

Corporate social responsibility (CSR) and its implementation into EU Company law



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Abstract

Building on both European Union (EU) law and chosen Member States' legislation, this study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee aims at understanding to what extent Member States are supporting the development and the implementation of CSR strategies in the business community, with particular focus on due diligence requirements. It also attempts at providing some recommendations aimed at possibly developing a comprehensive and structured approach to CSR for the whole of the EU.

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LIST OF ABBREVIATIONS

CSR	Corporate Social responsibility
COVID -19	Coronavirus disease 2019
ECCJ	European Coalition for Corporate Justice
GRI	Global Reporting Initiative
ILO	International Labour Organisation
IRBC	International Responsible Business Conduct
MNE	Multi-national enterprises
OECD	Organisation for Economic Co-operation and Development
RBC	Responsible Business Conduct
RVO	Rijksdienst voor Ondernemend Nederland -Netherlands Enterprise Agency
SCCD	Supply Chain Due Diligence
SDG	Sustainable Development Goals
SMEs	Small and Medium Enterprises
TUSL	Testo Unico Sicurezza Lavoro - Legislative Decree Law 81/2008

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EXECUTIVE SUMMARY

Companies' activities on the environment and the society as a whole significantly affect citizens' lives. As a consequence, policy-makers face the question of whether companies are to meet duties to prevent, identify, manage and mitigate any possible negative impact that they may cause on society as a whole (and thus human rights, health, environment and so on), including those impacts produced along their global supply chain. Such process is known as 'corporate social responsibility' (CSR), a term we use here as a synonym for 'responsible business conduct' (RBC).

Against this background, this Study aims at providing an overview of national CSR policies and legislations within selected Member States (France, Germany, Italy, the Netherlands, Poland and Spain), and an assessment of how these Member States have implemented European Union (EU)'s legislation and resolutions on CSR. The Study, therefore, aims at understanding to what extent Member States support the development and implementation of CSR strategies in the business community, whether CSR strategies are mandatory or voluntary and what enforcement mechanisms are foreseen. Additionally, with regard to our sample of EU Member States, the Study identifies due diligence obligations and requirements applicable to companies, including firms that belong to European companies' supply and subcontracting chain. The Study identifies national best practices as well as more problematic situations or loopholes in national legislation and practices. Finally, the Study provides some policy recommendations aimed at possibly developing a comprehensive and structured approach to CSR for the whole EU, centred in a legislative instrument that shall lay down mandatory due diligence requirements. It also provides recommendations on what this instrument can contain, how it may fit the EU's substantive and procedural *acquis*, and it paves the way to future research.

A notion of CSR under international law instruments

Various initiatives at international level, such as the ones adopted by the United Nations (UN), the Organisation for Economic Cooperation and Development (OECD) and the International Labour Organisation (ILO), highlight companies' duties to behave responsibly and respect human rights. The UN Global Compact, in particular, supports companies in carrying on their businesses responsibly, by aligning their strategies and operations with the UN's Ten Principles on human rights, labour, environment and anti-corruption ("UN Guiding Principles"). It also supports companies in taking strategic actions that advance broader societal goals, such as the UN Sustainable Development Goals (UN 2030 agenda), focusing on collaboration and innovation. Such principles are derived from the Universal Declaration of Human Rights, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN's Convention Against Corruption.

Similarly, at OECD level, the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") recommend business enterprises to conduct due diligence in order to identify, prevent or mitigate and account for how actual and potential adverse impacts are addressed by them. In addition, the OECD Due Diligence Guidance for RBC provides practical support to corporations on the implementation of the OECD Guidelines by means of plain language explanations of its due diligence recommendations and provisions.

CSR at EU and at Member State level: an unaccomplished work in progress

Over the last decade, the EU, through optional and mandatory provisions aimed at promoting CSR/RBC, has encouraged companies to conduct their business responsibly by a mix of voluntary and hard law

initiatives, aimed at implementing the UN Guiding Principles and the UN 2030 agenda for sustainable development. Falling short of a cross-sector horizontal due diligence legislation at EU level, some of those efforts resulted in the adoption of EU law (including, but not limited to Directive 2014/95/EU, hereinafter "NFR Directive"). The NFR Directive encompasses a clarification of non-financial reporting obligations that large corporations should be subject to. It was transposed in Member States over the last decade across various pieces of legislative instruments. The EU-level measures also comprise several soft law instruments adopted by the European Commission throughout the last decade. These instruments span from the European Commission's 2011 strategy for CSR, which combines horizontal approaches to promote CSR/RBC with more specific approaches for individual sectors and policy areas, which still constitutes the cornerstone of the EU's approach to CSR. In more recent years, they also encompass several pieces of soft law providing guidance to companies as to how the reporting obligations enshrined under the NFR Directive shall be carried out. More recently, a staff working document (SWD(2019) 143) adopted by the European Commission in March 2019 lays out EU's approach to CSR. Yet, all these initiatives, as effective as they have been in bringing CSR at the front of the business decisions, have not yet concretised in an obligation under EU law for all corporations to carry out business responsibly and in respect of human rights and environment. Eventually, it is to be stressed that the main policy focus has shifted over the last years towards the purpose of attaining environmental and social sustainability.

With regard to our sample of Member States it is to be mentioned that in recent years, France and the Netherlands have implemented due diligence legislation, laying out both specific (Netherlands, with respect to preventing and combating child labour) and general due diligence duties (France). In other Member States, such as Germany, many stakeholders have made the case for such legislation and this has resulted in the adoption of a bill which is not yet finalized by Parliament. Nevertheless, since such Member State legislation is fairly recent, assessing its impact has not yet been made possible: in all countries where such legislation was adopted, doubts arise as to whether companies' duties also apply throughout their supply chain and how misbehaviors of suppliers and contractors are to be enforced. As a result, the panorama throughout the EU is diversified, since there is no level playing field across the EU as to what duties corporations face, regarding the the impact of their activities on the society. The result is a lack of legal certainty for companies and citizens across the EU as to what due diligence duties enterprises shall follow.

In addition, the NFR Directive is only applicable to large corporations and it does not lay out common standards to be applied to all companies, while entities that do not fall within the scope of the NFR Directive can certainly opt into its rules and principles. Eventually, it is to be stressed that Member States have not implemented the NFR Directive by way of uniform measures and standards. As a consequence, even within the scope of the Directive, companies' playing field has not been levelled throughout the EU.

Assessment of Member States' policies: positive steps and challenges ahead

Overall, Member States have undertaken significant efforts in promoting CSR. Yet, in one respect, Member States' actions, with minor exceptions, have not gone far enough: putting in place mandatory due diligence duties is indeed scarce, as Member States often rely upon non-mandatory CSR provisions. While granting companies a certain degree of flexibility, such provisions do not provide for clear and specific legal duties to be applied to all companies regardless of their size; national legislations, in particular, do not provide for general tasks and duties that all companies' boards shall follow in order to prevent, promptly identify and mitigate the risks of human rights and

environmental abuses in their own companies, their subsidiaries and across their supply chain. Nor do initiatives across Member States set out enforcement mechanisms and legal remedies for victims of corporate wrongdoings or mandate sanctions for non-compliance, so that CSR still remains an initiative of a largely voluntary nature.

An EU-wide cross-sector mandatory due diligence initiative and recommendations for the EU legislator

In light of the above analysis and stakeholder consultation, what has emerged is that most stakeholders support an EU-wide legislative initiative regarding social and environmental due diligence, in order to level the playing field for companies across the EU.

Yet, such a piece of legislation requires several clarifications. The policy recommendations on Chapter 4 identify what scope a new directive, laying down mandatory due diligence obligations, shall have and suggest to revise the NFR directive. We also analyse to what extent such duties should apply to Small and Medium Enterprises (SMEs). Secondly, the study tries to figure out what specific obligations companies should comply with, and eventually recommends to put forward a cross-sector initiative, to be applied by all companies whatever their industry or sector of activity. Thirdly, the study tries to single-out specific rights that protect people damaged by a company's activities, or by actions of its subsidiaries and suppliers. Furthermore, the policy recommendations also address the question of what enforcement mechanisms the new directive should entail, also considering that EU legislations should respect the general principle of national procedural autonomy. Eventually, the study asks how the new directive fits in EU procedural law, and whether some of these EU law provisions need to be revised to accommodate the introduction of such new legislative instrument. Chapter 5 draws some final conclusions and remarks.

1. INTRODUCTION

The aim of the Study is to provide a framework covering both existing instruments of EU law relating to CSR, and existing legislation (and soft law) in this area in selected EU Member States, with a particular focus on corporate law. The Study identifies best practices at Member State level, and it also highlights some negative practices in this respect. In addition, it provides recommendations for possibly developing an EU comprehensive and structured approach to CSR.

After a short introductory framework of the most relevant international instruments, the Study delves into the current EU legal framework to CSR, with an overview of the implementation of Directive 2014/95/EU¹. It also focuses on an analysis of CSR instruments in selected EU Member States, chosen in the light of their legal framework on CSR as well as recent developments in this respect. It then zooms onto due diligence requirements enacted in the legislation of such selected Member States as well as clarified in pieces of soft law. It also focuses on some recent legislative initiatives at Member State level on due diligence requirements, which are only at bill or proposal stage, and how they can inform the debate at EU level.

Particular focus is placed not only on CSR applicable to multinational companies, but also the specific aspects that characterise SMEs. Once this analysis is carried out, the study focuses on possible recommendations for a comprehensive, holistic approach to CSR.

At the outset, prior to delving into the main aspects of the Study, it is worth caveating that several cross-disciplinary debates touch upon the subject of CSR. On the one hand, CSR has repercussions on the broader debate of respect for human rights. While human rights' elements become relevant both when the international legal instruments are at stake, as well as at regional and at Member State level, this study does not analyse the implications from a human rights standpoint of the CSR debate. At the same time, on the other hand, from an external relations' standpoint, this Study does not focus on the trade-related implications of the CSR debate. In this respect, it is worth recalling that a report, carried out for the European Commission (Commission) on due diligence requirements through the supply chain², has recently been published and will be duly referenced. However, such study was carried out in a pre-Covid 19 world. The Covid-19 emergency in 2020 has raised the debate of our European dependence on international supply chains. As such, it has also thrown into focus the question of how the supply chain can be rethought in the light of the need for companies doing business in the EU to focus on resilience.

Against the above background, short of focusing on human rights or trade, this Study encompasses instruments of company law, commercial law and civil law and is aimed at exploring potential policy avenues at EU level, once an overview and analysis of the legal landscape across selected EU Member States is carried out.

Several are the main elements of relevance to this study, and the broader context it is focused on. First, over the past few years, the focus of the Commission has shifted on the environmental aspects of the CSR debate. In the context of its Green Deal Communication adopted in December 2019, the Commission announced that it committed to review Directive 2014/95/EU in 2020 as part of the

¹ 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, OJ L 330, 15.11.2014.

² British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020 (Commission's 2020 Due Diligence Study).

strategy to strengthen the foundations for sustainable investment in the EU. Indeed, as the Commission acknowledges, a variety of different organisations and stakeholders are advocating a new regulatory approach to non-financial reporting³, focused on sustainability reporting, and these stakeholders opine that there is the need to update Directive 2014/95/EU.

Second, some other EU initiatives were announced in the context of due diligence reporting possible future EU-level legislation further to the abovementioned study. On 29 April 2020, the European Commissioner for Justice, Didier Reynders, announced that this institution will develop by 2021 legislation that would require companies to carry out due diligence to identify, account and mitigate for adverse human rights and environmental impacts in their supply chains⁴. In addition, CSR is also high in the agenda of the German Presidency of the Council of the EU, which took seat in July 2020. The Presidency highlighted that: "we are committed to an EU action plan to strengthen corporate social responsibility in global supply chains that promotes human rights, social and environmental standards and transparency, and which takes the experiences and lessons learned from the Covid-19 pandemic into account. This supports the coherent implementation of the Guiding Principles on Business and Human Rights of the United Nations and the OECD Guidelines for Multinational Enterprises"⁵.

Possible mandatory due diligence legislation at EU level is also a high topic in the agenda of the European Parliament and work has been ongoing in this respect. In 22 June 2020, the European Parliament Human Rights Subcommittee (DROI) organised a webinar on the topic, with a briefing paper having been submitted to it tackling the various policy options for the EU when possible due diligence legislation is contemplated⁶. In July 2020, the Conference of Committee Chairs of the European Parliament, adopted the European Parliament's Summary Report 2020, further to an exchange of views between parliamentary committees and their respective Commission Vice-Presidents and Commissioners, as foreseen in the Framework Agreement on relations between the European Parliament and the Commission. Such report also touched upon CSR. The Conference of Committee Chairs took note of the Commission's commitment to submit a proposal on mandatory corporate due diligence requirements through the supply chain, drawing attention to Parliament's upcoming legislative own-initiative report in that regard. It also highlighted the start of work on a report on "Sustainable Corporate Governance" to assess the effectiveness of the non-financial reporting and examine additional mechanisms and instruments to increase the sustainability of the decisions taken by companies' boards. This initiative brings forward the EU's Action Plan on Financing Sustainable Growth, which puts particular emphasis on fostering sustainable corporate governance through redefining corporate board duties.

Finally, Parliament took note of the Commission's intention to submit a proposal to amend Directive 2014/95/EU to further encourage companies to develop a responsible and sustainable approach to business; it noted, in this respect that "this proposal and a future proposal on corporate due diligence would be linked and that it is key that both instruments be fully consistent and coherent". Finally, it invited the Commission to await Parliament's resolutions and to consider submitting both proposals simultaneously.

³ European Commission, Inception impact assessment - Ares(2020)580716.

⁴ European Coalition for Corporate Justice, Commissioner Reynders announces EU corporate due diligence legislation, 30 April 2020.

⁵ Programme for Germany's Presidency of the Council of the European Union, Together for Europe's Recovery, July 2020.

⁶ [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI\(2020\)603495_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf)

Third, in terms of CSR and SMEs, another EU level study is ongoing and is expected to be finalised at the end of 2020. The overall objective of the project is to help EU member states to apply CSR as a holistic management approach to SMEs bearing in mind that Directive 2014/95/EU applies only to a limited number of large EU companies while leaving out SMEs, despite these latter are the predominant form of enterprise in EU and a key to achieving the goals of growth and jobs strategy. The project also aims to help Member States to incorporate in their programmes CSR measures for SMEs⁷.

Against this background, it is preliminarily necessary to first delve into what CSR means and provide a short excursus of the CSR debate among academia. Some clarifications on a possible definition of CSR come from the management literature which established CSR as a field of research on its own in the 1990s and 2000s. Crane *et al* (2008) define CSR as a set of company values that can be summarized in the following:

- (1) voluntary activities that go beyond those prescribed by law;
- (2) internalizing or managing negative externalities, for example a reduction on pollution,
- (3) multiple stakeholder orientation and not only focusing on shareholders,
- (4) alignment of social and economic responsibilities to maximize the company's profitability,
- (5) practices and values about "why they do it"; and
- (6) more than philanthropy alone⁸.

CSR rose to prominence in the 1990s and 2000s. In turn, this suggests that it is a relatively new area of academic research. However, the scholarly literature dates to at least the 1950s and even earlier. As Crane *et al* observe, the "basic questions at the heart of CSR are as old as business itself, such as what is a business for and what contribution does it make to society"⁹.

With the post-Covid 19 pandemic emergency, and upsurge of the digital age we are entering into, an era which fraught with uncertainty, upending and disrupting the entire business ecosystem, the concept of CSR is also being overhauled. The recent focus has been on sustainability, as also the Commission's agenda, briefly spelled out above, demonstrates. It is worth pointing out that, in this respect, there is a literature gap on how the notion of CSR has changed and evolved in the light of the Covid-19 pandemic. Neither do we purport to fill in such a gap.

However, a few observations can be made at the outset.

First, CSR has grown to become more central to business operations, with environmental, social and governance (ESG) principles assuming a pivotal role in the context of the purpose of the corporation: as such, dedicated CSR roles will be necessary to ensure organizations track and achieve their goals. In addition, the ESG metrics used by investors and stakeholders to evaluate the environmental impact of corporations are also gaining in importance, as ESG forms of investing are affirming themselves in a post-Covid 19 world¹⁰. Finally, other trends such as impact investing, human rights in the supply chain,

⁷ Interreg Europe, A Roadmap for Integrating Corporate Social Responsibility into EU Member States and Business Practises, 2020, available at: <https://www.interregeurope.eu/road-csr/>.

⁸ Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon, and Donald S. Siegel, *The Oxford Handbook of Corporate Social Responsibility*, 2008 (hereinafter, "Crane *et al*").

⁹ *Id.*

¹⁰ Pippa Stevens, Sustainable investing is set to surge in the wake of the coronavirus pandemic, CNBC, 7 June 2020.

as well as the rise of cause marketing in building brand equity, are also coming at the forefront of the CSR debate. These elements become “interwoven around the themes of globalization, competitive advantage, and measurable social impact”¹¹, which have all gathered enormous importance in a post-Covid 19 world.

The question arises whether CSR coincides with a corporation's purpose. As agility, foresight and resilience become crucial factors for businesses to thrive in the post-Covid 19 world, in the context of attracting human capital, corporations that project upon human capital a purpose become more appealing to work at, especially among young people. For example, according to New York University research, purpose-oriented employees remain with companies 20 % longer and are 47 % more likely to promote their employer to others. Yet, CSR should not be confused with the company's purpose¹². Rather, it is closely related to the responsibility of the corporation *vis-à-vis* not only to its shareholders, but to all stakeholders and to society as large. This understanding of the firm as bearing responsibility to stakeholders has been adopted also in soft law at Member State level. For example, as will be better seen in Chapter 3, the Dutch Corporate Governance Code states, “A company is a long-term alliance between the various stakeholders of the company. Stakeholders are groups and individuals who, directly or indirectly, influence – or are influenced by – the attainment of the company's objectives: employees, shareholders and other lenders, suppliers, customers, the public sector and civil society. The management board and the supervisory board have overall responsibility for weighing up these interests, generally with a view to ensuring the continuity of the company and its affiliated enterprise, as the company seeks to create long-term value for all stakeholders.” Therefore, CSR can be conceptualised as being related to what corporations should be responsible for in society¹³. As such, it has a definitional but also a normative connotation.

Against this backdrop, in Chapter 2, we will first provide an overview of the international and EU instruments concerning CSR and RBC, and briefly touch upon the most salient among them. Subsequently, we will focus on the EU's approach to CSR, zooming onto Directive 2014/95/EU, how it has been transposed in the chosen Member States, and what potential for improvements are there, as the EU considers revising such piece of legislation. This will then help set the scene to delve further on the due diligence requirements under the laws of certain selected Member States, which Chapter 3 shall tackle. This Chapter starts with analysing how Member States' corporate laws approach company purpose. This Chapter then addresses the most salient due diligence initiatives at Member State level, both from a legislative standpoint and from a soft law standpoint. This encompasses initiatives not only at national level, but also, potentially, regional level, when relevant. Based on the above analysis, some good and negative practices at Member State level will be highlighted. Finally, under Chapter 4, we will briefly explore policy recommendations, centred around an EU-wide instrument on mandatory due diligence, which we suggest the European Parliament should recommend the Commission to adopt. We look into what the instrument could cover, how the law of some Member States could inspire a Commission initiative, how such instrument fits the current EU *acquis* and whether there may be a need to amend some current EU procedural rules to accommodate it. We also opine that this instrument should be separate from, but well harmonise with, the revision of Directive 2014/95/EU. Finally, Chapter 5 draws conclusions.

¹¹ <https://www.sps.nyu.edu/professional-pathways/courses/MEEM1-CE9710-introduction-to-corporate-social-responsibility.html>.

¹² D. Pontefract, Stop confusing CSR with purpose, November 18, 2017.

¹³ Crane et al, 2008, Cited.

2. THE LEGAL FRAMEWORK: INTERNATIONAL LAW INSTRUMENTS AND THE EU LEGISLATIVE FRAMEWORK

- This Section tackles how the CSR notion is clarified in international law instruments, including the United Nations, the International Labour Organisation (ILO), the OECD. International documents, and in particular, the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), outline what responsible business conduct (RBC) principles are.
- This Section also tackles how CSR has been approached under EU law, both in terms of soft law and in terms of mandatory EU legislation. In particular, it analyses how Directive 2014/95/EU has been transposed under several chosen Member States.
- Finally, this Section draws conclusions on how, going forward, Directive 2014/95/EU has met its goals and what could be some possible improvements going forward.

2.1 The international law instruments on CSR

This Section seeks to assess how the CSR notion has been embraced by international law instruments. Despite the thrust of the Study is not the human rights topic, in this Section we will make reference to the international law documents addressing business responsibility, which also touch upon human rights, when relevant.

RBC principles and standards set out an expectation that businesses – regardless of their legal status, size, ownership structure or sector – avoid adverse impacts of their operations, while contributing to sustainable development of the societies in which they operate. These principles are recalled in a series of international documents whose most recent version was adopted in the course of the last decade, and in particular, the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). Such instruments codify in soft law the expectation that enterprises should prevent “causing or contributing to adverse impacts through their own activities and address such impacts when they occur. Enterprises are also expected to seek to prevent or mitigate adverse impacts directly linked to their operations, products or services by a business relationship. This includes their activities in the supply chain”¹⁴.

RBC is closely linked to but is not the same as a company’s purpose. In this respect, while in the 1970s, Milton Friedman had argued that the social responsibility of a corporation is increasing its profits¹⁵. On the other hand, Davies had that CSR requires ‘consideration of issues beyond the narrow economic, technical, and legal requirements of the firm’¹⁶. In a nutshell, the international instruments tackling CSR embedded the view, opposite to Friedman’s, that the business of a corporation is not just business but that the corporation had a responsibility vis-à-vis all stakeholders, and society as a whole.

¹⁴ OECD, Promoting sustainable global supply chains: international standards, due diligence and grievance mechanisms, Hamburg, 2017.

¹⁵ Friedman, M. 1970. The Social Responsibility of Business is to Increase its Profits. The New York Times Magazine, 13 Sept. 1970: 32–3, 124–6.

¹⁶ Davis, K. 1973. The Case for and against Business Assumption of Social Responsibilities. Academy of Management Journal, 16(2): 312–22.

First, we will look into how corporate responsibilities in the field of human rights were developed in the UN context. As former United Nations (UN) Special Representative of the Secretary-General J. Ruggie observes “the issue of business and human rights became permanently implanted on the global policy agenda in the 1990s”¹⁷. This reflected “the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity. Such developments heightened social awareness of business’ impacts on human rights and also attracted the attention of the United Nations”¹⁸. In recent years, the UN Human Rights Council has approved the 'Respect, Protect, and Remedy' Framework and endorsed the Guiding Principles on Business and Human Rights. We will look briefly at both those instruments, with particular focus on the onus they place upon corporations to respect human rights.

