

Next, it looks into some recent developments at the EU concerning human rights and environmental due diligence. Since the adoption of the renewed EU Strategy for CSR in 2011,[25] the EU has been undertaking various actions to progressively ensure the implementation of human rights and environmental due diligence along the supply chain.[26] These actions vary in nature and scope. For instance, the EU has adopted legislation imposing due diligence requirements in the context of risk sectors or commodities (such as conflict minerals or timber) or specific human rights (privacy). A reporting requirement on non-financial issues was introduced in 2014 through the Non-Financial Reporting Directive. Each of these regimes has been implemented in Luxembourg and will be addressed in chapter II of the study. The current chapter will provide a review of the key findings of a study commissioned by the European Commission's Directorate-General for Justice on due diligence requirements through the supply chain.[27] The section also presents the European Parliament's resolution of March 2021 containing a proposal for a Directive on corporate due diligence and corporate accountability. The Parliament's proposal gives insights into how a potential EU legal instrument on corporate due diligence may look like.

The chapter continues with a discussion of various laws and legislative initiatives across European states that have adopted or proposed human rights due diligence requirements for companies. These include the UK Modern Slavery Act, the French Duty of Vigilance Law, the Dutch Child Labour Due Diligence Law, the Swiss Responsible Business Initiative and the Swiss National Council counter-proposal, the German draft on Regulation of Human Rights and Environmental Due Diligence in Global

[25] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, 25.10.2011 COM (2011) 681 final.

[26] For a comprehensive review of the developments at the EU level on CSR, RBC and business and human rights, see; European Commission, Commission Staff Working Document: Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress (EC CSR Working Document), Brussels, 20.3.2019 SWD (2019) 143 final.

[27] EC Due Diligence Study, *op. cit.*.

Value Chains (Nachhaltige Wertschöpfungskettengesetz - NaWKG), and the Norwegian Ethics Information Committee draft Law.

The developments presented in this chapter demonstrate that there is an international momentum towards the imposition of mandatory due diligence obligations on companies, and that there are multiple ways to do so. The section concludes with an assessment of these options, drawing lessons for a potential Luxembourg law.

2.1 Developments at the UN-Level

2.1.1 UN Draft Treaty on Business and Human Rights

On 26 June 2014, the UN Human Rights Council established an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG). The OEIWG is mandated "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[28] In July 2018, the OEIWG published a "Zero Draft" of a legally binding instrument on business activities and human rights.[29] A revised version of the draft was published in July 2019 and a Second Revised Draft was released August 2020.[30]

The purpose of the draft treaty is delineated in Article 2 as follows:

a. to clarify and facilitate effective implementation of the obligation of States to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard;
b. to prevent the occurrence of human rights abuses in the context of business activities;
c. to ensure access to justice and effective remedy for victims of human rights abuses in the context of such business activities;

[28] A/HRC/RES/26/9.

[29] OEIWG, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (16 July 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[30] OEIWG, Second Revised Draft, *op. cit.*

d. to facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses.[31]

The draft treaty applies "to all business activities, including particularly but not limited to those of a transnational character".[32] This formulation is much broader than the one in the Zero Draft which only applied to business activities of *transnational* character.

The draft treaty reaffirms that "victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms".[33] It reaffirms that states

> [s]hall protect victims, their representatives, families and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings to seek access to effective remedy.[34]

The due diligence measures are enumerated in Article 6 under the heading "prevention". States are required to regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, requiring them "to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations".[35] The relevant article of the draft treaty mirrors the due diligence measures of the UNGPs, including the obligations to identify, prevent and mitigate, monitor and communicate on their human rights impacts.[36]

The standards applicable to human rights due diligence in the draft treaty have a broader scope than some of the domestic instruments that will be discussed below. According to the draft text, the due diligence obligations should cover both human rights and environmental impact assessments.[37] Human rights due diligence should also integrate a gender perspective including consultation with potentially impacted women and women´s organizations, in order "to identify and address the differentiated risks and impacts experience by women and girls".[38] Other due diligence measures in

[31] Second Revised Draft, Art. 2.

[32] Second Revised Draft, Art. 3.

[33] Second Revised Draft, Art. 3.

[34] Second Revised Draft, Art. 4.

[35] Second Revised Draft, Art. 6.

[36] Second Revised Draft, Art. 6.2

[37] Second Revised Draft, Art. 6.3(a).

[38] Second Revised Draft, Art. 6.3(b).

the draft treaty include meaningful consultations with affected individuals, communities or other stakeholders, public and periodic reporting on non-financial matters, integration of human rights due diligence requirements in business contracts, and the adoption and implementation of enhanced human rights due diligence measures in occupied or conflict-affected areas.

The draft text provides that "effective national procedures" should be in place in order to ensure compliance with human rights due diligence measures[39] and encourages states to provide incentives and adopt other measures to facilitate compliance by SMEs.[40] The draft treaty provides for "commensurate sanctions, including corrective action where applicable".[41]

Finally, in Article 8, the draft text provides for a liability regime which is in line with the wording of the UNGPs. The earlier Revised Draft (2019) limited the liability to "contractual relationships" which was criticized for being "too narrow" and "inconsistent" with the UNGPs.[42] The latest draft takes this criticism into account:

> States Parties shall ensure that their domestic law provides for the liability of legal or natural […] persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom it has a *business relationship*, from causing or *contributing* to *human rights abuses*, when the former *legally or* factually *controls* or supervises *such person* or the relevant activity that *caused or contributed to the human rights abuse*, or should have foreseen risks of human rights *abuses* in the conduct of their business activities, including those of transnational character, or in *their business relationships, but failed to put adequate measures to prevent the abuse.*[43]

The draft treaty further specifies that human rights due diligence will not automatically absolve a legal or natural person conducting business activities from liability: "The court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards".[44]

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[39] Second Revised Draft, Art. 6.5.

[40] Second Revised Draft, Art. 6.4.

[41] Second Revised Draft, Art. 6.6.

[42] D. Cassel, 'Five ways the new draft treaty on business and human rights can be strengthened', BHRRC (9 September 2019) https://www.business-humanrights.org/en/five-ways-the-new-draft-treaty-on-business-and-human-rights-can-be-strengthened.

[43] Second Revised Draft, Art. 8(7) (emphasizes are added to mark the changes in the text in comparison to the earlier draft).

[44] Second Revised Draft, Art. 8(8).

2.1.2 General Remarks on the UN Draft Treaty

Luxembourg participates in the UN treaty negotiations indirectly through the EU. A representative of the Ministry of Foreign Affairs has stated:

> With the formation of the government that resulted from the October 2018 legislative elections, the Ministry of Foreign and European Affairs participated more actively in the internal EU consultations ahead of the OEIWG negotiations and will engage constructively during the fifth session of the OEIWG in October 2019.[45]

Initially, the EU was critical of the treaty negotiations for several reasons, including the limited scope the Zero Draft (focusing only on transnational corporations and excluding SMEs) and disregard of the progress already made by the UNGPs.[46] Both these concerns have been addressed in the later drafts and the EU appears to have changed its position. The European Parliament's recent Resolution on Corporate Due Diligence and Corporate Accountability calls on the EU Commission to propose a negotiating mandate for the EU to constructively engage in the treaty negotiations.[47] The Council's Conclusions on EU Priorities in UN Human Rights Fora in 2021, released in February 2021, state that:

> The EU will also participate actively in the UN discussions on a legally binding instrument on business and human rights with the aim to promote an instrument that can effectively enhance the protection of victims of business related human rights violations and abuses and create a more global level playing field.[48]

Past attempts at the UN-level have failed to find "a consensus on meaningful EU legal obligations" for a binding business and human rights instrument.[49] In the current debate, the absence of certain states with dominant positions in the global economy risks to jeopardize the "viability" of the treaty

[45] See, Bağlayan, NBA, op. cit., Annex I, 12.

[46] For the EU's earlier position, see; https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx.

[47] EP Resolution, para. 30.

[48] General Secretariat of the Council of the EU, Council Conclusions on EU Priorities in UN Human Rights Fora in 2021 (Brussels, 22 February 2021), https://data.consilium.europa.eu/doc/document/ST-6326-2021-INIT/en/pdf, para. 24.

[49] Bright, Creating Legislative Playing Field, op. cit., 10. C. Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?' (2020) EUI Working Papers, MWP 2020/02, 10.

process.[50] Nonetheless, EU's changing position is a cause for optimism. The adoption of an international business and human rights treaty would be welcomed as it will allow for a "uniform approach" to regulate corporate behavior on a global scale.[51]

2.2 Developments at the EU-Level

2.2.1 EC Study on Due Diligence Requirements through the Supply Chain

A study led by the British Institute of International and Comparative Law (EC Due Diligence Study) on due diligence requirements through the supply chain was published in February 2020.[52] It was commissioned by the European Commission's Directorate-General for Justice and Consumers as an initial study for the possible development of regulatory options at the EU level. The EC Due Diligence Study has been conducted under the Commission's 2018 Action Plan on Financing Sustainable Growth, complementing another study on the directors' duties and sustainable corporate governance which was released in July 2020.[53]

The EC Due Diligence Study focused on due diligence requirements to identify, prevent, mitigate and account for abuses of human rights (including the rights of the child and fundamental freedoms, serious bodily injury or health risks, environmental damage and climate change). It investigated market practices, regulatory frameworks and options for regulating due diligence in companies' own operations and through their supply chain.

The study's methodology included desk research, surveys, interviews and case studies. The EC Due Diligence Study surveyed 334 businesses (across sectors and of different size) and around 300 stakeholders, including business and industry associations, civil society, trade unions and other stakeholders.

The EC Due Diligence study assessed four regulatory options with regard to possible EU–level legislation, including:

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[50] L. de Leeuw and M. Biggs, 'Re-cap: 2020 negotiations over binding treaty on business and human rights', SOMO (5 November 2020) https://www.somo.nl/re-cap-2020-negotiations-over-binding-treaty-on-business-and-human-rights/.

[51] Bright, Creating Legislative Playing Field, *op. cit*., 10.

[52] EC Due Diligence Study, *op. cit.*.

[53] EY, 'Study on directors' duties and sustainable corporate governance', *op. cit.*.

- option 1: no change;
- option 2: new voluntary guidelines;
- option 3: new reporting requirements; or
- option 4: the introduction of mandatory due diligence requirements.

Based on a literature review and survey results, the study assessed these four options and their economic impacts, social impacts, environmental impacts, impacts on human rights, and impacts on public authorities in the EU. One of the key findings of the study is that the introduction of a mandatory due diligence measure as a standard of care (option 4) would generate the most significant positive impacts on human rights and the environment when supported by appropriate monitoring and enforcement mechanisms.[54] The study also found that the costs of this option would be the highest for both companies and public authorities. The costs for companies would vary depending on the company's size, sector and scope of application of the requirements, but "would be proportionally highest" for option 4.[55] For public authorities, the costs for the monitoring of the implementation of option 4 were expected to be "significant", whereas "judicial remedies are likely to have significantly less additional costs for Member States, insofar as these costs would fall within existing budgets for courts and the judicial system".[56]

Another key finding of the study relates to current market practices. According to the findings of the study, currently around 37% of businesses undertake due diligence which takes into account human impacts, while only in 16% of the cases the due diligence covers the entire supply chain. Primary incentives for undertaking due diligence for businesses are reputational risks, investor demands and consumers demands.[57]

The majority of businesses that responded to the survey conducted for the study agreed that EU-level regulation of a general due diligence requirement would provide benefits to business in the form of a single harmonized standard (75.37%); legal certainty (66.42%); a level playing field (71.64%); and a non-negotiable standard (61.19%) without reducing competitiveness or innovation.[58] The study found

[54] EC Due Diligence Study, 22-23.

[55] EC Due Diligence Study, 22-23.

[56] EC Due Diligence Study, 22-23.

[57] EC Due Diligence Study, 16.

[58] EC Due Diligence Study, 142-48.

that "a general cross-sectoral regulation, which takes into account the specificities of the sector, and the size of the company in its application to specific cases" is the overall preferred option.[59]

2.2.2 Next Steps at the EU-Level

In April 2020, the European Commissioner for Justice Didier Reynders announced plans for a legislative initiative to introduce EU-wide mandatory due diligence requirements for businesses to respect human rights and prevent environmental harm across their global supply chains.[60] In November 2020, the EU Commission launched public consultations seeking input regarding its legislative proposal as a part of the EU's Green Deal and its Sustainable Finance Action Plan. The consultation addressed director's duties and sustainable corporate governance framework as well as human rights due diligence. The EU Commission had already indicated in December 2019 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 sustainability aspects".[61] This was also one of the main findings of the Study on directors' duties and sustainable corporate governance mentioned above. The EU Commission is currently working on a legislative initiative on sustainable corporate governance, addressing both directors' duties and human rights and environmental due diligence along the supply chain. According to website of the EU Commission, a proposal for a directive is expected in the second quarter of 2021.

In December 2020, the Council of the European Union called on the EU Commission to "table a proposal for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains". The Council also requested the Member States to "step up their efforts to effectively implement the UN Guiding Principles on Business and Human Rights, including through new or updated National Action Plans containing a smart mix of voluntary and mandatory measures, where appropriate".[62]

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[59] EC Due Diligence Study, 17.

[60] Speech by Commissioner Reynders in RBC webinar on due diligence (30 April 2020), https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/.

[61] 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", COM(2019) 640 final, 11 December 2019, 17.

[62] *Ibid.*, para. 37.

On 10 March 2021, the European Parliament adopted a Resolution[63] requesting the EU Commission to submit a legislative proposal on corporate due diligence and corporate accountability.[64]

These developments show a high degree of convergence among the EU institutions to move forward with mandatory human rights and environmental due diligence (and sustainable corporate governance) in the near future. The contents of such legislative initiative remain to be seen. Commissioner Reynders has stated in response to the German Corporate Due Diligence in Supply Chains Law that it was the EU Commission's intention to go further than the German draft both in terms of scope and obligations.[65] For now, the European Parliament's proposal provides an indication how future legislation might look like.[66]

2.2.3 The European Parliament's Proposed Directive on Due Diligence

The European Parliament's Resolution of 10 March 2021 on corporate due diligence and corporate accountability is based on an earlier report of the EP Committee on Legal Affairs that contains a proposed directive in the annex. The Commission has until June 2021 to reply to the Parliament's request.[67]

The primary objective of the proposed directive is to ensure that companies:

> [o]perating in the internal market fulfil their duty to respect human rights, the environment and good governance and do not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business relationship or in their value chains, and that they prevent and mitigate those adverse impacts.[68]

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[63] 504 votes in favour, 79 against and 112 abstentions.

[64] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[65] https://zeitung.faz.net/faz/wirtschaft/2021-03-03/a6cbde5b4cf2107cc7bf268d423fd708/?GEPC=s3.

[66] Note that the sustainable corporate governance consultation of the Commission focused on the director's duties and long term value creation in addition to the due diligence requirements through the supply chain. The extent to which director's duties will be addressed in the same legislative document with corporate due diligence is not yet clear.

[67] Inter-institutional Agreement on Better Law-Making of 13 April 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016Q0512(01)&from=EN, para. 10.

[68] EP Proposed Directive, Art. 1.

The proposal extends to all large undertakings governed by the law of a Member State or established in the territory of the EU (including those providing financial products and services) as well as all publicly listed small and medium-sized undertakings and 'high-risk' small and medium-sized undertakings.[69] The proposal also covers non-EU businesses operating in the European single market in order to ensure a "level playing field". An earlier draft of the proposal stipulated that individual EU Member States will have discretion to exempt "micro-undertakings" from the scope of the law, but this clause is omitted from the final version.

The Parliament's proposal draws heavily on the UNGPs and the OECD Guidelines in defining the relevant due diligence obligations and extends these to the environment and good governance. Accordingly, the proposal is broader than many of the domestic initiatives that are currently in development. Under the Parliament's proposal, the Member States are required to introduce rules to ensure that companies "carry out due diligence with respect to human rights, environmental and governance risks in their operations and business relationships".[70]

The due diligence obligations are described in Article 4 of the proposed directive. They include an ongoing assessment of human rights risks and the publication of the findings. In the event that the company identifies risks, it is required to establish a due diligence strategy. Companies may be exempted from establishing a due diligence strategy if they are included in the parent company's plan. The due diligence obligations apply to the entire value chain and business relationships. Companies should ensure that their purchasing policies do not cause or contribute to any potential or actual adverse impacts on human rights, the environment or good governance. They are required to verify regularly that their subcontractors and suppliers comply with their obligations.

Companies are required to consult with stakeholders, including trade unions and workers' representatives when establishing, implementing and reviewing their due diligence strategy.[71] They are required to make their due diligence strategy public and communicate it to employees and business partners.[72]

[69] EP Proposed Directive, Art. 2.

[70] EP Proposed Directive, Art. 4(1).

[71] EP Proposed Directive, Arts. 5 and 8.

[72] EP Proposed Directive, Art. 9.

The proposal contains a requirement for companies to provide for a grievance mechanism as an early warning system, allowing stakeholders to "voice reasonable concerns regarding the existence of a potential or actual adverse impact on human rights, the environment or good governance".[73]

Pursuant to the proposal, Member States are required to designate one or more national competent authorities responsible for the supervision of the application of the proposed Directive. The investigations can be commenced based on a risk-based approach or if the competent authority is in possession of relevant information regarding a suspected breach or a substantiated and reasonable concern raised by any third party. Sanctions are foreseen if the company fails to take remedial actions.

The proposed Directive requires Member States to have a civil liability regime in place through which companies can be held accountable for any harm arising from adverse impacts that these companies or the companies under their control have caused or contributed to.[74] A company can be discharged from liability if it proves that it took all due care to avoid the harm, or that the harm would have occurred even if all due care had been taken.[75]

2.3 Domestic Examples

Besides developments at the UN and the EU levels, various states have adopted legislation in the field of human rights due diligence or launched initiatives for future legislation. The current section describes a number of these laws and proposals, as they provide potential templates for legislation in Luxembourg.

2.3.1 United Kingdom

The Modern Slavery Act (MSA) of the United Kingdom entered into force on 29 October 2015.[76] The MSA refines the criminalization of slavery, forced labour, and human trafficking, imposing sentences ranging from fines to life imprisonment for convicted offenders.[77] Section 54 of the MSA requires

[73] EP Proposed Directive, Art. 9.

[74] EP Proposed Directive, Art. 19(3).

[75] EP Proposed Directive, Art. 19(3).

[76] Section 54 of the UK Modern Slavery Act (2015). For a detailed review of the MSA, see; J. Hayes, 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37 Statute Law Review 33.

[77] S. Neely, 'United Kingdom Country Report' (The UK Country Report in EC Due Diligence Study), op. cit., 311.

certain businesses to publish slavery and human trafficking statements on their websites describing the steps they have taken to prevent slavery and human trafficking in their businesses and supply chains during the relevant financial year.[78]

The clause dealing with transparency in supply chains (Section 54) of the MSA is inspired by the California Transparency in Supply Chains Act which entered into force on 1 January 2012.[79] The California Transparency in Supply Chains Act obliges large retailers and manufacturers operating in the State of California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains,[80] "even if they do little or nothing at all to safeguard their supply chains".[81] The key requirement of the California Transparency Supply Chain Act is that the disclosure must be posted "on the retail seller's or manufacturer's Internet Web site with a conspicuous and easily understood link to the required information placed on the business' homepage".[82] The primary purpose of the California Transparency in Supply Chains Act is to "educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains".[83]

Similarly, MSA Section 54 requires 'commercial organisations' that carry on a business or part of a business in the UK to publish annual statements disclosing the steps that they have taken, if any, to ensure that modern slavery and human trafficking does not take place in any of their supply chains, or in any part of their own business. The MSA applies to any "commercial organisations" in any sector, with an annual turnover of £36 million or more (globally).[84] The "commercial organization" is defined

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[78] The UK MSA, op. cit., Section 54. The transparency in supply chains clause (Section 54) of the MSA is inspired by the California Transparency in Supply Chains Act (2012). The California Transparency in Supply Chains Act mandates retailers and manufacturers operating in the State of California with annual gross revenue of more than USD 100 million (about EUR 82 million), to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains. See, California Civil Code, § 1714.43, subd. (a)(1), https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CIV&division=3.&title=&part=3.&chapter=&article. See also, D. K. Harris, California Transparency in Supply Chains Act A Resource Guide (2012), https://www.oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

[79] California Civil Code, § 1714.43, subd. (a)(1) https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CIV&division=3.&title=&part=3.&chapter=&article.

[80] The obligation applies to enterprises with annual gross revenue of more than USD 100 million (about EUR 82 million), *ibid*., Section 1714(a)(1).

[81] Harris, A Resource Guide, *op. cit*.

[82] Cal. Civ. Code, op. cit., § 1714.43, subd. (b).

[83] Senate Bill No. 657 (2009-2010 Reg. Sess.) § 2(j). https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB657.

[84] Total turnover is calculated as: (a) the turnover of that organisation; and (b) the turnover of any of its subsidiary undertakings (including those operating wholly outside the UK), see; MSA Guidance, op. cit., para. 3.2. The Shift has estimated that this covers approximately 12,000 companies active in the UK. See, Shift, 'Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on

as “a body corporate or partnership which supplies goods or services, and carries on a business, or part of a business, in the UK wherever that corporation is incorporated or formed.[85]

One of the primary purposes of the MSA Section 54 is to prevent modern slavery in organisations and their supply chains.[86] The UK Government’s official Guidance to the MSA states that “a means to achieve this is to increase transparency by ensuring the public, consumers, employees and investors know what steps an organisation is taking to tackle modern slavery”.[87] The transparency in supply chains clause “largely relies on the ‘courts of public opinion’ which include consumers, civil society, and investors, to address the role of businesses in preventing modern slavery from occurring in their supply chains and organisations”.[88] This, in practice, “means that consumer-facing companies are subject to greater scrutiny”.[89]

The slavery and human trafficking statement [90] required under the MSA must be approved by the board and signed by a director,[91] in order to ensure “senior level accountability, leadership and responsibility for modern slavery”.[92] The statement must cover the company’s “supply chains, and … any part of its own business”.[93] A parent company may produce one statement on behalf of itself and its relevant subsidiaries.[94] This statement is to be published on the organization’s website with a “prominent link to the statement on the homepage”.[95] The annual statement must be published as

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Business and Human Rights' (July 2015) https://www.shiftproject.org/media/resources/docs/Shift_ModernSlaveryAct_UNGPs_July2015.pdf, 2.

[85] The UK MSA, Section 54(12).

[86] Transparency in Supply Chains etc. A practical guide, Guidance issued under section 54(9) of the Modern Slavery Act 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf (The MSA Guidance), para. 1.5.

[87] *Ibid*.

[88] J. G. Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’, A/HRC/8/5 (7 April 2008), 54, quoted in C. Bright et al., Options for Mandatory Due Diligence in Belgium (June 2020) https://www.researchgate.net/publication/342424416_Options_for_Mandatory_Human_Rights_Due_Diligence_in_Belgium.

[89] Bright, *ibid*.

[90] The UK MSA, Section 54(2).

[91] The UK MSA, Section 54(6).

[92] The MSA Guidance, op. cit., para. 6(1).

[93] The UK MSA, Section 54(4).

[94] The MSA Guidance, op. cit., para. 3(4).

[95] The UK MSA, Section 54(7).

soon as possible after the financial year-end [96] and no later than within six months.[97] If an organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who requests one in writing, within 30 days of that request.[98] The structure or the specific content of a statement is not prescribed by law.

Civil proceedings for an injunction can be brought by the Secretary of State if a company fails to comply with the disclosure requirements.[99] Failure to comply with the injunction could lead to an order for contempt of court, punishable by an unlimited fine.[100] This enforcement mechanism, however, has not been used in practice and there have been no penalties to date for non-compliant organisations.[101] In addition to potential reputational and financial consequences, a materially inaccurate statement could lead to potential civil litigation from shareholders or other stakeholders, and potential personal liability for the directors for negligence and / or breach of duty.[102]

The principal consequences of failing to prepare a statement are reputational and potentially financial, in light of the increased scrutiny of such statements by investors and NGOs.[103] However, the lack of a central list of businesses which have to comply with the legislation, coupled with the lack of a central repository for the statements of businesses hampers an effective public follow-up.[104]

MSA Section 54 does not contain any provision regarding access to remedies for victims of modern slavery or human trafficking,[105] nor does it require companies to disclose information about their

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[96] The UK MSA, Section 54(7).

[97] The MSA Guidance, *op. cit.,* para. 7(4).

[98] The MSA Guidance, *op. cit.*, para. 7(4).

[99] The UK MSA, Section 54(11).

[100] The UK MSA, Section 54(11).

[101] Independent Review of the Modern Slavery Act 2015: Final report ('Independent MSA Review') (May 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf, 14.

[102] *Ibid*.

[103] The UK Country Report, *op. cit.*, 312.

[104] Note that Business & Human Rights Resource Centre maintains a public track record of companies' statements under the UK Modern Slavery Act, https://www.modernslaveryregistry.org/.

[105] C. Macchi and C. Bright 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in M. Buscemi, *et al.*, *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Brill, 2020), 8. See, R. McCorquodale, 'Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises', *BIICL* (July 2015) https://www.biicl.org/documents/724_uk_access_to_remedies.pdf?showdocument=1.

remediation processes where negative impacts have taken place and the company has caused or contributed to them.[106]

According to reviews of the supply chains section of the MSA, the law has contributed to a "greater awareness of modern slavery" and has led a number of large companies to take rigorous action in relation to modern slavery in their supply chains.[107] It has also generated discussions by companies that might not otherwise have considered the problem of severe labour exploitation.[108] However, due to various shortcomings both in the design and its implementation,[109] including lack of clarity, guidance, monitoring and enforcement,[110] the law has been criticized for failing to "meaningfully change corporate practices".[111]

MSA Section 54 is primarily designed to promote *transparency*. This has raised criticism regarding the effectiveness of the MSA.[112] On a general level, attempts to regulate business conduct with weak provisions that are meant to tackle the "most extreme abuse of labour rights" has been criticized for sending "confusing signals" which suggests that "businesses can get away unscathed, even if they do not take any serious steps to tackle modern slavery".[113]

Various studies have noted widespread corporate failure to comply with the requirements of the MSA, as well as issues with the contents of the statements.[114] A report published by Ergon Associates in October 2018 concluded that statements were getting longer, but not necessarily more informative.[115] With the exception of some leading companies, "detailed information on risk assessment processes

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[106] Shift, 'Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights' (July 2015), https://shiftproject.org/wp-content/uploads/2015/07/Shift_ModernSlaveryAct_UNGPs_July2015.pdf.