Then we will zoom onto certain CSR-related instruments developed by ILO. Finally, we will provide an overview of how CSR is looked by the OECD, prior to delving into what the EU approach to CSR has thus far been, more specifically with respect to Directive 2014/95/EU, as well as how it has been transposed in the six chosen Member States.

2.1.1 UN Instruments: the draft United Nations Code of Conduct of Transnational Corporations and the United Nations Guiding Principles on Business and Human Rights

In the 1970s, several historical factors, among which the emergence of developing countries in international fora such as the United Nations (UN), nationalisations and the OPEC crisis, and the concept of economic cooperation among developing countries, paved the way to what became a global worldview concept called New International Economic Order (NIEO). Such concept was to substitute the Bretton Woods system. Such worldview was not implemented but it helps to clarify the genesis of some UN instruments of relevance for our purposes. The Declaration for the Establishment of a New International Economic Order, adopted by the United Nations General Assembly in 1974, referred to the need for “[r]egulation and supervision of the activities of transnational corporations”, while another resolution titled “Programme of Action on the Establishment of a New International Economic Order”, adopted at the same time, referred to efforts to formulate, adopt and implement an international code of conduct for transnational corporations.¹⁹ It was in this context that the negotiations of the United Nations Code of Conduct of Transnational Corporations could be collocated. “The Code was meant to establish a multilateral framework in order to, in a balanced manner, the rights and responsibilities of transnational corporations and host country governments” in their relationships¹⁹.

Although the Code negotiations – serviced by the United Nations Centre on Transnational Corporations (UNCTC) – came to a halt, they paved the way to the adoption of a series of issue-specific international instruments. The instruments were indeed successfully negotiated during the next few years, were the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, agreed upon in the International Labour Organization (ILO); The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, agreed upon in the United Nations Conference on Trade and Development (UNCTAD); and the Declaration on

¹⁷ J. Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Netherlands Quarterly of Human Rights, Volume: 29 issue: 2, page(s): 224-253.

¹⁸ Id.

¹⁹ K.Sauvant, The Negotiations of the United Nations Code of Conduct on Transnational Corporations Experience and Lessons Learned, The Journal of World Investment and Trade 16 (2015), 11-87.

International Investment and Multinational Enterprises, agreed upon in the Organisation for Economic Co-operation and Development (OECD).

Despite the Code was not ultimately adopted, further to the above developments, the issue of human rights and transnational corporations and other business enterprises was further developed at the UN level. This process culminated in important developments at the inception of the 2010 decade, when the work of UN Special Representative of the Secretary General on business & human rights, John Ruggie, during his 2005-2011 mandate, led to the adoption of the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework". Out of the Ruggie consultation with stakeholders, which lasts several years, came the Protect, Respect and Remedy Framework. The Framework was presented to the UN Human Rights Council in 2008.

The Framework, as such, rests on three independent pillars, which mutually support each other:

1. The state's duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
2. The corporate responsibility to respect human rights. This means infringing on the rights of others and addressing adverse impacts with which a business is involved; and
3. The need for greater access by victims to effective remedy, both judicial and non-judicial.

The other important document in which this work culminated was the adoption of the UN Guiding principles on Business and Human Rights, which became the authoritative global reference point on business and human rights.

The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011²⁰. These Guiding Principles lay down the essential requirements for corporate respect for human rights. While not compulsory, they essentially inspire Member States' legal framework, laying down core elements that companies must address when implementing human rights' due diligence. Of soft law status, they do not lay down legal obligations for enterprises. The Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Therefore, as such, they also concern small and medium enterprises.

First, they lay out the duty for States to protect human rights²¹. Second, in what constitutes the most important pillar for our analysis, they enshrine corporate responsibility to protect human rights. Third, they also spell out the need for rights and obligations to be matched to appropriate and effective remedies when breached ("Access to remedy").

Zooming in, concerning companies, the Guiding principles concretise the second pillar of the abovementioned Framework in business' responsibilities *vis-à-vis* upholding human rights. They make clear that "companies should respect all internationally recognised human rights – understood, at a minimum, as those rights contained in the UN Universal Declaration of Human Rights, the International

²⁰ https://www.ohchr.org/documents/publications/quidingprinciplesbusinesshr_en.pdf.

²¹ The text reads that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".

Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the ILO Declaration on Fundamental Principles and Rights at Work”²².

In particular, the recommendations for companies can be understood along several main lines, four of which are grouped together under the concept of ‘human rights due diligence’²³.

First, they enshrine: « 1. Policy commitment and embedding: developing and articulating a human rights policy commitment and embedding it through leadership, accountability, and training throughout the company ».

Second, according to the Guiding principles, human rights due diligence is concretised in the following elements:

« 2. Human Rights’ Due Diligence, which consists of the following aspects :

- a. Assessing the company’s actual and potential human rights’ impacts;
- b. Integrating findings from such assessments into the company’s decision-making and taking actions to address them;
- c. Tracking how effectively the company is managing to address its impacts;
- d. Communicating to stakeholders about how it addresses its impacts »

Third, the principles also spell out the understanding that remediation for violations should be in place, with companies helping remediate any negative impacts that the company causes or contributes to.

2.1.2 The ILO international instruments

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (also called the “MNE Declaration”), is the main ILO instrument that provides direct guidance to enterprises (multinational and national) on social policy and inclusive, responsible and sustainable workplace practices. It was adopted 40 years ago and amended several times, most recently in March 2017²⁴.

Its principles are addressed to multinational and national enterprises, governments of home and host countries, and employers’ and workers’ organizations providing guidance in such areas as employment, training, conditions of work and life, industrial relations as well as general policies. In particular, “The ILO MNE Declaration states roles and responsibilities for governments (home and host), multinational enterprises, and workers’ and employers’ organisations and brings these actors together to solve decent work challenges and identify opportunities for inclusive growth”²⁵.

Its focus is on social and employment rights. The document, *inter alia*, recalls the UN Guiding Principles. In addition, the Declaration, clarifies, at para. 11 that “Multinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be consistent with national law and in harmony with the development priorities and social aims and structure of the country in which they operate” and at para. 12. That “Governments of host countries should promote good social practice in accordance with this Declaration among multinational enterprises operating in their territories”.

²² R. Davies, “The UN Guiding Principles on Business and Human Rights and conflict affected areas: state obligations and business responsibilities”, 2012.

²³ Id.

²⁴ ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

²⁵ Id.

Two other important documents are also worth mentioning in this respect: first, ILO Resolution concerning decent work in global supply chains, adopted by the Governing Body of the ILO in 2016. At para.18, such document provides that “[i]n line with the UN Guiding Principles, business enterprises should carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally. Business enterprises should establish operational-level grievance mechanisms for workers impacted by their operations in line with the UN Guiding Principles”²⁶.

Second, further to the Covid-19 pandemic, on 15 May 2020, the ILO adopted a document highlighting the Selected principles of the MNE Declaration particularly relevant for enterprises in their response to the COVID-19 pandemic and preparation for recovery and resilience: among them, of relevance are paragraph 9 (concerning how enterprises contribute to the realization of the fundamental principles and rights at work) and paragraph 10 (concerning recommendations for enterprises to carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts on human rights).

2.1.3 OECD Guidelines and Guidance

Two important OECD instruments matter in the context of the CSR debate. First, the OECD has articulated what constitutes RBC through the OECD Guidelines for Multinational Enterprises (OECD MNE)²⁷. They were first adopted in 1976 and were updated for the fifth time in 2011. The Guidelines are part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises.

They are government-backed recommendations to multinational companies. These cover all major areas of business responsibilities, such as: information disclosure, human rights, employment and industrial relations, environment, combatting bribery and corruption, consumer interests, science and technology, competition and taxation.

A second part of the OECD MNE concerns implementation procedures. Importantly, the OECD MNE spell out that “Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance.” Therefore, at Member State level

The OECD Due Diligence Guidance for RBC is another important soft law instrument in the context of ensuring how companies shall carry out RBC: it provides practical support to enterprises on the implementation of the OECD MNE. It does so by providing plain and clear language explanations of its due diligence recommendations and associated provisions. As the OECD spells out “Implementing these recommendations can help enterprises avoid and address adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply chains and other business relationships. The Guidance includes additional explanations, tips and illustrative examples of due diligence”²⁸.

²⁶ ILO, 2016 resolution concerning decent work in global supply chains: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_497555.pdf.

²⁷ Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

²⁸ Available at: <http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>.

The Guidance was adopted on 31 May 2018 during the annual OECD Ministerial Meeting at Council level. It seeks to promote a common understanding among governments and stakeholders on due diligence for RBC. This Guidance can help enterprises implement also the UN Guiding Principles as well as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, which, as seen above, also contain due diligence recommendations for business.

2.2 The approach to CSR in EU law: an historical excursus

The above instruments can be thought of as minimum thresholds the companies can take into account in the context of the CSR debate. The EU has both referred to them but has also endorsed a higher level of protection when it comes to CSR effectiveness. In this respect, the European Commission has played a pivotal role.

As highlighted by the European Commission, public authorities, including the EU, have an important role to support and encourage companies in their efforts to conduct their business responsibly. The work has focused along several main lines:

- (i) fostering firms across the industry or in individual sectors to work together on best solutions,
- (ii) providing incentives for the uptake of CSR or RBC, including by setting benchmarks and other requirements,
- (iii) raising awareness and providing necessary training.

The Commission has fostered the implementation of CSR by companies through a combination of voluntary and mandatory actions. It is worth highlighting, as the Commission recognises, that “when necessary and appropriate, adopting legislation represents another option”. In the last years, as will be better seen below, in the context the Commission’s recent wider work on supporting implementation of the United Nations 2030 Agenda for Sustainable Development and associated Sustainable Development Goals (SDGs), the Commission has taken a very active approach to CSR at EU level.

At the outset, the current Covid-19 pandemic has placed a focus in understanding the role that public authorities – and in particular, the EU institutions - must play in supporting CSR in the light of the changed conditions.

On the one hand, it is interesting to look at how the companies’ approach to CSR has evolved further to this emergency. The stakeholder consultation has confirmed that a dichotomy exists between CSR and profit-making. However, this dichotomy is only apparent. Only in the surface do CSR obligations create costs for companies. It is important to highlight CSR creates significant value, increases innovation and benefits the bottom line. In a nutshell, what seems like costly compliance, can become, in the long run, value-enhancing. CSR leads to value creation and this has not been called into question by the Covid-19 pandemic.

On the other hand, there is increased demand of citizens for sustainable business initiatives. This is all the more the case further to the post-Covid-19 world, as the emergence of new forms of mobility across cities shows, with citizens privileging green means of transport. This societal change also needs to be kept in mind when the EU’s approach to CSR is analysed. This shift in consumer preferences also affects the CSR discourse. The question then arises, when consumers demand more accountability on the side

of companies, how can the law follow suit to take account of such changes in the consumer patterns, all the while providing companies with both a level playing field, but also with clarity as to where their obligations lay.

In a nutshell, two main questions arise: What is the role of the EU institutions faced with this societal shift? Should the EU policy instruments applicable to CSR be re-thought to take account of the changed world conditions?

We will start from a historical excursus of the soft law instruments that underpin such approach over the last decade. Then, under Section 2.2.2, we will zoom into CSR requirements enshrined in EU hard law, by providing an overview of Directive 2014/95/EU, the most important current horizontal piece of EU legislation in this respect.

2.2.1 From the Commission's 2011 Communication to the Commission's 2019 staff working document on CSR

This Sub-Section will focus on the various Commission policy instruments on CSR, starting from its 2011 Commission Communication, to further initiatives, until the most recent initiatives, spanning to the end 2019 and to 2020.

In the Lisbon Europe 2020 Strategy, the Commission committed, *inter alia*, to renew the EU strategy to promote CSR. In 2011, asked by the Council and the European Parliament to further develop its CSR policy, the Commission put forward a strategy on CSR, covering the years 2011 to 2014²⁹. Such soft law document followed its announcement in 2010, further to the financial crisis, in the communication on industrial policy that it would put forward a new policy proposal on CSR³⁰. It also followed its statement in the Single Market Act that it would adopt a new communication on CSR by the end of 2011.

The aim of such strategy, still the cornerstone of the EU's approach to CSR, is to align the international and European visions of CSR. To this end, the Commission stresses the need for both horizontal and sector-specific measures, streamlines self- and co-regulation processes and evidences the need for complementary regulation, which culminated in the adoption of Directive 2014/95/EU but also several sector-specific measures, whose analysis goes beyond the scope of the study. A mix of measures is thus the endorsed approach.

The Commission recalled, first, its definition of CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"³¹. In this respect, in its 2011 Communication, the European Commission referred to CSR as "as the responsibility of enterprises for their impact on society"³².

Then the Commission highlighted that companies can become socially responsible by:

²⁹European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final ("hereinafter, "2011 Communication").

³⁰ Id.

³¹ Id.

³² Id.

- (a) integrating social, environmental, ethical, consumer, and human rights concerns into their business strategy and operations;
- (b) following the law.

While recognizing the efforts done, the Commission also evidenced the challenges, among which the fact that only circa 15 Member States out of the then 27 Member States had a legislative framework in place and that CSR was not considered as part of the core operations by companies. It queried whether voluntary measures were sufficient. It also highlighted that public authorities play a supporting role through voluntary policy measures and, where necessary, complementary regulation. In particular, it concluded that “Corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment. *Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility*”³³. (emphasis added). Hence, while the focus remained on voluntary compliance by companies of CSR, regulation was seen as a mean to such an end. As the debate later evolved to the issue of mandatory due diligence legislation, as will be better seen below, such voluntary-based view of CSR was later superseded.

Further to the 2011 strategy, in 2014 the Commission launched a public consultation with the aim to understanding how the strategy was welcomed by the stakeholders. The consultation showed that there was a high rate of approval for the Commission’s actions on CSR including Business and Human Rights. Two thirds of respondents assessed the overall impact as having been generally useful or very useful³⁴.

At the same time, among the challenges, they highlighted the need for improving transparency, international engagement, awareness raising and as well as support targeted to SMEs. Further to the UN Guidelines having been adopted in 2011, in 2015, the Commission complemented its work on CSR with a 2015 Staff Working Document³⁵.

Further to the adoption in 2015 by the UN of its 2030 Agenda and its SDGs, the most ambitious step in terms of sustainable development, the EU adopted the new European Consensus in June 2017. Such document was based on the “5 Ps” of the 2030 Agenda: People, Planet, Prosperity, Peace and Partnership, systematically integrating the social, economic and environmental dimensions. In this Consensus, “it promoted the integration of CSR in work with the private sector, including both employers’ and workers’ organisations, to ensure responsible, sustainable and effective approaches”³⁶. This marked a shift to the environmental aspect of the CSR debate. In its 2016, in its Communication “Next steps for a sustainable European future: European action for sustainability”, the Commission further reiterated its holistic approach to CSR, highlighting that: “The Commission will intensify its work on RBC, focusing on concrete actions to meet current and future social, environmental and governance challenges, building upon the main principles and policy approach identified in the Commission’s 2011 EU Corporate Social Responsibility Strategy”³⁷.

³³ Id.

³⁴ https://ec.europa.eu/growth/content/european-commission%E2%80%99s-strategy-csr-2011-2014-achievements-shortcomings-and-future-challenges_en.

³⁵ SWD(2015) 144 final, page 3.

³⁶ Id.

³⁷ COM/2016/0739 final.

Meanwhile, after Directive 2014/95/EU was adopted in 2014, as will be seen under Section 2.2.2, in June 2017 the Commission published its guidelines clarifying the obligations enshrined under this Directive, with the aim of assisting companies to disclose environmental and social information³⁸.

Over the recent years, the focus of the Commission moved from the notion of CSR towards a notion of RBC as closely intertwined with sustainability. In January 2019, the Commission issued a Reflection Paper “Towards sustainable Europe 2030”³⁹, where it highlighted how: “Businesses have a vital role to play in the sustainability transition. Over the last decades, both on a voluntary basis and spurred on by public authorities, an ever-growing number of companies have made environmental and social responsibility a core part of their corporate missions”. In March 2019, the Commission adopted its Staff Working Document on “Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights: Overview of Progress”, which takes stock of the steps taken and the lessons learnt⁴⁰. It *inter alia* highlighted the need to improve compliance with the due diligence requirements under the Directive 2014/95/EU⁴¹, including due diligence requirements with respect to some specific sectors. The discussion of such sectoral initiatives goes beyond the scope of the current work.

In June 2019, the European Commission published guidelines on reporting climate-related information⁴². They supplement the existing 2017 guidelines on non-financial reporting, which remain applicable.

In December 2019, in the context of its Green Deal Communication, as seen above, the new Commission announced that it would carry out a review of Directive 2014/95/EU in 2020. This review would feed into its announced strategy to strengthen the foundations for sustainable investment⁴³.

In February 2020, the Commission announced that it launched a public consultation in this respect⁴⁴. The same month, the Commission also published the results of an external study aimed at assessing the possible need to require corporate boards to develop and disclose a sustainability strategy, including due diligence throughout the supply chain, and measurable sustainability targets, referenced above⁴⁵. The study analyses how at Member State level companies define and implement due diligence processes to 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 (including with respect to climate). In concomitance with this, it lays down certain policy options for possible future legislation at EU level, analysing benefits and costs of each of them.

³⁸ Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information)

C/2017/4234, OJ C 215, 5.7.2017, p. 1–20

³⁹ European Commission COM(2019)22 of 30 January 2019.

⁴⁰ European Commission, COMMISSION STAFF WORKING DOCUMENT Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress, SWD(2019) 143 final.

⁴¹ European Commission Staff working document, Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress, SWD(2019) 143 final.

⁴² Communication from the Commission — Guidelines on non-financial reporting: Supplement on reporting climate-related information, C/2019/4490, OJ C 209, 20.6.2019, p. 1–30.

⁴³ COM/2019/640 final.

⁴⁴ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation>.

⁴⁵ Commission’s 2020 Due Diligence Study.

2.2.2 Directive 2014/95/EU: main elements

The above section provided an excursus of the most salient soft law instruments at EU level. We will now move our attention to what is the cross-sector most relevant EU piece of legislation, Directive 2014/95/EU (“non-financial reporting directive (NFRD), or NFR Directive”).

The NFR Directive sets out the rules on disclosure of non-financial and diversity information by large companies. It is essentially legislation that places upon such companies certain reporting and transparency obligations. It amends the Accounting Directive 2013/34/EU. Companies falling within its scope (large public-interest companies with more than 500 employees, as will be better seen below) are required to include non-financial statements in their annual reports. Specifically, the NFR Directive requires companies to disclose their business model, policies (including due diligence processes), outcomes, principal risks and risk management, and Key Performance Indicators (KPIs) relevant to the particular business, in four areas: environment, social and employee matters, respect for human rights, and anti-corruption and bribery. In addition, for some companies (typically listed ones), diversity reports are to be put in place.

Companies may use international, European or national guidelines to produce their statements – for instance, they can rely on: the UN Global Compact, the OECD guidelines for multinational enterprises, or standards, such as ISO 26.

Companies had to report according to the provisions of the NFR Directive for the first time in 2018, covering financial year 2017.

Directive 2014/95/EU mandated the Commission to produce a set of non-binding guidelines to assist companies to carry out such disclosure of non-financial and diversity information in their reporting cycles. On this basis, the non-binding 2017 Guidelines on non-financial reporting (EC Guidelines), referenced above, provide a support tool in this respect. However, they do not provide for a standardised framework⁴⁶. The 2019 Guidelines on reporting climate-related information also provide to companies help as to how companies must abide by the Directive’s provisions.

In spring 2020, a public consultation took place on the revision of the NFR Directive. In line with the results of our consultation, its outcome reflects how to bring further and to strengthen some of its provisions⁴⁷. The Commission’s work on the revision of the NFR Directive was also duly noted by the European Parliament in its summary report 2020, referenced above.

2.2.3 Directive 2014/95/EU’s transposition in chosen Member States

The six Member States (France, Italy, Germany, Netherlands, Spain and Poland) selected for this Study have literally transposed the scope of the NFR Directive, hence their legislations do not diverge. By contrast, these countries have followed different solutions regarding the entities to which national rules apply, and procedural issues, including enforcement and monitoring mechanisms.

From a methodological standpoint, as will be seen below, we should clarify the reason why we have selected these specific Member States. First of all, all these countries over the last years have adopted initiatives and legislations of different kinds regarding CSR; secondly, these jurisdictions provide for an

⁴⁶ CSR Europe, GRI, Accountancy Europe, Member State Implementation of Directive 2014/95/EU. A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information.

⁴⁷ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation>.

overview of what are some potentially positive and negative situations in this respect, considering as benchmark companies' compliance with RBC principles, Member States' proactive role and improved access to justice for victims of human rights and environment violations. Their variety and heterogeneity, also from a geographic standpoint, provides a good overview of the EU landscape.

In the Annex to the study, a thorough overview of how the Directive has been transposed in the six selected Member States is provided.

2.3 Conclusions regarding the way forward with Directive 2014/95/EU

First, the scope of the NFR is narrow, as the NFR Directive applies to large companies (large public-interest companies with more than 500 employees). In practice, it covers large listed companies, as well as large banks and insurance companies (whether listed or not), provided they have above 500 employees, but it does not cover small and medium enterprises that do not reach that threshold. Stakeholders agreed that the NFR Directive's obligations should not be restricted to companies listed on the stock exchange and that a level playing field among all companies in the EU should be ensured. In particular, the consulted stakeholders suggest that the scope of Directive 2014/95/EU should be expanded.

Second, consulted stakeholders pointed out that rules on non-financial obligations should be binding as this would indicate a strong signal and push companies to comply with them. The NFR Directive only provide for a 'comply-or-explain' provision, and this is clearly an incentive to comply with these rules.

Third, many stakeholder suggested to standardise some rules and principles of the NFR Directive, such as the principle of materiality or the reports' content.

To begin with, Article 19a of the Accounting Directive (which was introduced in this piece of legislation by Directive 2014/95/EU), requires companies to disclose information about four non-financial matters, if deemed material by the particular company: (i) environment; (ii) social and employee issues; (iii) human rights and (iv) bribery and corruption.

These are subject to the company's own materiality assessment. During the consultation, some stakeholders were of the opinion that the principle of materiality, as defined under the standards of the Global Reporting Initiative (GRI), should be implemented, according to which the principle of materiality is based upon three main criteria:

- 1) Conciseness and clarity: legibility and transparency of the actions undertaken, dialogue with stakeholders;
- 2) Innovation and anticipation: better risk management, selection of challenges, better understanding of opportunities;
- 3) Action / communication consistency: better CSR reputation, fight against greenwashing, credibility *vis-à-vis* civil society and investors.

This would allow for materiality to be better clarified and explained in a future revision of the NFR Directive, with the result that such assessment is no longer left to the company's discretion. More specifically, on 5 December 2019, the Economic and Financial Affairs Council adopted conclusions on

deepening the Capital Market Union. In these conclusions, it invited the Commission to “consider the development of a European non-financial reporting standard taking into account international initiatives”. The above examples mirror this suggestion.

Furthermore, in terms of standardisation concerning reporting on sustainability, the stakeholders opined that each company subject to the obligations should rely on the 10 principles of the UN Global Compact and on the UNSDGs, incorporating them in the reporting.

These principles are derived from the following international instruments: the UN Declaration of Human Rights, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Developments, and the UN Convention against corruption. As was seen above, first two UN Principles deal with human rights, and spell out that businesses should support and respect the protection of internationally proclaimed human rights, and make sure that they are not complicit in human rights abuses. Principles three to six concern human rights applicable to work, such as upholding the freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced and compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation. Finally, principles seven to nine deal with environment, while the last one deals with anti-corruption. This incorporation of such principles into the reporting should help companies to provide the core and essential information required under a future version of the Directive. In this respect, therefore, it aims at bolstering, standardising and making comparable the content of the reporting which, as seen above, is left to the company's own assessment under the current NFR Directive.

3. DUE DILIGENCE REQUIREMENTS IN SELECTED MEMBER STATES AND CSR

- This Section tackles how the due diligence requirements are addressed in six Member States: Italy, France, Germany, the Netherlands, Poland, and Spain. In this regard we will consider statutory rules, case law and ‘soft law’ provisions. Although most of these legal instruments covers broader subjects, we will exclusively focus on those relevant for company law matters. As such, we will first tackle some company law general issues in the EU’s Member States.
- Once the scene is set, this Section will also analyse good practices. For example, it will look into how some Member States have adopted sectoral or general legislation on mandatory due diligence. Two of such examples are France and the Netherlands.
- In particular, in 2019, the Netherlands adopted the Child Labour Due Diligence Act. Such law requires companies to identify, prevent, and, when necessary, address of child labour’ issues in their supply chains. The Child Labour Due Diligence Act applies to companies that sell or supply goods or services to Dutch end-users, including companies registered outside the Netherlands (Article 4(1)). The Act introduces a “duty of care” (*zorgplicht*). Such duty requires a company falling under the scope of this Act to “first determine whether there is a reasonable suspicion that a product, or service, involves child labour” (Article 5(1)). If such a suspicion exists, the duty requires the company “to develop and implement an action plan” (same provision). The notion of “suspicion” is not defined in the Act. The law requires companies to base themselves on sources which are “reasonably knowable and consultable” (Article 5.2). The notion of reasonableness is also not defined in the Act. According to this Act, companies falling under its scope must produce a statement declaring that they have conducted due diligence. The Act also imposes sanctions for failure to exercise due diligence, which may go as far as imposing on infringers criminal liability on (officers of) companies that are repeat offenders. It is to be complemented with decrees that still need to be adopted.
- In 2017, France adopted Act n° 2017-399 of 27 March 2017 relating to the duty of vigilance of mother companies and contracting companies (Vigilance Act). Under this piece of legislation, there is an obligation for large French companies to develop, publish and implement appropriate measures to identify risks and prevent violations of human rights, fundamental freedoms, human health and safety, and the environment. The general duty of due diligence triggers a duty to draft a ‘vigilance plan’. According to article L. 225-102-4 of the Commercial Code (introduced by the Vigilance Act), the vigilance plan should be established and effectively implemented by “any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad”. The Vigilance Act covers “the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship”. The Act foresaw civil fines for failure to fulfil obligations, yet in 2017 the Constitutional Council declared these provisions void as they violated the French Constitution, insofar as they sanctioned ‘indefinite’ obligations and behaviours.

- Finally, this Section draws conclusions on some negative best practices, identified both through desk research and through stakeholder consultation.

3.1 The impact of company regimes

Supranational legislation about non-shareholders' interests and human rights due diligence discussed in these pages is to be compared with company law regimes. Within the European Union, despite a significant harmonisation effort, company law rules are still national law. Hence, the question arises of how EU and supranational CSR duties, including due diligence requirements, can be compatible with national company law rules.

A preliminary question is to assess which national law is to be applied to companies. Although private international law criteria are not harmonised within the EU, in light of the Court of Justice of the European Union (CJEU)'s case-law about freedom of establishment⁴⁸, Member States should recognise any company incorporated in other Member States, regardless of the place of their business; to such companies, company law rules and principles of the country of incorporation apply⁴⁹. Therefore, in practice, the applicable company law regime is that of the country of incorporation, which could impose other requirements to domestically incorporated companies, such as a physical presence on the domestic territory.

National company law regimes across the EU still diverge in many respects. With regard to the scope of this Study, two issues are to be enquired: (a) which purposes can companies legitimately pursue according to the law of the country of incorporation; (b) whether holding companies are liable for human right violations committed by their subsidiaries (this issue also triggers the general question of 'piercing of corporate veil').

(a) Regarding the first issue (companies' purposes), the question arises whether companies can be only incorporated to pursue for-profit activities and to maximise shareholders' wealth, or whether companies can also pursue other goals. For instance, German company law does not require companies to pursue any specific purpose and, therefore, companies could be incorporated to attain not-for-profit purposes or even public goals. Recently, the French legislation has followed the same path: Article 1835 of the French Civil Code, as modified in 2019, allows companies to pursue any goals; a company's specific purpose is to be detailed in the articles of association. Under Italian law, by contrast, companies are necessarily for profit and should pursue the goal of distributing dividends to shareholders.

This general debate about the proper corporate purposes is reflected in national legislation and in domestic doctrinal and judiciary debates about directors' fiduciary duties.

Directors' fiduciary duties have always been a contentious field in company law debates. Recently, this debate has been enflamed by a statement on corporate purpose issued by the US. Business Roundtable, which has, surprisingly, advocated for a multi-stakeholder approach, in order to overcome inequality in modern capitalist societies.⁵⁰ Other scholars, however, have argued that this statement does not actually shift the real balance of powers from shareholders to other stakeholders, and that, by including other stakeholders' interests within directors' fiduciary duties, it is far from certain that these

⁴⁸ Case C-212/97 Centros Ltd v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459; Case C-208/00 Überseering [2002] ECR I-9919; Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] ECR I-10155; Case C-411/03 SEVIC Systems AG v. Amtsgericht Neuwied [2005] ECR I-10805; Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9641; Case C-378/10 VALE Építési kft, ECLI:EU:C:2012:440.

⁴⁹ See: Gerner-Beuerle C, Mucciarelli FM, Schuster E, Siems M (eds) *The private international law of companies in Europe*, Munich/Baden-Baden/Oxford (2019).

⁵⁰ Business Roundtable, Statement on the purposes of a corporation, 2019, <<<https://opportunity.businessroundtable.org/ourcommitment/>>>

interests will be actually pursued against market pressures.⁵¹

National legislation across Member States diverges in this regard. For instance, as a consequence of the codetermination regime⁵², directors of German companies must not only pursue shareholders' interests, they should rather strike a balance among their interests and those of the employees and other stakeholders, and this balance is to be assessed on a case-by-case basis.⁵³

Under Italian law, by contrast, under normal circumstances directors should only pursue shareholders' interests⁵⁴, while in the vicinity of insolvency creditors' interests become paramount⁵⁵. Since 2016, however, Italian companies can qualify as "benefit companies" by indicating in their articles of association that they aim at balancing shareholders' and other stakeholders' interests, and by specifying a specific purpose beneficial for the society as a whole (L. 208/2015). Besides distributing dividends, these companies should also operate in a "responsible, sustainable and transparent manner" *vis-à-vis* other stakeholders involved in their activities. The legislation about companies which operate for profit, however, has also triggered the question of whether other companies face similar duties. On the one hand, this legislation clearly shows that companies are compatible with any purposes, including the goal of pursuing public interests; on the other hand, it has been argued that "non-profit" companies do not have to strike a balance among shareholders' and other stakeholders' interests and can freely maximise shareholders' wealth.

Under French law, after a reform enacted in 2019⁵⁶, companies can indicate in the articles of association its basic purpose ("*raison d'être*") and the principles adopted and for which it allocates means in carrying out its activity⁵⁷. Eventually, French companies, after the French Civil Code was reformed in 2019, should also consider "the social and environmental stakes linked to its activity", not only shareholders' interests⁵⁸.

Setting up this debate allows the better understanding of the specific legislation tackled below. However, it has to be mentioned at the outset that this legislation will not only be limited to the corporate field, which is still the most relevant for our analysis, but will also briefly touch upon other sectoral areas, to the extent they are relevant in the context of the due diligence debate.

(b) The question of whether holding companies can be held liable for torts committed by their subsidiaries is also crucial for the enforcement of human rights. Businesses are often run through groups of companies, whereby a holding company controls many subsidiaries scattered in other countries. Whenever a tort damage is committed by one of these subsidiaries, the holding company is, at least in principle, not liable, given its autonomous legal personality. This is a straightforward consequence of the principle of separate legal personality of each entity, which shields their members from the company's debts.

⁵¹ The Business Roundtable statement has triggered an intense debate among legal scholars. Among others see, on the one hand, see: Bebchuk - Tallarita, *The Illusory Promise of Stakeholder Governance*, forthcoming, Cornell Law Review, 2020 (<https://ssrn.com/abstract=3544978>); on the other hand, see: Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, ECGI Working Paper in Law 515/2020.

⁵² In German companies above specific thresholds, a significant percentage of the members of the supervisory board (from 1/3 to 1/2 of the members, according to the number of a company's employees) is appointed by the company's employees or their trade unions.

⁵³ This conclusion is also supported by the German Corporate Governance Code (latest version March 2020), whose Foreword indicates that «[t]he Code highlights the obligation of Management Boards and Supervisory Boards [...] to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)».

⁵⁴ Article 2347 of the Italian Civil Code.

⁵⁵ According to a recent reform of Italian insolvency rules (Legislative Decree of 12 January 2019, n.14) when a company is in the vicinity of insolvency, directors should put all their efforts into overcoming the crisis (article 2086(2) of the Italian Civil Code); implicitly, this provision indicates that directors must not increase the risk profile of their company, regardless of shareholders' interests.

⁵⁶ [Loi 2019/486, 22.5.2019.](#)

⁵⁷ Art. 1835 of the French Civil Code

⁵⁸ Art. 1833 of the French Civil Code

Nevertheless, in all jurisdictions the question arises of whether the holding companies should be held liable for wrongdoings of their controlled companies (this issue is commonly labelled as “piercing of the corporate veil”). In European jurisdictions, the answer is in most cases in the negative, with limited exceptions occurring when dominant shareholders have committed abuses or mismanagement.

Holding companies, however, might be held liable in tort for negligence of their subsidiaries, provided that the applicable tort rules accept this connection. Strictly speaking, a tort liability is not a case of “piercing the corporate veil”. This has profound consequences upon the criteria to select the applicable law, as in that case choice of law and jurisdiction criteria for tort damages are to be applied instead of those applicable to the company’s internal affairs. In particular, criteria provided for in Regulation (EC) 864/2007 (Rome II Regulation) should apply⁵⁹. The consequences and implications of these specific criteria will be addressed in Chapter 4 of this Study.

3.2 Due diligence requirements in selected Member States

Due diligence is not usually defined in binding legislation across the analysed Member States. Exceptions are France (with respect to large companies) and Netherlands (with respect to child labour), which will be better analysed below. Among the jurisdictions we analyse, in Germany and in the Netherlands calls are being made by stakeholders on a general mandatory due diligence requirement legislation. In Germany, a bill initiative (*Lieferkettengesetz*) is pending. The results of a survey regarding compliance of companies with human rights and social minimum standards issued in July 2020 proved that the voluntary approach has led to unsatisfactory results, and at a press conference on 14 July 2020, two Ministers made public Germany’s plan to enact its own human rights due diligence law.

Also, there appears to be a gap with respect to how far the duty goes for the Member States where such legislation has been enacted. In particular, even in those Member States that provide for due diligence duties, these are either limited to specific sectors or do not apply to all companies across the board. For instance, in the Netherlands, only companies that respect human and environmental rights have access to public procurements or public funding, yet these provisions neither make reference to companies’ supply chain nor consider companies that do not apply for funding.

Highlighting that human rights’ violations continue to occur regardless of the current EU and national legal initiatives, a call is being made by the European Coalition for Corporate Justice (ECCJ) in several countries for a mandatory due diligence legislation⁶⁰. The social dimension of this problem was exacerbated with the current Covid-19 crisis. For instance, on June 2020, a new report, published by the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) identified poor working⁶¹, employment and housing conditions as one reason for the rapid spread of COVID-19 among the meat processing industry’s workforce, which is composed of predominantly immigrants.

Below, we provide an overview of the main legislation and soft law about due diligence requirements across the six chosen Member States: France, Germany, Italy, Netherlands, Poland and Spain.

⁵⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁶⁰ CORE, Mandatory Human Rights Due Diligence: An Initiative whose time has come, 2019, available at: <https://corporatejustice.org/news/16793-mandatory-human-rights-due-diligence-an-issue-whose-time-has-come>.

⁶¹ EFFAT Report, Covid-19 outbreaks in slaughterhouses and meat processing plants State of affairs and proposals for policy action at EU level, 30 June 2020, available at: <https://effat.org/wp-content/uploads/2020/06/EFFAT-Report-Covid-19-outbreaks-in-slaughterhouses-and-meat-packing-plants-State-of-affairs-and-proposals-for-policy-action-at-EU-level-30.06.2020.pdf>.

3.2.1 . Due diligence requirements in Italy

Italy does not lay down a notion of due diligence in mandatory legislation and no piece of legislation expressly provides for a mandatory due diligence process. The most relevant and effective legislation, adopted at national level, in line with the UN Guiding Principles consists of two Legislative decrees: first, Legislative Decree 231/2001 (*Decreto Legislativo 8 giugno 2001, n.231*), which strongly incentivizes the adoption of the so-called "231 Model", which concerns some risk mitigation measures in case a company were to be found as having committed a crime. Correctly adopting and implementing this model can allow these companies to escape administrative liability and avoid a range of penalties if they commit an offense listed in the legislative decree. The decree is binding. Second, (b)Legislative Decree n. 254/2016 on the communication of non-financial information, transposes the NFR Directive: to this end, see Table 1).

Beside those two decrees, are no mandatory provisions on due diligence for companies but only optional provisions, related to the implementation of the guidelines issued by international bodies.

Overview of the due diligence requirements in Italy.

(a)Due diligence requirements laid down in the law: General legislation

With the caveat made above, a legislative instrument laying down a due diligence requirement is the abovementioned Legislative Decree No. 231/2001. Such piece of legislation covers the area of unlawful administrative acts deriving from a crime, particularly human rights' violations and environmental crimes (both intentional and non-intentional environment pollution and environmental disaster and other environmental crimes).

This legislation does not expressly provide a definition of due diligence. However, the decree is in line with the OECD Guidelines. The decree regulates legal entities' liability for unlawful administrative acts deriving from a crime. The decree applies to all "corporate entities and companies and associations, regardless of whether they have legal personality". Specifically, it applies to legal entities including all kinds of companies (also state-owned companies), private legal persons (such as foundations), economic public entities, associations (also without legal personality).

The decree does not apply to the State, territorial public entities, non-economic public entities etc. The legislation introduces incentives for companies to strengthen their self-regulatory system and processes concerning risk activities. As spelled out above, companies are encouraged to adopt an adequate '231 Model', namely an organization and managerial model which identifies risk activities, sets protocol and decision-making processes for the offenses to be prevented, establishes procedures for managing financial resources. The Model also sets up the obligation to disclose information to the supervisory board and introduces a disciplinary system to punish non-compliance with the model. Each organizational model is drawn up based on the characteristics of each company, its activities and its production processes.

The decree does not explicitly include within its scope corporate groups and the entire supply chain. However, according to the case-law⁶² the parent company can be held responsible, provided that the

⁶² Criminal Cassation, section 5, 24583/2011, Tosinvest case.

natural person acting on behalf of the holding company colluded to the crime in order to pursue the interests of the holding company.

Pursuant to the decree, enforcement mechanisms vary depending on the nature of the penalty applied. In terms of the penalties, if any, for the violation of the above risk management requirement, the decree sets out a range of sanctions to be applied in the event of non-compliance. The penalties range from monetary fines, disqualification sanctions, seizure of the proceeds or profit of crime, and publication of the fine (Section II, art. 9-23).

(b) Due diligence requirements laid down in the law: sectoral legislation

A sectoral provision, enshrined under Legislative Decree n.81/2008 (TUSL Decree), which covers the areas of health and safety, is also relevant in this respect.

The Decree does not expressly refer to due diligence and it applies to all public and private companies.

This said, certain of its obligations apply only to some companies (see below). The Risk Assessment Working Document (DVR) should be drafted and updated in a specific way, particularly for large and medium-sized companies. For small business with limited risk it can be done via self-certification (up to 10 workers) or with standardized criteria (up to 50 workers).

Of relevance is Article 28 of Legislative Decree n.81/2008, which provides that all public and private Italian companies must draft and update a formal Document for the Evaluation of Risks (*"Documento di Valutazione dei Rischi"*), under the direct liability of the employer. The Risk Assessment Document (DVR) must have the following contents:

1. Report on Risk Assessment: containing details of all the risks to health and safety during work. This analysis is usually divided according to several risk factors, such as: workplace, machinery, equipment, chemical, physical and biological, organizational and management issues, etc. The analysis is preceded by information on the organizational chart and business and it should also indicate the criteria used for risk assessment;
2. A statement of the measures of prevention and protection implemented in order to eliminate the above risks identified, or if it is not possible to completely eliminate them, reduce the risk to an "acceptable" level;
3. Identification of procedures for the implementation of security measures;
4. Indication of the Service Manager for the Prevention (Responsabile del Servizio per la Prevenzione e Protezione), of the Protection of Workers' Safety Representative (Rappresentante dei Lavoratori per la Sicurezza) and the Company's Doctor (Medico Competente);
5. List of personal protective equipment (DPI), which are protective clothing for workers to wear the personal protective equipment (eg safety shoes, helmet, gloves, masks, etc.);
6. Program of the measures it considers necessary to ensure the improvement of safety standards over time, which means all those measures to be taken to improve levels of safety over time (maintenance, inspections, information activities and training of workers etc...);
7. Identifying the tasks that expose workers to specific risks.

The TUSL Decree does not specify whether these requirements comprise supply chains and subcontractors.

The enforcement mechanisms indicated in TUSL Decree are the same ones foreseen under criminal law: the omission of the necessary precautions triggers upon the employer criminal liability. In addition; there is also the right of the employer to ask damages.

The Penalties foreseen under the TUSL Decree for failure to abide by its provisions are criminal and administrative: the former comprise arrest from three (3) to six (6) months or a fine ranging from Euro 2,500 to Euro 6400 (art. 55, para. 1, TUSL). The latter comprise the suspension of business (and a ban on bargaining with the Public Administration).

(c) Due diligence requirements laid down in soft law

Italy periodically adopts the Italian National action plan on business and human rights (*Piano Azione Nazionale impresa e diritti umani* (PAN)). The current PAN spans from 2016 to 2021⁶³. It covers social and employee related matters, human rights and sustainability.

The Italian PAN does not provide an explicit definition of due diligence. It refers, however, to a due diligence mechanism/approach.

As to its material scope, it refers to all businesses (no definition is provided), with a particular focus on SMEs.

The PAN is not binding. It lays out voluntary duties, which encourage companies to identify and prevent violations of human rights and to promote a common approach to due diligence across businesses (SMEs). It also encourages them boost the adoption of mechanism of due diligence encompassing the supply chain.

The action plan does not specify measures to be put in place. However, one of the priorities is to adopt a mechanism of due diligence encompassing the whole supply chain. That said, it does not specify what such mechanism can consist of.

No enforcement mechanisms are foreseen and no penalties are laid down. Yet, the plan lists a range of measures:

1. comprehensive review of civil and commercial law to evaluate future legislative reform in order to introduce duty of care or due diligence for businesses;
2. Setting up a permanent working group composed of public or state-owned businesses and relevant stakeholders to monitor due diligence mechanisms;
3. Introducing mandatory non-financial reporting and due diligence processes for government agencies;
4. Implementing Regulation (EU) 2017/821 on due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict affected and high-risk areas.

The Plan also foresees the following awareness raising initiatives in conflict-stricken areas where the risk of human rights abuses is particularly acute:

1. Promote the knowledge of the OECD Guidelines on due diligence for companies in weak governance zones and in certain specific sector areas: "Risk Awareness Tool for Multinational

⁶³ http://cidu.esteri.it/resource/2016/12/49118_f_PANBHRITAFINALE15122016.pdf.

Enterprises in Weak Governance Zones” and “Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas”.

2. Include the theme of respect for human rights by the companies through specific projects ideated and developed by the Agenzia Italiana per la Cooperazione allo Sviluppo in the areas of conflict (or high risk of conflict) which foresee activities of sensibilisation and capacity development.
3. Strengthen the action of the Italian Cooperation (Cooperazione italiana) towards gender equality in the post-conflict countries in line with the UN three pillars (peace and security, development and human rights) and the legal and operational framework under UN Council Resolution 1325.

Separately from the plan, another soft law document is the Guide to Due Diligence in the Supply Chain, adopted by the Ministry of Economic Development in 2011⁶⁴ (*Guida alla due diligence nella catena di fornitura*), which expressly refers to the above-mentioned OECD guidelines.

The Guide covers the following areas: social and employee related matters; human rights; sustainability. The notion of due diligence under the Guide aligns to the definition of due diligence under the OECD Guidelines⁶⁵: “a process that, as integrating part of the decisional systems and risk management, allows companies to identify, prevent, and mitigate their own negative impact, both effective and potential, and to explain how the problem is faced”.

It applies to all businesses with a focus on SMEs. The Guide refers to voluntary duties including setting up control mechanisms, as well as evaluation criteria related to due diligence practices with regard to suppliers. Businesses are called upon to prevent or minimize their negative impact even when, although not having contributed to causing it, this impact is directly linked to their activities, their products or their services.

The Guide specifically focuses on a responsible supply chain. Companies are invited to implement due diligence towards suppliers and, in general, within the supply chain, to avoid contributing to a negative impact within their business operations.

In particular, each company falling under the Guide is called to encourage, as far as possible, its commercial partners, including suppliers and subcontractors, to apply responsible business behaviour principles, including in relationships within the supply chain.