[107] Independent MSA Review, *op. cit.*, 14

[108] Experts have noted that "the engagement of sectors such as services and real estate with the reporting obligation seems to have been triggered by the MSA and is viewed as a positive development, given that traditionally they did not engage with such issues". See; V. Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018), 81(6) Modern Law Review 1017, 1043.

[109] Mantouvalou, *ibid.*, 1040.

[110] Independent MSA Review, *op. cit.*, 14.

[111] Bright, Options Mandatory Due Diligence in Belgium, *op. cit.*, 26.

[112] The UK Country Report, *op. cit.*, 314.

[113] Mantouvalou (2018), *op. cit.*, 1045

[114] Ergon Associates Ltd, 'Modern slavery reporting: Is there evidence of progress?' (October 2018), https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739.

[115] *Ibid.*, 2.

continues to be rare".[116] These findings were confirmed by an independent review of the MSA commissioned by the UK Home Office.[117] The Final Report of May 2019 confirmed that "a number of companies are approaching their obligations as a mere tick-box exercise, and it is estimated around 40 per cent of eligible companies are not complying with the legislation at all".[118] The same report recommended that the reporting areas that are currently discretionary should be made mandatory and that the Government should consider an enforcement body to enforce sanctions against non-compliant companies.[119]

2.3.2 France

The French Duty of Vigilance Law of March 2017 is the only law that currently exists which imposes a *general* mandatory due diligence requirement for corporate human rights and environmental impacts.[120] The French law imposes on certain large companies domiciled in France or doing business in France an obligation to adopt and effectively implement a "vigilance plan".[121] It is considered as an "historic step forward", establishing for the first time a legal obligation to adhere to a standard of reasonable care in regard of conduct that could foreseeably harm human rights.[122]

The Duty of Vigilance Law amends the French Commercial Code (Code de Commerce) by inserting Articles L225-102-4 and L225-102-5. Article L225-102-4 specifies the content of the vigilance plan and its publication requirements, and empowers any interested party to ask the court for an injunction obliging companies to comply with the corresponding obligations. The French Conseil d'Etat can supplement these provisions by a decree, if necessary, which has not happened yet.[123]

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[116] Ergon Associates analyzed statements of 150 companies in 2017. Of these, only 81 of them produced a subsequent statement in 2018. Among the companies that produced a subsequent report in 2018, 42% percent of them made no change or minimal changes, suggesting that the process resembles "a mechanical exercise rather than a substantive engagement" or that "reports are put together by external consultants who use the same template for all companies". See, also Mantouvalou, *op. cit.*, 1045

[117] Independent MSA Review, *op. cit.*, 14.

[118] Independent MSA Review, *op. cit.*, 14.

[119] Independent MSA Review, *op. cit.*, 14-15.

[120] EC Due Diligence Study, *op. cit.*, 19.

[121] Law No 2017-399 of March 27, 2017 on the Duty of Vigilance of parent companies and instructing companies, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id.

[122] S. Cossart, 'The French Law on Duty of Care', *op .cit*, 318-19.

[123] A. Duthilleul and M. de Jouvenel, 'Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', January 2020, report of the Conseil général de l'économie (CGE) submitted to the French Ministry of Economy and Finance,

The law applies to any company who fulfils either one of the two following criteria:

- at least five thousand employees are employed by the company itself and its direct or indirect subsidiaries whose registered office is located within French territory, or
- at least ten thousand employees are employed by the company itself and its direct or indirect subsidiaries whose registered office is located within French territory or abroad.[124]

The calculation is based on the number of employees (salariés) of a parent company and its subsidiaries at the end of two consecutive financial years.[125]

The duty to exercise vigilance applies to the activities of the company itself and to those of the "companies it controls … directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship".[126] An established commercial relationship is defined under French law as "a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last".[127]

The obligations under the Duty of Vigilance Law entail the *elaboration*, *disclosure* and *effective implementation* of an annual vigilance plan which has to cover risks and serious harms on *human rights and fundamental freedoms, on the health and safety of individuals* and *on the environment*.[128]

The vigilance plan should include the following five elements: [129]

- a risk assessment that identifies, analyses and prioritizes risks;

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https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf, at 11 (CGE Report), at 15.

[124] For detailed analysis, see; S. Brabant and E. Savourey, "Scope of the Law on the Duty of Vigilance Corporate Duty of Vigilance Companies Subject to the Vigilance Obligations" in *Revue Internationale de la Compliance et de l'éThique Des Affaires* – Supplément à la Semaine Juridique Entreprise et Affaires N° 50 du Jeudi 14 Décembre 2017. http://www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf (hereafter "Dossier Thématique").

[125] Brabant and Savourey, *Dossier Thématique*, 7.

[126] French Commercial Code, article L. 225-102-4, para. 3, with reference to article L. 233-16 for the criterion of control.

[127] S. Cossart, *et al.*, 'The French Law on Duty of Care…', *op. cit.*, quoting French Commercial Code, art L. 442-6-I-5 and Cour de cassation, Chambre Commerciale,18 December 2007, 320.

[128] French Commercial Code, Article L. 225-102-4, para. 3, "Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement […]".

[129] French Commercial Code, Article L. 225-102-4, paras. 4-9.

- regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship;
- actions to mitigate risks or prevent severe impacts;
- a warning mechanism relating to risks, drawn up in consultation with trade unions;
- a monitoring mechanism to follow-up on the implementation measures and evaluating their effectiveness.

The companies are encouraged to draft their vigilance plan in coordination with the company's stakeholders, and where appropriate, with multiparty initiatives.[130] The law, however, does not define the concept of "stakeholders".[131]

The French law does not provide for an enforcement body but it establishes certain mechanisms to ensure compliance, including sanctions in case of a failure to adopt the vigilance plan. If a company fails to establish, implement or publish a vigilance plan, any person with standing (including NGOs, victims and unions) can give a three months' formal notice to comply (mise en demeure); after which the interested party can ask the competent court to order the company to comply, including under periodic penalty payments (astreinte).[132] The amount of such periodic penalty payments are to be decided by the judge.[133] So far, the enforcement mechanism has been triggered seven times and three cases have reached the court, indicating that "the mechanism is operational and several parties have utilized it".[134] Initially, the law had also allowed the judge to impose a civil fine (amende civile) up to

[130] French Commercial Code, Article L. 225-102-4, para. 4.

[131] See, T. Beau de Loménie and S. Cossart, 'Parties prenantes et devoir de vigilance', 2017 *Revue Internationale de la Compliance et de l'Éthique des Affaires* 50. Commentators have suggested that while this "rather mysterious" provision seems to encourage the company to take into account the opinions of NGOs, trade unions, consumer and shareholder associations with an interest in the company's activities, the expression "a vocation à" does not create an obligation, and therefore the company would not be in breach of its duty by failing to consult "stakeholders", see, A. Danis-Fatôme and G. Viney, *op. cit.,* fn 39 and accompanying text.

[132] French Commercial Code, article L. 225-102-4-II. Periodic penalty payments are injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation, see, S. Brabant and E. Savourey, 'A Closer Look at the Penalties Faced by Companies', *op. cit.*, at 1. S. Brabant and E. Savourey note that the amount of such periodic penalty payments, which is to be decided by the judge, "may need to be sufficiently large to bring about swift changes in companies' behavior", *ibid*.

[133] S. Brabant and E. Savourey, 'A Closer Look at the Penalties', *op. cit.*, 4.

[134] E. Savourey and S. Brabant, 'Theoretical and Practical Challenges', *op. cit.*, 149.

EUR10 million.[135] However, this provision was struck down by the French Conseil Constitutionnel on the grounds that it lacked legal certainty.[136]

Article L225-102-5 establishes a civil liability for the breach of the vigilance obligations based on general tort law.[137] For a civil liability to be established under French tort law, three conditions have to be met: the existence of damage, a breach of or the failure to comply with the vigilance obligation, and a causal link between the damage and the breach.[138] The claimant bears the burden of proof and has to prove that the case satisfies all three conditions. The civil liability of the company may be engaged whenever the failure to adopt a vigilance plan can be linked to the harm suffered by the injured party,[139] and not for the right's violation causing the damage *per se*.[140]

The obligation to effectively implement a vigilance plan entails an obligation of conduct (obligation de moyens) rather than an obligation of result (obligation de résultat).[141] A plaintiff bears the burden of proof when arguing that a company's failure to comply with the law caused harm.[142] A reversal of the burden of proof, which would have facilitated recourse for potential and actual victims, has been discussed during the parliamentary debates and rejected.[143]

The French Duty of Vigilance Law is the first and currently the only law that imposes general human rights due diligence obligations on companies. Several issues have been raised in regard to its implementation. The absence of a publicly available or official list of companies subjected to the law

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[135] S. Cossart, *et al.*, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All',2 *Business and Human Rights Journal* (2017), at 320. See, A. Danis-Fatôme and G. Viney, 'La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre'. 2017 *Recueil Dalloz* p. 1610, fn 85 and accompanying text.

[136] For a decision of the text see; Décision No 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. For a discussion , see ; C. Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?', EUI Working Paper MWP 2020/01, https://cadmus.eui.eu/bitstream/handle/1814/65957/MWP_2020_01.pdf?sequence=1&isAllowed=y, 6-7.

[137] Cons. const., Dec. no. 2017-750 DC, 23 March 2017, para 27.

[138] French Civil Code, Articles 1240 and 1241. General provisions of tort liability are the same in Luxembourg as they are in France and are codified in the Civil Code Art. 1382 and Art. 1383.

[139] French Commercial Code, article L. 225-102-5.

[140] C. Lavite, 'The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence' (16 June 2020) *Verfassungsblog*, https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/.

[141] S. Brabant and E. Savourey, 'A Closer Look at the Penalties Faced by Companies', *op. cit.*, at 2.

[142] E. G. Diggs, *et al.*, 'Business and Human Rights as a Galaxy of Norms', 50 *Georgetown J. of Int. L.* 309 (2019), 313.

[143] CGE Report, *op. cit*., 47.

has been one of the most pressing issues since the adoption of the law, considering that such a list would allow civil society to follow up the implementation of the law.[144] A report by the Conseil général de l'économie (CGE) of the French Ministry of Economy and Finance concluded that it is "impossibile [to] draw up a reliable list of the companies concerned".[145] The report states, among other reasons, that "no government department currently has all the information necessary to determine whether the Act applies to a particular company".[146] This conclusion was interpreted by civil society "as a refusal to issue such a list".[147] A civil society report published in June 2020 estimates that around 27% of the companies addressed by the law have not published a vigilance plan since its adoption.[148]

Another criticism levelled against the French law is that it limits the duty to exercise vigilance to "established relationships". According to Olivier de Schutter, the reason for limiting the obligations to permanent relationships is based on the argument that "only where the buyer has such a long-term relationship can it expect to bring about changes in the conduct of the operations of the supplier, and only then, it could be argued, is it easy for a company to monitor its supplier".[149] However, Schutter further argues that "there is no reason in principle why even a one-time buyer should not be able to insert into the supply contract a clause referring to compliance, by the supplier, with international human rights standards […]".[150]

The CGE Report characterised dialogue with stakeholders as the most important challenge in the implementation of the law, noting that many companies do not yet have a satisfactory engagement

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[144] P. Barraud de Lagerie et al. 'Rapport de recherche', *op. cit.*, at 5.

[145] See, 'CGE Report', *op. cit.*, at 20.

[146] "[…]qu'aucun service de l'Etat ne dispose actuellement de l'intégralité des informations nécessaires pour déterminer si la Loi s'applique à telle ou telle société", *ibid*.

[147] E. Savourey and S. Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption', *Business and Human Rights Journal*, 6 (2021), pp. 141–152, 143.

[148] S. Bommier, *et al.*, 'Le radar du devoir de vigilance – identifier les entreprises soumises à la loi' (June 2020) https://plan-vigilance.org/wp-content/uploads/2020/06/2020-06-25-Radar-DDV-Edition-2020.pdf, at 6. The same report suggests that the tax and statistical secrecy, and the absence of express requirement in the law to publish such a list are among the reasons for not publishing the list of companies subject to the law.

[149] O. de Schutter, 'Towards Mandatory Due Diligence in Supply Chains', *Study prepared for the International Trade Union Confederation* (ITUC Study), https://www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf?msdynttrid=HlJ0w_cm3qqs-h9nacnudjgd9vEool6Dt7W788D5WiM , 27.

[150] *Ibid.*, 28.

with stakeholders.[151] A 2019 report by Shift reached a similar conclusion.[152] In the report, Shift analyzed the human rights reporting of the 20 largest companies in France both before and after the Duty of Vigilance Law came into force. The report found "stakeholder engagement" to be the area where disclosure has actually become weaker after the adoption of the law.[153]

Finally, both scholars and practitioners have criticized the law on the issue of the "burden of proof" in civil liability litigation. Claire Bright has remarked that "the legislation constitutes a missed opportunity with regards to effective access to justice" because the burden of proof constitutes "an insurmountable obstacle for the claimants" to access to remedies.[154] Stéphane Brabant and Elsa Savourey have also commented on the "ambiguity" of the concepts of "breach" and "causation" which can be "particularly difficult for a claimant to prove".[155] This, as they have argued, "can make it difficult to establish civil liability and can weaken the objective of providing remediation for victims".[156] The CGE Report states that the issue "remains an explicit expectation of further development of the texts", noting however, that it is yet premature to respond to it at this early stage of the application of the law.[157]

2.3.3 The Netherlands

The Dutch Child Labour Due Diligence Law (Wet zorgplicht kinderarbeid) was adopted on 14 May 2019,[158] but is not expected to enter into force until mid-2022.[159] This waiting period is provided in

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[151] See, 'CGE Report', *op. cit.*, at 37. See also, Shift, 'Human Rights Reporting in France: Two Years In: Has the Duty of Vigilance Law led to more Meaningful Disclosure?'(December 2019) https://shiftproject.org/wp-content/uploads/2019/11/Shift_HumanRightsReportinginFrance_Nov27.pdf.

[152] Shift, 'Human Rights Reporting in France: Two Years In: Has the Duty of Vigilance Law led to more Meaningful Disclosure?' (December 2019) https://shiftproject.org/wp-content/uploads/2019/11/Shift_HumanRightsReportinginFrance_Nov27.pdf.

[153] *Ibid*., at 8. The report concluded that an average score went down to 2.2/5 from 2.5/5 before the Duty of Vigilance Law (Shift bases the scoring of the companies on human rights reporting according to maturity scales based on the UNGPs and the UNGP Reporting Framework. Each company is assigned an overall maturity score based on the key elements of the responsibility to respect human rights, as well as three cross-cutting indicators of good reporting. Companies are given a level of maturity on a scale ranging from '0 - Negligible' to '5 – Leading', *ibid*., 5.

[154] C. Bright, 'Creating a Legislative Level Playing Field', *op. cit.*, 7.

[155] S. Brabant and E. Savourey, 'A Closer Look at the Penalties Faced by Companies', *op. cit.*, 3.

[156] *Ibid*.

[157] *Ibid*.

[158] Unofficial translation of the Act commissioned by Ropes & Gray is available at; https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies.

[159] Allen & Overy LLP, 'Mandatory human rights due diligence laws: the Netherlands led the way in addressing child labour and contemplates broader action'(2 September 2020), https://www.allenovery.com/en-

order to allow the government to prepare a General Administrative Order (Algemene Maatregel van Bestuur) that would appoint a regulatory body and flesh out the obligations of companies under the Act in more detail.[160]

The law applies to all companies providing goods or services to Dutch consumers, irrespective of where the company is based or registered, its legal form and size.[161] The scope of companies covered by the law is particularly broad as it "may include companies selling goods or providing services online, to the extent that they address themselves explicitly to the Dutch consumer".[162] Transport companies are exempt if they are only transporting and not supplying the goods.[163]

The purpose of the law is to ensure that the Dutch consumers "can purchase goods and services in clear conscience" knowing that they are not produced using child labor.[164] Child labour is defined along the lines of ILO Conventions C138 (the Minimum Age Convention 1973) and C182 (the Worst Forms of Child Labour Convention 1999).[165]

All companies operating on the Dutch market are expected to:

i. *investigate* whether there is a reasonable suspicion that the goods or services to be supplied to Dutch end-users have been produced using child labour, and
ii. if there is reasonable suspicion (redelijk vermoeden) of child labour in the production of the goods or services, it must *adopt and implement a plan of action* (plan van aanpak).

The investigation should be focused on sources which are known and accessible for the relevant company.[166] The obligation to exercise due diligence can be satisfied if suppliers have issued statements that they exercise due diligence with respect to the goods and services they supply.[167]

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gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action.

[160] Ropes & Gray, 'Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies' (5 June 2019), https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies.

[161] Art. 4.1., Art. 1 and Art. 4.3.

[162] ITUC Study, *op. cit.*, 29.

[163] Art. 4.4.

[164] L. F. H. Enneking, 'The Netherlands Country Report', EC Due Diligence Study, Final Report, 173, quoting Preamble of the Act, as adopted in May 2019.

[165] The Dutch Child Labour Act, unofficial translation, *op. cit.*, Art 2.

[166] The Dutch Child Labour Act, unofficial translation, Art 5.2.

[167] The Dutch Child Labour Act, unofficial translation, Art. 5.1.

If the company has a reasonable suspicion of child labor in the production of the goods or services, it must adopt and implement a plan of action.[168] This can be "a joint action plan … ensuring that affiliated companies exercise due diligence, developed by or among one or more social organizations, employees' organizations or employers' organizations" and is approved by the Minister for Foreign Trade and Development Cooperation.[169] The Dutch law leaves it to the General Administrative Order to define the exact contours of adequate due diligence and the requirements for the plan of action, which will take into account the ILO-IOE Child Labour Guidance Tool for Business. [170]

Companies are also subject to "declaration" requirements under the law. The declaration should indicate that the company exercises due diligence in order to prevent that the goods and services that they sell or supply to Dutch end-users are produced using child labor.[171] The declarations will be published in an online public registry established by the designated supervising authority.[172] As it currently stands, the Act does not contain any specifications regarding the content of the statements, the risk assessment and the action plans. This can lead to a significant variation among companies' statements and the way they approach due diligence requirements, and can create legal uncertainty for companies.[173]

The enforcement of the Dutch law will be undertaken by a regulatory authority which will have the competence to address complaints by any natural person or legal entity whose interests are affected by the actions or omissions of a company. The company has to respond to the complaint within six months after its submission, and if the company fails to address it will be addressed by the regulatory authority.[174] One of the primary issues regarding the enforceability of the Act is that it does not create regular reporting requirements for companies: "It is a one-off exercise, rather than a requirement that must be regularly repeated".[175] Also, the regulatory authority will only respond to complaints made

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[168] The Dutch Child Labour Act, unofficial translation, Art. 5.2.

[169] The Dutch Child Labour Act, unofficial translation, Art. 5.4.

[170] The Dutch Child Labour Act, unofficial translation, Art. 4.3. The Child Labour Guidance Tool was created jointly by the International Labour Organization and the International Organisation of Employers as a resource for companies to meet the due diligence requirements indicated in the UN Guiding Principles on Business and Human Rights, as they pertain to child labor. See; Ropes & Gray, *op. cit.*

[171] The Dutch Child Labour Act, unofficial translation, *op. cit.*, Art 4.1.

[172] The Dutch Child Labour Act, unofficial translation, Art. 4.

[173] A. Marcelis, 'Dutch Take the Lead on Child Labour with New Due Diligence Law' (17 May 2019), https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/.

[174] The Dutch Child Labour Act, unofficial translation, Art. 3.4.

[175] Bright, Options for Due Diligence in Belgium, *op. cit.*, 31.

by others and will not actively engage in enforcement. This means that the Act will rely on the watchdog role of civil society to ensure its effectiveness.[176]

Non-compliance with the duty to file a declaration can result in a fine up to €4,350 and a failure to exercise due diligence or to provide a (satisfactory) plan of action can led to a fine up to €870.000. Penalties can "increase exponentially for companies found to have inadequate due diligence or lack of an appropriate plan of action to detect and prevent the use of child labour".[177] Companies that fail to comply with their due diligence obligations as set out in the Act can be subject to fines of up to 10% of their annual turnover.[178] The law also foresees criminal enforcement, a novelty in the field of business and human rights: "Within 5 years of imposition of an administrative fine, [if] a similar transgression is committed by the company by order or under supervision of the same (*de facto*) director, this is considered a criminal offence".[179] The law does not create a direct civil cause of action nor does it contain a provision regarding access to remedy for victims of child labour.[180]

2.3.4 Switzerland

Recently there have been a number of alternative legislative proposals on human rights and environmental due diligence in Switzerland. The Swiss Responsible Business Initiative (Konzernverantwortungsinitiative) (RBI),[181] which was launched in 2016 by the Swiss coalition for Corporate Justice representing more than 80 civil society organizations, sought to amend the Swiss Federal Constitution through the introduction of a specific provision on 'Responsibility of Business'.[182]

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[176] Macchi and Bright, *op. cit.*, 12.

[177] Allen & Overy, Mandatory Due Diligence Laws, *op. cit.*

[178] The Dutch Child Labour Act, unofficial translation, Art. 7.1 and Art. 7.3.

[179] Enneking, *op. cit.*, 177, quoting Art. 9 of the Act: "If this second transgression was committed without intent, it is considered a misdemeanor, punishable by a maximum of 6 months' detention and a €20,500 fine. If the second transgression was committed with intent, it is considered a crime, punishable by a maximum of 2 years' imprisonment and a €20,500 fine".

[180] This section was completed in December 2020. On 11 March 2011, four political parties submitted a legislative proposal in the Dutch Parliament on "Responsible and Sustainable International Business Conduct" (Wet verantwoord en duurzaam internationaal ondernemen). Due to time constraints the law was not analyzed in detail in this section. The elements of the law are addressed in the section on comparative assessment and in Table 1. It is important to note that, if adopted, the law on Responsible and Sustainable International Business Conduct would replace the Child Labour Due Diligence Law Art. 4.1.

[181] The Swiss Responsible Business Initiative, information available at: https://konzern-initiative.ch/initiative-erklaert/?_ga=2.91171738.1204446159.1608462276-1501191985.1608462276.

[182] N. Bueno, 'The Swiss Popular Initiative on Responsible Business From Responsibility to Liability' in L. F. H. Enneking, *et al.,* (eds.) Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards (Routledge 2018).

The proposed amendment sought to create a legal duty for Swiss-based companies with respect to environmental and human rights, both in Switzerland and abroad. It also contained a specific liability provision and a provision ensuring the applicability of Swiss law.

A parliamentary counter-proposal was adopted by the National Council (lower house) in June 2018 but rejected in June 2020. It included the same three elements (a due diligence obligation, a specific liability provision and an overriding mandatory provision to ensure application of Swiss law in international matters), although the scope of these elements differed from the RBI.[183] The proposal involved an amendment of Article 716a bis of the Swiss Code of Obligations requiring that "the board of directors takes measures to ensure that the company complies with the provisions for the protection of human rights and the environment relevant to its areas of activity, including abroad".[184]

A second counter-proposal was approved by both the National Council and the Council of States (upper house of the Swiss Parliament) in June 2020. This proposal has a much narrower scope in comparison to the RBI and the parliamentary counter-proposal of 2018. It is limited to non-financial reporting obligations for large publicly traded companies and regulated financial institutions, and imposes specific due diligence obligations only with regard to conflict minerals and child labor.

In light of the much narrower scope of the second parliamentary counter-proposal, the authors of the RBI decided to proceed with their proposal, thus paving the way for a national referendum about the RBI versus the counter-proposal. On 29 November 2020, in what was referred to as a "knife-edge vote",[185] the RBI was narrowly rejected.[186] The counter-proposal is currently subject to a 100-day deadline, during which the opponents can collect 50,000 thousand signatures and demand another

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[183] N. Bueno, 'The Swiss Responsible Business Initiative and its Counter-Proposal: Texts and Current Developments' (7 December 2018), *Business and Human Rights Journal Blog,* https://www.researchgate.net/publication/337207890_The_Swiss_Responsible_Business_Initiative_and_its_counter-proposal_Texts_and_current_developments.

[184] Counter-proposal of June 2018 by the Swiss Parliament to the RBI, Projet du Conseil fédéral du 23 novembre 2016, Décision du Conseil national du 15 juin 2018, 16.077 n CO. Droit de la société anonyme, https://www.parlament.ch/centers/eparl/curia/2016/20160077/N11%20F.pdf (in French) and https://www.parlament.ch/centers/eparl/curia/2016/20160077/N11%20D.pdf (in German).

[185] J. Horowitz, 'Knife-edge Swiss vote could make businesses liable for global rights abuses', CNN Business (27 November 2020), https://edition.cnn.com/2020/11/27/business/switzerland-responsible-business-initiative-referendum/index.html.

[186] J. D. Plüss, 'Responsible business initiative rejected at the ballot box' (29 November 2020), https://www.swissinfo.ch/eng/swiss-to-vote-on-holding-companies-accountable-for-supply-chain-abuses/46184500.

popular vote.[187] Otherwise, the counter-proposal 2020 will enter into force automatically following the deadline.

Both the RBI's proposal and the parliamentary counter-proposal of 2018 (counter-proposal of the National Council) give useful insights for human rights and environmental due diligence legislation, as they involved certain features that no other laws have (in particular the strict liability regime under the RBI).

The RBI proposed an amendment to the Swiss Constitution creating a legal duty for Switzerland-based companies with respect to environmental and human rights, both in their own operations and in respect of controlled companies. Companies would have been required to carry out *appropriate* due diligence.[188] It would have applied to companies having their registered office, central administration, or principal place of business in Switzerland. [189] SMEs were exempt, with the exception of SMEs belonging to high-risk areas (the extraction or trade of raw materials such as copper, gold, diamonds or tropical timber in developing countries).[190] The due diligence obligations would have extended to "all business relationships".[191]

The RBI contained a strict liability regime for *controlling* companies.[192] This involved a reversal of the ordinary burden of proof in tort law, according to which claimants would have needed to prove that the company breached its obligations and that this breach caused the damage. Under a regime of strict liability, a defendant would have to prove that they took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.[193] This allocation of the burden of proof sought to "alleviate the practical difficulties that claimants may face in accessing

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[187] Lenz & Staehelin, 'Counter-Proposal to Responsible Business Initiative: Overview of New Duties for Companies' (30 November 2020) https://www.lexology.com/library/detail.aspx?g=fe665c39-f775-4935-9294-044e94a65472.

[188] *Ibid.* The due diligence should allow companies to "identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken". RBI text with explanations, *op. cit.*

[189] Swiss Coalition for Corporate Justice, 'Texte de l'initiative avec Explications', available at: https://initiative-multinationales.ch/wp-content/uploads/2020/11/kvi_factsheet_initiativtext_fr.pdf (RBI text with explanations).