This is to be done through the following measures:

- 1) mapping and assessing the main risks within the supply chain,
- 2) developing and implementing strategies to respond to identified risks, and
- 3) developing criteria to measure performance and communication tools related to due diligence.

The enforcement mechanism foreseen is a non-judicial dispute settlement mechanism, which allows the stakeholders who have been affected by a non-compliant behaviour to the OECD Guidelines, to bring the issue to attention of the Italian National Contact Point for the OECD Guidelines (NPC). The NPC has the role of mediating between the parts to reach an agreement. To this end, the NCP adopts all the actions useful for dialogue and the settlement of interests, including the request for opinion

⁶⁴ Available at: [https://pcnitalia.mise.gov.it/attachments/article/2035843/Guida_Due_Diligence_catena_fornit_2012_DEP%20\(24\).pdf](https://pcnitalia.mise.gov.it/attachments/article/2035843/Guida_Due_Diligence_catena_fornit_2012_DEP%20(24).pdf).

⁶⁵ OECD Guidelines, Part I, Chapter II (General Principles), Article 12.

from its Committee and, if necessary, the consultation of experts and NCPs from other countries or even the OECD Investment Committee.

Considering that this is a soft law instrument, no penalties exist if the abovementioned due diligence duty is violated.

Conclusions on the duty of due diligence in Italy

At the national level, the NPC for multinational companies is operational. The NPC, as a multi-stakeholder body, also oversees the representation of the regions, through a representative designated by the Conference of the Regions and Autonomous Provinces. Over the years, the NCP has organized various initiatives in this regard, especially with reference to the management of supply chains, as seen above.

The consultation showed that there is a margin for improvement: the legislative Decree 231/2001 does not cover all the relevant cases concerning the protection of human rights, while Legislative Decree 254/2016, on the other hand, only provides for a disclosure obligation and applies exclusively to larger companies⁶⁶.

Stakeholders pointed out that mandatory due diligence measures should be introduced for companies (i.e. requiring companies to map the risks for the protection of human rights related to their activities and prevent violations)⁶⁷. According to the stakeholders, the current legislation on due diligence supports the development and implementation of CSR strategies in a very limited way: since due diligence is mainly about reporting, and it stems from the financial concept of risks, this appears insufficient to support the development of effective CSR strategies in the corporate community⁶⁸.

According to an interviewee, CSR should not be based on financial risks' concepts since CSR policies and measures relate to ethical and human rights areas⁶⁹. The NFR Directive, for instance, as seen under Chapter 2, does not provide for an obligation of due diligence, duty of care or monitoring, but only focuses on transparency. For these reasons, the interviewee considers that both the NFR Directive and the Italian transposition decree of such a Directive cannot be considered as exhaustive. Moreover, they are mandatory only for some types of companies (public interest or listed companies).

By contrast, according to another interviewee, the concerned legislation (or soft law) supports the development and implementation of CSR strategies in the business community, although CSR is not enough. According to such interviewee, CSR measures do not guarantee – and, therefore should not be considered sufficient to ensure – respect for human rights⁷⁰.

According to the consulted policy officer in charge of CSR measures for Tuscany region, the initiatives adopted thus far fail to reach a very high number of recipients, also because they are concentrated at regional level. These are often initiatives aimed at professionals who already know the topic and share experiences and proposals⁷¹. As such, awareness raising can be improved.

⁶⁶ Interview carried out on 30 June 2020 with Italian professor specialised in due diligence and human rights.

⁶⁷ Interview carried out on 30 June 2020 with Italian professor specialised in due diligence and human rights.

⁶⁸ Interview carried out on 22 June 2020 with Italian professor specialised in CSR policies.

⁶⁹ Interview carried out on 22 June 2020 with Italian professor specialised in CSR policies.

⁷⁰ Interview carried out on 30 June 2020 with Italian professor specialised in due diligence and human rights.

⁷¹ Interview carried out on 2 July 2020 with policy officer in charge of CSR measures for Tuscany region.

According to the NPC for OECD Guidelines consulted for this study, the current measures are satisfactory given the features of the Italian production system, based on SMEs.

In this perspective, a balance between the burdens on small businesses and the sustainability objectives must be ensured. There is still room for improvement in terms of urging large companies to involve their supply chains in the process of improving CSR aspects⁷².

3.2.2. Due diligence requirements in France

France is one of the few Member States where a mandatory due diligence duty exists since a few years. Starting from 2018, large companies falling within the scope of the French Law n° 2017-399 of 27 March 2017 relating to the duty of vigilance of mother companies and contracting companies (Vigilance Act) are expected to develop, implement, and publish their due diligence plans to identify risks and prevent infringements on human rights, fundamental freedoms, health and safety, and the environment.

In recent months, oil giant Total SA was sued by 14 local governments and several NGOs for not doing enough to reduce its carbon emissions and fight global warming. The claimants sought emergency proceedings against Total for non-compliance with its legal obligations under the Vigilance Act, which aims to address corporate negligence.

(a) Due diligence requirements laid down in the law: horizontal legislation

A legislative instrument laying down a mandatory due diligence requirement in France is the Vigilance Law.

The Vigilance Act provides for the obligation for large French companies to develop, publish and implement appropriate measures to identify risks and prevent violations of human rights, fundamental freedoms, human health and safety, and the environment.

The Vigilance Act does not expressly refer to due diligence. However, companies within the scope of the Vigilance Act have to establish a vigilance plan setting out reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of Article L. 233-16, 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. The Vigilance Law covers “the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship”. The “established commercial relationships” under French law should be considered as regular and stable relationships, with or without contract, with a certain volume of business and which are reasonably expected to be sustainable (the term is used in Article L442-1 of the Commercial Law and is further defined in the case law). It does appear, therefore, that the Act does not focus on all the levels of the supply chain.

In terms of material scope, as per article L. 225-102-4 of the Commercial Code - introduced by the Vigilance Act, the vigilance plan should be established and effectively implemented by “Any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at

⁷² Consultation with the NPC carried out on the 9 July via written questionnaire.

least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad." The vigilance requirements for the subcontractors and suppliers are the same as for the mother company. The aim of the law is to support suppliers and subcontractors and to upgrade the collaboration between them and the mother company.

In the event a company falling under the scope of the Vigilance Act fails to establish, publish or effectively implement a vigilance plan, any person demonstrating an interest (e.g. associations for the defence of human rights or the environment or unions) may request that the company complies with its obligations. If after a period of three months from the formal notice, the company has not complied with the obligations, the judge may order the compliance under penalty (L225-102-4). Furthermore, the civil liability of the company may be engaged in the event of failure to fulfil its obligations (Art. L.225-102-5). The company may be ordered to "repair the damage that the performance of these obligations would have prevented". Therefore, if a company implements a vigilance plan respecting its mandatory content and the quality of the plan, its responsibility should not be engaged even if damage occurs.

Article L. 225-102-4 and Article L. 225-102-5 provided that a company that breaches the obligations under the Vigilance Act may be ordered to comply with them, following the issuance of a formal notice. It may also be ordered to pay a fine of a maximum of ten million euros. The amount of this fine could be tripled if the responsibility of the company was engaged on the basis of a breach of its obligations which caused damage.

However, the French Constitutional Council, in its decision of 23 March 2017, No 2017-750 DC, para. 27, ruled that the definition of these obligations was not sufficiently precise (i.e. the general terms used such as "reasonable vigilance measures" and "appropriate risk mitigation actions", as well as the broad and vague nature of the wording "human rights" and "fundamental freedoms" and the absence of a strict delimitation of the scope of companies, businesses and activities falling within the obligations of the vigilance plan).

The Council declared the provisions relating to the civil fines, since they were to sanction 'indefinite' obligations, contrary to the Constitution.

(b) Due diligence requirements laid down in soft law

Please also find below some information on some soft law initiatives in France.

1. The Platform dedicated to CSR (*Plateforme nationale d'actions globales pour la RSE*) is one of the instruments provided by French soft law in matter of due diligence.

The Platform was established by the Prime Minister in 2013. It issues opinions on the questions submitted to it and it makes recommendations on social and governance issues related to CSR (Article 5 of decree n° 2013-333 of 22 April 2013).

The Platform is intended for dialogue, consultation and for preparing relevant proposals to the State or other institutions and organizations, including its members, in order to reinforce CSR practices.

The members of the Platform are divided into five categories of actors active on CSR and other organizations: Business and economic organizations, Employee organizations, Civil society

organizations, CSR researchers, Public institutions.

The CSR Platform has adopted and published numerous recommendations in respect of competitiveness, transparency, control of the value chain and public procurement. The platform is an innovative and original tool as it brings together representatives of the abovementioned five groups, giving voice to their concerns. However, what seems to be a strength can also be considered as a weakness – indeed, all decisions are taken by consensus and sometimes long discussions reach a dead end.

There is no specific definition of due diligence enshrined therein.

The Functioning Principles of the Platform (document last revised on 9 July 2019), are based on the definition of CSR by the European Commission. In France, the legislator defined a legislative framework for CSR focused on the following aspects: extra-financial reporting, socially responsible investment, gender equality in management bodies, gender equality, climate change and biodiversity. Within this framework, the Platform aims to ensure the compliance with the law and it encourages companies to respect CSR policies on a voluntary basis.

2. On July 10, 2017, it adopted its Opinion on Responsible relations between contractors and suppliers and the implementation of due diligence. The Opinion of the CSR Platform on 'Responsible relationships between contractors and suppliers' is another tool of soft law in France.

Under the Opinion, companies must take into account four areas: environmental matters, social and work matters, respect of human rights and the fight against corruption.

There is no specific definition of due diligence. However, according to the Opinion, each company may adopt a vigilance plan to identify its risks and to implement the most suitable procedures. It should however be based on four main principles: identify and assess, prevent, mitigate, remedy and report risks.

Concerning the targeted companies, the CSR Platform confirms that, notwithstanding the legislation introduced by law n° 2017-399 of 27 March 2017, every economic stakeholder has a duty to implement due diligence procedures in order to avoid the occurrence of negative impacts on its entire sphere of influence.

The obligations under the Opinion are of voluntary nature.

The duty of vigilance must, according to the Opinion, apply to the entire value chain, both to the extended capital control relationships (within the meaning of article L233-16 of the French Commercial Code) and to the commercial relationships (subcontracting relationships, i.e. the entities with which a company has a "business relationship" and over which it can exercise influence).

No enforcement mechanisms, nor penalties are foreseen.

3. The Guidance on CSR in logistics (*Référentiel RSE en logistique*) is another tool of the French soft law on due diligence related issues.

One of the main objectives of the Guidance is to support companies in the logistics sector. It concerns in particular very small enterprises, small and medium size enterprises and intermediate size

enterprises. It aims to facilitate exchanges between companies purchasing logistics activities and logistics service providers, especially during calls for tenders. This Guidance is also intended for all organizations that operate or subcontract logistics activities: public authorities (State, region, department, municipality), public establishments, NGOs, etc.

The CSR guidance in logistic is fully aligned with ISO 26000 and adapts it to the specific nature of logistics activities. The following issues are addressed in the guidance:

- Governance (integration of CSR into strategy and risk and opportunity management)
- Human rights (respect of the populations, promotion of CSR in the value chain (duty of care))
- Social (health and security at work, human capital development, working conditions and quality of life at work, employer / employee relations (including fundamental labour rights), social dialogue, compensation)
- Environment (climate change, energy air, circular economy, waste management, nuisances (including noise and congestion, water and soil pollution, biodiversity)).
- Fair practices (sustainable relationships with customers, subcontractors and suppliers, corruption and fraud, fair competition).
- Development of territories (involvement in the local territories e.g. supporting the socio-economic initiatives; supporting local actions in the field of education such as professional training in logistics activities, sport or culture; participating in local projects; local development of technologies related to business activity), local employment, population health);
- Issues relating to customers / consumers (fair practices in information and contracts, protection of customers and consumer health and safety, after-sales service and dispute resolution, protection of customer / consumer data).

While the guidelines are a guide to good practice, they do, however, not provide a certification. Thus, their success will mainly depend on the goodwill of the actors in the logistics sector.

4. Soft Law in France also foresees the so-called Standard NF X30-029 of July 2016 published by AFNOR (French Association for Standardization).

This document can be used by any type of organization, private or public, whatever is the activity and size.

The document provides a method for "establishing priorities for addressing areas of action" of social responsibility according to the guidelines of ISO 26000, in particular those in Article 7.

The document encourages social responsibility but it does not lay down a due diligence requirement.

5. Furthermore, in the automotive sector there are other sectorial measures. For exemple, the Commitment Charter establishes relations between customers and suppliers in the automotive sector (*Charte d'engagement sur les relations entre clients et fournisseurs au sein de la filière automobile*).

In 2009, stakeholders in the automotive industry made a commitment to comply with the provisions set out in the performance and good practice code establishing relations between customers and suppliers. This Charter is reinforcing this commitment. It also applies to sub-contractors.

The aims of the Charter are:

- Ensure the sustainability and competitiveness of the French automotive industry;

- Strengthen relationships within the sector through constructive dialogue and appropriate tools;
- Clarify local integration policies and strengthen a sustainable and competitive French offer;
- Develop contractual relationships (enforce the Code of Performance and Good Practice).

The Charter is a useful tool to encourage compliance with a good practice code covering relationships between customers and suppliers.

Conclusions on due diligence in France

The consultation with the stakeholders⁷³ has confirmed that the main initiative in France in respect of due diligence is the Vigilance Act (Law n° 2017-399 of 27 March 2017), the outcome of long discussions that started in 2012-2013 (after Rana-Plaza)⁷⁴. This is a big step forward for France in the EU, France being the first country with such a complete and advanced legal framework. In January 2020, the French General Council of Economy adopted the "Assessment of the implementation of the law n° 2017-399 of 27 March 2017 relating to the duty of vigilance of mother companies and contracting companies"⁷⁵. This document is not binding but it contains a thorough analysis of the companies' duties under the Vigilance Act. It also summarizes the strength and weaknesses of the law and provides an assessment as to how the law has been applied so far by companies taking into account the relatively short period since it was adopted.

Stakeholders have highlighted that the monitoring of how the law is implemented is not sufficient. According to a consulted stakeholder, an example of good monitoring is the German monitoring process, which reviews to what extent companies based in Germany are meeting their due diligence obligations in line with the National Action Plan for Business and Human Rights. The issue of lack of monitoring has also been particularly pointed out by the NGOs through the 'vigilance radar': <https://plan-vigilance.org/a-propos/>.

The representative of a company has underlined that the law is still rather new and there is not enough perspective to give an assessment of the law and its implementation. However, it can be noted that the risk mapping varies across sectors – e.g. the food industry is very advanced in terms of traceability while this is still rather a major issue for the textile industry. In addition, there is sometimes a discrepancy between what the companies report and what they actually put in place.

3.2.3. Due diligence requirements in Germany

In terms of methodology, this analysis draws on desk research. In particular, it draws from the following documents:

(a) The Germany country report in the study by British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020 (cited above);

⁷³ The following onterviews have been conducted: 1) interview with the Permanent secretary of the [RSE Platform](#) (member of France Stratégie) carried out on 17 June 2020; 2) interview with the CSR Director of [Greenflex](#) carried out on 24 June 2020

⁷⁴ The tragedy at Rana Plaza in Bangladesh on April 24, 2013 sparked a reaction in the entire world including France. NGOs, unions and officials wanted to go further than a "soft law" by campaigning for the creation of a legal obligation, which resulted in the Vigilance Act.

⁷⁵ https://www.economie.gouv.fr/files/files/directions_services/cqe/devoirs-vigilances-entreprises.pdf.

(b) Business and Human Rights Centre report (in particular, on the "Supply Chain Law Initiative" (*Initiative Lieferkettengesetz*);

(c) doctrinal literature; and

(d) information available in the website of the Federal Ministry of Labour and Social Affairs.

The German Government's "National Action Plan for Business and Human Rights", adopted in 2016, describes in detail companies' responsibilities to respect human rights according to the UN Guiding Principles. It *inter alia* sets a goal for 50 % of all companies with more than 500 employees to have a human rights system in place by 2020. However, it does not prescribe any penalties for lack of compliance.

To this end, a survey has been sent out twice on a sampling basis to determine whether at least 50% of the targeted companies have implemented the NAP recommendations into their business processes. Should this threshold level of implementation not be achieved, the NAP indicates that it is possible to enforce due diligence through legislative measures. Such survey has been the subject of controversy within the German government, with the Federal Ministry of Economic Affairs as well as several industry associations and companies having criticised the methodology and assessment criteria. The argument is that in the second revision of the survey, "the company must answer every single question positively in order to be classified as 'compliant'". It is argued that "the mechanism of "comply-or-explain" envisaged by the NAP is said not to be realistic insofar as the survey does not allow a simple explanation for non-compliance but requires the implementation of an equivalent measure. To date, about 22 percent of the companies addressed have replied"⁷⁶.

In Germany, mandatory due diligence requirements have been gaining momentum, though no such law exists yet. In February 2019, "a draft for a supply chain law was leaked from the Ministry of Economic Cooperation and Development and it was said that it could be issued should German companies not take the necessary steps themselves. This initial draft foresees penalties of up to EUR 5 million for companies which are not adhering to their human rights obligations"⁷⁷. On September 2019, a coalition of trade unions and NGOs launched a campaign advocating for the German government to adopt a mandatory supply chain due diligence (SCDD) law. This is called the "Supply Chain Law Initiative" (German: *Initiative Lieferkettengesetz*). By means of a petition, the German government was asked to adopt a law to make human rights due diligence mandatory for German companies by 2020. In July 2020, two German ministries, the Ministry of Economic Cooperation and Development and the Federal Ministry of Labour and Social Affairs, published a Term sheet for a German "Federal Bill on the strengthening of Corporate Due Diligence to Avoid Human Rights Impacts in Global Value Supply Chains". Such bill would consist of imposing upon large companies due diligence obligations (consisting of requiring companies to act when they identify impacts or risks of impacts⁷⁸).

Against this background, in Germany, and bearing in mind that no general mandatory due diligence exists, certain due diligence obligations are laid down both in public law and private law, as well as soft law instruments. We will look into the pieces of legislation (Section (a), or soft law (Section (b)) laying

⁷⁶T. Volland, Clifford Change, *Germany's Due Diligence Act*, 31 July 2020.

⁷⁷ S. Schenk, Q. Hubert, *Could Germany introduce a mandatory human rights due diligence law?*, (2019). Available at: <https://www.herbertsmithfreehills.com/latest-thinking/could-germany-introduce-a-mandatory-human-rights-due-diligence-law>.

⁷⁸T. Volland, Clifford Chance, *Germany's Due Diligence Act*, 31 July 2020

down a due diligence requirement, what areas it covers and whom is it addressed to, and what does this due diligence duty contain. We will also look at what the remedies for failure to comply are, if any.

Under Section (c), we will then zoom onto the 2019 German legislative proposal to regulate corporate human rights and environmental due diligence through global value chains, as described in the study by the British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020, as amended by the above-mentioned 2020 version.

(a) *Due diligence requirements laid down in the law: horizontal and sectoral initiatives*

Overview of the various legal instruments which lay out a mandatory due diligence requirement under German law:

1. Constitutional law: German Basic Law, Article 20a: precautionary principle which requires the state to prevent risks to the environment. Duty to protect, i.e. an obligation of diligent conduct on public authorities.
2. Environmental law: Federal Law for the Protection of Emissions (Bundesimmissionsschutzgesetz, BImSchG); Federal Law for the Regulation of Genetic Engineering (Gesetz zur Regulierung der Gentechnik, GenTG), German law regulating environmental impact assessments (Gesetz über die Umweltverträglichkeitsprüfung, UVPG);
3. Product liability law (Produkthaftungsgesetz, ProdHaftG)
4. German Administrative Offences Act (Ordnungswidrigkeitsgesetz – OWiG)
5. Public Procurement Law (Laws transposing directives on public procurement, German Law against Restraints of Competition)
6. Due Diligence Obligations in the Law of Non-Contractual Obligations (Civil Code)
7. Company law (German Companies Act)
8. Law of unfair business practices
9. German Labour law (General: Labour Protection Act; Specific: Protection of Mothers Act; Posted Workers Act)
10. Implementation Act of 11th April 2017 (Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz), transposing Directive 2014/95/EU into German law.

1. In terms of **constitutional law**, under Article 20A of the Basic Law, “Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order”: this is interpreted as requiring the public authorities to prevent risks to the environment, and can be framed as a “duty to protect”, namely a due diligent conduct obligation incumbent upon public authorities⁷⁹. This duty to protect extends beyond the environment to cover human rights. The German Constitutional Court has made clear that, when there are evident violations of the core values protected by a human right (so-called ‘Untermaßverbot’), the limit of discretion accorded to public authorities in complying with their duty to protect is reached (German Federal Constitutional Court, BVerfGE 88, 203 – Schwangerschaftsabbruch). For example, where a regulation pertains to dangerous facilities such as nuclear power plants, the duty to protect entails an obligation to take all steps necessary to minimise the risk of human rights violations (German Federal

⁷⁹ European Commission Study on Due Diligence, cited.

Constitutional Court, BVerfGE 49, 89 – Kalkar I). Such duty also encompasses putting in place administrative and judicial procedures aimed at preventing and redressing human rights violations.

2. In terms of **environmental law**, another due diligence duty that touches businesses is contained in the federal law that provides for protection of humans, animals and the environment against harmful emissions (Bundesimmissionsschutzgesetz, BImSchG) and finds its legal basis on this article. § 5 BImSchG imposes on operators of industrial compounds (factories, machinery, etc.) a duty of protection (§ 5 I (1) No 1 BImSchG which requires operators to take the measures necessary for preventing probable environmental impacts from occurring) and a duty of precaution (§ 5 I (1) No 2 which requires operators to take measures, in accordance with the scientific and technical state of the art ('Stand der Technik', § 3 VI (1) BImSchG), to reduce risks of environmental nuisance whose materialisation is possible yet not sufficiently probable to trigger a duty of protection. Likewise, § 6 of the Federal Law for the Regulation of Genetic Engineering (Gesetz zur Regulierung der Gentechnik, GenTG) imposes on operators of biogenetical compounds a general due diligence obligation. Finally, under the German law regulating environmental impact assessments (Gesetz über die Umweltverträglichkeitsprüfung, UVPG) that implements EC Directive 85/337/EWG of 27 June 1985, the competent public authority must identify, describe and evaluate the environmental impacts in accordance with applicable laws (nach Maßgabe der geltenden Gesetze, § 3 UVPG), which entails that the project must also comply with environmental due diligence requirements regulated elsewhere (including a general due diligence incumbent upon the public to avoid the deterioration of the water quality laid down in the Water Resources Act (Gesetz zur Ordnung des Wasserhaushalts – WHG).