[190] Swiss Coalition for Corporate Justice, 'How does the parliamentary counter-proposal differ from the popular initiative? ', https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf.

[191] RBI text with explanations, *op. cit.* proposed Art. 101a(2)(b)

[192] Bright and Bueno, *op. cit.*, 804.

[193] Proposed Article 101a(2)(c)

relevant information to prove that there was negligent conduct by the controlling company".[194] The relevant 'control' encompassed both the control of a parent company over its subsidiaries, and the 'economic control' that a company may exercise, for example, over a supplier in its supply chain.[195]

The counter-proposal of 2018 would have applied to Switzerland-based companies exceeding two of the three following thresholds: a balance sheet total of 40 million Swiss francs; a turnover of 80 million Swiss francs; and/or 500 full-time employees.[196] It would also have applied to "companies whose activities entail a particularly high risk of violating the provisions for the protection of human rights and the environment, also abroad". These areas were left to be defined by the implementing legislation.[197] In terms of due diligence obligations, no substantive difference exist between the RBI and the counter-proposal 2018.[198]

The liability regime of the counter-proposal 2018 also included strict liability for the controlling company. However, unlike under the RBI, economic dependence was not considered sufficient to establish a relationship of control, thereby excluding supply chain liability.[199] The personal liability of the members of the board of directors and natural persons involved in the administration or management of the company towards affected parties was expressly excluded. Both the RBI and counter-proposal 2018 specified that the proposed due diligence obligation and liability provision should be understood as overriding mandatory provisions. Neither the RBI, nor the Parliamentary counter-proposal 2018 provided for a state-based oversight body to monitor and ensure compliance with the law.

The counter-proposal 2020 imposed non-financial reporting obligations similar to the ones introduced by the EU NFR Directive (see Part II) and did not require companies to take any concrete measures if they identified social and environmental risks in their report. It included criminal sanctions for non-compliance with the applicable annual reporting obligations or for making false statements, which

[194] Bright and Bueno, *op. cit.*, 805. In the RBI's proposal "reversal of the burden of proof is only partial (i.e. it only concerns the due diligence processes in place), for the other elements of the civil liability claims (such as causation) and the degree of control exercised by the parent or lead companies, the burden of proof remains on the claimant", see Bright, Mandatory HRDD in Belgium, 42.

[195] Bright and Bueno, *op. cit.*, 804.

[196] Counter-proposal of 2018, *op. cit.* Proposed Art. 716a bis CO.

[197] *Ibid.*

[198] Bueno (2018), *op. cit.*, 4.

[199] Bright and Bueno, *op. cit.*, 806.

could be punishable by a fine of up to CHF 100,000 in case of an intentional breach and up to CHF 50,000 in case of negligence. [200]

2.3.5 Germany

Germany approved its national action plan on business and human rights (Nationale Aktionsplan Wirtschaft und Menschenrechte) in 2016.[201] It set as a goal that 50% of the German companies with more than 500 employees should incorporate human rights due diligence into their corporate processes by 2020. If this target would not be met, the Government stated that it would "consider further action, which may culminate in legislative measures".[202]

In order to assess whether this target was reached two surveys were conducted in 2019 and 2020.[203] Only 465 out of 3,300 randomly selected companies responded to the first survey and of these respondents less than 20% fulfilled the requirements of the NAP. Similar results were obtained in the second survey: 455 out of 2,250 companies participated and only 22% of these met the NAP's requirements.[204] The results showed that the NAP targets were far from fulfilled and increased the criticism that the efforts codified in the NAP were insufficient and too slow.[205]

In February 2019, the draft law on the Regulation of Human Rights and Environmental Due Diligence in Global Value Chains (NaWKG) prepared by the Ministry of Development and Cooperation (BMZ)

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[200] Proposed Art. 325ter, Swiss Criminal Code.

[201] German Federal Foreign Office, *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020*, https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf (German NAP).

[202] German NAP, 10.

[203] For the summary of Survey results, see; https://www.bmz.de/de/zentrales_downloadarchiv/Presse/hintergrund-NAP-unternehmensbefragung.pdf.

[204] Herbert Smith Freehills LLP, *Supply Chain Law in Germany: Current steps towards a mandatory human rights due diligence law* (22 July 2020), https://www.lexology.com/library/detail.aspx?g=f1bde270-239d-40cd-85ad-d805adba5790#:~:text=A%20Supply%20Chain%20Law%20would,must%20also%20comply%20with%20them.

The survey has been subject of controversy within the Government, with the Federal Ministry of Economic Affairs criticising the methodology and assessment criteria. The concern regarding the survey were shared by the industry associations and various companies. See; Voland, T., 'Germany's Due Diligence Act' (31 July 2020), https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/germanys-due-diligence-act.html.

[205] S. Schenk and Q. Hubert, *Could Germany introduce a mandatory human rights due diligence law?* (30 September 2019), https://www.herbertsmithfreehills.com/latest-thinking/could-germany-introduce-a-mandatory-human-rights-due-diligence-law.

was leaked.[206] The purpose of the draft law is to ensure the protection of internationally recognized human rights and the environment in the context of global value chains. In December 2019, the Federal Minister for Labour and Social Affairs (BMAS) and the BMZ publicly committed to a joint proposal for a supply chain due diligence law for German companies.[207]

The NaWKG applies to companies that have their statutory seat, central administration or principal place of business in Germany (Art. 2(1)). It applies to all "large companies" which exceed at least two of the three following criteria:

- balance sheet total: EUR 20 000 000;
- net turnover: EUR 40 000 000;
- average number of employees during the financial year: 250.[208]

The draft also covers "other companies" (with the exception of 'minor companies' and subsidiaries controlled by their parent company, if these companies (a) operate in a 'high risk sector' (agriculture, forestry and fishery; mining; manufacturing industries, including food, textile and electronics; and energy supply), *or* (b) operate in conflict-affected or high-risk areas.[209] The NaWKG covers business activities of these companies outside Germany (ausländische Geschäftstätigkeit) (Art. 2 (2)).

The NaWKG imposes a comprehensive due diligence requirement to protect human rights and the environment across the entire value chain.[210] The scope of due diligence obligation is delimited by a *notion of adequacy* (Angemessenheit).[211] The draft law further specifies that, "in order to satisfy the requirement of adequacy, business enterprises have to conduct an 'enhanced risk analysis' whenever they become aware of concrete risks of human rights impacts".[212] More specifically, companies are required to:

- conduct an ongoing risk assessment, the adequacy of which will be based on the country and sector-specific risks, the severity and foreseeability of the potential violations, the degree of

[206] The BMZ draft law was covered by the German newspaper TAZ (Die Tageszeitung) on 10 February 2019, https://taz.de/Neues-Wertschoepfungskettengesetz/!5569037/.

[207] See; http://www.bhrinlaw.org/key-developments/59-germany#NGO%20HRDD.

[208] See. D. Augenstein, "Country Report: Germany", EC Due Diligence Study, Final Report*, op. cit.*, 113.

[209] *Ibid.*, citing Art. 3.

[210] Augenstein, *op. cit.*, 113.

[211] Augenstein, *ibid.*,113 (emphasis original).

[212] *Ibid.*, 114.

involvement of the company with said violations as well as the size of the company and the leverage that it exercises *de facto* on the entity directly causing the violation/damage;

- implement preventive measures and monitor their effectiveness;
- take remedial measures including establishing an internal grievance mechanism or participating in an effective non-judicial grievance mechanism by a multi-stakeholder initiative;
- establish a whistle-blower system;
- appoint a compliance officer that monitors the due diligence obligations;
- draw up comprehensive documentation of its compliance with the due diligence obligations.[213]

The compliance officer has a duty to establish the complaints mechanism and the whistle-blower system, and to fulfill the company's documentation and reporting obligations.[214] The compliance officer may be subject to fines or imprisonment in case of breach of his/her duty causing serious bodily harm or death.[215]

The draft law also envisages the appointment of a competent public authority that would implement the law and monitor corporate compliance with due diligence obligations. The competent public authority would be empowered to issue ordinances as necessary for the execution of the law, to enter business premises and to request disclosure of information and documents.[216]

Sanctions are envisaged for non-complying companies under the draft law, including administrative fines and exclusion from public procurement.

Although the draft law does not provide for a specific liability regime in case of harm, it contains several measures "aimed at reinforcing access to justice for affected individuals".[217] These include:

- a requirement for companies to establish an internal complaint mechanism or participate in effective non-judicial grievance mechanism through a multistakeholder initiative;
- consideration of due diligence obligations as overriding mandatory rules, irrespective of the otherwise applicable law under private international law;

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[213] *Ibid.*, 114.

[214] *Ibid*.

[215] Bright, 'Options for Mandatory HRDD in Belgium', *op. cit.,* 45.

[216] Augenstein, *op. cit.*, 116.

[217] Bright, 'Options for Mandatory HRDD in Belgium', *op. cit.,* 46.

- a requirement that the statute of limitations would be waived pending completion of the non-judicial grievance procedure provided for in the law.[218]

2.3.6 Norway

In August 2018, the Norwegian Government appointed an expert committee to investigate a potential law on "ethics information" and a right to information on companies' human rights impacts. In November 2019, the committee published a draft law relating to transparency regarding supply chains, the duty to know and due diligence.[219] The stated purpose of the proposed law is to "ensure that consumers, organisations, trade unions and others have access to information about fundamental human rights and working conditions in enterprises and supply chains and shall contribute to promoting enterprises' respect for fundamental human rights and decent work".[220]

The law applies to enterprises that offer goods and services in Norway, including publicly owned enterprises.[221] It applies to large companies covered by the Accounting Act *or* companies exceeding at least two of the following thresholds:

- balance sheet of NOK 35 million (about EUR 3.25 million);
- net sales of NOK 70 million (about EUR 6.5 million); and
- at least 50 employees.

The law imposes an obligation on companies "to know of salient risks that may have an adverse impact on fundamental human rights and decent work, both within the enterprise itself and in its supply chains".[222] The proposed law imposes due diligence obligations "in order to identify, prevent and mitigate any possible adverse impact on fundamental human rights and decent work" as well as reporting obligations".[223]

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[218] *Ibid.*

[219] Ethics Information Committee (28 November 2019), https://media.business-humanrights.org/media/documents/files/documents/Norway_Draft_Transparency_Act_-_draft_translation_0.pdf.

[220] Ch. 1.1.

[221] Ch. 1.

[222] Ch.2.5.

[223] Ch.2.10.

The Norwegian consumer protection authority would be responsible for providing guidance and supervising compliance with the law.[224] It would also be empowered to impose fines for failure to adhere to its obligations.[225]

2.4 Comparative Assessment and Lessons for Luxembourg

The laws and legislative proposals discussed above show that there are divergent ways of designing a due diligence law, notably with regard to material scope, personal scope, type of obligations, type of business relationships and implementation mechanisms, including oversight, enforcement and access to remedies.[226] This final section provides a comparative assessment of these elements in light of the framework prescribed by the UNGPs in order to draw some lessons for Luxembourg.

2.4.1 Material Scope

The material scope of the law concerns the types of adverse impacts on human rights and environment that the due diligence obligation covers. A number of existing laws and legislative initiatives focus on a single human rights issue, including the UK MSA and the Dutch Child Labour Law, and define the material scope in specific terms. The Dutch Child Labour Law, for instance, defines the material scope in reference to the ILO's Minimum Age Convention 1973 and the Convention on the Worst Forms of Child Labour.

The focus on a single issue has been criticized in the EC Due Diligence Study for its "unintended effects", as it might detract attention from other types of impacts or other serious breaches of human rights.[227]

As an alternative, the emphasis could be put on the most serious human rights abuses. However, another study conducted by the British Institute of International and Comparative Law (BIICL) concluded that:

[224] Ch. 3.11.

[225] Ch. 4.

[226] Comparative table in the Annex provides a summary of the elements discussed in this section.

[227] EC Due Diligence Study, Synthesis Report, 54.

> A reference to "gross human rights abuses" [..] would narrow the scope […] in a way that is not UNGPs-aligned. It would only cover a small range of the most serious human rights violations. Insofar as these definitions are limited to human rights defenders or those exposing illegal public activity, they would not cover the rights-holders envisioned by the UNGPs. Moreover, these narrow definitions would not provide legal certainty with respect to any other human rights potentially harmed by companies, their subsidiaries or supply chains. It is also likely to exclude the increasing focus that is placed on environmental impacts and climate change.[228]

In general, the approach adopted across European countries seems to favor an overarching human rights due diligence obligation that also extends to environmental impacts (which could be done on the basis of the OECD Guidelines).[229] The French Duty of Vigilance Law, for instance, requires that a company's vigilance plan must address "serious harms on *human rights and fundamental freedoms, on the health and safety of individuals* and *on the environment*" without defining the scope more precisely. The Swiss Responsible Business Initiative would have applied to internationally recognized human rights and environmental standards, whereas the counter-proposal (2018) was limited to the international legal instruments ratified by Switzerland. The German Draft Sustainable Value Chain Act defines its scope by reference to a list of international human rights treaties listed in an annex. The EU Parliament's proposal also includes an extensive list of international human rights instruments.

In order to be UNGP compliant, a Luxembourg due diligence law should cover "all internationally recognized human rights", including, "at a minimum", those rights which are listed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the principles from the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.[230] The wording "at a minimum" shows that the list is not exhaustive and can include other human rights standards.

[228] Pietropaoli et al., 'A UK Failure to Prevent Mechanism fir Corporate Human Rights Harms' (BIICL 2020), 25.

[229] EC Due Diligence Study, Final Report, 277.

[230] UNGP 12.

2.4.2 Personal Scope

The laws and law proposals discussed above vary in terms of their personal scope.[231] A number of them apply only to large companies as defined by their turnover or number of employees. The French Duty of Vigilance Law applies only to large companies defined by the number of "salariés" (non-salariés employees excluded). The law has been criticized for its narrow scope.[232] It has been estimated that around 200 to 250 companies fall within the scope of the law.[233] It has been argued, however, that SMEs are caught indirectly within its scope in so far as they are within the supply chain of the larger companies.[234]

The draft German Law currently pending before parliament focuses on the number of employees but lowers the threshold from 3000 to 1000 employees after two years of the law's adoption. Temporary workers are included in the number, which takes into account all companies belonging to the same group.[235]

A number of proposals have relied on more nuanced formulations instead of relying exclusively on turnover or number of employees. They have used a combination of criteria including the balance sheet total, turnover and number of employees. Examples include the Swiss counter-proposal of 2018, the Dutch Responsible and Sustainable International Business Law that is currently pending before the Dutch Parliament and the German NaWKG which was subsequently replaced by the Government's draft.

Some of the laws extend due diligence and reporting obligations to foreign as well as domestic companies. The Dutch Child Labour Law, for instance, covers companies that are supplying goods or services to Dutch end-users. The UK MSA also applies to all British and foreign companies that are doing business in the UK, provided that they meet certain threshold. Similarly, the European Parliament's proposal also applies to non-EU companies that are selling goods and providing services on the internal market. The latter further applies to all publicly listed SMEs and SMEs in high-risk

[231] *Personal* should not be confused with "personnel" in French. Personal scope refers to the companies that are subject to the law that can be defined based on various criteria as will be discussed in this section.

[232] Sherpa et al., 'le radar du devoir de vigilance: identifier les enterprises soumises à la loi' (2020), https://www.asso-sherpa.org/entreprises-soumises-devoir-de-vigilance-radar-ong.

[233] See, 'CGE Report', *op. cit.*, 20.

[234] Pietropaoli *et al.*, 'A UK Failure to Prevent Mechanism', *op. cit.*, 31.

[235] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Art. 1§1(3).

sectors. The preamble of the EU Parliament's proposal states that the Directive should cover state owned companies and companies providing financial products and services.

UNGP 14 clearly states that:

> The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.[236]

However, the commentary to UNGP 14 further explains that:

> Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size.

The OHCHR's Interpretive Guide provides further guidance:

> In many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations. However, *size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks*. The severity of its actual and potential human rights impact will be the more significant factor […].[237]

As a "workable compromise" towards the conflicting issues of limited capacity and potential impact, the OHCHR has suggested a "risk-based" approach to regulation which would include:

> [p]rioritising resources so that those companies and sectors posing the highest levels of risk fall under the closest scrutiny, while those apparently posing lower levels of risk are subject to "lighter-touch" regulation. [238]

This does not necessarily suggest that SMEs are *a priori* excluded from the scope. Rather, it would mean adopting a risk-based approach *or* introducing lighter requirements for SMEs *or* introducing a so called "phase-in" or "transitional period", allowing SMEs more time to adjust while at the same

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[236] UNGP 14 (emphasis added).

[237] OHCHR, Interpretative Guide, 20 (emphasis added).

[238] UN OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020), (Issues Paper on Legislative Proposals) https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf, 11.

time providing support to build capacity.[239] For instance, reporting requirements could be alleviated for small enterprises and excluded for the smallest (micro) enterprises.

It is, however, important to include SMEs within the substantive scope of the law, considering their major role in the economy.[240] Their inclusion would also help make SMEs "future-proof" and ensure that they adapt and "stay relevant in the economy", as noted by one of the interviewees in preparation of this study. Finally, larger companies are increasingly demanding that the obligations are extended to smaller companies to ensure a level-playing field.[241]

Transitional periods could be introduced not only for SMEs but also for larger entities. The French Duty of Vigilance law, for instance, allows legal action only after the submission of reports for the financial year after the law came into force (in 2018).[242] Similarly, the Dutch Child Labour Law gives companies "five years to reduce or remedy any potential offending supply commitments entered into prior to the effective date of the Act".[243]

To align with the UNGPs and other international standards, it would be desirable if potential due diligence legislation in Luxembourg would apply to all companies regardless of their legal form, size, sector, operational context, ownership and structure, carrying on business or part of a business in Luxembourg. [244] At the same time, in order to avoid a disproportionate burden on SMEs, differentiated obligations, could be introduced taking into account the risk factors, for instance. The modalities of such an approach could be regulated by a Grand-Ducal Regulation to allow flexibility in respect of changing circumstances (this is often done in administrative (environmental) law, for instance, as the next chapter will demonstrate). SMEs should be given further guidance and support based on the UNGPs and other international standards, including the OECD Guidelines.

It would be desirable, from a human rights perspective, that the law's personal scope is as wide as reasonably feasible, and covers companies with a limited number of employees or a limited actual

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[239] The Danish Institute for Human Rights, Sustainable Corporate Governance Consultation Response (February 2021), https://www.humanrights.dk/sites/humanrights.dk/files/media/document/DIHR%20Response%20to%20EC%20Consultation%20on%20Sustainable%20Corporate%20Governance%20February%202021.pdf, 9.

[240] See, STATEC, 'Un portrait chiffré des entreprises au Luxembourg' (2020), 16-17, https://statistiques.public.lu/catalogue-publications/analyses/2020/PDF-Analyses-03-2020.pdf.

[241] F. West, 'On Mandatory Due Diligence, SMEs Don't Need a Free Pass; they Need Flexibility', *Shift* (November 2020) https://shiftproject.org/smes-mhrdd/.

[242] EC Due Diligence Study, Final Report, *op. cit.*, 280.

[243] *Ibid.*

[244] UNGP 14.

presence in Luxembourg.[245] Accordingly, a combination of different factors, including the number of employees, net turnover (le chiffre d'affaires) and balance sheet total (somme bilantaire), might be more useful than an exclusive focus on the number of employees in Luxembourg.

Investment funds and financial services providers are of specific concern, considering their prominence in Luxembourg.[246] The OHCHR states that:

> The UNGPs apply to all business enterprises, including commercial banks and other entities in the financial sector. […] Equally, they apply to any company and commercial vehicle from any other sector that may be a client of, or enter into a business relationship, with a bank. [247]

Accordingly, it is important that the scope of a future law in Luxembourg is clear that it extends to the economic actors in the financial industry.

A number of laws analysed above apply to companies domiciled in the relevant jurisdiction as well as companies that are selling goods and providing services in that jurisdiction. A due diligence law in Luxembourg should apply to both companies domiciled in Luxembourg and companies that are selling goods and providing services in Luxembourg.[248] This approach would create a level playing field between Luxembourgish companies and non-Luxembourgish companies that operate in Luxembourg.

To be in accordance with the UNGPs, a potential law on due diligence could include companies in the public sector. According to the UNGP 4:

> States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance

[245] This would for instance include the so-called Soparfi (Société de participation financière), among others. Soparfis are holding companies governed by Luxembourg company law, although they might take different legal forms. Therefore, a due diligence law that covers Luxembourg companies would also capture Soparfis providing that they fall within the defined scope of the law.

[246] For key figures on financial services, see; https://www.luxembourgforfinance.com/en/financial-centre/key-figures/; for fund industry see; https://www.alfi.lu/en-GB/Pages/Industry-statistics/Luxembourg. For a comprehensive guidance on due diligence approaches relevant for institutional investment managers and asset owners, see; https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf.

[247] OHCHR, OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector (2017), https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf, 3.

[248] This approach is likely to extend the scope of the law's application to bank branches (succursales), for instance, providing that they meet the other eligibility criteria.

or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[249]

This point is reinforced in the NAP which contains an action point on implementing pilot projects on due diligence in majority state-owned companies.[250]

2.4.3 Type of Obligations

Human rights due diligence laws vary in terms of the obligations they impose. A number of laws require companies to "report" or "disclose" their impact on human rights and the environment. These laws are *encouraging* companies to undertake due diligence by introducing transparency and reporting requirements. Strictly speaking, they do not impose substantive duties to undertake due diligence. The EU Non-Financial Reporting Directive and the UK Modern Slavery Act are among the examples.

A second category of due diligence laws goes beyond human rights reporting requirements and imposes explicit duties for companies to undertake human rights due diligence. Most laws or proposals that have been discussed above fall within this category although they vary in other respects (for instance with regard to civil liability provisions). In general, these laws require companies to undertake due diligence in accordance with the UNGPs or other international standards, including the OECD Guidelines. This obliges companies to identify human rights risks, to prevent and mitigate negative impacts and to account for their policies.

In accordance with the UNGPs, most of these laws require a continuous due diligence process. In this regard, the Dutch Child Labour Law is not entirely in line with the UNGPs as it obliges companies to conduct due diligence only once.

Stakeholder engagement, including consultation of workers, is an increasingly prevalent obligation imposed on companies. Both the draft UN treaty on business and human rights and the European Parliament's proposal draw attention to meaningful consultations with stakeholders as an important component of due diligence obligations in line with the UNGPs.

A due diligence law in Luxembourg could draw on due diligence obligations prescribed in the UNGPs and the OECD Guidelines. This would entail assessing actual and potential human rights impacts,

[249] UNGP 4 and the commentary.

[250] NAP II, *op. cit.*, 22.

integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Consideration could also be given to stakeholder consultations.

2.4.4 Corporate Group and Supply/Value Chain Obligations

Human rights abuses and environmental harms often take place within complex value chains or as a result of the conduct of overseas subsidiaries of the parent company. This raises challenges for victims to seek reparations against the parent company or the group, due to the principle of "limited liability" and separation of legal personalities within corporate groups.[251] Therefore, it is important for a due diligence law to define the reach of obligations within the corporate group or value chains clearly.

The laws and proposals examined above apply to subsidiaries and supply/value chains but do so in different ways.

Under the UK MSA applies to companies carrying on business, or part of a business in any part of the UK. The slavery and human trafficking statement must cover the company's "supply chains, and […] any part of its own business".[252] The parent company may produce one statement on behalf of itself and its relevant subsidiaries.[253]

The French Duty of Vigilance Law covers risks and serious harms that derive from the activities of the company and the companies it controls directly or indirectly, as well as subcontractors and suppliers "with which the company maintains an established commercial relationship".[254] An established commercial relationship is defined under French law as "a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last".[255]

The Dutch Child Labour Due Diligence Law requires companies to review their entire supply chain as they are expected to investigate whether there is a reasonable presumption that the goods and services to be supplied have been produced using child labour. The proposed Dutch Responsible and

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[251] P. Muchlinski, 'Limited liability and Multinational Enterprises: A Case for Reform?' (201) 34 Camb. J. Econ. 915, 915.

[252] The UK MSA, Section 54(4).

[253] The MSA Guidance, *op. cit.*, para. 3.4.

[254] French Commercial Code, article L. 225-102-4, para. 3.

[255] S. Cossart, *et al.*, 'The French Law on Duty of Care…', *op. cit.*, quoting French Commercial Code, art L. 442-6-I-5 and Cour de cassation, Chambre Commerciale, (18 December 2007), 320.

Sustainable International Business Conduct covers the production chain (productieketen) defined as "the entirety of activities, products, production lines, supply chain and business relationships of a company".

The Swiss RBI, would have applied to companies that have their registered office, central administration, or principal place of business in Switzerland. It would have used the "factual control" or "economic control" to determine the scope of liability.[256] In the counter-proposal 2018, purely economic dependence was not considered sufficient to establish a relationship of control. The draft Norwegian law imposes an obligation on the enterprise itself and in its supply chains.

Under the UNGPs, a company should look both at its own activities and at its business relationships.[257] Business relationships are defined as:

> 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.[258]

Irene Pietropaoli *et al.* note that:

> The question as to whether a company causes, contributes to or is directly linked to an impact is not exclusively determined by the *relationship* which the company has with the relevant business partner. Instead, it is determined by how the company is linked to the *impact* itself (not the actor causing it).[259]

In this regard, as they note, the French Duty of Vigilance Law does not follow the UNGPs insofar as it limits liability based on the *relationship* which the company has with the *actor*, rather than the *impact*.[260]

Recently, the author of the UNGPs, John Ruggie, clarified certain aspects of this complex issue in a public letter in relation to the German Draft on Corporate Due Diligence in Supply Chains Law.[261] After noting that the law does not "closely align" with the UNGPs, John Ruggie explained:

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[256] EC Due Diligence Study, 275.

[257] OHCHR, Interpretive Guide, op. cit., 41.

[258] OHCHR, Interpretive Guide, op. cit., 5.

[259] Pietropaoli *et al.*, "A UK Failure to Prevent Mechanism", *op. cit.*, 43 (emphasis original).

[260] *Ibid.*

[261] J. Ruggie, 'Letter to German Ministers regarding alignment of draft supply chain law with the UNGPs' (9 March

> Although the draft law defines the concept of supply chain broadly to include the entire value chain, the specific obligations on companies to proactively identify risks and take action to address them apply only to the company's own operations and its direct suppliers—that is, to Tier 1 suppliers. In contrast, the UNGPs and the OECD Guidelines cover the full spectrum of value chain actors, for the simple reason that Tier 1 suppliers typically are not the biggest source of the problem. […] A focus on Tier 1 alone would lead companies to focus on relationships that are less likely to pose significant human rights risks, while ignoring others (beyond Tier 1) where the probability of such risks is higher.[262]

Moreover, scholars have argued that:

> [l]imiting due diligence to the conduct of the company and its first-tier supplier […] may create incentives to circumvent due diligence by further outsourcing or by artificially adding additional tiers to the supply chain. Furthermore, it would create arbitrary distinctions between companies (and sectors) operating with longer supply chains as opposed to those with integrated business models.[263]

In response, companies often ask how far up or down the supply chain their obligations reach. According to John Ruggie, the answer to this question should not be defined "by layers" but rather by "salient human rights risk".[264] According to the UNGPs, companies should focus on areas where the risk of adverse human rights impacts is most significant:

> Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.[265]

In light of the above, it is important that a due diligence law in Luxembourg clearly defines the transnational reach of obligations across corporate groups and value chains. Elements of such a

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2021), *Shift*, https://shiftproject.org/wp-content/uploads/2021/03/Shift_John-Ruggie_Letter_German-DD.pdf.

[262] *Ibid.*

[263] M. Krajewski, *et al.*, 'Human Rights Due Diligence Legislation – Options for the EU' (24 April 2020), https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_BRI(2020)603495.

[264] UNGP 17, the Commentary.

[265] UNGP 17, the Commentary.

definition could focus on corporate and legal relationships, but also on more factual aspects of control and influence. In this context, reference is often made to the notion of "leverage", which defines the "level of influence which a company has over a third party".

> By using the "influence" or "control" tests to determine liability, a mechanism may incentivize companies to disengage from those activities in an attempt to remote itself from the scope of application. Instead, the concept of leverage actually expects companies to proactively engage more, and to demonstrate this engagement. In this way, a due diligence duty could utilize the legal test for "influence" or "control", by requiring companies to show that they have in fact exercised the expected amount of leverage to meet the due diligence standard.[266]

Due diligence legislation should impose an independent obligation within an economic network to monitor the activities of other entities abroad. It should clearly affirm:

> [t]he duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations, directly or indirectly.[267]

2.4.5 Oversight and Enforcement

The enforcement of due diligence laws can take various forms, including administrative, civil (see next section), and criminal law mechanisms. The French Duty of Vigilance law relies on civil (private) enforcement and does not establish governmental monitoring and oversight.[268] The Swiss RBI and the parliamentary counter-proposal of 2018 did not propose a state-based oversight body either.[269] The Dutch, German and Norwegian proposals presented above envisage administrative enforcement by a regulatory authority with divergent competencies. The competent authority could monitor compliance, receive complaints, or engage in capacity building and awareness raising. The EU Parliament's proposal leaves enforcement to the Member States.

Sanction for a failure to comply with due diligence obligations can also take various forms. The Dutch, the Norwegian and German proposals envisaged fines for non-compliance, while the German proposal also included a potential exclusion from public procurement. The Dutch Child Labour Law and the Swiss Parliamentary counter-proposal of 2020 impose criminal sanctions.

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[266] EC Due Diligence Study, *Synthesis Report*, 53. See also; UNGP 19 and the Commentary.

[267] G. Skinner, et al., The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (December 2013), 65.

[268] CSOs have created a website that provides a list of companies subject to law and monitors their vigilance plans: https://vigilance-plan.org/.

[269] *Ibid.*, 40.

Sanctions presuppose an ex-post review of corporate activities once human rights and environmental impacts have materialised. In addition, sanctions could also be designed in such a way as to encourage companies to comply with their due diligence obligations rather than punishing them for non-compliance. This might involve ex-ante requirements, such as impact assessments and permit requirements that are common in environmental law. Companies could also be incentivized (or sanctioned) through various economic tools at the disposal of the state, such as public procurement conditions and export credit and export licensing processes.

Various sources have suggested that enforcement of due diligence laws through a public authority would have certain advantages. The OHCHR has stated that:

> Whichever regulatory structure is eventually preferred […], some form of supervisory institution is likely to be needed to help support implementation and compliance, through educational and capacity building work with companies, for example. These kinds of supporting institutions also have potentially important roles to play vis-à-vis liaison with stakeholder groups, monitoring evaluating regulatory impacts and effectiveness, engaging with other State agencies […], reporting progress and contributing to regulatory development and law reform.[270]

Along the same lines, Scheltema and van Dam have noted that:

> [t]he most benefits can be achieved with some form of administrative enforcement by means of a single supervisor. Contrary to private law enforcement, administrative law enforcement takes place structurally and systematically, which will lead to more and faster clarity about the standards and thus contribute to legal certainty. In this way, open standards can be specified more quickly than with private law enforcement. [271]

Indeed, since the legislator cannot predefine all possible scenarios where corporate human rights risks may arise, an administrative agency could play an important role in fleshing out those obligations more concretely on a case by case basis. At the same time, any proposal for supervision and enforcement by a public agency should consider whether there is sufficient capacity to ensure an effective implementation of the due diligence law, as such supervision and enforcement might involve considerable costs, given the scale of business activity in Luxembourg. A potential law should avoid

[270] OHCHR, *Legislative proposals for mandatory human rights due diligence by companies* (June 2020), 19-20.

[271] C.C. van Dam and M.W. Scheltema, 'Opties voor afdwingbare IMVO-instrumenten

Een onderzoek naar de mogelijke juridische vormgeving en handhaving van afdwingbare IMVO-instrumenten' (2020), 33.

imposing high administrative burdens on companies and the bureaucracy, especially if it would not be guaranteed that these burdens would achieve the purpose of the law, i.e. the protection of human rights in business activities and value chains. Moreover, an absence of centralized supervision and enforcement would not necessarily imply ineffectiveness, as the mere adoption of an obligation to exercise due diligence could spur action by shareholders, stakeholders and civil society, pushing companies to comply with their due diligence obligations.

2.4.6 Access to Remedies

Accessing remedies is one of the major obstacles faced by victims of human rights abuses across the globe. The UNGPs recognize this:

> 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 their territory and/or jurisdiction those affected have access to effective remedy. Remedies could take many forms including judicial and non-judicial.

The laws and legislative proposals discussed above have varying approaches to remedies. The French Law, the Swiss RBI and the counter-proposal 2018 create a direct civil cause of action permitting third parties to sue a company for the adverse consequences of failure to comply with the law. The French Law refers to general tort law. A claimant bears the burden of proof to demonstrate that the complaint satisfies all three conditions of a tort: damage, a breach of or failure to comply with the vigilance obligation, and a causal link between the damage and the breach. This is often considered a barrier to remedies, since the claimant may not have access to the information needed to fulfil these elements. The Swiss approach would have shifted the burden of proof to the company by introducing a strict liability regime. A defendant would have to prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

The OHCHR classifies the liability regimes into three broad categories:

> **Category 1:** regimes that require companies to prevent harm through the exercise of human rights due diligence (for which the occurrence of harm is a key element of the breach);
> **Category 2**: regimes that require companies to carry out human rights due diligence (i.e. liability arises from the failure to exercise human rights due diligence, and whether or not that failure has resulted in actual harm is immaterial to establishing non-compliance); and

> **Category 3**: regimes that contain no explicit requirement to carry out human rights due diligence, but which create strong incentives in that direction (e.g. regimes that permit the company to use the fact that it had carried out human rights due diligence as a defence to legal liability for causing harm, or which permit levels of compliance with human rights due diligence standards to be taken into account "in mitigation" in deciding on an appropriate sanction for a legal breach).[272]

Accordingly, the French Law:

> [p]otentially straddles both category 1 and category 2; while enforcement action does not require applicants to show actual harm stemming from a failure by a company to put in place a "vigilance plan" or to implement it correctly, it also provides for the possibility of actions for compensation in the event of actual harm.[273]

Alongside judicial mechanisms, non-judicial implementation remedies could also be considered including complaints procedures and whistle blowing mechanisms at company or industry level. For instance, the EU Parliament's proposal foresees a company level grievance procedure as an early warning system for risk awareness and mediation. Similarly, the German proposal contained a complaint mechanism within the company.

The German draft also included various other provisions to enhance access to remedies, including a waiver on statute of limitations pending completion of a non-judicial grievance procedure and the use of overriding mandatory provisions. The latter element can be relevant in the context of transnational corporate activities if human rights and environmental impacts occur in a country where access to justice is limited. Under the Rome II Regulation (Art. 4), the applicable law in civil liability claims is the law of the place where the damage occurred. Qualifying a provision as an overriding mandatory provision ensures its application irrespective of the otherwise applicable law. The EU Parliament's proposal and the Swill RBI also contain similar provisions.

"Due Diligence Defence"

Under the UNGPs, "[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in

[272] OHCHR, Issuer Paper, *op. cit.*, 12-13.

[273] *Ibid.*, 13.

relevant jurisdictions".[274] This means that the scope of liability can be much narrower than the scope of due diligence obligations.

The commentary to UNGP 17 states that:

> Conducting *appropriate* human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse.[275]

However, the commentary further underlines that:

> [b]usiness 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.

It has been argued that a due diligence defence is not in line with the UNGPs as it might lead to a "sophisticated 'box-ticking' exercise" whereby companies practice "due diligence *a minima*" in order to avoid legal liability.[276] However, a more widely accepted view seems to be that a due diligence defence is not necessarily suspect.[277] A due diligence defence "would enable a company to avoid liability if it showed that it has put in place processes which are reasonable in all the circumstances. […] Having a defence could be a very effective incentive to companies to act on this duty and to provide evidence to the courts of doing more than merely reporting on what they claim they have done. Thus, the defence is the incentive for a company to undertake human rights due diligence by more than tick-box exercise".[278] Clarifying the extent of due diligence that would exempt companies from liability for human rights impacts would encourage companies to comply with such obligations while creating much-needed legal certainty at the same time.

A future law should seek to contribute to the prevention of human rights abuses, while ensuring accountability in case of a failure to prevent. A clear civil liability regime could facilitate private enforcement and avoid some of the problems that centralized enforcement by a public agency might

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[274] UNGP 12, the Commentary.

[275] UNGP 17, the Commentary (emphasis added).

[276] ITUC Study, 50.

[277] EC Due Diligence Study, *op. cit.*, 264; Failure to Prevent Study, *op. cit.*, 48-54; Danish Institute of Human Rights, 'Sustainable Corporate Governance Response' (February 2021), 21.

[278] R. McCorquodale, 'Corporate Duty to Prevent Human Rights Impacts – A Way Forward for UK Legislation' (12 March 2020), reviewing 'Failure to Prevent Study', https://www.cambridge.org/core/blog/2020/03/12/corporate-duty-to-prevent-human-rights-impacts-a-way-forward-for-uk-legislation/.

involve. Luxembourg law already has favourable rules to facilitate access to remedies. For instance, the statute of limitation period is 30 years (Article 2262 Civil Code), which is longer than in many European countries. There are also various possibilities of non-judicial dispute resolution in Luxembourg, including civil mediation.[279] These mechanisms are not restricted in terms of nationality of the parties or the location of the conduct which gives them a wide scope of applicability. A future due diligence legislation could co-opt these mechanisms alongside judicial ones in order to establish an effective private enforcement regime for failures to exercise human rights due diligence.

[279] See, Bağlayan, NBA, op. cit. Annex, 139-144 for a list of various mediation mechanisms and institutions in Luxembourg.

III. Due Diligence Legislation in Luxembourg: Legal Considerations

There is currently no general binding obligation on companies in Luxembourg to adopt human rights and environmental due diligence measures in relation to their activities or their business relationships. Nonetheless, Luxembourg law contains references to due diligence in various contexts. This chapter will address several fields of domestic law that are relevant to a future law on corporate human rights due diligence, identifying building blocks that already exist, as well as opportunities for the integration of new due diligence obligations within the framework of Luxembourgish law.[280] The chapter starts with several sectoral EU regulations that are part of Luxembourgish law, before moving to specific sections of domestic law. The chapter concludes by discussing several issues of legal integration that would need to be discussed by future due diligence legislation.

3.1 The Existing Legal Framework

3.1.1 EU Regulations on Due Diligence

Timber Regulation

The EU Timber Regulation is "the first legal instrument" [281] at EU level that includes mandatory due diligence, entering into force in 2013.[282] The Regulation seeks to prohibit illegally harvested timber and products derived from such timber from the EU internal market by imposing due diligence obligations to first time operators.[283] The due diligence process as defined in the Timber Regulation has three components:

- access to information,
- risk assessment based on the information obtained, and

[280] A more comprehensive list of laws and regulations related to business and human rights are included in the NBA 2019.

[281] EC Study, Final Report, 167.

[282] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market

[283] Timber Regulation, Preambular para. 16.

- mitigation of the risk in a manner proportionate to the risk identified.[284]

Due diligence under the Timber Regulation is an *ex-ante* process that needs to be carried out prior to any placing of timber or timber products on the EU market.[285]

As a part of the due diligence process, the Timber Regulation sets out two categories of information to be assessed:

a) specific information related to the timber or timber product itself: a description, the country of harvest (and, where applicable, the sub-national region and concession), the supplier and trader, and documentation showing compliance with applicable legislation;[286]
b) general information that provides the context for assessing the product-specific information, on the prevalence of illegal harvesting of specific tree species, the prevalence of illegal harvesting practices in the place of harvest, and the complexity of the supply chain.[287]

According to the EU Commission's non-binding Guidance Document for the EU Timber Regulation:

> While the general information provides operators with the context in which to evaluate the level of risk, the product specific information is necessary to determine the risk linked to the timber product itself. This means that if the general information shows potential risks, special attention must be given to gathering product-specific information. If the product is derived from several timber sources, it is necessary to assess the risk for each component or species.[288]

The Timber Regulation stipulates that "the competent authorities shall carry out checks to verify if operators comply with the requirements".[289] Furthermore, the Regulation provides for a "monitoring organization" which shall "maintain and regularly evaluate" due diligence systems and "take appropriate action in the event of failure by an operator to properly use its due diligence system,

[284] Timber Regulation, Preambular para. 17.

[285] Expert Group on the EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation Guidance document - Due Diligence, https://ec.europa.eu/environment/forests/pdf/28_02_2020_Guidance_on_Due_Diligence.pdf.

[286] Timber Regulation, Art. 6.1(a).

[287] Timber Regulation, Art. 6.1(b).

[288] EU Commission, *Commission Notice of 12.2.2016 Guidance Document for the EU Timber Regulation*, Brussels, 12.2.2016 C(2016) 755 final, 4.

[289] Timber Regulation, Art. 10.

including notification of competent authorities in the event of significant or repeated failure by the operator".[290]

Conflict Minerals Regulation

The Conflict Minerals Regulation, which came into force on 1 January 2021, codifies supply chain due diligence obligations for selected EU importers of certain minerals and metals, including smelters and refiners processing minerals inside the EU.[291] The importers of various metals including tin and gold must comply with and report on supply chain due diligence obligations if the minerals originate from conflict-affected and high-risk areas.

The Regulation sets out obligations in relation to five key areas:

- introducing internal management systems to support supply chain due diligence;
- identifying and assessing actual or potential risks in the supply chain;
- responding to identified risks;
- carrying out independent third-party audits; and
- reporting on supply chain due diligence policies and practices.[292]

For each of the above requirements, the Regulation sets out detailed obligations and requires them to follow the OECD's Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas. In 2018, the EU Commission adopted non-binding guidelines for in-scope companies on how to identify conflict-affected and high-risk areas and for Member States on how to carry out *ex-post* check on importers. [293]

The Conflict Minerals Regulation sets out differentiated obligations for "upstream" and "downstream" companies.[294] Upstream companies have to comply with mandatory rules on due diligence when they

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[290] Timber Regulation, Art. 8.

[291] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (Conflict Minerals Regulation), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:130:TOC.

[292] Conflict Minerals Regulation, Arts 4-7.

[293] Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H1149.

[294] "'Upstream' means the mineral supply chain from the extraction sites to the smelters and refiners, inclusive" (Art. 2(j)); "'downstream' means the metal supply chain from the stage following the smelters and refiners to

import.[295] Downstream companies are further categorized into two categories: "those importing metal-stage products also have to meet mandatory due diligence rules; and those operating beyond the metal stage do not have obligations under the regulation, but they are expected to use reporting and other tools to make their due diligence more transparent, including, for many large companies, those in the non-financial reporting directive".[296]

The Conflict Minerals Regulation obliges Member States to carry out *ex-post* checks in order to ensure that the in-scope companies are complying with their due diligence obligations.[297]

General Data Protection Regulation

The GDPR "lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data". [298] It has a wide territorial scope and applies to the processing of personal data by "a controller or a processor" based in the EU,[299] regardless of whether the processing takes place in the EU.[300] It also applies to the processing of personal data of data subjects who are in the EU by a controller or a processor not in the EU, where the processing activities are related to goods or services offered in the EU,[301] or the monitoring of their behaviour as far as that behaviour takes place within the EU.[302]

The GDPR provides that "taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be

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the final product" (Art. 2(k)).

[295] https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/

[296] *Ibid*.

[297] Conflict Minerals Regulation, Art. 11.

[298] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), Art. 1(1).

[299] Articles 4(7) and 4(8) of the GDPR define the terms controller and processor respectively.

[300] GDPR, Art. 3(1).

[301] GDPR, Art. 3(2)a.

[302] GDPR, Art. 3(2)b.

able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary".[303]

Under Art. 35 of the GDPR, certain types of processing, which include the use of new technologies and are likely to pose a high risk to the rights and freedoms of natural persons due to the nature, scope, context and purpose of the processing, would require a "data protection impact assessment" (DPIA). The DPIA, at a minimum, has to include:

a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;
b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;
c) an assessment of the risks to the rights and freedoms of data subjects, [and]
d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.[304]

Failure to conduct DPIA or to comply with the requirements of the GDPR can lead to the fines imposed by the competent supervisory authority.[305] The latter can also receive complaints from the "data subjects" on alleged infringements of the Regulation.[306]

3.1.2 Corporate Law

Various features of corporate law might be relevant to the development of due diligence legislation, including corporate reporting and transparency requirements, directors' duties and liability, and corporate governance.

Luxembourg companies are primarily governed by statutory law, codes of corporate governance (the main one being the "X Principles" of Corporate Governance of the Luxembourg Stock Exchange), [307] and the company's articles of association.

[303] GDPR, Art. 24.

[304] GDPR, Art. 35(7).

[305] GDPR, Art. 83.

[306] GDPR, Art. 77.

[307] Luxembourg Stock Exchange, *Les X Principes de gouvernance d'entreprise de la Bourse du Luxembourg,* 4th

The main statutory instruments of corporate law that are of relevance are:

- The *Law on Commercial Companies of 10 August 1915*, as amended (the "Companies Law").[308] The Companies Law was revised in 2016[309] and a consolidated version of the Law was published in December 2017.[310] Beside a modernization of the SARL and the SA, the Law introduced a new type of company, the simplified public limited liability company (SAS). It also clarified the legal framework and confirmed certain practices, and
- The *Law of 19 December 2002* on the Trade and Companies Register and the accounting and annual accounts of undertakings, as amended (Accounting Law).[311]

There is no overarching corporate governance code applicable to all companies in Luxembourg. The X Principles of the Luxembourg Stock Exchange apply to companies listed on the LuxSE and to Luxembourg companies whose shares are admitted to trading on a regulated market operated by the LuxSE. Non-listed companies can voluntarily apply the X Principles. The Association of the Luxembourg Fund Industry (ALFI) has also issued a code of conduct for the governance of investment funds and management companies, which was last updated in 2013.[312] According to ALFI's website, the ALFI Code of Conduct "provides a framework of high-level principles and best practice recommendations for the Luxembourg funds industry".[313] Although the adoption of the ALFI Code of Conduct is entirely voluntary, ALFI's website notes that the "Code of Conduct has been adopted on a widespread basis by industry participants".[314]

3.1.2.1 Corporate Reporting and Transparency Requirements in Luxembourg

In Luxembourg, Article 1711-1 of the Companies Law defines the scope of annual consolidated accounting for Luxembourg-based companies.[315] The Law of 18 December 2015,[316] implementing the

edition-revised version (December 2017); https://www.bourse.lu/legislation#14688535946648.

[308] Law of 10 August 2016 amending the Law of 10 August 1915 on Commercial Companies (Loi modifiée du 10 août 1915 concernant les sociétés commerciales).

[309] I. Corbisier, "La réforme du droit luxembourgeois des societies" (2016) 4 *TRV-RPS* 416.

[310] Following the renumbering of the articles of this Law, a new consolidated version of the Commercial Companies Law was published on 15 December 2017 by the Grand-Ducal Regulation of 5 December 2017.

[311] http://legilux.public.lu/eli/etat/leg/loi/2002/12/19/n1/jo.

[312] https://www.alfi.lu/en-GB/Pages/Setting-up-in-Luxembourg/Fund-governance

[313] *Ibid*.

[314] *Ibid*.

[315] Companies Law, Art. 1711-1.

[316] http://legilux.public.lu/eli/etat/leg/loi/2015/12/18/n7/jo.

Directive 2013/34.EU, made various changes to the preparation of the annual accounts, including changing the rules that are used to determine the size of a company.[317] Financial reporting obligations vary depending on the size of the company.[318] The Law also changed the disclosure requirements for small companies introducing a principle of "materiality", as a result of which information that is considered immaterial, may be omitted from the annual accounts.[319] The term "material" (significatif) means the status of information where its omission or misstatement could reasonably be expected to influence decisions that users make on the basis of annual accounts of the undertaking.[320]

Legislative provisions on social-environmental reporting were introduced for the first time with the transposition of the EU Non-Financial Reporting Directive (NFR Directive).[321] The Law of 23 July 2016 transposed the NFR Directive into domestic law *a minima,* without going beyond what is required by the Directive. The transposition has resulted in amendments to several legislative texts, including amendments to the Companies Law and the Accounting Law.

The non-financial reporting law targets public interest entities (entités d'intérêt public) that meet the following criteria:[322]

- Companies that (together with their subsidiaries - entreprises filiales) exceed at least two of the three following criteria:
    - 20 million euros of balance sheet total (bilan),
    - 40 million euros of net turnover (chiffre d'affaires),
    - 250 employees (nombre des membres du personnel employé à plein temps et en moyenne au cours de l'exercice);
- Companies (together with their subsidiaries) with more than 500 employees on its balance sheet date on a consolidated basis (à la date de clôture de son bilan, sur une base consolidée).[323]

[317] M. Wilkenhuysen, 'Luxembourg', in W. J. L. Calkon (ed.), The Corporate Governance Review (9th Edition) (2019 Law Business Research Ltd), 216.

[318] *Ibid*.

[319] *Ibid*.

[320] Law of 18 December 2015, modifying Accounting Law, Art. 26.6.

[321] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095.

[322] A PIE is defined as an entity whose securities are admitted to trading on an EU regulated market, as well as licensed credit institutions and insurance companies having their registered office in the EU.

[323] Companies Law, Art. 1730-1(1), Accounting Law, Art. 68bis(1).

The above criteria limit the personal scope of the law to around 76 companies in Luxembourg.[324]

The companies subject to law are required to disclose non-financial statements containing information related to environmental, social and employee issues, respect for human rights, and the fights against corruption and bribery.[325] Companies which are active in the extractive sector or in the exploitation of primary forests are required to publish an annual report on payments made to governments.[326]

The Law identifies the information that should be disclosed: [327]

- a brief description of the undertakings/group's business model (modèle commercial);
- a description of the policies pursued in relation to the matters set out above, including *the due diligence processes implemented* (les procédures de *diligence raisonnable* mises en oeuvre);
- the outcome of these policies (les résultats de ces politiques);
- the main risks relating to those matters arising in connection with the operations including, where relevant and proportionate, its business relationships, products and/or services which are likely to cause adverse impact in those areas of risk, and how it manages those risks.
- non-financial key performance indicators relevant to the particular business.

The law is based on a "comply or explain" principle whereby companies are required to provide a clear and reasoned explanation (une explication claire et motivée des raisons) if they do not pursue policies in relation to the issues specified in the Law. Accordingly, companies are obliged to report on whether they have a policy in place, but they are not *required* to have a policy in these matters or have in place due diligence procedures.

Entities may rely on national, European or international standards when disclosing the relevant information. The Law does not provide further reference concerning these frameworks, nor does it provide any clarification regarding *procédures de diligence raisonnable.* The "vagueness of certain provisions" was noted by the Chambre de Commerce in their *avis sur projet de loi* of 21 April 2016:

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[324] Projet de loi ,No 6868 of 6 July 2016, séance 42, https://www.chd.lu/wps/PA_RoleDesAffaires/FTSShowAttachment?id=202C0978BCBFE15EEED924952B669F5A$FB5AE22DBA52006CC5FA1FCEA236DAC0.

[325] "au moins aux questions environnementales, aux questions sociales et de personnel, de respect des droits de l'homme et de lutte contre la corruption", Companies Law, Art. 1730-1(2).

[326] Companies Law, Art. 1760-2.

[327] *Ibid*.

> La Chambre de Commerce regrette […] l'imprécision de certaines dispositions, notamment quant aux principes généraux pour les informations à publier, particulièrement pour le rapport consolidé […].[328] [329]

Entities have flexibility to choose whether to include the non-financial statements in the management report or in a separate report, as long as the separate report is published together with the management report or made available within six months after the balance sheet date on the entity's website.[330]

The Law provides certain reporting exceptions. Companies may be permitted not to disclose non-financial information in exceptional cases when this would be seriously prejudicial to the commercial position of the group, provided that such an omission does not preclude a fair and balanced understanding of the group's development, performance, position and impact of its activity.[331]

An approved statutory auditor (réviseur d'entreprises agrée) must verify whether the non-financial statement has been provided.[332] Failure to provide the required information can result in a fine for directors or managers from EUR 500 to 25,000.[333] A prison term of one month to two years and a fine of EUR 5,000 to 125,000 can be imposed on managers, directors, and auditors, who, *with fraudulent intent*, fail to publish the annual accounts, the consolidated accounts, or the management report.[334]

There have been no reported sanctions for a failure to comply with the Law until now. The CSSF carried out an examination of the relevant non-financial information for 2017 and noted that most in-scope

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[328] Avis de la Chambre de Commerce (21.4.2016), Projet de Loi, No 6868, at 3. Note that, Chambre de Commerce has welcomed the Law, in particular that it was transposed *a minima* and has noted that the vagueness of the provisions are in no way attributable to the Government since they have "fidèlement transposé le contenu de la Directive 2014/95/UE". It has, however, called on the European Commission to issue non-binding guidelines on the methodology applicable to the communication of non-financial information in accordance with the Directive.

[329] Note that, in 2017, the European Commission has published guidelines to help companies disclose social and environmental issues: Commission Guidelines on Non-financial Reporting (26 June 2017), available at: https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en.

The European Commission has also published Guidelines regarding climate related information (2019) which supplements the guidelines of 2017, available at: https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en#climate.