3. Another due diligence duty is contained in **product liability law**, under which manufacturers are liable if their products do not conform to the standards that a reasonable objective consumer can expect (§ 3 Produkthaftungsgesetz, ProdHaftG). According to some authors, the product liability laws impose due diligence obligations on producers that are mapped onto the different stages of the production process, including an obligation to observe products that have been placed in the market.

4. Finally, other due diligence duties are contained in § 130 of the **Administrative Offences Act** (Ordnungswidrigkeitengesetz – OWiG) under which a business owner is liable if, intentionally or negligently, he/she fails to take the supervisory measures necessary for his/her business to comply with legal duties incumbent upon him/her as owner.

5. **Public procurement law**: The bulk of German regulation on public procurement consists of a transposition of EU directives into domestic law. In the National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020 (German Federal Foreign Office)⁸⁰ the government has committed to check whether and to what extent binding minimum requirements for corporate human rights due diligence can be enshrined in public procurement law. The specification of human rights due diligence requirements must be tailored to the specific subject of the contract and cannot take into account the overall business- and corporate policy of the bidder⁸¹. § 97 III of the German Law against Restraints of Competition provides that social and environmental aspects shall be

⁸⁰ German Federal Foreign Office, National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020, p. 16.

⁸¹ German Government, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Michel Brandt, Heike Hänsel, Zaklin Nastric, weiterer Abgeordneter und der Fraktion DIE LINKE, Deutscher Bundestag, Drucksache 19/6512 (14.12.2018); and German government, Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Uwe Kekeritz, Katharina Dröge, Harald Ebner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN: Ökologische, soziale und menschenrechtliche Kriterien in der öffentlichen Beschaffung als Beitrag für eine nachhaltige Entwicklung weltweit, Deutscher Bundestag, Drucksache 19/7567 (02.02.2019).

taken into consideration when awarding contracts. Under § 124 I (1) GWB, a company can be excluded from the bidding process if it has demonstrably violated existing environmental, social or labour law obligations in the execution of public contracts. After the acceptance of the bid, the contracting authority can require companies to observe social and environmental aspects in the execution of the contract (§ 128 GWB).

6. Moving on to private law, under civil law (§ 823 of the German Civil Code (**Bürgerliches Gesetzbuch – BGB**)) persons have a cause of action for infringements of their life, bodily integrity, freedom, property and personality rights – thus covering interests also protected by international human rights law. With respect to infringements resulting from positive acts, to establish liability, claimants must prove that the defendant caused damage to a protected interest through intentional or negligent conduct. Defendants act intentionally when they know that their conduct involves a risk of damage and accept that such damage may occur; they act negligently when their conduct was contrary to the diligence required by general business practice (die im Verkehr erforderliche Sorgfalt, § 276 II BGB). With respect to infringements resulting from omissions, claimants must also prove that the defendant incurred a 'safety duty' (Verkehrspflicht) – an affirmative duty to prevent the infringement and that being the damage foreseeable, acted negligently to breach it. According to some authors, "these safety duties can be viewed as binding due diligence obligations, given that they were developed to determine whether defendants are obliged to take safety measures to prevent an infringement of protected interests"⁸². In addition, "acting with due diligence within the meaning of the German law of non-contractual obligations requires the adoption of reasonable measures that a careful person of average circumspection and capability would consider necessary and adequate in order to prevent infringements of protected interests. The threshold of reasonableness is determined on the basis of a cost-benefit analysis: the more probable and serious the possible impact/damage and the lower the costs of preventing it, the more precautionary measures a reasonable person is expected to take"⁸³.

7. Under § 93 I of the Companies Act (**Aktiengesetz – AktG**), all members of the company's executive board (Vorstand) must act with the diligence of a decent and conscientious manager. Members of the executive board bear the burden of proof for complying with due diligence obligations (§ 93 II AktG). Under case law (LG München I, Urteil vom 10 Dezember 2013 – 5 HK O 1387/10 – Siemens/Neubürger), "members of the executive board have a joint due diligence obligation to set up and supervise a firm-wide compliance system for damage prevention and risk control. Members of the executive board breach their due diligence obligations if they fail to establish a functioning compliance system that ensures effective monitoring and control of business processes. This due diligence obligation to ensure a functioning compliance system also applies" between these members⁸⁴.

8. Law of unfair business practices: under § 3 II **UWG**, unfair business practices are business actions towards consumers that do not satisfy the requirements of corporate due diligence (unternehmerische Sorgfalt) and that are likely to materially affect consumers' economic behaviour. Corporate due diligence is defined as "the standard of expertise and diligence that an entrepreneur can be reasonably be expected to observe in relation to consumers, considering his/her field of activity, the principle of good faith, and honest market practices (§ 2 I No 7 UWG)"⁸⁵. According to the German Federal Court of Justice (Bundesgerichtshof) in BGH GRUR 1980, 858ff – Asbestimporte, a violation of corporate due

⁸² European Commission Study on Due Diligence, cited.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

diligence within the meaning of § 2 UWG can be assumed where foreign working conditions violate “basic ethical requirements every legal order should aim to protect and are therefore incompatible with the principle of good faith and honest market practices”, even if the economic exploitation of lower protection standards in third countries does not as such constitute an unfair business practice.

9. Under German Employment law, § 3 I **Labour Protection Act** (ArbSchG) provides that employers must take the steps necessary for supervising, adapting and improving occupational safety, whilst clarifying the principles under § 4 I ArbSchG. Pursuant to § 5 ArbSchG, employers must “identify the concrete health and safety hazards bound up with a particular activity and determine which protective measures are actually required”. Under § 7 ArbSchG, employers must furthermore ensure that employees are physically and mentally capable of observing and complying with protective measures), while under § 12 ArbSchG they must instruct employees about occupational health and safety in a way that is sufficient and adequate considering the individual work situation. Under the German Protection of Mothers Act (Mutterschutzgesetz – MuSchuG), employers are required to take the necessary measures for protecting pregnant and breastfeeding mothers and their children. Under the Posted Workers Act (Arbeitnehmerentsendegesetz – AEntG), “§ 14 AEntG provides for no-fault joint and several liability of an entrepreneur (the general or main contractor) for contractors commissioned by him (subcontractors) with regard to the payment of minimum wages and holiday fund contributions of employees”⁸⁶.

10. For the Implementation Act of 11th April 2017 (Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz), transposing the NFR Directive into German law, please see Chapter 2 and Table 1 in the annex.

(b) *Due diligence requirements laid down in soft law*

Overview of three important initiatives:

11. In terms of soft law, the Partnership for Sustainable Textiles contains an example of multi-stakeholder sectoral initiative which lays down due diligence requirements. In response to a number of accidents in the textile industries of Bangladesh and Pakistan, the Partnership was founded in 2014 upon the initiative of the German Federal Minister for Economic Cooperation and Development. It is composed of 130 representatives from five different actor groups: government, business, nongovernmental organizations, trade unions and standard-setting organizations. It covers roughly half of the German market in relation to the 100 top-selling companies in the German textile retail industry. Its purpose is to achieve social, ecological and economic improvements along the entire textile supply chain – from the production of raw materials for textile production to the disposal of textiles. The members commit to binding and verifiable targets that become gradually more ambitious. It operates on the basis of three pillars: individual responsibility, under which members commit to binding and verifiable procedural obligations, collective engagement, under which members jointly devise and implement so-called Partnership Initiatives, and mutual support, under which members learn from one another by exchanging information, discussing content-related questions, participating in various training programs and receiving practical assistance. The procedural obligations “include an obligation to publish roadmaps and progress reports in which each member defines binding individual targets for the coming year and reports on their implementation. In addition, the Textile Partnership

⁸⁶ Id.

has defined a number of stakeholder-specific deadlines and volume targets, applicable to all members since 2018. These targets are based on international frameworks, including the UNGPs, the ILO and the OECD. Some of these targets are overarching while others are sector specific; some are obligatory while others merely constitute recommendations. More specifically, the targets include a number of mandatory measures relating to supply chain management⁸⁷.

12. Other industry standards: Industry standards in which German companies participate include AIM Progress (consumer goods); the Automotive Industry Action Group and the European Automotive Working Group on Supply Chain Sustainability (automotive); the Business Environmental Performance Initiative and the Business Social Compliance Initiative (commerce); the Electronics Industry Citizenship Council (electronics); the Global e-Sustainability Initiative and the Joint Audit Cooperation (telecommunications); ICTI Care (toys); the Pharmaceutical Supply Chain Initiative (pharmaceuticals); Railsponsible (rail transport); the Responsible Sport Initiative (sports equipment); the Sustainable Apparel Coalition (textiles); and Together for Sustainability (chemicals).³⁶² In addition, German companies take part in multi-stakeholder initiatives formulating due diligence requirements, some of which encompass companies from different business sectors while others are industry-specific. Among those are, for example, the Global Compact (non-sector specific); the Better Cotton Initiative and the Fair Wear Foundation (textile); the Ethical Trading Initiative (commerce); the Extractive Industries Transparency Initiative (extractives); the Global Coffee Platform and the International Cocoa Initiative (coffee & cocoa); and the Roundtable on Responsible Soy and the Roundtable on Sustainable Palm Oil (soy & palm oil).

13. National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020 (German Federal Foreign Office): in line with the principles, the Action plan highlights the following core elements of due diligence in the field of human rights that companies must abide by:

- a human rights policy statement
- procedures for the identification of actual or potential adverse impact on human rights
- measures to ward off potentially adverse impacts and review of the effectiveness of these measures
- reporting a grievance mechanism⁸⁸.

⁸⁷ For an overview, see: <https://www.textilbuendnis.com/wp-content/uploads/2018/02/targets-overview-2017.pdf>.

⁸⁸ The duty is framed as follows: "The responsibility to exercise due diligence applies in principle to all enterprises, regardless of their size, the sector in which they operate, or their operational context within a supply or value chain with an international dimension. The nature and exercise of due diligence for any given enterprise should be commensurate with these factors; it should be possible for the enterprise to incorporate its due diligence obligations into its existing processes in an appropriate manner without the creation of undue bureaucratic burdens. Enterprises should prevent and mitigate any adverse impact of their business activity on human rights. When due diligence in the realm of human rights is defined and exercised, consideration should be given to the beneficial effects of corporate activity and to the diverse perspectives of the company's own employees, the relevant stakeholders and others who may be affected. Within large enterprises, these include the staff of the human resources, purchasing, compliance and sales divisions. From outside the enterprise, suppliers, customers and trade unions but also bodies from civil society, business organisations and governments should be involved. Particular attention should be given to the rights of their respective employees and to those of local populations who may be affected. Depending on the size of the enterprise, the nature of its products or services, the potential risk of particularly adverse impacts on human rights and the operating context, the measures to be taken are likely to vary in scope. It may be appropriate to conduct certain elements of the process in combination with other enterprises within an association or industry, subject to compliance with antitrust legislation. Small and medium-sized enterprises in particular should make use of the advisory and support services to be offered by the Federal Government and business associations under the National Action Plan. The expertise of organisations within civil society and trade unions should also be brought to bear. The elements of human rights due diligence described in binding form in the following paragraphs are not to be understood as a rigid sequence. On the contrary, findings relating to one element should be used continually for the revision and development of the other elements

The Action Plan provides that the Federal Government expects all enterprises to introduce the processes in a manner commensurate with their size, the sector in which they operate and their position in supply and value chains.

(c) *Pending bills and/or proposals on mandatory due diligence requirements*

As seen above, the law containing a mandatory due diligence requirement across the supply chain, going beyond the National Action Plan Requirements, was called for by a broad range of stakeholders on the seventh anniversary of the devastating fire that engulfed the Ali Enterprises textile factory in Pakistan (which occurred on 11 September 2012)⁸⁹. Several stakeholders encompassing trade unions, environmental, human rights and development organizations as well as fair trade representatives and church-based initiatives considered the current voluntary obligations not sufficient. They pointed out how German companies do not by themselves comply with due diligence requirements, and called for the Federal Government to impose legal obligations on German companies to uphold human rights and environmental standards globally. A first draft was leaked in 2019 by the federal Ministry of Economic Cooperation and Development⁹⁰.

As mentioned above, the most recent 2020 version of the bill *Lieferkettengesetz* was announced in July 2020⁹¹: a press conference on 14 July 2020, two Ministers made public the need to enact its own human rights due diligence law, an updated variant of the *Lieferkettengesetz*⁹².

The *Initiative Lieferkettengesetz*, as it now stands in this announced summer 2020 version, would comprise within its scope companies (or groups of companies) that are registered in Germany and have more than 500 employees. The bill would not apply to foreign companies that do business in Germany but make key business decisions abroad. Due diligence duties would be derived from the requirements of the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. According to the bill, the “affected companies will have to develop procedures to identify risks of impacts on the rights the Act aims to protect which may be caused by their activities and business relationships generally, and along their supply chains. These companies shall also establish a complaint mechanism. After assessing those risks and potentially prioritising particularly significant risks, the companies will have to develop measures to effectively keep supply chains free of human rights violations and environmental harm. They will also be required to publish a transparent and publicly accessible annual report on their compliance with the aforementioned obligations. In response to concerns from the business community, the ministers made it clear that risk management should be proportionate and reasonable. The benchmark shall vary dependent on the type of business activity, the probability and severity of adverse impacts occurring realisation and the effective control of the company over risk management. The greater a company's influence within the supply chain, the stricter the due diligence obligations shall be”⁹³. The bill foresees that companies shall achieve higher compliance standards if they have a close relationship or strong leverage in relation to their supplier. It would also provide that

so that learning processes can take place. There must be scope for the incorporation of present and future legal requirements for the exercise of human rights due diligence.”

⁸⁹ <https://lieferkettengesetz.de/pressemitteilung/broad-civil-society-alliance-calls-for-supply-chain-law/>.

⁹⁰ See *supra*, footnote 86.

⁹¹ German Ministry of Work and Social Affairs, Press release, 14 July 2020.

⁹² A survey referred to in this press release showed that significantly less than 50 percent of the companies surveyed who replied comply with their corporate due diligence.

⁹³ *Id.* As of October 2020, we could not corroborate whether this still reflects the latest version of the bill.

companies shall only be liable if violations of human rights or of environmental standards were foreseeable and avoidable.

The key elements of the Proposed Law are still agreed upon by Germany's governing coalition and the bill is said to be passed by the German Parliament by September 2021 at the latest⁹⁴.

Conclusions on due diligence requirements in Germany

As provided for in the National Action Plan 2016-2020, the Federal Government expects all enterprises "to introduce guidelines and processes to fulfil their human rights due diligence obligations - in Germany and in their operations abroad. When designing and implementing their due diligence processes in the area of human rights, consideration should be given to the beneficial effects of corporate activity and the different perspectives of the company's employees, relevant stakeholders and others who may be affected. In large enterprises, these include the human resources, purchasing, compliance and sales departments. From outside the enterprise, suppliers, customers and trade unions as well as bodies from civil society, business organisations and governments should be involved. Particular attention should be directed to the rights of their respective employees and to those of local populations who may be affected". These obligations should be focused on 5 areas: a human rights policy statement; procedures for the identification of actual or potential adverse impact on human rights; measures to ward off potentially adverse impacts and review of the effectiveness of these measures; reporting; a grievance mechanism.

This is not a one-size-fits-all approach. The National Plan also provides that "Depending on the size of the enterprise, the nature of its products or services, the potential risk of particularly adverse impacts on human rights and the operating context, the measures to be taken are likely to vary in scope. It may be appropriate to conduct certain elements of the process in combination with other enterprises within an association or industry, subject to compliance with antitrust legislation. Small and medium-sized enterprises in particular should make use of the advisory and support services to be offered by the Federal Government and business associations under the National Action Plan".

It also provides that "there must be scope for the incorporation of present and future legal requirements for the exercise of human rights due diligence".

However, Germany has not yet adopted such pieces of legislation, the above indications remaining soft law only. While requirements akin to due diligence exist in several pieces of legislation, no such comprehensive legislation has been adopted. As we highlighted above, stakeholders (including several large international companies) have called and are increasingly calling for such legislation and the two concerned Government ministries have answered these calls by announcing the terms of the bill in July 2020. Importantly, stakeholders such as Transparency Germany, have opined that future initiative also needs to tackle anti-corruption requirements. They opine that "while the German Ministry of Economic Cooperation and Development also floated a proposal on human rights and environmental due diligence, but prevention of corruption in supply chains has so far only been included in the EU NFR Directive. In addition, referring to the "recent comprehensive study commissioned by the EU on due

⁹⁴ T. Volland, cited.

diligence requirements throughout the supply chain focuses on human rights and environment only”, Transparency Germany criticised the omission of corruption prevention from the scope of the study⁹⁵.

3.2.4. Due diligence requirements in the Netherlands

From a methodology standpoint, this analysis draws on desk research and draws from the following documents:

- (a) The Netherlands country report in the study by British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020 (cited);
- (b) Business and Human Rights Centre report, Dutch Agreements on International Business Responsibility; and
- (c) doctrinal literature⁹⁶.

It also draws from consultations with RVO.

In the Netherlands, mandatory due diligence was recently enacted in a piece of sectoral legislation. Its implementation is still work in progress.

We will first address the legislative obligations under Netherlands law. Then we will zoom onto the Dutch voluntary business conduct agreements, or covenants.

(a) Due diligence requirements laid down in the law: sectoral legislation

A legislative instrument laying down a due diligence requirement is the Dutch Child Labour Due Diligence Act⁹⁷ (“CLDD Act”), which was adopted in May 2019. The CLDD Act seeks to introduce a due diligence obligation for companies bringing goods or services onto the Dutch market to prevent the use of child labour. Several aspects of interpretation and, especially, the implementation of the law, are still to be determined via an instrument known as a General Administrative Order or GAO (‘Algemene Maatregel van Bestuur’, AMvB), which needs to be adopted. The CLDD Act should enter into force before 2022.

The CDLL Act pertains to child labour specifically. It defines child labour along the lines of ILO Conventions C138 (the Minimum Age Convention 1973) and C182 (the Worst Forms of Child Labour Convention 1999)⁹⁸.

Under the CLDD Act, the due diligence requirement means that companies should first assess whether there is a reasonable presumption that the goods and services to be supplied have been produced with

⁹⁵ Angela Reitmaier, Transparency Germany, Why we need mandatory due diligence in supply chains for human rights, the environment and preventing corruption, 2020, available at: <https://voices.transparency.org/why-we-need-mandatory-due-diligence-in-supply-chains-for-human-rights-environment-and-prevention>.

⁹⁶ L.F.H. Enneking & M.W. Scheltema, ‘The Netherlands’, in: C. Kessedjian & H. Cantú Rivera (eds.), Private International Law Aspects of Corporate Social Responsibility, Cham: Springer 2019 (hereinafter: Enneking & Scheltema 2019); L.F.H. Enneking, ‘Corporate duties of care in relation to responsible business conduct in global value chains’, in: L.F.H. Enneking et al. (eds.), Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains, London: Routledge 2019.

⁹⁷ Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet Zorgplicht Kinderarbeid).

⁹⁸ Art. 2. CLDD Act.

child labour. For the quality of this assessment, the law refers to the International Labour Organization's and International Organisation of Employers' "Child Labour Guidance for Business"⁹⁹. This guide is based on the UN Guiding Principles. The investigation must focus on sources that can be reasonably known and that are accessible to the company¹⁰⁰. If the investigation conducted by the company indicates that there is a reasonable presumption that child labour has contributed to the product or service, the company is expected to draw up an action plan in line with international guidelines (the UNGPs or the OECD Guidelines for Multinational Enterprises) to prevent this impact¹⁰¹.

The due diligence requirement is not further described in the CLDD Act. However, it is expected that further requirements and clarifications will be provided with the GAO.

The CLDD Act applies to every company (whether domiciled in the Netherlands or abroad) that supplies goods or services to Dutch end-users. The CLDD Act defines end-users as 'the natural or legal persons that use or use up the goods or make use of the services'¹⁰². The CLDD Act defines company as 'a company in the sense of Art. 5 of the Dutch Commercial Register Act 2007 or any other entity that engages in economic activities, regardless of its legal form and the way in which it is financed'¹⁰³.

The CLDD Act includes a number of exemptions regarding its scope: indeed, companies that do not supply goods or services to Dutch end-users are not bound by the obligations set out in it¹⁰⁴. Furthermore, companies only responsible for the transport of the goods that are to be supplied are exempted from complying with the provisions of the CLDD Act¹⁰⁵. Finally, the CLDD Act gives the possibility to exempt other categories of companies by means of the GAO¹⁰⁶. These other categories of companies may include for instance small companies and companies doing business in low risk sectors.

The duties included in the CLDD Act are two-fold. First, the CLDD Act requires every company falling under its scope to produce a declaration stating that it conducts due diligence¹⁰⁷. Further to the duty to issue a declaration, the CLDD Act contains an (implicit) requirement for the companies to perform due diligence (*gepaste zorgvuldigheid*), aiming to prevent Dutch-end users from being supplied with goods produced using child labour.

The declaration must be submitted to the public supervisor and it is published in an online registry on the public supervisor's website. The CLDD Act does not contain further specifications regarding the form and content of either the declaration or the due diligence duty: however, it leaves further specifications to the GAO, taking account of the existing ILO-IOE Child Labour Guidance Tool for Business¹⁰⁸.

The CLDD Act's duties regarding both the due diligence and the declaration are directed to companies that supply goods or services to Dutch end-users. As such, they target, in particular, the last segment of the Dutch supply chain, the one which supplies good and services to Dutch-end users. The due

⁹⁹ Ibid. Art. 5(1).

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Preamble CLDD Act.

¹⁰³ Ibid., Art. 1(b).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., Art. 4(4).

¹⁰⁶ Ibid., Art. 6.

¹⁰⁷ Ibid., Art. 4.

¹⁰⁸ Ibid., Art. 4(3).

diligence requirements set forth in the CLDD Act are the same for every company falling under its scope.

Enforcement mechanisms need to be specified in the implementation decrees. A public supervisor will be indicated in the GAO. Its tasks will be the monitoring and the enforcement of the provisions set out in the CLDD Act, ensuring compliance with the Act by the companies caught by its scope.

Under the Act, if the company does not comply with the supervisor's order, the supervisor can impose an administrative fine: 1) of up to EUR 4,100 for non-compliance with the duty to file a declaration (or, if this amount is not considered appropriate, a fine of up to EUR 8,200); and 2) of up to EUR 820 000 for non-compliance with the duty to conduct due diligence along the lines set out in the bill (or, if this amount is not considered appropriate, a fine of up to 10 % of the company's annual turnover)¹⁰⁹. Additionally, criminal sanctions can be imposed on (officers of) companies that are repeat offenders. If, within 5 years of imposition of an administrative fine, 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. If this second transgression was committed without intent, it is considered a misdemeanour, punishable by a maximum of 6 months' detention and a EUR 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 EUR 20,500 fine¹¹⁰.

Criminal sanctions provided in the CLDD Act can be imposed under the Dutch Economic Offences Act (*Wet op de Economische Delicten*). These sanctions may be enforced by the Dutch public prosecutor before the police court for economic offences or the economic division of the competent court.

(b) Due diligence requirements laid down in soft law

In the Netherlands, aside from the abovementioned law, CSR (*Maatschappelijk verantwoord ondernemen*, MVO), is not regulated by legislation.

There are, however, nine agreements ("Covenants") on International RBC stipulated between the Dutch Government and societal parties pertaining to various sectors of Dutch industry. The existing agreements relate to garments and textile, banking, the gold sector, sustainable forestry, the food products sector, insurance, pension funds, the metals sector, and natural stone, floriculture. The different covenants differ in scope. Some of them focus on human rights impacts only (like the Banking Covenant), while others focus on many topics, including, beyond human rights, the environment, health & safety, living wage and animal welfare (like the Garments and Textile Covenant).

In 2014, the minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs, also on behalf of the Minister of Economic Affairs, drew up an action plan to implement the UN Guiding Principles called National Action Plan on Business and Human Rights¹¹¹. In this respect, the Government clarified, *inter alia*, the notion of international CSR as follows: "International Corporate Social Responsibility (ICSR) is a prerequisite for sustainable, inclusive growth. Companies bear a social responsibility for what goes on in their supply chains and for ensuring fair work under satisfactory conditions of employment. To prevent abuses in terms of working conditions, child labour, environment, corruption and human rights in their supply chains, the government expects companies

¹⁰⁹ Ibid., arts. 7(1)-7(3).

¹¹⁰ Ibid., art. 9.

¹¹¹ <https://www.business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>. The first time the wording corporate social responsibility appeared in Dutch discourse was during a Parliamentary debate in 1999: See Parliamentary Dossier 26485 at <https://zoek.officielebekendmakingen.nl/dossier/26485>.

to act in accordance with the OECD Guidelines wherever possible. The government also holds them accountable for doing so". It also spelled out that "the government has reached agreement with a number of sectors on the subject of due diligence. A sector risk assessment analysis¹¹² highlighted several areas (construction, chemicals, retail, energy, financial services, wholesale, wood and paper, agriculture and horticulture, oil and gas, garments and textile, food, electronics, and metal) where high risks of adverse impacts on human rights and the environment were identified: the Government then clarified that "it expected companies in these sectors to both take steps aimed at preventing and mitigating the CSR-related risks in their value chains, and engage with other companies and stakeholders to come to concrete agreements on the ways in which these risks could be dealt with in a structural manner"¹¹³. Those agreements substantiated in so-called "covenants": namely, voluntary agreements on International Responsible Business Conduct (IRBC) between companies, NGOs and other partners at sector level, "which typically take the form of a written document setting out the actions that each of the parties is expected to take in furtherance of the aims" the covenant has¹¹⁴. The covenants (IRBC-covenants) were to be drafted based on a 2014 report¹¹⁵ by the Dutch Social and Economic Council (SER) on IRBC¹¹⁶.

The Covenants are semi-voluntary sector-based agreements where risks related to RBC are addressed.

Their goal is two-fold:

1. "Taking steps to avoid adverse effects of and improve circumstances for groups affected by specific risks (e.g. child labour, low wages, human rights violations or environmental pollution) within a period of three to five years after an agreement has been concluded.
2. Offer a collective solution to problems that businesses are unable to solve, or solve entirely, on their own"¹¹⁷.

The parties to these covenants "voluntarily commit themselves to making certain efforts and/or implementing certain measures (notably due diligence procedures) with the aim of enhancing RBC in their global value chains"¹¹⁸.

The 10 existing covenants cover 10 areas, namely they relate to garments and textile, banking, the gold sector, sustainable forestry, the food products sector, insurance, pension funds, the metals sector, and natural stone, floriculture (this latter signed in 2019). An agreement on agriculture is expected to be signed¹¹⁹.

As the 2020 study on due diligence carried out for the Commission explains in the Netherlands Report, "A number of the existing covenants (including garments and textile, banking, gold and insurance) are

¹¹² KPMG, 'MVO Sector Risico Analyse –Aandachtspunten voor dialoog', report for the Dutch Minister of Foreign Trade and Development Cooperation and the Dutch Minister of Economic Affairs (September 2014), available at rijksoverheid.nl/documenten/rapporten/2014/09/01/mvo-sector-risico-analyse.

¹¹³ British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020

¹¹⁴ Id. For an understanding of the notion of covenant see Dutch Ministry of Justice and Security:

<https://www.kcwj.nl/node/13707/convenant?cookie=no.1545150904990-2057775079>.

¹¹⁵ The SER gave examples of these agreements: <https://www.imvoconvenanten.nl/en/why/achtergrond>.

¹¹⁶ Id.

¹¹⁷ <https://www.business-humanrights.org/en/dutch-agreements-on-international-business-responsibility/>

¹¹⁸ British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020.

¹¹⁹ This information is the outcome of desk research and could not be confirmed with stakeholder consultation.

administered by the SER and include: “(i) a due diligence requirement that builds on the UNGPs and the OECD Guidelines, (ii) access to remedy if a company causes or contributes to human rights (or environmental) violations and (iii) a reporting requirement on due diligence (policies) and (where relevant) access to remedy. Each of these covenants has a Steering Committee, which is responsible for dealing with day-to-day governance issues for the implementation of the agreement. Furthermore, (...) independent Monitoring Committees, submit yearly reports to the respective Steering Committees on the progress made by the parties in carrying out the activities as agreed upon; a summary of these reports may be made public. The remaining covenants vary quite widely in set-up and content”.

We will herewith look at an example of an agreement: the Dutch Agreement on Sustainable Garments and Textile. The agreement was entered into on 9 March 2016 by a coalition of industry organisations, trade unions, civil-society organisations and the Dutch government. In terms of goals, they are listed as follows: 1) “to achieve substantial progress towards improving the situation for groups experiencing adverse impacts in respect of specific risks in the garment and textile production or supply chain within 3-5 years”; 2) “to provide individual enterprises with guidelines for preventing their own operation or business relationships from having a (potential) adverse impact in the production or supply chain and for resisting it if it does create such an adverse impact”.

In terms of scope, the Agreement “has been signed by around 95 companies from the Dutch garment and textile sector that have thereby expressed they are committed to achieving its goals. The enterprises involved in the agreement ‘are divided into three categories, each with specific due diligence requirements in keeping with the size of the enterprises and depending on whether they buy directly from the production countries’¹²⁰.

In terms of areas it covers, particular focus is placed on “working conditions, including fighting discrimination, child labour and forced labour as well as supporting the right of negotiation by independent trade unions, a living wage, and health and safety standards for workers and on minimising the negative impact of activities on the environment”¹²¹.

Due diligence must be carried out with respect to the activities throughout the production, supply or value chain, which encompasses the process from raw material to consumer or user. Individual enterprises supporting the Agreement commit to sign “a Declaration in which they state that: 1) they will conduct a due diligence process, which is consistent with their size and business circumstances; 2) present an annual action plan as part of their due diligence process to the secretariat of the Agreement on Sustainable Garment and Textile; 3) in their annual action plan i) explicitly discuss certain issues that are deemed to be relevant and ii) provide the agreement’s Secretariat with certain information relating to their business activities and their value chains; and 4) agree to the rules and procedures of the agreement’s complaints and disputes mechanism”¹²². Reference is made to the OECD Guidelines and the UN Guiding Principles, as well as the ILO labour standards. The Agreement requires parties to the agreement to “[...] develop tools to help participating enterprises complete their due diligence process”, including specific guidelines for small and medium-sized enterprises as per the structure of the OECD’s Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. It is the Secretariat who is tasked with drafting the list of risks and questionnaires for SMEs to

¹²⁰ Id.

¹²¹ Id.

¹²² Convenant Duurzame Kleding en Textiel, SER 2016, available at ser.nl/-/media/ser/downloads/overigepublicaties/2016/convenant-duurzame-kleding-textiel.pdf. See for the English translation: Agreement on Sustainable Garment and Textile, SER 2016, available at ser.nl/-/media/ser/downloads/engels/2016/agreement-sustainable-garmenttextile.pdf, page 8 and 9.

prioritise risks and it is the Secretariat “that assesses the quality and the annual progress of the action plans that the companies involved will prepare as part of their due diligence duties”¹²³. An independent Complaints and Disputes Committee is tasked with issuing a ruling on complaints and the Secretariat monitors compliance with the ruling¹²⁴.

Conclusions on due diligence in the Netherlands

The Netherlands has adopted a very interesting piece of legislation, the Child Labour Act, laying down mandatory due diligence requirements. When the law enters into force, Dutch companies will be required to declare that they have addressed the issue of child labour in their supply chains. Through “legislating minimum requirements for responsible business conduct, the Netherlands stands out as a frontrunner in the international trend towards mandatory human rights legislation”¹²⁵.

Until 2019, the Dutch government’s approach was voluntary. Such an approach was not sufficient to address the issues with respect to the severe problem of child labour. The bill, which was proposed to the Dutch Parliament in 2017, became law in 2019¹²⁶. Yet, its effectiveness will partially depend on the further specification of various elements on the law, yet to be adopted in the form of General Administrative Orders (‘Algemene Maatregelen van Bestuur’, AMvBs).

While this is a step forward, MVO Netherlands, an advisory body to the Dutch government, considering that “companies should also be required to address other risks of negative impacts on labour standards, human rights and the environment in their supply chains” is calling on “the Dutch government to promptly investigate the possibility of broad due diligence legislation that is in accordance with the OECD Guidelines for Multinational Enterprises”¹²⁷. On September 18, 2020, the MVO has published a document where it recommends to the Netherlands Ministry of Economic Affairs to adopt a bill concerning broader due diligence legislation than on child labour¹²⁸. The recommended legislation would require companies to perform due diligence in line with the OECD Guidelines and the UN Principle. From publicly available information as of the date of this study, this advisory opinion has not led to the adoption of a bill yet. The recommendation study follows two reports adopted by the Dutch government on mandatory business and human rights standards in Spring 2020. In the first report, it is recommended that voluntary agreements be supplemented by mandatory instruments¹²⁹. The second report sets out different options for such mandatory legislation¹³⁰.

The consultation has showed that there is support for such horizontal legislation. However, according to the RVO representative, in order to avoid some European companies being subject to more heavy requirements than others, with the potential of forum shopping, mandatory due diligence should be required at an EU wide level.

¹²³ British Institute of International and Comparative Law, Civic Consulting, Directorate General for Justice and Consumers, LSE, Study on Due Diligence Requirements through the supply chain, 20 February 2020.

¹²⁴ See the agreement’s annual reports 2016/2017 and 2018 at <https://www.imvoconvenanten.nl/en/garments-textile/agreement/publicaties>.

¹²⁵ <https://www.mvoplatform.nl/en/the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law/>.

¹²⁶ For an overview: <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.

¹²⁷ <https://www.mvoplatform.nl/en/the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law/>.

¹²⁸ MVO, Advies 20/08, Samen naar duurzame ketenimpact toekomstbestendig beleid voor internationaal MVO.

¹²⁹ <https://www.rijksoverheid.nl/documenten/rapporten/2020/03/26/dwingende-en-vrijwillige-imvo-maatregelen>.

¹³⁰ <https://www.rijksoverheid.nl/documenten/publicaties/2020/04/03/opties-voor-afdwingbare-imvo-instrumenten>.

3.2.5 . Due diligence requirements in Poland

In Poland, no mandatory due diligence requirements exist. However, in several pieces of legislation, one can identify certain requirements, akin to a due diligence obligation, as laid down better below.

The current initiatives have mostly focused on CSR reporting. In Poland, the provisions of the NFR Directive were introduced by the amendment to the Accounting Act of 15 December 2016 (Journal of Laws of 2017, item 61). The new regulations apply for the first time to financial statements for the financial year beginning on 1 January 2017 (see Table 1). Two further initiatives must be highlighted: first, the RESPECT Index, one of two initiatives (benchmarks) introduced in Poland with respect to listed companies, adopted in 2009; the second initiative is the „Raporty Społeczne” („Social Reports”) competition launched in 2007. The RESPECT Index project “continues the Warsaw Stock Exchange (WSE) activities resulting in the first index of socially responsible companies, which was the first in Central and Eastern Europe to reflect the indices of socially responsible companies”¹³¹. The Social Reports concerns a private sector initiative where prizes are awarded to companies that develop and present the best reports on CSR. This is aimed at promoting initiatives on “CSR, sustainable development, environmental protection, and social commitment directed to companies and organisations that publish reports on their activities in these areas”.

(a) Due diligence requirements laid down in the law: horizontal legislation

One piece of legislation laying down a due diligence requirement in Poland is Article 16 of the Act on liability of legal entities, according to which legal entities are liable if the person acting on their behalf committed the crime of corruption, a crime against humanity or the environment or a tax offence.

Article 16 of the covers the areas of corruption, environment, human rights and tax offences. There is no direct reference to due diligence in such Act. However, this Act is in line with the notion of ‘due diligence’ of the OECD Guidelines according to which ‘due diligence’ is a broad concept that covers the actual/potential adverse impacts and risks related to the following topics: corruption, bribery human rights violations, environment protection etc.

All legal entities, as defined under corporate Polish law, are covered by the scope of the Act. The Act provides for legal liability of entities that do not meet specific requirements concerning the protection of the environment and human rights, violate the anticorruption law or tax law.

The Act provides for penalties for infringing sectoral legislation. A financial penalty in the amount of PLN 1 000 to 5 000,000 is envisaged, however, it is not meant to be higher than 3 % of the revenue generated in the financial year in which the prohibited act was committed.

(a) Due diligence requirements laid down in the law: sectoral legislation

Furthermore, in Poland there are sectorial measures in the form of Charters who are relevant in terms of environment. Particularly, we will consider articles 75, 237 and 80 of the Law on environmental protection.

¹³¹ Magdalena Wójcik-Jurkiewicz, Role of CSR Reporting, Evidence from Poland, „Zeszyty Teoretyczne Rachunkowości”, tom 94 (150), 2017, s. 173-188.

Art. 75 of the Law on environmental protection provides for the obligation of entrepreneurs to protect the environment:

1. 'During construction works, the investor implementing the project shall take into account environmental protection in the area of work, in particular soil protection, greenery, natural terrain and water relations;
2. When conducting construction works, it is allowed to use and transform natural elements only to the extent necessary in connection with the implementation of a specific investment;
3. If the protection of natural elements is not possible, actions should be taken to repair the damage caused, in particular by environmental compensation;
4. The competent administration body shall specify in the building permit (...).'

There is no direct reference to due diligence. However, similarly to the above law, also this law is in line with the notion of 'due diligence' of the OECD guidelines.

The law covers entrepreneurs/companies conducting construction work.

The article requires entities falling within the scope of the Law to take all steps possible to ensure the protection of the environment, in line with indications provided in the construction permit.

The article provides a series of nature compensation - a set of activities including, in particular, construction work, earthwork, soil remediation, afforestation, planting or creating clusters of vegetation, leading to the restoration of the natural balance in a given area, compensation for damage made in the environment through the implementation of the project and preservation of the landscape.

According to Art. 330 of the Law on environmental protection, the infringement of Art. 75 is subject to a fine (criminal penalty).

Another relevant provision, under the same Law on environmental protection, is Art. 237. This provision states that in the event of circumstances indicating the possibility of the installation's negative impact on the environment, the environmental protection authority may, by decision, oblige the operator of the installation using the environment to draw up and submit an ecological review. The ecological review must contain, among others, a description of the activities aimed at preventing and reducing the environmental impact.

The article, as such, does not provide a definition of due diligence. However, the act is in line with the notion of 'due diligence' of the OECD Guidelines, as seen above.

The article applies to operators of installations. If there is the risk of an installation to pollute the environment, the operators may be required to draft an ecological report which must include, among others, a description of the activities aimed at preventing and reducing the environmental impact. It is not specified whether it relates to the supply chain.

Administrative procedure before a starost are foreseen. (Head of a county - the second-level unit of local government and administration in Poland). The article indicates administrative penalties.

Finally, according to Article 80 of the Law on environmental protection, the advertising or any other type of promotion of a good or service shall not contain content promoting a consumption model

contrary to the principles of environmental protection and sustainable development, and in particular using the image of wildlife to promote products and services that negatively affect the natural environment.

There is no direct reference to due diligence in this provision. The article applies to all entities carrying out marketing/advertising of their products and it entails the prohibition of misleading environmental advertising does not specify whether the obligation relates to the supply chain.

The article foresees controls which may be carried out by the Commercial inspection authority. There is no information on whether not respecting it triggers the application of penalties.

(b) Due diligence requirements under soft law

Among the various soft law initiatives, several are worthy of being mentioned.

First, the National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights 2017-2020 focuses on the following areas: human rights in relation to forced work, employment, freedom of association, right to fair remuneration, occupational health and safety, right to development.

The National Action Plan is based on three pillars:

- the state's commitment to protecting human rights;
- corporate responsibility for respecting human rights;
- access to remedies.

The document points out that thanks to actions based on due diligence, transparency and reporting, companies can:

- protect and increase the company's reputation and positive image;
- retain and expand the group of customers;
- enable companies to attract and retain qualified staff;
- build and develop sustainable relationships with employees and stakeholders;
- reduce threats to business continuity that could arise within the company or in the company's relations with the local community or with other external partners
- reduce the risk of lawsuits for human rights violations;
- attract investors who increasingly take into account ethics and human rights in their activities;
- become a partner/investor in other companies that incorporate human rights in their policies;
- support ethics in the company.

An important place in the Guidelines is occupied by the issue of ensuring by the state effective, both judicial and extrajudicial mechanisms for dealing with complaints about violations of human rights in connection with economic activity. According to the Guidelines, victims should be guaranteed access to remedies and the possibility of seeking compensation for damage suffered.

The document contains thorough information about legal requirements and relevant national legislation on the protection of human rights in business development, guiding entities that wish to implement CSR in this area. It is considered satisfactory as it provides comprehensive and practical information on CSR implementation.

Another document is the 'Sustainable business -Manual for small and medium-sized enterprises', a guideline for implementing CRS for SMEs. They focus on sustainable business for SMEs and relate to issues such as company personnel, social engagement, environment, sustainable development.

The document specifies that responsible business concerns synergies between three areas:

- economical,
- environmental,
- social.

The document contains detailed and practical information on how to plan and implement CSR policies for SMEs. It contains examples of good practices, advice on how to effectively set up CSR actions, monitoring processes, etc. It is considered as helpful and comprehensive information on CSR for SMEs.

Conclusions on due diligence requirements in Poland

According to a consulted stakeholder (Responsible Business Forum),¹³² the existing policies are not satisfactory. Firstly, there are very limited initiatives from the government aiming at CSR implementation in Poland, there is no one official (governmental) contact point where entities could obtain all necessary information and support.

In some cases, according to some interviewees, Polish legislation is not coherent with CSR principles (e.g. the procurement law limits CSR initiatives by strictly defining details of procurement documents). In the consultation, it has emerged that the current legislation stemming from the transposition of the NFR Directive leaves gaps and loopholes.

For example, from the consultation it emerged that the requirement of non-financial reporting should not be limited to companies listed on the stock exchange. The circle of obliged entities should be wider to ensure better implementation of CSR principles (very often those entities which are not obliged will not act voluntarily). Also, for this reason, the rules on non-financial reporting should be binding, unlike the current situation when the transposition of the NFR Directive does not provide for their binding nature.

In terms of freedom of form when it comes to a reporting obligation, the NFR legislation could be more precise by regulating technical aspects of reporting, (e.g. types of information to be included, form of providing the information, e.g. tables, graphs, etc.) For two reasons: (i) to guide the companies willing to implement CSR and (ii) to enable effective comparisons of reports.

3.2.6. Due diligence requirements in Spain

In terms of methodology, this report relies on desk research and, in particular, the following reports:

- (a) the Spain Country Report in the 2020 Commission's Study on due diligence" (cited);
- (b) Amnesty International submission, Submission to the United Nations Committee on Economic, Social and Cultural rights, 63rd Session, 12 to 29 March 2018;
- (c) A report from Interreg Europe, "The State of the Art on CSR in Spain"¹³³.

¹³² Interview with Responsible Business Forum on 25 June 2020.

¹³³ https://www.interregeurope.eu/fileadmin/user_upload/tx_tevprojects/library/file_1523529521.pdf.

Spain does not have a general due diligence requirement enshrined in its legislation.

More specifically, the Spanish government has mainly relied on CSR as a mechanism to integrate social and environmental concerns in the Spanish business operations. There has been a gradual evolution of CSR initiatives and institutions in Spain. In 2008, the Spanish government created the State Council on CSR to advise the government on policy and regulation regarding sustainability¹³⁴. This Council integrates national and regional administrations, employer federations, trade unions, and sustainability experts. Indeed, of particular importance are also regional administrations.

In 2014, following the recommendations of the EU in the document entitled “A renewed EU strategy 2011-2014 for CSR”, the Spanish government adopted the initiative called “Spanish strategy on companies’ corporate social responsibility practices 2014-2020”. Such initiative aims to promote actions that support the development of responsible practices in both companies (including SMEs) and Public Administrations. This is a piece of soft legislation, as it relies on the voluntary integration by companies of societal, labour, environmental and human rights concerns into their governance and management, strategy, policies and procedures.

Spain has a merely voluntary approach to CSR. The National Action Plan on Business and Human Rights (NAP)¹³⁵ for Spain was endorsed by the Council of Ministers on 28 July 2017 and published in the Official State Gazette on 14 September 2017: this plan does not lay out mandatory due diligence. The NAP endorses the UN Guiding Principles and the understanding of the due diligence under this international legal instrument.

The Spanish NAP does not encompass “any specific policy or measure addressed to implement the second pillar of the UN Guiding Principles. In this regard, there is not any clear commitment for public and private enterprises to set in place human rights due diligence procedures in accordance with the Guiding Principles”¹³⁶. Under the Spanish NAP, it is the companies that voluntarily decide whether or not to introduce human rights risk prevention mechanisms. The NAP has been considered as “a missed opportunity to address gaps in the Spanish legal system”¹³⁷.

This said, several pieces of legislation mention some requirements which can be considered akin to “due diligence”. They will be better seen here below.