[330] *Ibid*., Art. 68bis.(5).

[331] Companies Law, Art. 1730-1(1).

[332] Law of 19 December2002, Art. 68bis(6), Companies Law, Art. 1730-1(6).

[333] Companies Law, Art. 1500-2(4).

[334] Companies Law, 1500-5(2).

companies published information on the referred matters; "nevertheless, further improvements are expected in order for [them] to fully comply with the Law".[335]

3.1.2.2 Directors' duties / responsibilities and liability

Directors have a duty to act in the best interests of the company, and are required to comply with the Companies Law and with the company's articles of association.[336] They must "act as a reasonably prudent businesspersons", "manag[e] the company's business in good faith, with reasonable care, in a competent, prudent and active manner, at all times in the company's best interests, and must refrain from doing anything that does not fall within the scope of the company's corporate objectives".[337]

The law does not define what should be considered a company's best corporate interest.[338] In December 2015, the Luxembourg District Court explained that:

> [i]t is an adaptable concept, the exact interpretation of which depends on the company concerned and the nature of its activities. For some companies, the corporate interest is aligned to the interests of a company's shareholders. For other companies, it includes the interest of the legal entity as a whole, including the interests of shareholders but also those of employees and creditors. [339]

Director's liability is mainly based on provisions of the Companies Law (in particular, Articles 441-8 and 441-9) as well as general provisions of tort liability in the Civil Code (Art. 1382 and Art. 1383). In addition, directors can face criminal charges for certain offences.

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[335] CSSF, Newsletter No 216 - January 2019, available at: https://www.cssf.lu/wp-content/uploads/files/Publications/Newsletter/Newsletter_2019/newsletter216eng.pdf

[336] In addition to the relevant laws (Companies Law of 1915, Civil Code and Criminal Code) this section draws on; M. Wilkenhuysen, 'Luxembourg', in W. J. L. Calkon (ed.), The Corporate Governance Review (9th Edition) (2019 Law Business Research Ltd), 207-228; and I. Corbisier and P.-H. Conac, "Luxembourg. Corporate Governance of listed companies" in Conac in A. Fleckner and K. Hopt (Eds.) Comparative Corporate Governance: A Functional and International Analysis (2013), 630-32. Wilkenhuysen, ibid, 213.

[337] In addition, based on the Companies Law, directors incur some general duties, including the general management of the company, representation of the company towards third parties and upholding their duty to avoid any conflicts of interest. See, *ibid*.

[338] *Ibid*.

[339] Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725, cited *ibid.* 214.

Civil Liability

According to Art. 441-8 of the Companies Law, directors do not, "in principle",[340] incur any *personal liability* in relation to the commitments of the company.[341] However, members of the board of directors, management board, or supervisory board can be held liable based on various provision under the Companies Law and on the basis of the general principles of tort law of the Civil Code:

- Liability for a breach of the duty of care (*responsabilité pour faute de gestion*): under Luxembourg law, directors can be held liable for wrongful acts committed in the execution of their duties on the basis of the *first sentence* of Art. 441-9.[342] For liability to arise under this provision, the director has to commit a fault (faute) either by a wrongful act or wrongful omission which would have to cause a foreseeable damage to the company. If the damage would have arisen irrespective of this act or omission, no liability will be incurred by the directors. The type of liability provided for in Art. 441-9 is a contractual liability based on the "mandat social" towards the company and does not exist towards third parties.
- Liability for breach of the company's bylaws (articles of association) or violation of the provisions of the Companies Law: based on the *second sentence* of Art. 441-9, directors can be held jointly and severally liable for damage caused to either the company or third parties as a result of a breach of the articles of association or the Companies Law.[343] The action brought by the third parties will be based on tortious liability. The notion of "third party" has a broad scope according to a decision of the Tribunal d'arrondissement de Luxembourg dated 10 November 2000.[344] Under this provision, the claimant needs to prove a causal link between the breach and the damage in order for liability to arise. It has been argued that the causal link requirement can create an "extra hurdle" for liability in particular in situation when the breach consists of a lack of action.[345]

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[340] I. Corbisier and P.-H. Conac, "Luxembourg. Corporate Governance of listed companies" in Conac in A. Fleckner and K. Hopt (Eds.) *Comparative Corporate Governance: A Functional and International Analysis* (2013), 630.

[341] Art. 441-8.

[342] Note that Art. 441-9 applies to one tier system. For the corresponding articles in two-tier system, see; Art. 442-10 [Art. 60*bis*-10] for management board, and Art. 442-18 [Art. 60*bis*-18] for supervisory board.

[343] The relecant sentence of the Art. 441-9 reads: "Les administrateurs et les membres du comité de direction sont solidairement responsables, soit envers la société, soit envers tous tiers, de tous dommages résultant d'infractions aux dispositions de la présente loi, ou des statuts".

[344] Cited in R. Sabatier and M. Heart, *La responsabilité des dirigeants de société : les avancées jurisprudentielles (1re partie)* in Wolters Kluwer – ACE Comptabilité, fiscalité, audit, droit des affaires au Luxembourg (2015), 24 (international citations omitted).

[345] The argument is raised in, G. V. Calster and S. Demeyere, "Belgium County Report" in *EC Due Diligence Study* (Annex: Country Reports), 13. Considering the proximity of Belgian and Luxembourg company law (see, I.

Criminal Liability

The Companies Law contains certain specific criminal offences that may be triggered by a fault committed by a director.[346] According to Art. 1500-2, paragraph 4, which states that managers and directors who failed to publish a non-financial statement or the corporate governance statement can be subject to a fine of up to EUR 25,000.[347] Moreover, the managers or directors who, with fraudulent intent, have failed to publish the annual accounts, the consolidated accounts, the management report and the certificate of the person entrusted with the audit are subject to "a jail term of one month to two years and a fine of 5,000 to 125,000 euros or to either one such penalties" (Art. 1500-5).

Certain acts of directors, acting alone or collectively, which would amount to civil liability, can also fall within the scope of the rules set out in the Criminal Code.[348]

3.1.2.3 Corporate Governance: The X Principles of LuxSE

The X Principles of LuxSE provide general principles, recommendations and guidelines on best practices relating to corporate governance for companies listed on the LuxSE and all Luxembourg companies whose shares are admitted to trading on a regulated market operated by LuxSE.[349]

The X Principles include three series of rules:

The general principles

The ten general principles are mandatory for listed companies. According to its preamble:

> Their scope is sufficiently broad for all companies to be able to adhere to them, regardless of their specific features. All Luxembourg companies whose shares are admitted for trading on a regulated market operated by the Luxembourg Stock Exchange […] must therefore apply them without exception.[350]

Corbisier and P.-H. Conac, *op. cit.*, 632) the argument it equally relevant in the context of Luxembourg.

[346] For a list of offences, see; Title XV of the Companies Law.

[347] Companies Law, Art 1500-2(4).

[348] Buren, *op. cit.*, 6.

[349] Preamble, X Principles.

[350] *Ibid*., "Les X Principes sont obligatoires. Ils sont d'une portée suffisamment large pour que toutes les societies puissent y adhérer, quelles que soient leurs spécificités. Toutes les sociétés luxembourgeoises dont lesactions sont admises à la négociation sur un marché réglementé opéré par la Bourse de Luxembourg […] doivent donc les appliquer sans exception".

The recommendations

The recommendations are based on a "comply or explain" approach according to which companies are asked to comply with the recommendations or to explain, in their annual reports, why they are departing from them. Although listed companies are expected to comply with the recommendations, it is acknowledged that certain "specific circumstances", such as the company's nationality, size, shareholder structure, business activities, exposure to risk, and management structure, and CSR aspects may justify a departure from certain recommendations. [351] In this case, the companies need to explain why they have chosen to depart from the recommendation.

Notably, the X Principles mention that:

> Smaller target companies, in particular those that have recently been admitted to trading on the market, as well as young growth companies, may take the view that some of the Recommendations are disproportionate or less relevant in their case. Likewise, holding and investment companies may require a different structure for their Board of Directors, which may affect the relevance of some of the Recommendations to them.[352]

The guidelines

The guidelines "provide advice on the appropriate manner for a company to implement or interpret the recommendations, and reflect 'best practices'".[353] As stated in the Preamble, "the guidelines are optional and therefore not subject to the obligation to 'comply or explain'".[354]

The revised fourth version of the X Principles was published in December 2017, taking effect on 1 January 2018. There is no reference to human rights or supply chain due diligence in the X Principles, but they include a CSR principle (Principle 9), specifying various measures for the implementation of policies and introduces mandatory disclosure of CSR commitments.[355] Principle 2, which delineates directors' duties, also asks the board to consider CSR aspects and to consider the interests of "all stakeholders in their deliberations".[356]

Principle 9 reads:

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[351] Preamble, X Principles. See also, Corbisier and Conac, *op. cit.*, 609.

[352] Preamble, X Principles.

[353] *Ibid*.

[354] *Ibid*.

[355] Principle 9, X Principles.

[356] *Ibid*.

> La société définit sa politique en matière de responsabilité sociale, sociétale et environnementale. Elle précise les mesures prises pour la mise en œuvre de sa politique et leur donne une publicité adéquate.[357]

Under this principle, companies have to integrate CSR aspects into their long-term strategy and describe how the CSR approach contributes to this goal.[358] They are to report non-financial information in a "clear and transparent" manner in a dedicated report that analyses the sustainability of their activities.[359] The board of directors is invited to "regularly consider the company's non-financial risks, including in particular the social and environmental risks"[360] and to "publish a methodological memorandum […] relating to the way in which significant factors have been identified and data have been established".[361] Guideline 9.4 lists "significant" CSR performance indicators, which include "subcontracting and relations with suppliers".

Although explicit due diligence language is lacking from the X Principles and the references to human rights are broad (mainly within the CSR framework), it is conceivable to include due diligence requirements within the corporate governance code. The non-financial risk assessment and the reporting obligations resemble due diligence requirements, although they focus on the risk to *companies* and not to the environment or to external stakeholders as contemplated in the human right due diligence framework.[362]

3.1.3 Environmental Law

The protection of the environment is among Luxembourg's constitutional principles.[363] According to Article 11bis of the Constitution "the State guarantees the protection of the human and natural

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[357] *Ibid*., "La société définit sa politique en matière de responsabilité sociale, sociétale et environnementale. Elle précise les mesures prises pour la mise en œuvre de sa politique et leur donne une publicité adequate".

[358] Recommendation 9.1, X Principles.

[359] Recommendation 9.2, X Principles. The guideline to the recommendation 9.2 of the X Principles reads: "The company is encouraged to use a framework recognised at international level (Global Reporting Initiative, International Integrated Reporting Framework, SASB sustainability standards, FSBTCFD Climate-related Financial Disclosures and/or similar standards) in preparing such a report. It is invited to align itself with the 17 UN Sustainable Development Goals".

[360] Recommendation 9.3, X Principles.

[361] Recommendation 9.4, X Principles. Workforce, staff training, safety, absenteeism, gender balance, subcontracting and relations with suppliers, energy consumption water consumption, waste treatment, CO2 emissions, adaptation to the consequences of climate change, measures taken to preserve or develop biodiversity are indetified amojnf the perfomace indicators applicable to business activities.

[362] Examples of risks identified in the X Principles include, "financial, strategic, operational, legal and regulatory, and reputational risks", Principle 2, Guideline 2.3.2, X Principles.

[363] http://data.legilux.public.lu/file/eli-etat-leg-recueil-constitution-20191214-fr-pdf.pdf.

environment, working to establish a sustainable balance between the conservation of nature, in particular its capacity for renewal, and the satisfaction of the needs of present and future generations [...]".[364]

National environmental legislation, which is to a large extent derived from EU legal framework, is compiled in a "Code de l'environnement".[365] As it currently stands, environmental law in Luxembourg does not expressly require businesses to exercise due diligence. However, certain basic environmental principles, which are also embedded in Luxembourgish law, have similarities with the concept of due diligence concept. In particular, "the principles of 'prevention' and the 'precautionary approach' (Vorsorgeprinzip) have similarities with the concept of due diligence insofar as they relate to pre-hoc decision-making and risks management".[366] Arguably, these principles "are likely to be influential in the interpretation of any due diligence standard of care relating to the environment".[367]

The precautionary principle can be distinguished from similar preventive measures in that "formulations of the preventive principle suggest that legal action shall only be taken where there is evidence that the planned activity causes a hazard to the environment"[368] whereas the precautionary principle "already runs in advance of such evident harms or risks"[369] "permit[ting] a lower level of proof to be used whenever the consequences of waiting for an irrefutable proof may be very costly or even irreversible".[370] Luxembourg environmental law includes provisions that contain both preventive and precautionary principles.

Law of 15 May 2018 on environmental impact assessment (evaluation des incidences sur l'environnement)

An Environmental Impact Assessment (EIA) is an *ex ante* process for identifying and analyzing the potential environmental impacts of a certain project. It is based on the idea that "the impact of (potentially) environmentally harmful projects should be analysed before the authorization of the

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[364] http://legilux.public.lu/eli/etat/leg/recueil/constitution/20191214.

[365] http://legilux.public.lu/eli/etat/leg/code/environnement/20201220.

[366] EC Due Diligence Study, Final Report, 182.

[367] EC Due Diligence Study, 182.

[368] M. Schröder, *Precautionary Approach/Principle* (March 2014), MPEPIL, para. 4, referring to *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) [2010] ICJ Rep 14, para. 101 and the Convention for the Prevention of Marine Pollution from Land-Based Sources (1974), Art. 4 (4).

[369] *Ibid*.

[370] *Ibid*.

project is granted, in order to be able to take a decision in view of all impacts of a project".[371] The EIA obligation follows from the precautionary principle which requires an early understanding of the environmental impacts of a project in order to prevent environmental harm.[372]

In Luxembourg, the main piece of legislation regulating environmental impact assessments is the Law of 15 May 2018 on the assessment of the impacts on the human and natural environment of certain road projects.[373] The Grand-Ducal Regulation of the same day establishes a list of projects subject to such an environmental assessment.[374]

According to the Law 15 May 2018, projects likely to have significant impacts on the environment need to involve an EIA (Art. 2.1). The Law divides development projects into four categories that are subject to separate EIA regimes.

An EIA should identify, describe and assess in an integrated manner "the significant direct and indirect impacts" of a project on the population and human health, on biodiversity, on land, soil, water, air and climate, on material goods, cultural heritage and landscape, and the interaction between these factors (Art. 3).

The project developer that is required to provide a report including the following elements: (Art. 6):

- a description of the likely significant effects of the project on the environment;
- a description of the characteristics of the project and / or the measures envisaged to avoid, prevent or reduce and, if possible, compensate for the probable significant negative effects on the environment;
- a description of the reasonable alternatives that have been examined by the developer, depending on the project and its specific characteristics, and an indication of the main reasons for the choice made, having regard to the impact of the project on the environment.

The project developer preparing the EIA report is required to consult with the relevant authorities (Art. 7) and the public (Art. 8). Where appropriate, he or she is also required to conduct cross-border consultations (Art. 9). The EIA report is published on a dedicated website and announced in at least four daily newspapers for public comments over a 30- day period (Art. 8.1). Following an examination of the EIA, the Ministry of the Environment, Climate and Sustainable Development (MECDD), transmits

[371] A. Epiney, *Environmental Impact Assesment* (January 2009), MPEPIL, para. 1.

[372] *Ibid*.

[373] http://legilux.public.lu/eli/etat/leg/loi/2018/05/15/a398/jo.

[374] http://legilux.public.lu/eli/etat/leg/rgd/2018/05/15/a399/jo.

its reasoned conclusion to the project developer no later than 90 days after the expiry of the consultation period (Art. 10). If necessary, the competent authority is empowered to ask for additional information useful for a reasoned conclusion on the significant environmental effects of the project (Art. 10). The Law provides criminal sanctions in case the project developer knowingly provides inaccurate information in the context of the EIA report including a prison term of eight days to six months and/or a fine of 251 to 100,000 euros (Art. 22).

Law of 20 April 2009 on environmental liability with regard to prevention and the repair of environmental damage

The law of 20 April 2009[375] transposes the EU Environmental Liability Directive 2004/35/EC into domestic law.[376] It establishes an environmental liability framework based on the "polluter-pays" principle to *prevent* and *remedy* environmental damage (Art. 1). The law differentiates between two types of activities and the applicable liability regime (Art. 4). It applies to "environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities" (Art. 4(a)); and to "damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent" (Art. 4(b)).

The principle of prevention is set out in Art. 6. If there is an imminent threat of environmental damage, the operator is required to take the "necessary preventive measures without delay" (Art. 6.1). If the environmental damage has nonetheless occurred, the operator is required to take remedial measures (Art. 7), and bear the costs of the preventive and remedial actions taken pursuant to the law (Art. 9.1), unless he can prove that he was not at fault or negligent (Art. 9.4).

Law of 28 April 2017 on the control of major-accident hazards involving dangerous substances

The law of 28 April 2017[377] is a transposition of Directive 2012/18/EU requiring establishments where dangerous substances are used or stored in large quantities to put in place safety measures and measures to prevent major accidents in industrial installations.[378] The purpose of the law is to provide rules for the prevention of major accidents which involve dangerous substances, and the limitation of their consequences for human health and the environment, and to ensure a high level of protection.

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[375] http://legilux.public.lu/eli/etat/leg/tc/2014/08/13/n1/jo.

[376] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0035.

[377] http://legilux.public.lu/eli/etat/leg/loi/2017/04/28/a459/jo.

[378] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0018.

Under the law, operators are required to take all necessary measures to prevent major accidents and to limit their consequences for human health and the environment, including notifying all concerned establishments (Art. 5); deploying a major accident prevention policy (Art. 17); producing a safety report for upper-tier establishments (Art. 19); producing internal emergency plans for upper-tier establishments (Art. 20); and providing information in case of accidents (Art. 24).

The law sets out an inspection system overseen by the Labor and Mining Inspectorate and the Environmental Administration which includes inspections in regular intervals and non-routine inspections (Art. 27). In the event of infringements, the law provides both administrative sanctions (Art. 35) and criminal sanctions (Art. 36).

Law of 9 May 2014 on industrial emissions

The amended Law of 9 May 2014 on industrial emissions transposes Directive 2010/75/EU on industrial emissions[379] and aims to achieve the integrated prevention and reduction of pollution from establishments. "In order to achieve a high level of protection of the environment considered as a whole", the Law aims to prevent and reduce pollution from industrial activities; avoid or, where this is not possible, reduce emissions to air, water and soil; and prevent waste generation (Art. 1). The installations concerned are listed in the various chapters and annexes of the law.

The law requires the concerned operators to produce a "baseline report" which contains information on the state of soil and groundwater contamination by relevant hazardous substances (Art. 3.9).[380]

The Law requires the relevant operators[381] to prepare and submit a "baseline report" (rapport de base) to the Environmental Administration (l'Administration de l'environnement) prior to the commissioning of the facility or prior to the first update of the permit issued to the facility that occurs after the entry into force of the Law (Art 21.2).

The baseline report must contain the information necessary to determine the state of soil and groundwater contamination allowing a comparison with the situation when the activities are definitively ceased (Art. 21.2). The baseline report shall contain at least the following elements: (a) information on the present use and, where available, on past uses of the site; (b) where available,

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[379] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0075.

[380] Communication from the Commission — European Commission Guidance concerning baseline reports under Article 22(2) of Directive 2010/75/EU on industrial emissions, available at: https://op.europa.eu/en/publication-detail/-/publication/1d9c8da3-d4f2-11e3-8cd4-01aa75ed71a1.

[381] According to the Government's website around sixty establishments in Luxembourg fall within the scope of the Law. See;
https://environnement.public.lu/fr/emweltprozeduren/Autorisations/Etablissements_classes/IED.html.

existing information on soil and groundwater measurements that reflect the state at the time the report is drawn up or, alternatively, new soil and groundwater measurements having regard to the possibility of soil and groundwater contamination by those hazardous substances to be used, produced or released by the installation concerned (Art.21.2).

The systematic assessment of the environmental risks is based on at least the following criteria:

(a) the potential and actual impacts of the installations concerned on human health and the environment taking into account the levels and types of emissions, the sensitivity of the local environment and the risk of accidents;

(b) the record of the operator's compliance with permit conditions;

(c) the operator's participation in the EU eco-management and audit scheme (EMAS)[382] (Art. 22.4(c)).

Art. 22 of the Law establishes a system of environmental inspection. Operators are required to provide the Administration de l'environnement with all necessary assistance to enable it to conduct site visits, take samples, and collect any information necessary to perform the inspection (Art. 21.1). In order to conduct compliance monitoring activities, the Environmental Administration Control and Inspection Unit was created in 2017. It publishes information on inspection planning and full inspection reports,[383] including descriptions of instances of non-compliance and corrective actions recommended to, and accepted by, the operators.[384]

3.1.4 Labour Law

Although there is no direct reference to human rights and environmental due diligence in Luxembourgish labour law, various provisions place duties on employers that can be of relevance to due diligence legislation. This section will focus on "equality and non-discrimination" and "health and safety" at work, concluding with some general observations on "employer's liability".

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[382] EMAS is a management instrument developed by the Commission for companies and other organisations to evaluate, report, and improve their environmental performance, see; EU Commission Staff Working Document, *Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress*, SWD(2019) 143 final, (20 March 2019). According to the OECD, "Several EU institutions located in Luxembourg and one local organisation have adopted the EMAS. Several other local organisations are under consideration. However, EMAS remains unpopular among local businesses", see; OECD, *OECD Environmental Performance Reviews: Luxembourg 2020* (2020) (OECD Environmental Performance Review), available at: https://doi.org/10.1787/fd9f43e6-en, 84.

[383] Rapports d'inspection, see; https://environnement.public.lu/fr/emweltprozeduren/Autorisations/Etablissements_classes/IED/rapports-inspection-ied.html.

[384] OECD Environmental Performance Review, *op. cit.,* 83.

Equality and non-discrimination

The Labour Code prohibits discrimination in the work place on several grounds including gender, family status, marriage status, religion or belief, age, disability, sexual orientation, age, disability and race and ethnic origin and nationality.[385]

Gender based discrimination and other forms of discrimination are addressed under separate titles in the Labour Code. Gender discrimination is addressed in articles L.241-1 to L.245-8, prohibiting "any discrimination based on sex, either directly or indirectly by reference to, inter alia, marital or family status".[386] Under Art. L.245-4(3), the employer is required to take *all necessary preventive measures* to ensure the protection of the dignity of every person in labour relations (*toutes les mesures de prévention nécessaires*), including information measures. The ITM is responsible for the enforcement of this provision (Art. L. 245-8).[387] The Labour Code provides for penalties based on gender-based discrimination pursuant to Articles 241-11.[388]

Other forms of discrimination are mentioned in Articles L.241-1 to L.251-1 to L.254-1. These articles define both direct and indirect discrimination and harassment on grounds of religion or belief, age, disability, sexual orientation and race and ethnic origin (L.251-1).[389] The law applies in respect of access to employment, self-employment and occupation, including selection criteria and recruitment conditions, in any branch of activity and at all levels of the professional hierarchy, including promotions; access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; employment and working conditions, including dismissals and pay; membership of and involvement in an organisation of

[385] The definition of discrimination in criminal law (Criminal Code, Art. 454) is broader than that of labour law and also includes the following criteria: origin, skin colour, morals, nation, trade union activities and state of health, see; Putz, *ibid*.

[386] http://legilux.public.lu/eli/etat/leg/memorial/2008/70.

[387] The Inspectorate of Labour and Mines (Inspection du travail et des mines – ITM) is responsible for, among other things to ensure the proper application of the legal, regulatory, administrative and contractual provisions on working hours, wages, safety, health and wellbeing, as well as the employment of children and adolescents, equal treatment for men and women, protection against sexual harassment in the workplace and for providing information and technical advice to employers and workers on how to comply with legal, regulatory, administrative and contractual provisions. The Labour Court (Tribunal du Travail) has jurisdiction over individual disputes between employers and employees arising from a labor contract or an apprenticeship contract, complementary pension schemes, and insolvency insurance.

[388] L'article L.241-11 du Code du travail reads; « *L'employeur, ses préposés ou mandataires ou toute personne qui diffuse ou publie des offres d'emploi ou des annonces relatives à l'emploi non conformes au principe de l'égalité de traitement entre hommes et femmes et qui, malgré l'injonction écrite de l'Administration de l'emploi de s'y conformer, persistent dans le maintien de ces offres ou annonces, sont punissables d'une amende de 251 à 2000 euros. En cas de récidive, cette peine peut être portée au double du maximum.* »

[389] http://legilux.public.lu/eli/etat/leg/loi/2006/11/29/n1/jo.

workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Exceptions to the principle of non-discrimination are set out in Articles Art. L. 252-1 to Art. L. 252-3. As noted by scholars, there is no general principle of "equality" (*égalité*) in labour law.[390] Unlike French case law, which imposes a general principle of equality on the employer in respect of any decision, Luxembourgish case law does not seem to follow this approach.[391] In Luxembourg, "the employer remains free to base her/his choices and decisions on her/his own criteria",[392] with the exception of above mentioned non-discrimination criteria.

Health and safety at work

The Law of 17 June 1994 imposed occupational health measures on all companies and all employees in Luxembourg. Employers that fail to do so can face civil as well as criminal liabilities (L.327-2).

According to Article L.312-2(1) of the Labour Code, the employer is required to take the necessary measures to protect the safety and security of the health of employees, including occupational risk prevention, information and training activities. Prevention is defined as "l'ensemble des dispositions ou des mesures prises ou prévues à tous les stades de l'activité dans l'entreprise en vue d'éviter ou de diminuer les risques professionnels" (Art. L. 311-2(3)). Furthermore, the employer must ensure that these measures are adapted if circumstances have changed and must aim to improve existing situations (Art. L. 312-2(1)).

The obligations imposed on employers bear similarities to the principles of due diligence requirements, including risk assessment and reporting. Under Art. L.312-5, employers are required to assess risks to health and safety at work, determine the protective measures to be taken and, if necessary, the protective equipment to be used, record a list of occupational accidents which have resulted in an employee's incapacity to work for more than three days, and report the accidents at work suffered by employees to the ITM (Art. L.312-5(1)). Art. L.312-5(2) further states that "un règlement grand-ducal … définit, *compte tenu de la nature des activités et de la taille des entreprises*, les obligations auxquelles doivent satisfaire les différentes catégories d'entreprises, concernant l'établissement des documents prévus au paragraphe (1) sous les points 1 et 2" (documents

[390] Putz, *op. cit.*, 233.

[391] *Ibid*.

[392] *Ibid*.

concerning the assessment of risks and the determination of the protective measures to be taken).[393] In this way, the law presupposes differentiated obligations based on the nature of the activities and the size of companies.