(a) *Due diligence requirements in the law: horizontal and sectoral legislation*

The following pieces of legislation are relevant:

1. Law 2/2011 on Sustainable Economy
2. Law 11/2018 that implements the NFR Directive (for a better overview, see Table 1 in Annex 1)
3. Law 31/1995 on Prevention of Occupational Risks transposing Directive 89/391/EEC (Framework Directive)
4. Law 21/2013 on Environmental Assessment
5. Law 26/2007, of October 23, on Environmental Liability
6. The 2015 Corporate Governance Code

¹³⁴ European Commission Study “Study on due diligence requirements through the supply chain”, 2020.

¹³⁵ “A first draft of the NAP was released on 17 June 2013, which was followed by a second draft on 26 June 2014 that was to be approved by the Council of Ministers”. Id.

¹³⁶ Id.

¹³⁷ Id.

7. Law 10/2010, of 28 April 2010, on the Prevention of Money Laundering and Terrorist Financing

Several are the areas that they cover, with Law 11/2018, transposing the NFR Directive, having the broadest scope:¹³⁸

1. Law 2/2011 on Sustainable Economy, which focuses on environmental matters
2. Law 11/2018 that implements the NFR Directive on the following areas: environmental matters; social and employee matters; respect for human rights; anti-corruption and bribery matters
3. Law 31/1995 on Prevention of Occupational Risks, concerning workers' health and safety¹³⁹
4. Law 21/2013 on Environmental Assessment, concerning environmental matters
5. Law 26/2007, of October 23, on Environmental Liability, concerning environmental matters
6. Law 10/2010, of 28 April 2010, concerning anti-money laundering.

None of the above provide a definition of "due diligence". Below is a brief description of each of them when it comes to their material scope of application:

1. The Law 2/2011 states some provisions to influence on corporate behaviour. In relation to transparency and corporate governance, the Law encourages listed companies to increase transparency in relation to the remuneration of their directors and senior managers, as well as their remuneration policies. Similarly, credit institutions and investment services companies should increase transparency in their remuneration policies, and their coherence with the promotion of solid and effective risk management (Article 27). The law establishes a national target of 20 % of energy consumption to come from renewable energy by 2020 for both homes and commercial buildings (Article 78). This implies that companies should meet sustainability criteria a view to optimising their energy consumption. It also creates the Carbon Fund for a Sustainable Economy (FES – CO₂), which will help to reduce GHG emissions by buying carbon credits (Article 91).
2. Law 11/2018 that implements the EU NFR Directive applies to companies with over 500 employees and with the following characteristics: Net turnover: over EUR 40 million; or balance sheet total: over EUR 20 million. The following entities and companies are caught by its scope: Public Interest Entities: Listed companies; Credit institutions; Insurance undertakings; Payment and electronic money Institutions; Pension funds which, during two consecutive years, at the closing date of each year, have at least 10 000 participants; Investment services and collective investment institutions, which has 5 000+ clients or 5 000+ shareholders; Entities who, during two consecutive years, at the closing date of each year, have a net turnover over EUR 2 billion, and over 4 000 employees.
3. Law 31/1995 does not apply – in line with European legislation – to those activities whose characteristics do not permit it in the field of public service, e.g. police, security, armed forces and military activities, as well as civil protection.
4. The business activities and sectors subject to an environmental impact assessment are listed in Annex I to the Law 21/2013 and comprise various types of business activities.
5. For the purposes of Law 26/2007, 'operators' means any natural or legal person, public or private, who carries out an economic or professional activity or who, by virtue of any title, controls over such

¹³⁸ E.g. social and employee related matter; human rights; anti-corruption and bribery matters; sustainability and collaborative economy, etc.

¹³⁹ Other relevant legislation: Royal Decree 1311/2005, of November 4, on the Protection of the Health and Safety of Workers against Risks derived or that may arise from Exposure to Mechanical Vibrations¹⁰¹⁰ - Royal Decree 374/2001, of April 6, on the Protection of the Health and Safety of Workers against the Risks related to Chemical Agents during Work¹⁰¹¹ - Organic Law 3/2007, of 22 March, for Effective Equality between Women and Men.

activity or has a determining economic power over its technical operation. For its determination will be taken into account what sectoral, state or autonomous legislation, for each activity on the holders of permits or authorizations, registration or communications to the Administration (Article 2.10).

6. The Law 10/2010 covers entities that, through branches or agents or the provision of services without permanent establishment, carry out activities in Spain (Article 2.1) and, natural persons that act as employees of a legal person, or provide permanent or occasional services for the latter (Article 2.2).

In terms of duty akin to due diligence, here is an overview for each of these pieces of legislation (bearing in mind that there are no specific provisions when it comes to the supply chain):

1. Law 2/2011: No such duty exists.

2. Law 11/2018: See Table 1 in the Annex 1.

3. Law 31/1995: Pursuant to the duty to protect enshrined in this law, employers shall guarantee the health and safety of their workers in all work-related matters¹⁴⁰. Under the domestic law, employers shall prevent occupational risks by integrating preventive actions into the company and by adopting all necessary measures to protect the health and safety of workers. Occupational risk assessment and the planning of preventive actions. Information, consultation and participation of workers (Article 18). The duty is obligatory.

4. Law 21/2013: The legislation consists of an administrative regulation to prevent environmental impacts through assessing in advance the likely environmental effects of certain projects and activities carried out by private entities. It sets out a list of activities and conditions that governs the administrative procedure for evaluating: (a) Plans and programmes, which are subjects to a strategic environmental evaluation (*evaluación ambiental estratégica*), and (b) Projects, which are subjects to an environmental impact assessment (*evaluación de impacto ambiental*).

Businesses should integrate the findings from the impact assessments for relevant internal functions within their activities and take appropriate preventative and mitigating actions. Businesses should also carry out consultations with all stakeholders regarding the findings from the impact assessments.

5. Law 26/2007 transposes the European Directive 2004/35/EC, of the European Parliament and of the Council, of April 21, on environmental responsibility in relation to the prevention and repair of environmental damage, establishing an administrative regime of objective and unlimited environmental liability based on the prevention and “polluter pays” principles. It comprises the following obligations:

- (a) Obligations of prevention and avoidance of new damages.
- (b) Obligations of reparation.
- (c) Environmental Risk Assessment.

6. The Law 10/2010 provides, depending on the risk, different levels of application of due diligence measures: normal due diligence, simplified due diligence and enhanced due diligence measures.

In terms of enforcement mechanisms, the following are foreseen:

1. The Law 2/2011 omits the consequences of non-compliance with the publication of sustainability and CRS reports. The only requirement is of a transparency nature and entails publication of the reports through the website of the Ministry of Labour, Migrations and Social Security (former Ministry of Employment and Social Security), in accordance with the provisions of the *Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno*. The law endorses a comply and explain principle.

¹⁴⁰ Article 40.2 of the Spanish Constitution entrusts to the public powers the responsibility for safeguard health and safety at work. Spain ratified a number of ILO Conventions on Occupational Safety and Health (Conventions Nos. 013, 062, 115, 119, 120, 127, 136, 148, 155, 162, 176 and 187).

2. Law 11/2018: Not specified.
3. Law 31/1995: The Labour and Social Security Inspectorate carries out the activity of surveillance and control of the legislation on the risks' prevention at work. It then establishes the existence of a breach of the legislation and requests the employer to correct the faults observed. If the request is not complied with, and the deficiencies continue the Labour and Social Security Inspector issues a formal statement of breach of statutory duty.
4. Law 21/2013: In some cases, these impact assessments are a prerequisite for obtaining an authorization of programs and projects. Complain or explain principle. In case of noncompliance, these laws include a sanctioning framework.
5. Law 26/2007: The competent authority ensures that the operator adopts the measures of prevention, avoidance or repair of environmental damage, as well as to observe the other obligations established in the Law 26/2007.
6. Law 10/2010: The Council of Ministers, on a proposal from the Minister of Economy and Finance, have competence to impose penalties for very serious breaches. The Minister of Economy and Finance, on a proposal from the Commission for the Prevention of Money Laundering and Monetary Offences, have competence to impose penalties for serious breaches. The Director-General for the Treasury and Financial Policy, on a proposal from the instructor, have competence to impose penalties for minor breaches.

In terms of penalties, if any, for the violation of the due diligence requirement, the situation is as below:

1. Law 2/2011: No sanctions for non-compliance are foreseen.
2. Law 11/2018: See Table 1.
3. Law 31/1995: Non-compliance with obligations on the prevention of occupational risks area by employers gives rise to administrative liability following a disciplinary procedure, and, where appropriate, to criminal and civil liability for damages. For example, this latter occurs when employers fail to take due protective measures or fail to provide workers with training and information.
4. Law 21/2013: The following are foreseen: Fines: the developers that fail to meet their obligations can be fined (very serious infringements: EUR 240 401-2 404,000; serious infringements: EUR 24 000-240 400; minor infringements: EUR 24 000) (Article 56.1). In addition, should there be a violation, the company may be excluded from public procurement: the imposition of a sanction for the commission of very serious infringement will entail the prohibition of contracting in accordance with the Law of the Public Sector Contracts (Article 56.3). Finally, damages may be awarded: if the infringements have caused damages or harm to the Public Administration or the environment, the developer should return to its original state the situation altered by the infringement or compensate for the damages and losses caused (article 53.4).
5. Law 26/2007: There are three types of liabilities linked to environmental incidents or damage: civil, criminal and administrative liability. The following sanctions are foreseen: Fine; Termination of the authorization; Suspension of the authorization.
6. Law 10/2010: The following are foreseen: Liability of the obliged person even by way of simple failure to comply. Liability of those holding administrative or management positions for any breach should this be attributable to wilful misconduct or negligence (Article 54). For the commission of offences, the following sanctions may be imposed: Public and private reprimand; Penalties; Withdrawal of authorisations; Temporary suspension.

(c) Due diligence requirements in soft law

Aside from the abovementioned NAP, the 2015 Corporate Governance Code, which applies to listed companies, whatever their size and market capitalisation (except where expressly indicated that a recommendation is applicable only to large cap firms), is relevant in this respect.

The Code includes 64 voluntary good governance recommendations for listed companies by establishing a risk control and management function in charge of an internal unit and under the supervision of a dedicated board committee. The board of directors shall approve the minimum content of the CSR policy. The code provides guidance on how to implement the principle of transparent communication with disclosure of both non-financial and financial information. The CSR policy should state the principles or commitments the company will voluntarily adhere to in its dealings with stakeholder groups, specifying at least: a) the goals of its CSR policy and the support instruments to be deployed; b) the corporate strategy with regard to sustainability, the environment and social issues; c) concrete practices in matters relative to: shareholders, employees, clients, suppliers, social welfare issues, the environment, diversity, fiscal responsibility, respect for human rights and the prevention of illegal conducts; d) the methods or systems for monitoring the results of the practices referred to above, and identifying and managing related risks. e) the mechanisms for supervising non-financial risk, ethics and business conduct; f) channels for stakeholder communication, participation and dialogue; g) responsible communication practices that prevent the manipulation of information and protect the company's honour and integrity.

It is up to companies to decide whether or not to follow these corporate governance recommendations, but the Code requires them to give a reasoned explanation for any deviation, so that shareholders, investors and the markets in general can arrive at an informed judgement. Article 540 of the Royal Legislative Decree 1/2010, of 2 July, Approving the Consolidated Text of the Capital Companies Act, 1001 lays down the "comply or explain" principle, which requires listed firms to specify their degree of compliance with corporate governance recommendations, justifying any failure to comply in the pages of their annual corporate governance reports.

No liability is foreseen for failure to abide by its provisions.

Conclusions on due diligence in Spain

Aside from the abovementioned legislative provisions, which do not set out mandatory due diligence obligations, the Spanish approach to CSR has relied on voluntary measures, with the regions playing an important role.

Indeed, as the Amnesty International submission to the United Nations Committee on Economic, Social and Cultural rights spells out "there are no regulations in the Spanish legal system (that) require companies, in a binding manner, to adopt human rights due diligence measures. Nor does it therefore impose any sanctions in the absence thereof. The latest legal reforms fail to address the many obstacles of a legal, judicial and practical nature limiting or hampering access to justice for the victims. Nor does the legal system recognise the liability of parent companies for the actions of their subsidiaries. On the contrary, Spain has decided to adopt an eminently voluntary approach concerning the observance of

human rights by the private sector"¹⁴¹.

3.3. Certain selected good practices

In this Section, we highlight some good practices at country level. The methodology for choosing them has been to focus on a mix of desk research and consultation of stakeholders in the various Member States.

Compared to a decade ago, consumer awareness increases when it comes to goods brought to the market, which have been used not respecting human rights. In terms of child labour, Human Rights Watch has reported how children do hazardous work at many stages of the supply chain, such as for example, in gold mines, and such work is used to assemble products which EU citizens have access to. However, no accountability on the side of businesses corresponds to such increased consumer awareness.

In most Member States analysed, with minor exceptions, there is no mandatory due diligence requirement. The NFR Directive, which compels companies of a certain size to carry out non-financial reporting obligations, does not go enough in depth, both with respect to the scope of the companies it covers (and the lack of taking into account suppliers' and subcontractors' business practices), and with respect to how the duty is carved out. Indeed, reporting obligations, while important, are not sufficient. The due diligence duty of companies to engage in RBC also encompasses a duty of care, i.e. requiring businesses to check the supply chain for human rights' violations and to mitigate such risks by taking actions.

As such, a trend has affirmed itself in recent years towards the introduction of more stringent rules with respect to supply chains. Examples of such legislation have been the Netherlands and France, which will be better discussed below. In the UK as well, since 2015, a law is in place (Modern Slavery Act) to prevent slavery in the supply chain. Outside the EU, Switzerland and Norway are also examples of jurisdictions where such duty has been introduced.

(a) Dutch vision on mandatory due diligence requirements: the example of the Child Labour Due Diligence Act

In 2019, the Netherlands adopted the **horizontal legs**¹⁴². Such law requires companies to identify, prevent, and, when necessary, address the issue of child labour in their supply chains. Importantly, it introduces in Dutch law a duty of care to prevent the supply of goods and services that have been created with the aid of child labour.

As an introduction, prior to this law, in the Netherlands, the Dutch government did not compel, but it merely encouraged businesses to adopt a voluntary approach to CSR-related due diligence, including the issue of child labour. As seen, Covenants –which are in a nutshell soft law- are in place. In 2014, the Dutch Child Labour Due Diligence Law was initiated by a Member of Parliament.

Now momentum has arrived to expand the scope of the law from child labour to all human rights. As of lately, on 25th of June 2020, Tony's Chocolonely, a Dutch chocolate business, together with 49 other

¹⁴¹ Amnesty International submission, Submission to the United Nations Committee on Economic, Social and Cultural rights, 63RD SESSION, 12 – 29 MARCH 2018, p. 18.

¹⁴² For a broader overview, see Section 3.1.4.

Dutch companies, sent a letter to Minister Kaag, calling for support for a legal framework for due diligence and asking the government to adopt legislation which ensures more transparency and equality in the supply chain so as to force companies to seriously tackle the negative impact on human rights and the environment in their chain.

In this Section, we will briefly speak about the Child Labour Due Diligence Act and why it may be considered as a good practice. First, in terms of scope, the Child Labour Due Diligence Act applies to companies that sell or supply goods or services to Dutch end-users, including companies registered outside the Netherlands (Article 4(1)). It has, therefore, a broad reach. The Act introduces a “duty of care” (“zorgplicht”): in a nutshell, this duty consists of preventing the supply of goods or services produced using child labour. This means that a company falling under the scope of this law has to “first determine whether there is a reasonable suspicion that a product, or service, involves child labour. If such a suspicion exists, it has to develop and implement an action plan (Article 5.1)”. Such suspicion is not defined in the law. Yet, for the quality of the assessment, the law refers to the ILO’s Child Labour Guidance for Business. The law requires companies to base themselves, for the investigation, on sources which are “reasonably knowable and consultable” (Article 5.2). If the investigation indicates that there is such reasonable presumption that child labour has contributed to the product or service, the company shall draw up an action plan to prevent this, in accordance with the UN Guiding Principles or the OECD Guidelines for Multinational Enterprises.

According to this law, companies falling under its scope must produce a statement declaring that the company has conducted due diligence. The Act also imposes sanctions for failure to exercise due diligence. First, Article 7.2a) provides that if the company fails to produce the statement, or fails to carry out an investigation, or fails to set up an action plan, then the regulator may impose a symbolic fine of EUR 4.100. Such penalty may also be imposed by the regulator for adopting an “inadequate” investigation or action plan (Article 7.2b)). Also what is inadequate is not further specified. The regulatory authority will not be able to start enforcement on its own and only third party complaints may trigger it.

Second, should there be a repetition, within five years, of such a failure to adopt due diligence, the conduct falls under the notion of economic offence which triggers the application of the Economic Offences Act (Wet op de economische delicten). As such, the company may face criminal penalties, or higher fines.

The legislative obligations under this Netherlands piece of legislation are a good first example with respect to the political will tackle the issue of human rights due diligence across the supply chain. Even if of narrower scope, i.e. touching upon child labour, it paves the way to legislation which acknowledges the importance of a clear obligation on companies to carry out “due diligence” on whether their goods have been produced using child labour and to envisage a plan to prevent child labour in the supply chain if they come across it. They are also compelled, under the law, to submit a statement to the government where they report on the due diligence efforts carried out¹⁴³. On the one hand, the scope *rationae materiae* is broad and it allows for a level playing field. Indeed, the law applies not only to companies which are registered the Netherlands, but to all companies including those registered abroad that deliver their products or services to the Dutch market twice or more per year.

¹⁴³ J. Kippenberg, Netherlands takes big step toward tackling child labour, Human Rights Watch, June 4, 2019.

On the other hand, the duty is carved out as duty of efforts. As seen, the law will enter into force in 2022 and it will be made operative by means of General Administrative Orders, which have yet to be adopted. Such orders are an executive responsibility of the government but will have to be approved for both Chambers of the Dutch parliament for this law. They will better specify how the duty will apply. For example, they are expected to specify the criteria and specifications for the quality of the action plan. It is therefore important, at implementation stage, that civil society and business organisations be intensively involved in the preparation of decrees laying down how such duty of care must be in practice implemented¹⁴⁴. In addition, the Government will have to decide which regulatory authority will be tasked with supervising compliance with the law. Finally, for the time being, there are no requirements as to how the statement must be carried out in the law-its form and content will need to be established by the Order. Unlike the UK Modern Slavery Act, or the below discussed French law, companies will have to submit the statement once¹⁴⁵.

To conclude, through legislating minimum requirements for RBC, the Netherlands stands as one of the frontrunners in the trend towards mandatory human rights legislation" that can be observed throughout the EU and internationally¹⁴⁶.

(b) Netherlands: best practices in public procurement

This best practice falls under the voluntary measures that companies adopt to benefit from public procurement. The first interviewee is affiliated with the Netherlands Enterprise Agency (RVO). The topic was CSR in the context of public procurement in the Netherlands. The interviewee clarified that, based on specific legal basis (mentioned in the notice for a call), the companies who bid for funding (typically, companies who want to invest in or trade with other countries but the risk is too high. They can apply for funding to lower the risks of apply for financing with under better conditions than the country they plan to invest in) must demonstrate that they abide by certain CSR-related criteria. Depending on the call or financial instrument (there is a very broad range of instruments such as seed capital, loans, guarantees and funds), the criteria are elaborated in a checklist and negotiated each time in the context of the single call or financial instrument) as a condition to benefit of such funding.

The interviewee clarifies that these criteria often go well beyond the OECD Guidelines, which are considered minimum standards. RVO has a checklist (or monitoring tool for each fund or call) on the basis of which it assesses whether the companies, beneficiaries of funding, comply these criteria and how they do so: it carries out inspections as well as local visits in the countries where the projects are executed, etc.

The companies (often Small&Medium enterprises) may lament the administrative burden due to showing these requirements, but are happy in the long run, since they say that abiding by these criteria is value enhancing. This is shown in the RVO reports which are also publicly available.

(c) France: the Vigilance Act

Discussions with the stakeholders have confirmed that the main initiative in France in respect of due diligence is the Vigilance Act (Law n ° 2017-399 of 27 March 2017) which is the outcome of long

¹⁴⁴ D66 Party intervention in the Meeting Report 14 May 2019 on the Voting the Child Due Diligence Act.

¹⁴⁵ MVO Platform, Update: Frequently asked questions about the New Dutch Child Labour Due Diligence Law, 3 June 2019.

¹⁴⁶ MVO Platform, The Netherlands takes a historic step by adopting child labour due diligence law.

discussions that started in 2012-2013 (after Rana-Plaza). Law n° 2017-399 of 27 March 2017 relating to the duty of vigilance of mother companies and contracting companies. This is a big step forward for France in the EU, France being the first country with such a complete and advanced legal framework.

The Vigilance Act entails a duty of general due diligence upon large French companies, framed as a duty of vigilance. The vigilance duty set forth in the Vigilance Act ensures that large companies subject to its provisions establish measures to avoid severe impacts on various areas deriving from their activities. The topics covered by the Vigilance Act are the following: human rights, fundamental freedoms, human health and safety, and the environment. The duty applies to large companies, and to their subcontractors or suppliers with whom there is an established commercial relationship (unclear whether this means direct relationship or also subcontractors or suppliers further down the chain).

The general due diligence duty provided by a binding legislative instrument as the Vigilance Act has significant benefits for both businesses and for the responsible national authorities. Firstly, businesses could benefit from the harmonisation of the rules concerning vigilance and due diligence requirements laid down in other kind of instruments (e.g. soft law). Indeed, the inclusion of a due diligence requirement in the law gives legal certainty to the requirement itself, setting its specifics and individuating the areas and the subjects it covers. The Vigilance Law also provides that any person demonstrating an interest with the topics covered by the due diligence requirement can require the company to abide to its obligations. Indeed, the law structures the enforcement process of the due diligence requirement as highly participative, involving the public and not only the competent authority in the process.

The French General Council of Economy issued in January 2020 the "Assessment of the implementation of the law n° 2017-399 of 27 March 2017 relating to the duty of vigilance of mother companies and contracting companies"¹⁴⁷. This document is not binding but is a thorough analysis of the duties under the Vigilance Act which also summarizes the strength and weaknesses of the law and provides an assessment as to how the law has been applied so far by companies taking into account the relatively short period since the implementation of the law.

In terms of improvements, according to the Representative of Greenflex, the major problem is that some companies have very similar 'risk mapping' without tailoring it to their particular business (this is where the GRI standards are useful for example). Some companies are also not very happy to disclose information, e.g. in the textile industry, since if they disclose their particular risks they are sometimes 'attacked' so they avoid providing this information. Therefore, also transparency could be improved. Also, the monitoring of the law could be improved.