Under Art. L. 312-7 (1) and (2) the employer has an obligation to consult employees in the context of all matters relating to health and safety at work, in particular regarding any action that has substantial effects, and to consider their proposals.

Employer's Liability

The employer's civil liability vis-à-vis employees follows the traditional liability regime, except in the case of a work accident or occupational disease where the traditional scheme is in principle excluded because the employee is supported by Association d'Assurance contre les Accidents (AAA).[394]

Employers are responsible for the errors and omissions of their employees towards *third parties* if there is a contractual relationship. Moreover, even in the absence of a contractual relationship, employees can be held liable for the damage caused by their employees on two legal grounds.[395]

- Vicarious liability (*Responsabilité du fait d'autrui*): The employer is responsible for the actions of his employees and apprentices (*apprentis*). [396] [397]
- Responsibility for the act of things (*Responsabilité du fait des choses*): Art. 1384(1) of the Civil Code provides that "one shall be liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody".[398]

[393] Labour Code, Art. L.312-5(2),

[394] Putz, ibid., 359. The Accident Insurance Association (Association d'Assurance Accident - AAA), under the auspices of Ministry of Social Security, is a public institution responsible for the prevention and payment of compensation for work accidents and occupational diseases.

[395] *Ibid*.

[396] Civil Code, Art. 1384(3); "[L]es maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés".

[397] Civil Code, Art. 1384(4); "[L]es artisans, du dommage causé par leurs apprentis, pendant le temps qu'ils sont sous leur surveillance.

[398] Civil Code, Art. 1384(1); "[O]n est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde".

3.1.5 Enforcement Regimes

Enforcement regimes can be divided between systems of private enforcement (civil liability) and public enforcement (criminal and administrative enforcement).

Civil liability is codified in Article 1382 of the Civil Code: "any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it". According to Article 1383, "one shall be liable not only by reason of one's acts, but also by reason of one's imprudence or negligence".[399] These provisions apply to both natural and legal persons, including companies. In order to engage liability, three elements need to be present:

- a fault
- a damage
- a causal link between the fault and the damage.

The burden of proof of all these elements falls on the claimant. The standard of care in Luxembourg is the conduct that can be expected from a *bon père de famille .*

Luxembourg law recognizes the *criminal liability* of legal persons pursuant to the Law of 3 March 2010.[400] This Law applies to most types of legal entities, apart from the State and municipalities which are expressly excluded (Article 34). Corporate criminal liability does not preclude the criminal liability of natural persons, authors, or accomplices who committed the relevant offenses. It arises whenever a felony or a lesser offense (*délit*) is committed by one or more of the entity's legal representatives or one or more of its legal or *de facto* directors on behalf of and for the benefit of the entity. The courts may apply the following penalties in case the corporate entity is found liable for a crime or an offense:

- Pecuniary fines: Minimum of EUR 500 and maximum of EUR 750,000 for offenses of minimum of EUR 500 and maximum corresponding to twice the maximum rate provided in the Criminal Code for the commission of an offense committed by a natural person (Art 36, Criminal Code).
- For the following crimes and offenses, the minimum and maximum fines will be multiplied by five (Art 37, Criminal Code):
  - Crimes or offenses against State security;
  - Acts of terrorism and terrorist financing;
  - Violation of laws relating to detention of arms;

[399] "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence"

[400] Law of 3 March 2010, Mémorial A no 36 of 2010.

- Trafficking of human beings;
- Drug trafficking;
- Money laundering;
- Misuse of public funds;
- Corruption and bribery;
- Assisting unauthorized entry to the country and residence;
- Illegal employment of third country nationals.
- Specific confiscation (*Confiscation spéciale*);
- Exclusion from participation in public procurement;
- Dissolution of the entity.

In Luxembourg various *administrative* agencies are empowered to monitor corporate conduct and to impose administrative sanctions. For instance, the Commission de Surveillance du Secteur Financier (CSSF) has the power to issue injunctions and suspensions and administrative fines.[401] The Commission Nationale pour la Protection des Données (CNDP) has various investigative, corrective and advisory powers including issuing penalties for infringements set out by the General Data Protection Regulation and imposing penalty payments (astreintes) for a delay to comply with an order of the CNPD to provide information or with a corrective measure issued by the CNPD.[402] The Commissariat aux assurances (CAA), the administrative authority supervising the insurance sector, also has the power to issue a wide range of sanctions in addition or instead of fines.[403] These include warnings, reprimands, prohibitions on carrying out certain transactions and other limitations on the conduct of business, the temporary suspension of one or more of the executives and the removal from the relevant register.

3.2 Integrating Due Diligence Legislation in Luxembourg Law

3.2.1 Legal Certainty

A potential challenge for a future due diligence law is how to ensure legal certainty (sécurité juridique) for companies in matters of civil, criminal and administrative liability. Concerns could be raised against

[401] Law of 5 April 1993 on the Financial Sector, Arts. 59 and 63.

[402] Law of 1 August 2018, Articles 48-52.

[403] Law of 10 August 2018, Article 46.

extending human rights liabilities to companies on the grounds that this "would result in particularly incalculable burdens for companies" and that, as a result, "the relevant laws could be unconstitutional because they violate the principle of legal certainty".[404] Certain key concepts, such as "due diligence" and "business relationship", involve a certain level of flexibility that might create a degree of an uncertainty. Accordingly, the law should define these terms as precisely as possible, in particular if there are sanctions involved: "certainty is a particularly important consideration where the consequences of a breach are potentially serious for a company and its directors".[405]

The French Conseil Constitutionnel addressed this issue when reviewing the constitutionality of the draft French Duty of Vigilance Law, in particular with regard to the fine (amende civile) foreseen in the draft adopted by parliament. The draft included a penalty of up to 10 million Euros for a failure to comply with the vigilance obligations and up to 30 million Euros if that failure resulted in damage. The Conseil Constitutionnel invalidated this provision on grounds of unconstitutionality because the penalty was equivalent to a criminal penalty but had not been defined in sufficient and clear terms as required by law.[406]

The Conseil Constitutionnel concluded that:

> Compte tenu de la généralité des termes qu'il a employés, du caractère large et indéterminé de la mention des « droits humains » et des « libertés fondamentales » et du périmètre des sociétés, entreprises et activités entrant dans le champ du plan de vigilance qu'il instituait, le législateur ne pouvait, sans méconnaître les exigences découlant de l'article 8 de la Déclaration de 1789 et en dépit de l'objectif d'intérêt général poursuivi par la loi déférée, retenir que peut être soumise au paiement d'une amende d'un montant pouvant atteindre dix millions d'euros la société qui aurait commis un manquement défini en des termes aussi insuffisamment clairs et précis.[407]

In Luxembourg, the Constitutional Court recently recognized the constitutional value of the principle of legal certainty.[408] It requires that any law must be sufficiently clear, accessible and predictable.

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[404] R. Grabosch and C. Scheper, 'Corporate Obligations with Regard to Human Rights Due Diligence Policy and Legal Approaches' (Friedrich Ebert Stitung 2015), https://library.fes.de/pdf-files/iez/12167.pdf, 28.

[405] J. Zerk, *Multinationals and Corporate Social Responsibility* (CUP 2006), 53.

[406] Décision n° 2017-750 DC du 23 mars 2017, Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, para. 8.

[407] *Ibid*., para. 13.

[408] Arrêt de la Cour constitutionnelle - Arrêt n° 00152 of 22 January 2021, http://legilux.public.lu/eli/etat/leg/acc/2021/01/22/a72/jo. For an analysis of this topic see; C. Sauer, 'Le principe de sécurité juridique au Luxembourg : la constitutionnalisation d'un concept aux contours flous' (15

Legal certainty indicates that:

> [l]es personnes soient, sans que cela appelle de leur part des efforts insurmontables, en mesure de déterminer ce qui est permis et ce qui est défendu par le droit applicable. Pour parvenir à ce résultat, les normes édictées doivent *être claires et intelligibles, et ne pas être soumises, dans le temps, à des variations trop fréquentes, ni surtout imprévisibles*.[409]

However, as noted by Robert Grabosch and Christian Scheper:

> A norm is not to be considered uncertain merely because it requires interpretation. As long as it is *capable* of interpretation […] the legal situation remains recognizable. It is not necessary in principle that the addressee of the norm be able to understand the provision, without seeking advice from a legal expert. The use of so-called uncertain legal concepts with regard to what constitutes a norm, as well as the exercise of discretion on behalf of the authorities, with regard to legal consequences, thus do not encounter concerns as long as the meaning of the legal concepts is understandable when all materials and experiences from business practice and juridical practice are taken into account. [410]

In order to ensure legal certainty, a future due diligence law should make an effort to define the content and reach of the obligations as clearly as possible. This would be even more pertinent if the breach of obligations would result in fines or penalties. The concepts should be defined in reference to internationally recognized standards, including the UNGPs and the OECD Guidelines. New legislative initiatives both at domestic and EU levels are based on these standards, which will ensure a degree of consistency even among different jurisdictions. Legal certainty will be important not only to (transnational) companies, but also to other stakeholders, including victims of negative human rights impacts.

Nonetheless, considering the fact-intensive nature of any assessment of corporate liability for human rights abuses, it may be illusive to suggest that a future due diligence law should provide *absolute* legal certainty, and this may not even be desirable. As noted by the OHCHR:

February 2020) *Journal des tribunaux Luxembourg***,** 2020/1, n° 67, 66.

[409] M. Besch 'Normes et légistique en droit public Luxembourgeois' (Larcier 2019), 412 quoting Conseil d'État français, *Rapport public 2006 - Sécurité juridique et complexité du droit*, p. 281 (emphasis added).

[410] R. Grabosch and C. Scheper, *op. cit.* 29 (citations omitted, emphasis original).

> overly detailed and proscriptive legal regimes could discourage innovation and proactive behavior by companies and encourage narrow, compliance-oriented, "check box" human rights due diligence processes.[411]

The European Court of Human Rights has also held that:

> [w]hilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[412]

Therefore, in designing human rights due diligence obligations, the legislator needs to strike a balance between legal certainty and sufficient flexibility.[413] The OHCHR suggested that:

> a reasonably common way of providing this flexibility [could be] by way of 'umbrella' legislation, which can be supplemented with further regulations and guidance as needed. Guidance can be binding or non-binding, or can be used to create a presumption of compliance with the regime.[414]

In striking this balance, draft legislation should seek to provide clarity on the central obligations to be imposed on corporations, especially when non-compliance would result in liability. At the same time, the law should leave room for adaptation to changing circumstances and a progressive development of human rights law.

3.2.2 Obstacles from the Perspective of EU Law

A potential objection to human rights due diligence legislation might come from an EU law perspective, although such objections have apparently not been raised against the French due diligence law. Possibly, the imposition of new human rights obligations on companies might be considered as a potential restriction on free movement within the internal market. Nevertheless, if this would be the case, such restrictions would arguably be justified on grounds of public policy, as long as the requirements of proportionality and non-discrimination would be met. An obligation of

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[411] OHCHR, "Improving accountability and access to remedy for victims of business-related human rights abuse: the relevance of human rights due diligence to determinations of corporate liability", UN Doc. A/HRC/38/20/Add.2, (1 June 2018), para. 17.

[412] *The Sunday Times v United Kingdom (No 1)* Application No 6538/74, Merits (26 April 1979, para. 49.

[413] OHCHR, A/HRC/38/20/Add.2, *op. cit.,* para. 18.

[414] OHCHR, Issues Paper, *op. cit.,* 19.

corporate human rights due diligence would fit with the European Union's foundation on 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. [415]

3.2.3 Amendments

New legislation can take the form of a standalone law or an amendment of existing legislation. From a human rights perspective, there is no weighty reason to prefer either option. The French Duty of Vigilance Law involved an amendment of the commercial code, while the Swiss RBI proposed an amendment of the Constitution.

The previous sections of this chapter have identified contexts in Luxembourgish law where due diligence obligations or similar duties already exist. One option to introduce human rights due diligence obligations on companies would be through an amendment of the 1915 Companies Law. The amendments would need to ensure that the new obligations concern a substantive duty to exercise due diligence and are clearly demarcated from the provisions on non-financial reporting. To ensure that this substantive aspect of the new legislation is clearly established, it might be preferable to add a new and separate section to the Companies Law. If the amendments would be introduced under the "General Provisions" (1st Title) of the Company Law, they would cover all types of Luxembourgish companies, unlike the French law that only applies to "sociétés anonymes". If it is envisaged that the law also applies to non-Luxembourgish companies that operate in Luxembourg, other entry points need to be investigated.

3.3 Conclusions

As it currently stands, Luxembourg law does not include a general obligation for companies to exercise due diligence in regard of human rights and the environment, although some sector-specific due diligence obligations exist, notably in the context of the trade in timber and conflict minerals. In addition, Luxembourg corporate law includes several reporting obligations that refer to due diligence, but these provisions have a limited scope of applicability.

At the same time, the existing legislation surveyed in this section demonstrates that the legal notion of due diligence is not alien to Luxembourg law, which could facilitate the introduction of a general corporate due diligence obligation. This section has identified and described various regimes that

[415] European Union, Treaty on European Union (Consolidated Version), (7 February 1992), Art. 2.

involve obligations of due diligence, which can be used as examples of how the obligation to exercise due diligence could be drafted. They also provide templates for requirements on reporting as well as suggestions as to how mechanisms of supervision and enforcement could be framed.

IV. Due Diligence Legislation in Luxembourg: Policy Considerations

Besides the concrete legal issues addressed previously, the development of draft legislation on corporate due diligence should take into account more general considerations related to the integration of the new law in existing regulatory and policy frameworks.

4.1 Contribution to Policy Coherence

The importance of policy coherence and alignment of policies in the field of business and human rights is underlined in the UNGPs:

> UNGP 8 calls for states to promote business respect for human rights via state-based entities that influence business practices;
>
> UNGP 9 urges states to maintain adequate policy space to meet human rights obligations when pursuing other policy objectives, such as agreements concluded with other states or businesses, including investment treaties or contracts;
>
> UNGP 10 calls for states to promote respect for human rights through their membership in multilateral institutions.

Furthermore, UNGPs 4 to 6 highlight the need for states to operationalize their duty to protect human rights in their capacity as economic actors.

The UNGPs acknowledge that States sometimes need to make difficult choices and that an appropriate balance requires a comprehensive approach to business and human rights aimed at ensuring *horizontal* and *vertical* policy coherence.[416] Horizontal policy coherence concerns consistency among the state's human rights policies and practices across departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour. Vertical coherence, on the other hand, entails having the necessary policies, laws and processes to implement international human rights law obligations.

[416] UNGP 8 and the Commentary.

In the fields of business and human rights, policy coherence has been advanced through NAPs. According to the UN Working Group on Business and Human Rights, one of the main functions of NAPs is to provide for "greater coordination and coherence within Government on the range of public policy areas that relate to business and human rights".[417] A number of NAPs that are currently in place, including in Luxembourg, address due diligence in the supply chain or value chain. [418]

Nonetheless, a number of policy coherence challenges exist. According to the OECD, those challenges are linked to "divergent understanding of due diligence among governments agencies, as well as differences of views on promoting due diligence".[419] Accordingly, "one way to facilitate policy coherence is a common understanding across government agencies of the concept of due diligence and of the processes for carrying out due diligence".[420] According to the OECD, "creating a coherent enabling environment for supporting business due diligence efforts may take several forms, including legislation".[421] The OECD paper on Policy Coherence for Responsible Business Conduct notes that new laws increasingly contribute to policy coherence in supply chain due diligence.

This does not imply, however, that human rights due diligence legislation would *a priori* contribute to overall policy coherence. The OHCHR has warned that:

> It will be important to ensure that mandatory human rights due diligence regimes can benefit from, and do not interfere with or undermine […] wider regimes.[422]

Depending on how they are designed, human rights due diligence laws can conflict with other policy objectives and potentially create disincentives among companies to proactively engage in human rights protection:

> [t]here may be incentives running counter to the objectives of mandatory human rights due diligence regimes, such as may exist under laws of civil liability, […] (e.g. between regulatory approaches that seek to encourage companies to more proactively investigate human rights

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[417] UN Working Group on Business and Human Rights, "Guidance on National Action Plans on Business and Human Rights" (November 2016), 1.

[418] For a list of NAPs that refer to supply chain due diligence with varying degrees, see; https://globalnaps.org/issue/supply-chains/ (last accessed January 2021).

[419] OECD, Policy Coherence for RBC, *op. cit.*, 3.

[420] *Ibid*.

[421] *Ibid*. The OECD paper on Policy Coherence for RBC notes that the new laws are increasingly contributing to policy framework in supply chain due diligence, such as the French law on the duty of vigilance enacted on 27 March 2017.

[422] OHCHR, Issues Paper, *op. cit.,* 21.

abuses in supply chains and judicial approaches to liability that may operate in such a way as to deter this).[423]

In order to avoid such conflicts, the OHCHR recommends states to engage in a comprehensive review process to identify any areas of tension as well as overlap with other domestic law regimes.[424] In Luxembourg, the National Baseline Assessment (2019) has reviewed a number of areas and identified various legal and policy gaps, that could be addressed by a potential mandatory human rights due diligence regime.

Luxembourg is a signatory to various international human rights treaties and is bound to protect human rights, also from abuses by third parties, including businesses. Future due diligence legislation would help Luxembourg fulfil its duty to protect.

The "Nohaltegkeetscheck" (sustainability check)[425] which is being put in place for all draft laws will include the following question "l'avant-projet de loi permet au Luxembourg d'être en conformité avec les droits de l'homme et respecte les règles prévues dans les textes internationaux?".[426]

At the same time, legislation should not be seen as the only way to foster policy coherence with respect to human rights due diligence. A different example of such policy coherence concerns the clauses inserted since November 2020 into contracts signed between the Ministry of Development Cooperation and non-public entities and in contracts on grants and subsidies between the Ministry of Economy and businesses.[427] According to these clauses, the beneficiary enterprise verifies - as part of a due diligence procedure - that it complies with the UNGPs and the OECD Guidelines, and that its entire value chain does so as well. Public procurement, export credit and export licensing, and development finance are also areas where the Government could contribute to greater policy coherence by requiring businesses to demonstrate a commitment to human rights due diligence.

Human right due diligence legislation along the supply chain raises a number of policy coherence challenges due to its complex nature and the involvement of various stakeholders. In his final work for the UN Human Rights Council, the author of the UNGPs warned for "'horizontal' incoherence, where

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[423] *Ibid*.

[424] *Ibid*., 20.

[425] https://csdd.public.lu/dam-assets/documents/avis/2018/idees-directrices-pour-une-politique-de-developpement-durable.pdf.

[426] Email communication with the relevant authority.

[427] Note that the Covid-19 specific measures are excluded in view of their temporal and exceptional nature (communication with a representative of Ministry of Economy).

economic or business-focused departments and agencies that directly shape business practices conduct their work in isolation from and largely uninformed by their government's human rights agencies and obligations, and vice versa".[428] The development of a due diligence law constitutes an opportunity for coordination across government departments. A joint effort could help align diverging policies and formulate a coherent message from different institutions on the importance of corporate human rights due diligence.

4.2 EU or National Legislation?

Concerns have been raised regarding advantages and disadvantages of a legislative initiative at the European level compared to one at the national level. Some of these are general arguments and the others are specific to Luxembourg.

The stakeholders in Luxembourg appear to have divergent positions on this matter. The Government's Coalition Agreement of 2018 states that ;

> Le Luxembourg soutiendra des initiatives européennes pour renforcer la responsabilité sociale et environnementale des entreprises transnationales dans la gestion de leurs chaînes d'approvisionnement et s'engagera au niveau européen pour une législation contraignante et effective. Dans ce contexte, la possibilité de légiférer sur le devoir de diligence pour les entreprises domiciliées au Luxembourg sera étudiée […].

According to the Union des Entreprises Luxembourgeoises (UEL)[429] and the Institut National pour le Développement durable et la Responsabilité sociale des entreprises (INDR) ;

> L'UEL est clairement contre une législation nationale unilatérale. Le Luxembourg est une économie ouverte et ne peut à lui seul imposer des contraintes législatives à ses propres entreprises qui vont plus loin que celles auxquelles font face les entreprises étrangères, défavorisant de ce fait les entreprises luxembourgeoises comparativement aux entreprises étrangères. Le Luxembourg faisant partie du marché unique européen, une initiative isolée de ce genre entraînerait inévitablement des distorsions de marché, une perte d'attractivité, des délocalisations, des procédures juridiques complexes et disparates au niveau européen, et

[428] UN Doc A/HRC/17/31/Add.2 (23 May 2011), para. 28.

[429] Representing, Association des Banques et Banquiers, Luxembourg (ABBL), Association des Compagnies d'Assurances et de Réassurance (ACA), Chambre de Commerce du Grand-Duché de Luxembourg, Chambre des Métiers du Grand-Duché de Luxembourg, Confédération luxembourgeoise du commerce (clc), Fédération des Artisans, FEDIL – The Voice of Luxembourg's Industry, HORESCA.

ainsi des charges administratives et financières lourdes et généralisées à tous les niveaux de la chaîne d'approvisionnement, etc.

Cela ne signifie pas que l'UEL est contre l'introduction d'un cadre plus contraignant en la matière, pour autant qu'il émane d'une initiative européenne proportionnelle, et ait des répercussions mondiales. Nous soutenons le développement d'un mécanisme de diligence raisonnable qui constitue un pas en avant par rapport à la situation actuelle, tout en étant réalisable dans la pratique pour les entreprises. Cela à l'image des nombreuses entreprises qui déploient des efforts indéniables en la matière, et l'UEL les y encourage.[430]

Recently, 32 companies representing 8 different economic sectors in Luxembourg and the Union luxembourgeoise de l'économie sociale et solidaire (ULESS)[431] released the following statement titled "Un appel pour une législation en faveur d'une diligence raisonnable obligatoire en matière de droits de l'homme et de l'environnement" :

> Selon les principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme, les entreprises ont la responsabilité de respecter les droits humains, y compris dans leurs chaînes de valeur. Certaines entreprises ont déjà pris des mesures pour mettre en œuvre cette responsabilité. L'expérience a toutefois montré que les engagements volontaires ne suffisent pas à eux seuls. Il est nécessaire que la diligence raisonnable obligatoire soit mise en œuvre de manière adéquate par tous. Une législation sur la diligence raisonnable en matière de droits humains et de l'environnement contribuerait effectivement à créer à la fois une sécurité juridique et des conditions de concurrence équitables („level playing field"). Elle garantirait que tous les acteurs économiques sont tenus de respecter les mêmes normes et qu'aucune entreprise ne peut se soustraire à ses responsabilités sans conséquences ou réaliser des bénéfices au détriment de personnes et de la nature. Aujourd'hui, les employés, les clients, les investisseurs et le grand public attendent que les entreprises assument cette responsabilité. Nous saluons si le Luxembourg mette en place une législation nationale en faveur d'une diligence raisonnable en matière de droits humains et de l'environnement qui ouvrira la voie à une réglementation ambitieuse au niveau européen. [432]

[430] Human Rights Stakeholder Survey – Position UEL-INDR, 2 February 2021.

[431] https://www.uless.lu/fr/.

[432] Available, https://a19552c1-19b5-4ffa-b609-e76b2641a39a.filesusr.com/ugd/447785_29fb7c4a83114c30884de06d2208d136.pdf

Since March 2018, L'Initiative pour un devoir de vigilance (L'Initiative), representing 17 civil society organizations, has been running a campaign for the adoption of due diligence legislation.[433] In the survey questionnaire sent out in the context of this study, the Initiative submitted the following:

> The Initiative pour un devoir de vigilance would like to recall that there is still "an imbalance in favor of purely voluntary measures as opposed to binding measures" in the economic context in relation to human rights.
>
> Therefore, a national law on due diligence for the implementation of the [UNGPs] could strengthen the effective protection of human rights worldwide.
>
> Indeed, as NGOs' and the *Commission consultative pour les droits de l'Homme* reports show, business activities (in risk sectors but also beyond) pose challenges in terms of potential or actual of human rights violations "here and elsewhere".
>
> Luxembourg, a candidate for a seat on the UN Human Rights Council, will therefore not be able to ignore these realities.
>
> In order for its candidacy for a seat on the UN Human Rights Council in 2022 to be coherent, Luxembourg should be among the first to guarantee protection against human rights abuses in the context of economic activities by adopting national legislation. This legislation would also allow Luxembourg to adopt rules adapted to the national economic context.
>
> If Luxembourg puts in place effective legislation at national level, this would also contribute to the development of an ambitious regulatory framework for the European level. Such an approach could only strengthen coherence of Luxembourg's candidacy for a seat on the Council for Human Rights of the United Nations.

In the context of the same survey, the Commission consultative des Droits de l'Homme (CCDH) submitted:

> Any future national regulation should be complementary to European and international regulation – the former does not exclude the latter and vice versa. The CCDH thus recommends regulating due diligence requirements as soon as possible in Luxembourg while continuing its efforts on EU level to push for a comprehensive EU regulation. It should also

[433] https://www.initiative-devoirdevigilance.org/. L'Initiative includes the following organizaitons : Action Solidarité Tiers Monde, Aide à l'enfance en Inde et au Népal, Amnesty International Luxembourg, Association luxembourgeoise des Nations Unies, Caritas Luxembourg, Cercle de coopération des ONGD, Comité pour une Paix juste au Proche-Orient, Commission luxembourgeoise Paix et Justice, Etika, Fairtrade Lëtzebuerg, Fncttfel – Landesverband, Frères des Hommes Luxembourg, Greenpeace Luxembourg, OGBL, OGBL Solidarité syndicale, Partage.lu, SOS Faim Luxembourg.

meaningfully contribute to the EU negotiations regarding the international treaty on mandatory due diligence.

Assessment

Arguably, there are certain advantages to an EU-wide instrument on corporate due diligence, irrespective of the specific contents of such an instrument. It is often argued that the EU law would ensure a level playing field and legal certainty by providing a standard applicable in all Member States. However, noting that the EU due diligence instrument will most likely be a Directive,[434] certain divergences in the implementation by Member States are inevitable. This might detract from the expected level playing field and legal certainty at the EU level. Similar observations have been made in the context of the GDPR, which repealed Directive 95/46/EC. According to the preamble of the GDPR, Directive 95/46/EC had not prevented "fragmentation in the implementation of data protection across the Union" or "legal uncertainty".[435] Under the Directive, there existed "a difference in levels of protection" due to the "existence of differences in the implementation and application of Directive 95/46/EC".

Another argument that has been raised in favour of the adoption of an EU instrument rather than national legislation is that this would discharge, to some extent, Member States of the difficult task of defining the appropriate scope and content of due diligence requirements.

However, it should be underlined that European and Luxembourg due diligence legislation are not mutually exclusive. It is not unprecedented for Luxembourg to determine its priorities towards a policy issue and consequently "push for an ambitious EU Law". During an interview for this study, the Minister of Environment underlined the example of climate change legislation in which Luxembourg was among the "frontrunners" in the EU. Luxembourg set high standards at the domestic level, while EU legislation was still in making. The EU policy makers were discussing 40% greenhouse gas emissions reduction targets. Luxembourg, together with other like-minded countries, set its domestic target at 55%, and eventually, the target was raised to 55% also at the EU level.

There are various other arguments relevant to the decision of whether to wait for EU legislation or prepare domestic legislation, including timing. It is anticipated that negotiations at the level of the EU will take an extended period of time due to the complex nature of the legislation. However, the

[434] This is anticipated in the EC Due Diligence Study: "In Accordance with Article 50 of the Treaty for the Functioning of the EU […] a legal duty which is formulated in European company law would most likely take the form of a Directive". See EC Due Diligence Study, *Synthesis Report*, 53.

[435] GDPR, *op. cit.,* Recitals, para. 9.

legislative process in the domestic context might also take a considerable amount of time, as it will also involve deliberations, negotiations and consultations with the professional *Chambres*. Accordingly, there is reason to conclude that the process should start as early as feasible.

As mentioned above, an EU instrument is likely to be a Directive, entailing a minimum standard, which might not be the most desirable approach from a human rights perspective. In any event, the adoption of a Directive would oblige Luxembourg, like all Member States, to adopt implementing legislation. Luxembourg could pre-empt these developments by formulating its domestic approach, tailored to the specific Luxembourgish context, within the parameters of international standards mentioned above. In doing so, it could also contribute to the debates on the contents of an *ambitious* EU instrument.

4.3 Impact Analysis

Human rights due diligence laws can take many forms as regards their design and implementation. Consequently, the impact of legislation can vary significantly depending on the requirements imposed by the law and its enforcement. In light of these variables, it is difficult to assess the potential impacts of future due diligence legislation in a general manner. Also in other jurisdictions, mandatory human rights due diligence is a relatively new area of regulation, which means there is little empirical data available on the possible impacts of such legislation.[436] Accordingly, this section provides some general comments based on a review of secondary literature, and, where relevant, on observations from various stakeholders that were obtained either through the surveys or interviews.

4.3.1 Impact on Right-Holders

It is estimated that the social, human rights, and environmental impacts of mandatory human rights due diligence will be significantly higher than those of voluntary guidelines or merely reporting obligations.[437] One of the advantages of a mandatory due diligence regime, according to the EC Due

[436] EC Due Diligence Study, 522-532.

[437] EC Due Diligence Study, 522-532 (emphasis added).

Diligence Study, is that it would offer preventive benefits.[438] These benefits are "especially likely to create substantive impact when they include demands for collaboration with external stakeholders" and when there is a robust risk assessment, transparency, monitoring, and compliance systems in force.[439] It is also expected that mandatory due diligence would impact human rights standards positively in supply chains through a trickle-down effect.

At the same time, the EC Due Diligence Study warns against "poorly designed" mandatory due diligence regimes that may have negative human rights consequences.[440] Strict legislation might encourage companies to reduce investments or withdraw from certain regions, instead of having to justify business relationships in risky areas. This, in turn, could inflict an economic burden on local populations and could subsequently impact their human rights, including the right to food, the right to health and the right to education.[441]

4.3.2 Impact on Companies

Human rights due diligence legislation is aimed at regulating corporate conduct in regard of how companies assess and address human rights and environmental risks. During the interviews, a number of stakeholders, including representatives of companies and the public sector, commented that there should be a "full-blown economic impact assessment" before a due diligence legislation will be proposed, in order to avoid disproportionate interventions. Such an impact assessment would certainly be desirable but in practice it might be difficult to obtain conclusive results, in particular because any impact analysis would need to consider not only costs, but also the benefits that due diligence would generate. As has been shown in the literature, these benefits are difficult to quantify, since they often come only in the long run, but also because some benefits are difficult to measure, such as increases in reputation and trust among stakeholders. Also, a company could transfer some of the costs incurred due to the new legislation to its consumers, which would complicate the analysis. In addition, the EU Better Regulation Toolbox notes that a cost to one business may be a benefit to another company.[442] The EC Due Diligence Study summarizes these points as follows:

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[438] EC Due Diligence Study, 522-532.

[439] EC Due Diligence Study, 522-532.

[440] EC Due Diligence Study, 522-532.

[441] EC Due Diligence Study, 522-532.

[442] https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-58_en_0.pdfIbid.

> [q]uantification of costs and benefits in impact assessments is often difficult due to the lack of appropriate data. It is especially difficult to quantify impacts for the non-economic impact areas as the quantification and monetization of social and environmental costs and benefits requires sophisticated methodologies and data to estimate approximations and there are only few impact assessments of similar legislations which contain data that can be used for this analysis.[443]

Costs

Mandatory due diligence will create various costs depending on the size of the company, the complexity of value-chain and the requirements that are being imposed. According to a study prepared by the European Parliament "each step of the due diligence process involves some specific costs", including:

- the risk identification phase: costs of acquiring knowledge of the company's operations and supply chain;
- the prevention and mitigation phase: costs of developing capacity of suppliers, mitigation measures;
- the accounting phase: costs of monitoring, reporting and communicating on due diligence findings and measures taken.[444]

Some of these costs will be one-time costs, whereas the others will be recurrent ones.

One-time costs usually include internal staff cost, fees for external advisory services and costs related to changes in ICT systems and procedures. Recurrent costs include staff costs related to the collection of required information, the preparation of reports, the verification of information, the disclosure of information, and/or the publication of reports. In addition, fees for external consultants as well as costs of external auditors feed into the estimation of regulation-induced recurrent costs.[445]

The EC Due Diligence Study provides the following additional labour costs estimations per year:

- a representative large company with revenues of 10 billion EUR would face additional annual labour costs of approximately EUR 500.920.

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[443] EC Due Diligence Study, 390.

[444] C. Navarra, 'Corporate Due Diligence and Corporate Accountability European Added Value Assessment' (October 2020) *European Parliamentary Research Service*.

[445] EC Due Diligence Study, 293.

- a representative SME with revenues of 1 million EUR would face additional annual labour costs of approximately 740 EUR,
- a large SME with annual revenues of 50 million EUR (the upper bound according the Eurostat SME definitions) would face additional annual labour costs of EUR 36.990.[446]

The EC Due Diligence study notes that the above estimates represent averages across companies from all sectors of the economy and that "depending on companies' business model, value chain complexities and the degree of internationalisation, the numbers can be substantially lower or higher for some businesses".[447] These estimates may be higher for a company in Luxembourg considering that Luxembourg has higher average labour costs per hour (EUR 40.6) than the EU (EUR 27.4).[448]

Of particular relevance in the context of Luxembourg is that:

> depending on the final regulations the recurrent costs may be much more significant for the financial sector than for other companies. This is because of the financial sector's role in financing and facilitating the economic activities of companies in just about any other sector of the economy.[449]

During the interviews, a number of companies indicated that they already undertake human rights and environmental due diligence assessments voluntarily (by conviction) even though they may not necessarily label them as such. For those companies, the costs incurred by future legislation will be lower as they can build on the existing mechanisms. This was also indicated by a representative from the fund industry:

> [the costs] will vary greatly depending on the robustness of existing good governance procedures – some organisations will see larger gaps, others will fulfil the requirements already.

The EC Due Diligence Study notes that companies that are "not directly affected by the regulations are likely to be impacted indirectly through supply chain effects".[450] This is confirmed by a comment made in the survey by a small company representative:

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[446] For detailed cost analysis see, EC Due Diligence Study, 427-428.

[447] EC Due Diligence Study, 428.

[448] Eurostat data reproduced in EC Due Diligence Study, 421-22.

[449] EC Due Diligence Study, 428.

[450] EC Due Diligence Study, 300-301.

> [the law] should begin by only considering larger business entities (e.g. >500 employees or >50 million Euro turnover). In multinational companies, this will trickle down to the smaller entities in each country […].

A number of stakeholders raised concerns regarding the financial impact of future legislation on SMEs. A company responding to the survey indicated: "we are small and sometimes overwhelmed by all new regulations. The costs of running a business in a regulated world is getting too high". It might be that SMEs over-estimate the financial impact of due diligence. The OHCHR has stated that "for a small enterprise with limited human rights risks, it will likely be a task that can be allocated to an existing member of staff, requiring a limited amount of his or her time", implying that some of the costs would be covered by the existing structures of the company.[451]

One respondent to the survey drew attention to the use of technology and mentioned how it might reduce the administrative cost for companies:

> It probably would require a high-level initial (financial) effort to put in place the necessary tools to monitor the situations and the member's compliance. The running costs can be digested over time. Digital tools should be available at some stage in order to reduce the administrative burden.

There is an increasing interest in developing technologies that would help companies and suppliers in various stages of their due diligence processes, including using blockchain, artificial intelligence, and machine learning solutions.[452]

Benefits

Companies are expected to conduct human rights due diligence irrespective of the economic benefits that such an assessment might bring. Nonetheless, various studies have suggested that human rights and environmental due diligence could bring certain economic benefits for companies, although these are also difficult to quantify. The OECD has listed some of these benefits as follows:

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[451] OHCHR, Interpretive Guide, 33.

[452] For an assessment of different technological tools that could assist human rights due diligence processes, see; J. Nishinaga and F. Natour, 'Technology Solutions for Advancing Human Rights in Global Supply Chains A Landscape Assessment' (June 2019) *Human Rights and Business Initiative University of California, Berkeley*, https://humanrights.berkeley.edu/sites/default/files/publications/technology_solutions_for_advancing_human_rights_in_global_supply_chains_june_2019_0.pdf.

> Due diligence can help enterprises create more value, including by: identifying opportunities to reduce costs; improving understanding of markets and strategic sources of supply; strengthening management of company-specific business and operational risks; decreasing the probability of incidents relating to matters covered by the OECD Guidelines for MNEs; and decreasing exposure to systemic risks.[453]

Another paper published by the OECD with contributions from ILO, IMF and World Bank Group further elaborates that:

> Working towards sustainable supply chains, including by incorporating a thorough due diligence process into their management systems, helps enterprises detect risks and gain improved knowledge of their operations. Prevention and mitigation of sustainability risks reduces the company's exposure to potentially large remediation costs it might incur if the risk were not addressed. Increased awareness of the company's actions leads to long-term benefits as the company internalises and institutionalises the findings from supply chain due diligence. Benefits of doing so can manifest in improved perception of the company both internally and externally, leading to other benefits such as improved analyst recommendations or decreased cost of capital (mainly due to reduced risk and increased transparency). The internal benefits, such as increased ability to retain and attract talent, increased productivity, better management of the company's reputation, and value creation, should not be overlooked. [454]

Other studies have also confirmed these findings. Bağlayan *et al.* have identified a number of areas in which respect for human rights could have a positive economic impact on companies either by reducing their "costs and risks" or helping them "gain competitive advantage" in the market. [455] One of these areas concerns community relations and the so-called "social license to operate":

> The "social licence to operate" is a term used to identify the intangible but ongoing approval or acceptance of businesses by affected communities. It is distinct from the legal or regulatory

[453] OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018), 16.

[454] OECD, 'Promoting Sustainable Global Supply Chains: International Standards, Due Diligence and Grievance Mechanisms' (February 2017) 7-8, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_559146.pdf (citations omitted).

[455] B. Bağlayan, *et al.*, 'Good Business: The Economic Case for Protecting Human Rights' *BHR, Frank Bold and ICAR* (2018) (Good Business) https://corporatejustice.org/2018_good-business-report.pdf.

> licence granted by the government of a country. A company is granted a social licence when its operations meet stakeholder expectations and social norms.[456]

The authors provide various examples where the lack of a social license has created long and short term financial losses for companies, including opportunity costs and loss of productivity.

Another area cited in this study draws attention to the preferences of upcoming generations. According to a Deloitte study covering 29 countries:

> Millennials with a college degree and working in predominantly private sector organisations want to contribute to the positive impact business has on society. 73% of the participants believed that business was a force for good in society. The findings suggest[ed] that Millennials are increasingly choosing employers because they identify positively with a company's values.[457]

A recent study conducted jointly by the Finance & Human Rights and the Geneva Center for Business and Human Rights analysed banks and asset managers in six European countries, including Luxembourg, in order to gain baseline information on the current status of human rights in the European finance industry.[458] One of the key findings of the study is that:

> [a]ddressing human rights is associated not only with risk mitigation, but also with the creation of opportunities for better financial performance. Pertinent risk factors that can be mitigated by addressing human rights include reputational risk, the risk to infringe on individuals' rights, regulatory risk, a reduced ability to attract talent, as well as operational risk.[459]

There is some evidence suggesting that business leaders across the world are increasingly recognizing the "inextricable link between profits and purpose".[460] According to Larry Fink of BlackRock, one of the world's largest asset managers:

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[456] Bağlayan, Good Business, 26.

[457] *Ibid.*, 24.

[458] Finance & Human Rights (FaHR), *et al*., 'How are European financial institutions addressing human rights in their activities?' (2020), https://www.finance-humanrights.org/wp-content/uploads/2020/11/Sustainable-Finance-and-Human-Rights-survey.pdf.

[459] *Ibid*., 14 (numerical references omitted).

[460] L. Fink, Letter to CEOs: 'A Sense of Purpose', BlackRock, 2018, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter. For other examples, see; K. Marslev, Doing Well by Doing Right? Exploring the Potentials and Limitations of a Business Case for Human Rights (DIHR 2020), 12.

> It is clear that being connected to stakeholders – establishing trust with them and acting with purpose – enables a company to understand and respond to the changes happening in the world. Companies ignore stakeholders at their peril – companies that do not earn this trust will find it harder and harder to attract customers and talent, especially as young people increasingly expect companies to reflect their values. The more your company can show its purpose in delivering value to its customers, its employees, and its communities, the better able you will be to compete and deliver long-term, durable profits for shareholders.[461]

A number of companies that filled out the survey questionnaire have listed the following benefits to be expected from mandatory human right due diligence:

- Improved reputation, level playing field, personal satisfaction and motivation because of high business standards;
- Stronger awareness within the company and among stakeholders;
- Stronger consumer confidence;
- Improved ESG risk management and opportunities to engage on sustainability topics with direct clients;
- Improved corporate identity and values;
- Good governance and improved risk management which have been shown to enhance financial outcomes;
- Greater transparency on the topic of human rights;
- Greater leverage over suppliers.

4.3.3 Impact on Competitiveness

Competitiveness is a multi-dimensional concept which is difficult to analyse in general terms.[462] Davidson *et al.* argue that "a firm and a country may have different goals: a firm's aim might be to firstly survive and to eventually thrive in international markets; whilst a country's aim might be to improve the living standards and welfare of its citizens".[463]

[461] L. Fink, 'Letter to CEOs' (2021).

[462] P. Davidson, *et al.*, 'How do Laws and Regulations Affect Competitiveness: The Role for Regulatory Impact Assessment', OECD Regulatory Policy Working Papers No. 15 (2021), 13.

[463] *Ibid.*, 13.

Commenting on the French Duty of Vigilance Law, the only example of a general due diligence legislation currently in place, Bright has argued that "contrary to what critics might have suggested, the legislation does not seem to have affected France's international competitivity; the country attracted a record level of foreign direct investment after its adoption".[464]

Scheltema and Van Dam have assessed how the introduction of a mandatory due diligence obligation would impact the business climate and international competitive position of the Netherlands. Their conclusions may be relevant for Luxembourg, considering the economic similarities of the two economies, including the business-oriented regulatory and fiscal framework, the prominence of the financial sector and the presence of companies with high degrees of mobility. The authors argue that:

> [i]t is very unlikely that the introduction of a regulation that makes due diligence enforceable is in itself a reason for a company to leave the [country] or not to establish itself [there]. If companies are already considering such a decision, they will often consider the entire system of legislation and regulations, including the tax burden.[465]

Various stakeholders in Luxembourg voiced concerns relating to the financial sector, especially in light of its mobility. There is currently no empirical evidence to demonstrate whether the adoption of mandatory due diligence legislation would encourage financial service providers to migrate to countries where such legislation is lacking. Moreover, it should be noted that the financial sector is already one of the most heavily regulated industries, meaning that it may adapt relatively easy to an extra layer of regulation.

Nonetheless, a number of stakeholders raised concerns that companies, in particular those in the financial sector, might leave Luxembourg if a regulation is introduced, especially if the neighbouring countries do not have similar legislation. One stakeholder noted during an interview:

> The fund industry and the financial industry are dependent on efficiencies and value chains across Europe. There is obviously a competition between financial centers. So if there is any kind of gold-plating, there is always a risk that the fund industry leaves because of over-regulation, regardless of what the topic is. […] There is always a risk if you add additional layers of regulation that are not present in other markets.

Along similar lines, another stakeholder stated that while regulation would

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[464] C. Bright., EUI Working Papers, *op. cit.*, 9.

[465] Scheltema and van Dam, *op. cit.*, 104.

> [s]trengthen Luxembourg's position as a jurisdiction characterized by robust regulation", […] "overly prescriptive regulation may jeopardise the competitiveness of the financial centre if a level playing field is not maintained because other regions or jurisdictions opt to implement rules at a later stage.

A stakeholder from the public sector considered:

> Hopefully the balance will be neutral to positive. Luxembourg already has a high awareness and acceptance for the protection of HR and the environment. Customers and governments would probably welcome adding a layer. But companies might avoid Luxembourg for fear of higher costs.

Two public sector representatives stated that due diligence legislation could be another form of "nation branding" for Luxembourg and bolster the positive image of the country. One of them stated:

> It would be very good for the Luxembourgish businesses to show their business partners that they are held to very high standards.

Along the same lines, CSO representatives stated:

> A new regulation could be a part of the strategy "Letz make it happen" and can also become a real argument for businesses to choose Luxembourg in an international context where businesses are held more and more accountable for their activities around the world […].

One stakeholder from the public sector made a comparison with the Luxembourg approach towards sustainability:

> The position of Luxembourg on sustainability issues has shown that an investment in environmental standards has cemented Luxembourg's position as a financial center of the future.

A company stakeholder was more cautious:

> [a] new regulation would probably present constraints to the companies and negatively impact the business-friendly image of Luxembourg by adding another layer of administrative burden. On the other side, mandatory due diligence would improve the reputation of Luxembourg's financial center and in the long term strengthen performance of a sustainable economic sector.

Another stakeholder objected to the idea that companies would leave Luxembourg if a due diligence law is to be introduced:

> there is no reason to assume that companies would leave the country. If so, this raises the question what kind of businesses Luxembourg wants to be a host of – businesses that are willing to respect human rights or also those that are not? According to international human rights law, the response to that question should be the former rather than the latter, meaning that States have to make sure that every business respects human rights.

One public sector representative stated that legislation "would give a positive signal but at the same time could worry investors about the scope and risks [..]". A similar concern was raised by a private sector representative:

> [o]n sait bien que ces sont les investisseurs étrangers qui font vivre le pays. Ils regardent le taux d'impôt, le personnel disponible, etc… et les points descendent pour tout ce qui est contrainte. … Si on rajoute encore cette contrainte en plus, une contrainte qui vient avec des sanctions, ils vont se demander pourquoi ils viendraient ici.

For another interviewee from the public sector, human rights due diligence legislation would not have a decisive impact on the competitiveness of the economy because "[human rights] is not the (companies') main business. Usually human rights violations are collateral impacts".

4.3.4 Impact on Authorities' Work

The supervision and enforcement of human rights and environmental due diligence laws can take different forms, which will impose divergent burdens on the public authorities. The number of entities subject to the law and the scope of the competencies assigned to a supervisory body (if there would be one) will be crucial in this regard.

In general, new legislation could impose the following implementation and enforcement costs:

- the cost of raising awareness for new requirements;
- establishing licensing, permit, certification, seal/label and/or code of conduct systems;
- dealing with queries and applications;
- implementing inspections and audits to verify compliance and sanction non-compliance.[466]

[466] European Commission, 'Better Regulation Toolbox', 471.

According to the EC Due Diligence Study, if a judicial remedy is foreseen in the new legislation, "it is expected that this would take place within existing judicial structures and processes so that this option would not create any additional costs for the legal systems […]".[467]

Alongside judicial mechanisms, non-judicial implementation options could be considered in a legislative proposal. For instance, an ombudsman or national human rights institutions could be involved in the implementation of due diligence law. Luxembourg offers various non-judicial dispute resolution mechanisms,[468] which could be used for the private enforcement of due diligence legislation. The impact of these options on the workload of the authorities would likely be minimal. Likewise, complaints procedures and whistle blowing mechanisms at company or industry level could be envisaged, which would also avoid imposing burdens on the authorities.

By contrast, administrative enforcement by a regulatory body "could presumably have significant resource implications for the State".[469] Instead of establishing a new authority, another option could be "decentralized enforcement". This would involve allocating the supervision work to existing sectoral institutions based on their field of expertise. However, an expert currently working in the management of a regulatory body stated that "existing bodies are only trained in protecting specific [human rights] or environmental issues and their focus is often limited to the national territory. A transversal coverage would need the expansion of an existing body […] or the creation of a new transversal body". The expert further added that the costs of creating a new administrative body "would probably be similar to enforcement by existing bodies", since in either case there would be a need for "new agents, specific trainings, office space, equipment and so on". The expert estimated that, "if a new body would start with 15 staff full time, the estimated budget would probably be around 2 million Euros".

This observation is in line with the findings of the EC Due Diligence Study:

> The supervision and enforcement of a due diligence requirement by the State would probably go very substantially beyond the current expertise, resources and legal mandate of national authorities responsible for supervising and enforcing corporate reporting requirements. Given the scope of what would need to be overseen, adequate resourcing of such an oversight body could be challenging. However, oversight mechanisms and State-based enforcement

[467] EC Due Diligence Study, 544.

[468] Bağlayan, NBA, *op. cit.* Annex, 141.

[469] EC Due Diligence Study, *Synthesis Report,* 49.

> mechanisms have been found to be effective even where they are criticised for lacking enough resources and bringing very few prosecutions.[470]

The cost of a regulatory authority would also depend on the number of companies that need to be supervised: "the more companies would be subject to the regulation, the more costs it would create for public authorities as they would need to conduct more compliance controls and inspections of companies".[471]

If, however, fines and penalties are foreseen, this could generate income for public authorities and recover some of the costs. Authorities might also consider the use of "quality assurance schemes". [472] According to Chambers and her co-authors, these are

> [v]oluntary schemes open to regulated entities who can demonstrate a strong track record of compliance and adherence to standards, with robust systems and processes in place. The schemes are then linked to statutory regulation because those with a strong track record then benefit from a reduced burden of enforcement".[473]

A number of companies that were interviewed underlined the work of the INDR. Consideration may be given to potential ways to use the INDR ESR certification scheme in this regard.[474] The IMS (Inspring More Sustainability) could be another interlocutor.

Finally, various economic tools at the disposal of the state could be used to reinforce due diligence obligations without burdening budgets and resources, such as public procurement and export credit and export licensing processes.

4.3.5 Towards Balanced Legislation

The core objective of corporate due diligence legislation would be to improve the protection of human rights and the environment across the global value chains by imposing an obligation on companies to exercise due diligence. Given the significant positive and negative impacts that corporate activity can have on human rights and the environment, it is likely that a corporate obligation to identify risks will

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[470] EC Due Diligence Study, *Synthesis Report*, 49.

[471] EC Due Diligence Study, 546.

[472] R. Chambers, *et al.*, 'Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law' (August 2020), 25.

[473] *Ibid.*

[474] https://indr.lu/obtenir-le-label-esr/.

lead to enhanced levels of protection. The realisation of this objective needs to be balanced against countervailing concerns, for instance with regard to administrative burdens on companies, in particular those small and medium enterprises and authorities. Future legislation should seek to strike a balance between those different preoccupations and lawmakers should assess and compare different options in terms of reporting, supervision and enforcement. At the same time, this section has shown that some of the costs or burdens imposed by new legislation will be counterbalanced by specific benefits to both corporations and the public sector.

V. Conclusions

There is a growing momentum at international, EU and domestic levels to impose mandatory due diligence obligations on companies. Various countries have launched legislative proposals in this regard, based explicitly or implicitly on the UNGPs and the due diligence concept developed therein. This study has examined the possibilities of introducing such legislation in Luxembourg.

The laws and proposals in different countries demonstrate that there are different ways to design due diligence legislation. Some laws explicitly specify a substantive obligation to exercise due diligence, while others encourage companies to undertake due diligence by introducing transparency and reporting requirements. The material scope of the laws and initiatives differs as well, as some focus on a single human rights issue (child labour, modern slavery, privacy) or a specific economic activity (trade in timber or minerals), while others cover the full spectrum of human rights and environmental protection. Commonly, draft legislation recognizes that due diligence obligations should not be limited to the companies' own operations, but extend to "business relationships" in supply or value chains, albeit that these relationships are defined on the basis of varying criteria. Finally, mechanisms of oversight and enforcement also take different forms including administrative, civil and criminal mechanisms. Some drafts facilitate specific access to remedies in their design, whereas others are silent about it.

The varied approaches developed in different countries demonstrate a degree of fragmentation, which has resulted in calls for a uniform EU approach, invoking concerns regarding "legal certainty" and "level playing field", among others. The EU Commission has taken note of these concerns and commissioned a study to investigate the options for a mandatory regime of human rights due diligence across supply chains. Meanwhile, in March 2021, the EU Parliament has adopted a Resolution requesting the EU Commission to submit a legislative proposal on corporate due diligence and corporate accountability. It is expected that the EU Commission will release its proposal during Summer 2021. While the contents of such a proposal remain undecided, Commissioner Didier Reynders has expressed that it will be "ambitious".

The concurrent developments at national and EU levels have impacted discussions in Luxembourg. Recently, the debate has narrowly focused on whether Luxembourg should wait for an EU proposal or move ahead with domestic legislation. This is arguably a relatively unhelpful debate as the two approaches are not mutually exclusive. Luxembourg has already made a commitment in its Coalition Agreement to support the forthcoming developments at the EU level. Accordingly, it is advisable that Luxembourg starts addressing some of the complex issues mentioned above, whose resolution will be

time-consuming both at the EU and the domestic levels. Given that the EU regime will most likely take the form of a Directive which would require Luxembourg, like other Member States, to adopt implementing legislation, Luxembourg could start defining its own preferred approach within the parameters of the UNGPs and other international standards. Considering Luxembourg's specific situation, in terms of the size of its economy in comparison to scarce regulatory capacity, it should start as soon as feasible to address the substantive issues which will need to be addressed eventually anyway. An inter-ministerial committee involving the relevant ministries could start working systemically on these issues in consultation with businesses, business representatives, trade unions, civil society organizations and the *barreau*. Once Luxembourg has devised an approach that fits both its human rights ambitions and its economic reality, it can also present its proposals at the level of the EU and influence developments in an assertive and pre-emptive manner.

This study has identified a variety of due diligence regimes already existing in different fields of Luxembourg law. It is recommended that drafters of future legislation on human rights and environmental due diligence make use of these templates and the underlying understanding of how due diligence can be encouraged, monitored and sanctioned through legal means.

Importantly, Luxembourg should determine the overriding objective of its due diligence legislation. A law that focuses on the prevention of human rights abuses along value chains would incorporate other elements of due diligence than a law that focuses on providing access to remedies. Moreover, even if an ambitious law would be preferable from a human rights perspective, this might not be the most feasible option in terms of implementation. In light of these considerations, policy makers and legislators are advised to decide on the various issues flagged in this study, including the personal and material scope of the law, the character and reach of the obligations, and the means of enforcement and access to remedies. Future legislation should seek to strike a balance between the imperative of improving corporate respect for human rights and the practical need to avoid imposing disproportionate burdens on companies and public authorities. At the same time, it should be kept in mind that the potential costs of human rights due diligence are likely to be counterbalanced by various benefits, not only for right-holders affected by corporate activity, but also for Luxembourg's corporations and for the country as a whole. For that reason, a new law should be integrated within a "smart mix" of government measures and policies aimed at improving human rights due diligence in Luxembourg and abroad.

Annex

Human rights due diligence laws and proposals in selected European countries and the European Parliament

	FR Duty of Vigilance Law- FR	NL Child Labour Due Diligence Law	NL Responsible and Sustainable International Business Law	CH Responsible Business Initiative	DE Regulation of Human Rights and Environmental Due Diligence in Global Value Chains NaWKG	DE Law on Corporate Due Diligence in Supply Chains	NO Draft Law Relating to Transparency Regarding Supply Chains, the Duty to Know and Due Diligence	EP EP Resolution on Corporate Due Diligence and Corporate Accountability
Status	In force	Entry into force expected in 2022	Proposal by political parties – submitted to the Parliament	CSO proposal – rejected at the national referendum on	Initial proposal of the Ministry of Development (replaced by the Government Draft)	Government draft currently pending before the Parliament	Expert committee Proposal	EP Resolution with Recommendations to the EU Commission

Material Scope	Human rights, health, personal security and environment	Child labour	Human rights, environment and labour	Human rights and environment	Human rights and environment	Human rights standards as annexed to the draft law	Human rights and decent work	Human rights, environment and good governance
Personal Scope	Companies that for two consecutive financial years employ:	All companies selling goods and supplying services in	All companies that at the balance sheet date exceed at least two of the following three	All companies based in CH except low-risk SMEs	Large companies based in DE All companies delivering products or services in DE [475]	Large companies with more than 3,000 employees (> 1,000 as of 2024) including worldwide [477]	All companies delivering products or services in NO [478]	All large companies operating in the EU (including state owned

[475] Großunternehmen which on their balance sheet dates exceed at least two of the three following criteria:

(a) balance sheet total: EUR 20 000 000;

(b) net turnover: EUR 40 000 000;

(c) average number of employees during the financial year: 250.

Companies that have their statutory seat, central administration or principal place of business in Germany.

[477] Large companies who have their their head office (Hauptverwaltung),their main place of business (Hauptniederlassung) or their seat (Sitz) in Germany (approx. 600 companies).

[478] It applies to large companies covered by the Accounting Act *or* companies exceeding at least two of the following thresholds:

(a) balance sheet NOK 35 million (about EUR 3.25 million);

(b) net sales NOK 70 million (about EUR 6.5 million);

(c) at least 50 employees.

	(a) 5,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France, or (b) 10,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France or abroad. French subsidiaries of	NL (whether based or not in NL)	criteria: an average workforce during the financial year of 250 employees, a balance sheet total of € 20 million or a net turnover of more than € 40 million		- SMEs in high-risk sectors [476]			companies and financial sector) Publicly listed SMEs and High-risk SMEs are included Micro-size undertakings expressly excluded

Includs publicly owned enterprises offering goods and services.

[476] SMEs with the exception of 'minor companies' (Kleinunternehmen)) and subsidiaries controlled by their parent company (beherrschtes Unternehmen), provided these companies

(a) operate in a 'high risk sector' (agriculture, forestry and fishery; mining; manufacturing industries, including food, textile and electronics; and energy supply, *or*

(b) operate in conflict-affected or high-risk areas.

Business activities of these companies outside Germany ("ausländische Geschäftstätigkeit") is also covered.

	foreign companies if they reach the thresholds							
Main Obligations	Elaboration, disclosure and effective implementation of a vigilance plan (annually)	Exercise of due diligence and reporting	Detailed due diligence obligations in accordance with the OECD Guidelines (explicit extraterritorial focus) [479]	Duty of care, including due diligence based on the UNGPs	Due diligence and enhanced annual risk analysis if there are concrete risks of human rights impacts	Duty of care, risk management, preventive measures, remedies	Duty to know of salient risks (all companies), exercise due diligence (large companies), reporting.	Detailed due diligence, stakeholder consultation, publication and communication of due diligence strategy, disclosure of non-financial and diversity information

[479] Art. 2.1 of the draft law reads: "A company that knows or can reasonably suspect that its activity may adversely affect human rights, labor rights or the environment *in a country outside the Netherlands* is obliged to:

(a) take all measures that can reasonably be required of it to prevent those consequences;

(b) insofar as those consequences cannot be prevented: to limit those consequences as much as possible, to undo them and, if necessary, to arrange for recovery;

(c) if those consequences cannot be sufficiently limited: to refrain from doing this activity insofar as this can reasonably be expected of it.

Reach of Obligations	Directly and indirectly controlled companies and "established commercial relationships"	Whole supply chain	Production chain (productieketen) defined as "the entirety of activities, products, production lines, supply chain and business relationships of a company"	Whole supply chain, companies' own operations and companies they "control"	Whole value chain [480]	Whole supply chain (Lieferketten). Responsibility beyond first tier depends on "substantiated knowledge" of possible human rights violations	Whole supply chain	Whole value chain [481]

[480] Applies to entire value chain delimited by a *notion of adequacy* (Angemessenheit). To satisfy the requirement of adequacy, companies have to conduct an 'enhanced risk analysis'.

[481] Defined in Art. 3.5. as: "all activities, operations, business relationships and investment chains of an undertaking and includes entities with which the undertaking has a direct or indirect business relationship, upstream and downstream, and which either:

(a) supply products, parts of products or services that contribute to the undertaking's own products or services, or

(b) receive products or services from the undertaking ".

Civil Liability	Parent company liability for damage caused by controlled companies, sub-contractors and suppliers with "established commercial relationship" that devoir de vigilance could have prevented	Not explicitly provided in law	Not explicitly provided in law[482]	Parent company liability (strict) for damage caused by controlled companies (subsidiaries and economically controlled companies) Due diligence defence if company can prove that it took all due care to avoid damage, or the damage would	No explicit provision but victims can bring claims based on general principles of German law	No explicit civil liability provision in the draft law but §11 allows trade unions or NGOs to bring civil claims on behalf of the victims	Not explicitly provided in law	Member States to ensure that they have a civil liability regime in place. If the company can prove that it took all due care in line with the Directive to avoid any harm or that the harm would have occurred anyway, it should not be held liable for that harm

[482] The proposed law states that the disputing parties "may submit their dispute to a dispute resolution committee or court of law" (unofficial translation available at https://www.mvoplatform.nl/, Art. 2.7). Note that, the civil courts will be available to any interested party to submit their claims even in the absence of explicit reference in the legal text as long as a legal obligation to conduct due diligence exists.

				have occurred even if all due care had been taken				
Enforcement	Any person with standing can file a complaint for non-compliance before the judge The judge can require the company to publish a plan and impose periodic penalty payments	Any person affected by company's failure to comply can file a complaint with the regulatory authority (after having first field the complaint with the company). The regulator can impose fines in case of non-compliance	Any concerned party can file a complaint with the regulator	No explicit provision	Company appointed compliance officer. Oversight by an administrative body with powers to issue ordinances and sanctions.	The Federal Office of Economics and Export Control (BAFA) is responsible for enforcing the law (§§ 14-19). BAFA will have investigative powers (e.g. search and seizure) and can issue fines. Depending on the amount of the fine, companies can be excluded from public procurement for up to three years.	The Norwegian consumer protection authority would be responsible for providing guidance and supervising compliance with the law	At the level of Member States through a national competent authority which would have power to undertake investigations, including receiving submissions from third parties. Sanctions and administrative fines are foreseen n case of non-compliance.

Bibliography

Allen & Overy LLP, Mandatory human rights due diligence laws: the Netherlands led the way in addressing child labour and contemplates broader action, 2020, available at: https://www.allenovery.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action.

Association of the Luxembourg Fund Industry (ALFI), Industry Statistics Luxembourg, available at: https://www.alfi.lu/en-GB/Pages/Industry-statistics/Luxembourg

Association of the Luxembourg Fund Industry (ALFI), Setting Up in Luxembourg – Fund Governance, available at: https://www.alfi.lu/en-GB/Pages/Setting-up-in-Luxembourg/Fund-governance

Bağlayan, B., Landau, I., McVey M. and Wodajo, K., Good Business: The Economic Case for Protecting Human Rights, 2018, BHR, Frank Bold and ICAR, available at https://corporatejustice.org/2018_good-business-report.pdf.

Bağlayan, B., Mapping the Business and Human Rights Landscape in Luxembourg National Baseline Study, 2019, available at: https://maee.gouvernement.lu/dam-assets/directions/d1/pan-entreprises-et-droits-de-l-homme/Mapping-the-Business-and-Human-Rights-Landscape-in-Luxembourg.pdf

Beau de Loménie, T. and Cossart, S., Parties prenantes et devoir de vigilance, 2017, Revue Internationale de la Compliance et de l'Éthique des Affaires 50

Besch, M., Normes et légistique en droit public Luxembourgeois, 2019, Larcier

Bommier, S., et al., Le radar du devoir de vigilance – identifier les entreprises soumises à la loi, 2020, available at: https://plan-vigilance.org/wp-content/uploads/2020/06/2020-06-25-Radar-DDV-Edition-2020.pdf

Brabant, S., Savourey, E., A Closer Look at the Penalties Faced by Companies, 2017, BHRRC, available at: https://www.business-humanrights.org/en/latest-news/a-closer-look-at-the-penalties-faced-by-companies/

Brabant, S., Savourey, E., Scope of the Law on the Duty of Vigilance Corporate Duty of Vigilance Companies Subject to the Vigilance Obligations, 2017, Revue Internationale de la Compliance et de l'éthique Des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires N° 50 du Jeudi 14 Décembre 2017, available at : https://media.business-humanrights.org/media/documents/cc551474b8206d6a7b9c6a92c2a3fb280c881139.pdf

Bright, C., Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?, EUI Working Papers, MWP 2020/02, available at: https://cadmus.eui.eu/handle/1814/65957

Bright, C., et al., Options for Mandatory Due Diligence in Belgium, 2020, available at: https://www.researchgate.net/publication/342424416_Options_for_Mandatory_Human_Rights_Due_Diligence_in_Belgium.

Bueno, N., The Swiss Responsible Business Initiative and its Counter-Proposal: Texts and Current Developments, 2018, Business and Human Rights Journal Blog, available at: https://www.researchgate.net/publication/337207890_The_Swiss_Responsible_Business_Initiative_and_its_counter-proposal_Texts_and_current_developments

Bueno, N., The Swiss Popular Initiative on Responsible Business from Responsibility to Liability, in Enneking, L.F.H., et al., (eds.), Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards, 2018, Routledge

Buscemi, M., et al., Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law, 2020, Brill

Business and Human Rights Resource Centre (BHRRC), Five ways the new draft treaty on business and human rights can be strengthened, 2019, available at: https://www.business-humanrights.org/en/blog/five-ways-the-new-draft-treaty-on-business-and-human-rights-can-be-strengthened/

Business and Human Rights Resource Centre (BHRRC), Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote, 2020, available at: https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/

Chambers, R., Kemp, S. and Tyler K., Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law, August 2020, Kingsley Napley

Commission de Surveillance du Secteur Financier du Luxembourg (CSSF), Annual Report 2018, 2018, available at: https://www.cssf.lu/en/Document/annual-report-2018/

Commission de Surveillance du Secteur Financier du Luxembourg (CSSF), Newsletter No 216 – January 2019, 2019, available at: https://www.cssf.lu/wp-content/uploads/files/Publications/Newsletter/Newsletter_2019/newsletter216eng.pdf

Corbisier, I., La réforme du droit luxembourgeois des societies, 2016, 4 TRV-RPS 416

Corbisier, I. and Conac, P.-H., Luxembourg. Corporate Governance of listed companies, in Conac, P.-H., Fleckner, A., Hopt K., (Eds.) Comparative Corporate Governance: A Functional and International Analysis, 2013

Cossart, S., et al., The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All, 2017, 2 Business and Human Rights Journal

Danis-Fatôme, A. and Viney, G., La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017, Recueil Dalloz p. 1610

The Danish Institute for Human Rights, Sustainable Corporate Governance Consultation Response, 2021, available at: https://www.humanrights.dk/sites/humanrights.dk/files/media/document/DIHR%20Response%20to%20EC%20Consultation%20on%20Sustainable%20Corporate%20Governance%20February%202021.pdf

Davidson, P. et al., How do Laws and Regulations Affect Competitiveness: The Role for Regulatory Impact Assessment, 2021, OECD Regulatory Policy Working Papers No. 15

Davies, P. and Green, M., Swiss Parliament Considers Responsible Business Initiative, 2020, Latham and Watkins LLP, available at: https://www.lexology.com/library/detail.aspx?g=2742c5ee-7a9e-4e65-bab6-d1a5939e619e.

De Leeuw, L., and Biggs, M., Re-cap: 2020 negotiations over binding treaty on business and human rights, 2020, available at: https://www.somo.nl/re-cap-2020-negotiations-over-binding-treaty-on-business-and-human-rights/

De Schutter, O., Towards Mandatory Due Diligence in Global Supply Chains, 2020, International Trade Union Confederation (ITUC), available at: https://www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf?msdynttrid=HlJ0w_cm3qqs-h9nacnudjgd9vEool6Dt7W788D5WiM

Diggs, E. G., et al., Business and Human Rights as a Galaxy of Norms, 2019, 50 Georgetown J. of Int. L. 309

Duthilleul, A. and De Jouvenel, M., Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2020, available at: https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf

Enneking, L.F.H., *Netherlands country report for European Commission study on Human Rights Due Diligence in the Supply Chain*, 2020, *In: Study on due diligence requirements through the supply chain. Part III: Country Reports* (pp. 170–196), available at: http://hdl.handle.net/1765/116741

Epiney, A., Environmental Impact Assessment, 2009, MPEPIL

Ergon Associates Ltd, Modern slavery reporting: Is there evidence of progress?, 2018, available at: https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf

Ethics Information Committee, Report from the Ethics Information Committee, appointed by the Norwegian government on June 1, 2018. Report delivered on November 28, 2019, 2019, available at: https://media.business-humanrights.org/media/documents/files/documents/Norway_Draft_Transparency_Act_-_draft_translation_0.pdf

European Commission, Staff Working Document, Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights: Overview of Progress, European Commission, 2019, SWD(2019) 143 final, Brussels, available at: https://ec.europa.eu/docsroom/documents/34482

European Parliament Working Group on Responsible Business Conduct (RBC), Speech by Commissioner Reynders in RBC Webinar on Due Diligence, 2020, available at: https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/

European Commission, Communication from the Commission — European Commission Guidance concerning baseline reports under Article 22(2) of Directive 2010/75/EU on industrial emissions, 2014, C 136/3, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0506%2801%29

European Commission, Commission Guidelines on Non-financial Reporting, 2017, available at: https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en

European Commission, Commission Notice of 12.2.2016 Guidance Document for the EU Timber Regulation, 2016, (COM/2016/755/Final), available at: https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/C-2016-755-F1-EN-MAIN-PART-1.PDF

European Commission, Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H1149

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, 2011, (COM/2011/681/Final), available at: https://op.europa.eu/en/publication-detail/-/publication/ae5ada03-0dc3-48f8-9a32-0460e65ba7ed

European Commission, 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", 2019, (COM/2019/640/Final)

European Council, Council Conclusions on EU Priorities in UN Human Rights Fora in 2021, adopted by the Council at its 3785th meeting held on 22 February 2021, available at: https://data.consilium.europa.eu/doc/document/ST-6326-2021-INIT/en/pdf

European Parliament, Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences, 2020, (2020/2616(RSP)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.pdf

European Parliament, Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, 2020, (2020/2129(INL))

Expert Group on the EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT), Regulation Guidance document - Due Diligence, 2020, available at: https://ec.europa.eu/environment/forests/pdf/28_02_2020_Guidance_on_Due_Diligence.pdf

Finance & Human Rights (FaHR), et al., How are European financial institutions addressing human rights in their activities?, 2020, available at: https://www.finance-humanrights.org/wp-content/uploads/2020/11/Sustainable-Finance-and-Human-Rights-survey.pdf

Frantfurter Allgemeine, EU dringt auf noch härteres Lieferkettengesetz: Justizkommissar Reynders lobt deutsche Einigung, 2021, available at: https://zeitung.faz.net/faz/wirtschaft/2021-03-03/a6cbde5b4cf2107cc7bf268d423fd708/?GEPC=s3

German Federal Foreign Office, National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020, 2020, available at: https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf

Grabosch, R., and Scheper, C., Corporate Obligations with Regard to Human Rights Due Diligence Policy and Legal Approaches, 2015, Friedrich Ebert Stitung, available at: https://library.fes.de/pdf-files/iez/12167.pdf

Harris, K., California Transparency in Supply Chains Act: A Resource Guide, 2012, available at: https://www.oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf

Horowitz, J., Knife-edge Swiss vote could make businesses liable for global rights abuses, 2020, CNN Business, available at: https://edition.cnn.com/2020/11/27/business/switzerland-responsible-business-initiative-referendum/index.html.

Koch, H., Schnittmuster für eine bessere Welt, 2019, Taz.de, available at: https://taz.de/Neues-Wertschoepfungskettengesetz/!5569037/

Inter-institutional Agreement on Better Law-Making of 13 April 2016, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016Q0512(01)&from=EN

Krajewski, M., Faracik B., Methven O'brien C. and Martin-Ortega, O., Human Rights Due Diligence Legislation – Options for the EU, 2020, available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_BRI(2020)603495

Landau, I., What are we missing by focusing on modern slavery?, 2019, BHRRC, available at: https://www.business-humanrights.org/en/blog/what-are-we-missing-by-focusing-on-modern-slavery/

Lavite, C., The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence, 2020, Verfassungsblog, available at: https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/

Lenz & Staehelin, Counter-Proposal to Responsible Business Initiative: Overview of New Duties for Companies, 2020, available at: https://www.lexology.com/library/detail.aspx?g=fe665c39-f775-4935-9294-044e94a65472.

Luxembourg Stock Exchange, Les X Principes de gouvernance d'entreprise de la Bourse du Luxembourg 4th edition-revised version, 2017, available at : https://www.bourse.lu/legislation#14688535946648

Mantouvalou, V., The UK Modern Slavery Act 2015 Three Years On, 2018, 81(6) Modern Law Review 1017

Marcelis, A., Dutch Take the Lead on Child Labour with New Due Diligence Law, 2019 https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/

Marslev, K., Doing Well by Doing Right? Exploring the Potentials and Limitations of a Business Case for Human Rights, 2020, DIHR

McCorquodale, R., Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises, 2015, BIICL, available at: https://www.biicl.org/documents/724_uk_access_to_remedies.pdf?showdocument=1

McCorquodale, R., Corporate Duty to Prevent Human Rights Impacts – A Way Forward for UK Legislation, 2020, available at: https://www.cambridge.org/core/blog/2020/03/12/corporate-duty-to-prevent-human-rights-impacts-a-way-forward-for-uk-legislation/

Muchlinski, P., Limited liability and Multinational Enterprises: A Case for Reform?, 2010, 34 Camb. J. Econ. 915

Navarra, C., Corporate Due Diligence and Corporate Accountability European Added Value Assessment, 2020, European Parliamentary Research Service, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf

Nishinaga, J. and Natour, F., Technology Solutions for Advancing Human Rights in Global Supply Chains A Landscape Assessment, 2019 Human Rights and Business Initiative University of California, Berkeley, available at: https://humanrights.berkeley.edu/sites/default/files/publications/technology_solutions_for_advancing_human_rights_in_global_supply_chains_june_2019_0.pdf.

OECD, Environmental Performance Reviews: Luxembourg 2020, 2020, available at: https://doi.org/10.1787/fd9f43e6-en

OECD, Promoting Sustainable Global Supply Chains: International Standards, Due Diligence and Grievance Mechanisms, 2017, available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_559146.pdf

OECD, *Responsible Business Conduct For Institutional Investors*, 2017, available at: https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf

Office of the United Kingdom Secretary of State for the Home Department, Independent Review of the Modern Slavery Act 2015: Final Report, 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

Office of the United Kingdom Secretary of State for the Home Department, Transparency in Supply Chains etc. A practical guide, 2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf

Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (OEIGWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, 2018, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf

Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (OEIGWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft, 2020, available at: https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx

United Nations Human Rights Council (UNHRC), Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 2014, A/HRC/RES/26/9

Pietropaoli, I., et al., A UK Failure to Prevent Mechanism for Corporate Human Rights Harms, 2020, BIICL, available at: https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf

Plüss, J.D., Responsible business initiative rejected at the ballot box, 2020, available at: https://www.swissinfo.ch/eng/swiss-to-vote-on-holding-companies-accountable-for-supply-chain-abuses/46184500

Ropes & Gray, Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies, 2019, available at: https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies

Ruggie, J., Letter to German Ministers regarding alignment of draft supply chain law with the UNGPs 2021, Shift, available at: https://shiftproject.org/wp-content/uploads/2021/03/Shift_John-Ruggie_Letter_German-DD.pdf

Sabatier, R., and Heart, M., La responsabilité des dirigeants de société : les avancées jurisprudentielles (1re partie) in ACE Comptabilité, fiscalité, audit, droit des affaires au Luxembourg, 2015, Wolters-Kluwer

Sauer, C., Le principe de sécurité juridique au Luxembourg : la constitutionnalisation d'un concept aux contours flous, 2020, Journal des tribunaux Luxembourg 2020/1 No 67

Savourey, E. and Brabant, S., The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption, 2021, Business and Human Rights Journal, 6

Schenk, S. and Hubert, Q., Could Germany introduce a mandatory human rights due diligence law? 2019, Herbert Smith Freehills LLP, available at: https://www.herbertsmithfreehills.com/latest-thinking/could-germany-introduce-a-mandatory-human-rights-due-diligence-law

Schenk, S., Thorhauer, N. and Hubert, Q., Supply Chain Law in Germany: Current steps towards a mandatory human rights due diligence law, 2020, Herbert Smith Freehills LLP, available at: https://www.lexology.com/library/detail.aspx?g=f1bde270-239d-40cd-85ad-d805adba5790#:~:text=A%20Supply%20Chain%20Law%20would,must%20also%20comply%20with%20them

Schröder, M., Precautionary Approach/Principle, 2014, MPEPIL

Sherpa et al., Le radar du devoir de vigilance: identifier les enterprises soumises à la loi, 2020, available at : https://www.asso-sherpa.org/entreprises-soumises-devoir-de-vigilance-radar-ong

Shift, Human Rights Reporting in France: Two Years In: Has the Duty of Vigilance Law led to more Meaningful Disclosure?, 2019, available at: https://shiftproject.org/wp-content/uploads/2019/11/Shift_HumanRightsReportinginFrance_Nov27.pdf

Shift, Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights, 2015, available at: https://shiftproject.org/resource/mapping-the-modern-slavery-act-against-the-un-guiding-principles/

Smit, L., Bright C., McCorquodale R., Bauer M, Deringer H., Baeza- Breinbauer D, Torres-Cortés F., Alleweldt F., Kara S. and Salinier C. and Tejero Tobed H., Study on Due Diligence Requirements through the Supply Chain, 2020, available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

STATEC, Un portrait chiffré des entreprises au Luxembourg, 2020, available at: https://statistiques.public.lu/catalogue-publications/analyses/2020/PDF-Analyses-03-2020.pdf

Swiss Coalition for Corporate Justice, How does the parliamentary counter-proposal differ from the popular initiative?, 2018, available at: https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf

Swiss Coalition for Corporate Justice, Texte de l'initiative avec Explications, 2020, available at: https://initiative-multinationales.ch/wp-content/uploads/2020/11/kvi_factsheet_initiativtext_fr.pdf

United Nations Human Rights Office of the High Commissioner (OHCHR), Improving accountability and access to remedy for victims of business-related human rights abuse: the relevance of human rights due diligence to determinations of corporate liability, 2018, A/HRC/38/20/Add.2

United Nations Human Rights Office of the High Commissioner (OHCHR), OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, 2017, available at: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf

United Nations Human Rights Office of the High Commissioner (OHCHR), UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies, 2020, available at: https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pd . f

United Nations Human Rights Office of the High Commissioner (OHCHR), The Corporate Responsibility to Respect Human Rights: An interpretive guide, 2012, available at: https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf

United Nations Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, 2014, available at: https://www.ohchr.org/documents/issues/business/unwg_%20napguidance.pdf

United Nations Human Rights Council (UNHRC), Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2008, A/HRC/8/5, available at: https://www.undocs.org/A/HRC/8/5

United Nations Human Rights Council (UNHRC), First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 2016, A/HRC/31/50

Van Dam, C.C., and Scheltema, M.W., Opties voor afdwingbare IMVO-instrumenten: Een onderzoek naar de mogelijke juridische vormgeving en handhaving van afdwingbare IMVO-instrumenten, 2020, Rijkesoverheid, available at: https://www.rijksoverheid.nl/documenten/publicaties/2020/04/03/opties-voor-afdwingbare-imvo-instrumenten

Voland, T., Germany's Due Diligence Act, 2020, Clifford Chance, available at: https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/germanys-due-diligence-act.html

West, F., On Mandatory Due Diligence, SMEs don't Need a Free Pass; they Need Flexibility, 2020, Shift, available at: https://shiftproject.org/smes-mhrdd/

Wilkenhuysen, M., Luxembourg, in Calkon, W.J.L., (ed.), The Corporate Governance Review 9th Edition, 2019, Law Business Research Ltd

Zerk, J., Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies, 2013, OHCHR, available at: https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf

Zerk, J., Multinationals and Corporate Social Responsibility, 2006, Cambridge University Press (CUP)