(d) France: the PACTE law

PACTE law 22 May 2019-486 relating to business growth and transformation, introduces a requirement for the corporate purpose to be managed "taking into consideration the social and environmental stakes linked to its activity". The PACTE law, among other things, amends articles 1833 and 1835 of the Civil Code, and provides that the company must be managed taking into account the social and environmental issues related to its activity. Thus, the company can choose to modify its statutes to include a "raison d'être" (i.e. principles which the company adopts and for which it allocates means in carrying out its activity). This creates a "mission company". A company wishing to acquire the status of

¹⁴⁷ https://www.economie.gouv.fr/files/files/directions_services/cqe/devoirs-vigilances-entreprises.pdf.

"mission company" must establish a "raison d'être", specify objectives, methods of execution and monitoring of these objectives, and make this subject to official validation.

The PACTE law applies to all French companies without exception.

The consulted stakeholders agree that the PACTE law is an example of a legal framework to help companies to be more in compliance with CSR. However, even if the PACTE law gives guidelines it is still up to the companies to define what a 'raison d'être' will be. So, it can be considered that this law is a rather a 'process' that encourages voluntary action on the side of the companies.

3.4. Certain selected negative practices

Please find below an overview of certain negative aspects identified in the analysed Member States when it comes to their approach to CSR.

(a) National approach in Italy not conducive to compliance by companies

Policies related to CSR in Italy are mainly at the regional level, or trade unions and business driven. The Italian approach has been to keep CSR measures voluntary and mainly based on soft law. In turn, this has not incentivized enough businesses to strive for higher standards on CSR and more forward-looking policies in relation to anticorruption, equality and human rights areas.

Hence, the current policies in place are not considered enough, since CSR measures are voluntary and rely mostly on business decisions. Moreover, while the issue is still highly debated and in flux, tackling CSR aspects by focusing mostly on non-financial reporting is not a sufficient way to foster CSR in the corporate community, since CSR covers a broad range of matters for businesses, that cannot be tackled only through non-financial reporting. Some scholars hold that non-financial reporting indicates an underlying general duty to consider other stakeholders' interests. And some legislative actions (mentioned in the table above) have increased the level of enforcement of non-shareholders' interests. The main problem is related to the company law definition of a "company", which is only based upon shareholders' interests¹⁴⁸.

Standards, such as ISO 26000:2010 and Social responsibility Guide, have played a key role in supporting businesses to adopt CSR measures by providing guidelines. According to the interviewee, using more standardization measures to support CSR is an effective way of supporting businesses and fostering CSR.

(b) Netherlands: potential for improvement of current public procurement legal framework

In the Netherlands, in terms of negative practices, an interviewee highlighted a few of them:

(a) First, there is no standardized minimum guidance on CSR provided by the government, so the criteria have to be negotiated each time. A standard could help reduce the paperwork and the time consuming process to negotiate them for every single call/financial instrument.

(b) Second, profit shifting to lower tax jurisdictions is not tackled. On the issue of profit shifting, there is no agreement between the Ministries: while the Ministry of Foreign affairs is in favour of addressing

¹⁴⁸ See *supra*. Section 3.1.

this in the context of CSR, the Ministry of Economy does think that the fiscal advantages that Netherlands gives to companies should be preserved. In the opinion of the interviewee, this may also need addressing. With this issue playing in the background it is difficult to ask that companies investing in other countries handle their tax payments responsibly as part of the CSR guidelines (In this respect it is worth recalling that the tax Chapter is explicitly excluded from the due diligence requirements of the OECD Guidelines).

(c) When it comes to the scope of the requirement, the Dutch companies that apply for funding are subject to the requirements. When considering global chains, suppliers of such companies which are local companies are not bound by the same CSR-related rules as those the Dutch companies are bound by. Thus, the RVO has no mandate to check what those local companies are doing. SMEs that do not apply for funding are also not bound by the abovementioned requirements and this may point at a gap since a level playing field must be ensured.

(c) Poland: insufficient non-financial statements

In Poland, as a bad practice the report of the Ministry of Finance 'Reporting of extended non-financial information for 2017' indicates the fact that many non-financial statements do not provide details of due diligence procedures. For example, a company claims that it takes preventive measures to protect the environment but does not provide information about concrete measures taken.

Another example of bad practice is related to the area of human rights in connection to the supply chain. The description of the procedure was quite superficial, (*i.e.*, the company collects statements from contractors and there is a threat of terminating cooperation with them in the event of a violation of human rights, however, there is no information about monitoring of violations (there is no description of control mechanisms). This negatively impacts compliance by companies. According to the report of the Ministry of Finance 'Reporting of extended non-financial information for 2017', out of 116 analyzed non-financial reports, 57 made reference to due diligence. However, there were numerous cases in which an entity described certain procedures without using the term of "due diligence procedure". Nonetheless, the content of the description showed that these were due diligence procedures. There were also few cases in which the entity claimed to present due diligence procedures, but the analysis of the content and diagrams showed that they were not (*e.g.* a description of the business model, and not specific due diligence procedures applied in a specific area).

In addition, according to a consulted stakeholder (Responsible Business Forum), there is no specific legislation or soft law that aims at supporting CSR strategies. That said, some sectoral laws could be indirectly relevant in this context, like for example legislation providing for occupational health and safety, employment law in relation to the protection of employees or laws on extended producer responsibility.

4. RECOMMENDATIONS

- This Section tackles what recommendations can be made in terms of mandatory due diligence requirements. One of the outcomes of the consultation has been that, in order to give to due diligence duties more weight, it would be advisable to make them mandatory at the EU level.
- This solution would require defining the scope of the new piece of legislation, and how the new rules are to be enforced.
- This Section also tackles how our recommendations can fit the existing *acquis*.

Based on the above analysis, in this Chapter, we will provide an overview of some policy recommendations to the European Parliament, centred around mandatory due diligence at EU level.

4.1 The EU should adopt cross-sectoral EU-level legislation on mandatory due diligence requirements

In 2018, as part of its Action Plan on Financing Sustainable Growth, the Commission announced, under Action 10, that: “to promote corporate governance that is more conducive to sustainable investments, by Q2 2019, the Commission will carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest”¹⁴⁹.

In this context, the Commission launched the abovementioned DG JUST study, with the aim of addressing due diligence requirements through supply chains. *Inter alia*, the study assessed options to regulate due diligence in companies' own operations and through their supply chains for adverse human rights and environmental impact, including relating to climate change. This study fits with the objectives of the new Commission's strategy objectives “European Green Deal”, which, as seen above in Chapter 2, finds that a business focus on sustainability should be further included in the corporate governance rules across the EU¹⁵⁰. It is on this basis that, in the context of a webinar hosted by the European Parliament's RBC Working Group, on 29 April 2020, where the findings of the Commission's study were presented, that Commissioner for Justice Didier Reynders announced that the Commission will introduce next year a legislative initiative on mandatory due diligence for companies. He also announced that this institution is preparing a public consultation on sustainable corporate governance and due diligence, which is set to inform the Commission's legislative proposal. A public consultation is ongoing¹⁵¹.

¹⁴⁹ European Commission Communication, Action Plan: Financing Sustainable Growth, COM/2018/097 final.

¹⁵⁰ Cited.

¹⁵¹ CSR Europe, Towards an effective environmental and human rights due diligence law, 2020, available at: <https://www.csreurope.org/newsbundle-articles/towards-an-effective-environmental-and-human-rights-due-diligence-law>.

One of the options analysed by the Commission study, also with respect to the expected costs (for example, administrative costs of compliance, awareness raising and so on), is introducing a new piece of legislation (a horizontal initiative) prescribing mandatory due diligence requirements through the supply chain (Option 4 of the study). Most respondents of the business survey as part of that study have considered that such option does not bear significant costs. Instead, a new legislation would lead to the following benefits: greater legal certainty, greater supply chain certainty, greater leverage over non-EU supplier provided by the non-negotiable standard, less distortion of competition due to more equal standards for EU and non-EU suppliers and doing away comparative advantage among companies regulated by various Member States in the absence of comprehensive EU-wide regulation.

In the abovementioned study, over two third of respondents answered that new voluntary guidelines will not have social impact, and circa 68.46 % of the respondents concluded that new voluntary guidelines will neither have environmental impact, nor have human rights impact. Despite these voluntary measures are adopted in the legislative framework of the Member States under analysis, they do not provide for sanctions for companies which do not comply with them, except for the case when these companies need access to funding and in the context of public procurement CSR-related criteria.

Our study confirms these findings. In particular, during our consultation, stakeholders have held that merely optional or voluntary provisions are not able to induce companies to respect human rights across their supply chain and subsidiaries. As one interviewee from a public body acknowledged, for “larger and more resourceful companies, it is unclear what they do, with respect to the supply chain, when they make business abroad. An EU-approach would have the benefit of both guaranteeing a level playing field and – if extended to also encompass the aspect of fair taxation - also do away, for example, with the fiscal advantage that companies registered in some Member States benefit from”. Echoing the results of the DG Just study, stakeholders also lamented here that voluntary or Member State level due diligence legislation would lead to an unsystematic, scattered approach and to little level playing field in this context. This, in turn, would negatively influence the uptake of due diligence processes. Another interviewee acknowledges that: “in order to give to due diligence duties more weight, it would be advisable to make them an obligation at the EU level”. The European Commission’s announcement that it will propose a legislative initiative on human rights due diligence for companies has thus been welcomed in the consultation.

Eventually, it is to be underlined that the legal basis of this harmonising measure is to be found in Article 50(2)(g) of the Treaty on the Functioning of the European Union, which is the legal basis for all company law harmonising directives. This article reads:

The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: [...] (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union; [...]

Interestingly, a Directive that, among other things, also harmonises due diligence duties across the supply chain and companies’ subsidiaries, would represent the only harmonising measure addressing director duties and groups of companies.

4.2 Scope and reach of the obligation *rationae materiae*: framing the duty of diligence beyond reporting/transparency obligations.

At a minimum, a mandatory due diligence requirement would compel companies to carry out due diligence to identify, prevent, mitigate and account for human rights and environmental adverse impacts in their supply chain.

There are various models under which due diligence can be defined as a standard. For instance, as seen above, the French Vigilance Act defines it as a “duty of vigilance” using a reasonableness standard, while the Dutch law on Child Labour defines it as a “duty of care”. The German 2019 bill proposal uses the notion of “adequacy”. Notwithstanding the nuancing of the definition, the abovementioned DG Just study tackling due diligence requirements through supply chains agrees that reporting and transparency are not sufficient.

According to interviewed academics specialized in due diligence, “measures on disclosure/ reporting transparency are not sufficient and CSR is a not adequate notion to face the problems related to the respect of human rights by companies”. According to an interviewee: “This is certainly clear to companies, because usually those having a sustainability strategy fully implement it; yet, this is not always clear to policy decision-makers, given the complex division of competences and functions of bodies with different degrees of autonomy and specific limits of competences that regulate these aspects. This situation could be improved with a coordinated and unitary programming on these issues rather than leave up to local authorities the opportunity to decline or take on board these activities”.

Therefore, the duty of diligence should not be left to reporting obligations. While the consultation did not lead to further specifications as to how the duty of diligence should be framed, at national level several models exist (such as in France, Germany, or the Netherlands regarding child labour). In this respect, were the duty to contain a risk assessment analysis, it would be important to also consider any peculiarities of each industry, and to design a context-specific duty (as the abovementioned European Commission study also suggests). For example, regarding the French duty of diligence Act, a French business representative underlined: “that the law is still rather new and there is not enough perspective to give an assessment of the law and its implementation. However, it can be noted that the risk mapping varies across sectors – e.g. the food industry is very advanced in terms of traceability while this is still rather a major issue for the textile industry”.

It will hence be necessary to avoid a one-size-fits all approach and take account of the specificities of the sector, which should still be factored in in the context of a horizontal initiative.

Therefore, the conclusion is that a duty of diligence mandatory obligation should consist of substantive due diligence, which should go beyond reporting obligations. It is recommended that future environmental and human rights due diligence legislation adopts a substantive due diligence model, where – in accordance with the UN Guiding Principles, the “companies engage actively in analysing, mitigating as well as remedying any adverse impacts on human rights based on and connected with their own activities in their business relations”.

4.3 *Scope rationae personae: the initiative should not only cover large companies but also SMEs (considering their specificities).*

On 22 June 2020, a briefing paper to the European Parliament highlighted some aspects of the future Human Rights Due Diligence Legislation¹⁵². In this respect, the paper recalled that the UN Guiding Principle 14 leaves no doubt that “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure”. At the same time, this Principle acknowledges that “the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors”: unlike larger companies, SMEs have less resources and the prevalence of the business owner figure. The Commentary to UNGPs Principle 14 recognises 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 briefing paper acknowledges that while it is “suggested that human rights due diligence legislation should not exclude a priori any company from its obligation to implement such due diligence” it “should address the special challenges of small and medium enterprises (SMEs) and/or a particular sector through various regulatory options, thereby concretising the proportionality principle which would allow for a differentiation of obligations”. To give light to the abovementioned principle would mean to include in the scope of the said law SMEs. Yet, their particularities need to be taken into account. According to the abovementioned paper, for instance, one of the options “could be the adoption of a phased approach allowing smaller companies to start implementing the full set of obligations at a later stage. For the European Parliament, particular attention “needs to be paid to the special features of SMEs, bearing in mind the fact that micro and SME enterprises constitute an overwhelming majority of businesses in the EU, with many not being in a position to carry the same burden of additional obligations large, multinational companies”.

An example of a broad scope as regards the firms’ dimension is the Dutch Child Labour Law, which “applies to any company registered in the Netherlands that sells or supplies goods or services to Dutch end users and to companies not registered in the Netherlands that sell or supply goods or services to Dutch end users”. Dutch rules, therefore, apply to any company, regardless of their size, and, interestingly, not only to companies incorporated in the Netherlands, but also to foreign companies operating in the domestic market.

The consultation has made clear that more pieces of information from SMEs are needed to understand how a duty of diligence should be framed to take account of their specificities. One interviewed acknowledged that there is no reason why SMEs cannot be made subject to mandatory due diligence requirements. In this respect, with particular insight into the country specific situation (and not in the context of advocating for an EU-level initiative), the interviewee highlighted that what is seen by SMEs as a burden in the short run, in the long run would yield to more company value. The interviewee also highlighted that “a level playing field” shall be ensured (“SMEs that do not apply for funding are also not bound by the abovementioned requirements and this may point at a gap since a level playing field must be ensured”).

¹⁵² European Parliament, Briefing paper requested by the DROI Subcommittee, Human Rights Due Diligence Legislation - Options for the EU, 2020, cited.

No conclusion as to the appropriate thresholds for the SMEs' business to be caught by the scope of the law can be drawn by the consultation. One option is that the due diligence duty would be triggered only when a sector poses particular risk. For example, the abovementioned Commission study points out that, according to the survey, the overall preference appears for a general cross-sectoral regulation, but "which takes into account the specificities of the sector, and the size of the company in its application to specific cases. Survey respondents expressed an overall preference for a standard which applies regardless of size, but views varied in this respect: many noted a concern about the potential burden for SMEs, whilst others argued that many of the risks in their supply chain relate to the activities of SMEs"¹⁵³.

To conclude, while there is evidence from the consultation that not only companies of a large size can be subject to such duty, the consultation was inconclusive as to how the duty of diligence could apply to SMEs because the scale and scope of consultation was minor: therefore, this cannot be answered fully and more research, or a specific impact assessment study targeting SMEs, would be needed on this point.

4.4 There should be clarity as to the business activities in the supply chain covered by the legislation

The abovementioned June 2020 paper for the European Parliament highlights that the current laws across Member States do not specify how down in the supply chain the obligation shall go. As seen above, the French Due Diligence Act requires the risk assessment to cover the "situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship", i.e. subsidiaries and entities with which the company has an established commercial relationship. It is unclear whether this refers only to the first tier of a supply chain (namely, the company's direct contractual partner) or to additional tiers further along the chain. Likewise, the Dutch law, considering the decrees of implementation have not yet been issued, answers the question of whether "goods or services to be supplied have been produced using child labour", as covering only the first tier of a supply chain, when the law is interpreted narrowly¹⁵⁴.

In this respect, in the context of a future EU-wide instrument, ambiguities should be avoided. From the consultation, the supply chain aspect emerged with respect to ensuring that the local authorities are given the mandate to understand also what the local companies the Member States' companies interact with are doing. For example, a local authority in the Netherlands, highlighted that "When considering global chains, suppliers of such companies which are local companies are not bound by the same CSR-related rules as those the Dutch companies are bound by. Thus, the organisation has no mandate to check what those local companies are doing." This may point at a gap that can be addressed in the adoption of a future legislative initiative.

As the briefing to the European Parliament spells out, it is recommended that "future mandatory due diligence legislation extends its application not only to the activities of the company itself, but also to business relations including the value chain. Limiting due diligence to the conduct of a company and its first-tier supplier might be less burdensome on businesses, but would exclude a significant number of cases in which the company's activity may have an impact on human rights. Such a limitation may

¹⁵³ See DG Just Due Diligence study, cited, p. 17. See also p. 254-255.

¹⁵⁴ Briefing paper requested by the DROI Subcommittee, Human Rights Due Diligence Legislation - Options for the EU, 22 June 2020, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI\(2020\)603495_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf).

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” and thus would risk not creating a level playing field for all actors involved. Indeed, according to one interviewee, “Coherence could be achieved by making mandatory for companies and their production chains the impact assessment and risk management related to human rights” (emphasis added).

We are aware that extending the due diligence requirement to the entire value chain might be burdensome or even an impossible task for European companies; and yet, these risks can be easily mitigated by designing such due diligence requirements as a duty of care, which does not trigger a company’s, or its directors’, liability unless they are at fault. In other words, the scope of a new due diligence duty should not be restricted to only companies’ first tier of sub-contractors, but this new duty should not trigger a strict liability.

4.5 Comprehensive scope of human rights covered and violations covered

In accordance with the briefing paper just rendered to the DROI Subcommittee of the European Parliament in June, a Human Rights mandatory due diligence legislation should apply to all human rights, as laid down in international instruments, as will be better seen below.

Indeed, the due diligence mandatory legislation referring only to rights considered to be “fundamental” (for example, in the context of the Charter of Fundamental Rights of the European Union), might limit its scope and it may cause legal uncertainty with respect to its application. To clarify the scope of such broad legislation, it might be useful to make reference to the main international instruments covering the matter. Specifically, the draft could refer to the UN Guiding Principles: as seen under Chapter 2, the UN Guiding Principles refer to various legal instruments and documents that are globally accepted and shared, thus covering a wide variety of human rights. The legislation refers to the **Universal Declaration on Human Rights** (UDHR), the two covenants on civil and political rights and on economic, social and cultural rights (ICCPR and ICESCR) and the human rights conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) addressing rights of people in vulnerable situations. Furthermore, the ILO core standards and other internationally accepted instruments of human rights, specifically the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are also mentioned.

When it comes to the scope of the violations, the initiative should cover all types of violations of human rights, not only severe infringements, such as the French corporate duty of vigilance Act, which is limited to ‘severe violations’ but does not define this term. Limiting the scope to severe violations might be a too high threshold and, additionally, might raise ambiguities that will trigger litigation costs. The intensity of a human right violation, in other words, should matter only to assess to what extent human rights are damaged, not as a threshold for applying the new rules.

The severity of a violation, according to Principle 24 of the UN Guiding Principles, should only serve the purpose of prioritizing the actions of a company in order to address actual and potential adverse human rights’ impacts.

4.6 Mechanisms should be put in place for effective monitoring and enforcement of the due diligence obligation when violation of contract or torts are committed

General contract law might be one of the most efficient instruments to reach the enforcement of SCDD. Business contracts, indeed, could include clauses concerning human rights and SCDD obligations. The law applicable to such contracts is to be established according to Regulation (EC) No 593/2008 (Rome I Regulation)¹⁵⁵, which applies to contractual obligations in civil and commercial matters, including Supply Chain Due Diligence obligations. Therefore, as general rule, parties are free to select the most suitable legal system, unless a specific exception provided for it in the Regulation applies.

However, the main policy issue is establishing general due diligence also triggered when parties have not established any contractual duties. In this regard, policy makers face a crucial dilemma. On the one hand, such due diligence duties could be framed as general directors' duties vis-à-vis third parties, based on statutory provisions; in that case, due diligence duties are likely to be characterised, for private international law purposes, as "company law" duties falling into the *lex societatis*. On the other hand, due diligence could be considered as a general duty of acting without negligence, whose violation triggers a liability in tort. Both options are on the table for policy-makers. Should the harmonising instrument be a directive, instead of a regulation, this issue can be left to Member States' decision, provided that their implementing measures fulfil the goal of introducing an effective due diligence procedure in their own legislation. Both solutions, however, should be accompanied by adequate procedural and substantive rules, that frame directors' duties in a meaningful way. In this regard, it is useful to stress that many of the national instruments introducing due diligence requirements do not deal with legal liability and enforcement issues, failing to ensure access to remedy for victims.

In this regard, we could consider some proposals made in 2018 by the European Coalition for Corporate Justice (hereinafter, "ECCJ"), which identified 10 features for "effective, comprehensive" mandatory Human Rights Due Diligence Legislation. With the aim of having an effective due diligence in place, two proposals seem to be particularly suitable¹⁵⁶. The first proposal made by ECCJ is that a "civil liability of companies for damage caused by entities under their direct or indirect control" should be statutorily established, provided that "these entities have infringed internationally recognised human rights or environmental standards". Control is to be determined according to factual circumstances, including the exercise of economic power in long-term business relationships. The second proposal of ECCJ that should be praised is introducing a "due diligence defence": companies may discharge their liability only if they provide evidence that (a) they took due care in identifying and avoiding losses or damages, or (b) the damage would have occurred even if due care had been taken. This approach reverses the burden of proof, and thereby alleviates certain recurrent obstacles to access to justice faced by claimants in proceedings relating to business-related human rights and environmental harms, in particular in relations to the access to information necessary for victims to substantiate their claims.

In particular, it should be made clear that parent companies cannot be discharged from liability by simply showing that they are not involved in health or environmental supervisions of their subsidiaries

¹⁵⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

¹⁵⁶ ECCJ, 'A call for human rights and environmental due diligence legislation', 2 December 2019.

'activities, which were conducted independently by the subsidiaries' management'¹⁵⁷. Things are a bit more complicated with regard to suppliers; nevertheless, in order to avoid risks of circumvention, it should be made clear that companies should provide evidence of having taken due care in avoiding human right violations on behalf of their suppliers; in this regard, an assessment is to be conducted on a case-by-case basis, taking also into account whether the European company can exercise a market power over the supplier involved in a damaging action.

In this regard, it is with mentioning that, in the context of a paper delivered in June to the DROI Subcommittee of the European Parliament, a very interesting briefing was given about "EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims"¹⁵⁸. Such briefing sheds light on some of the enforcement aspects of a future Supply Chain Due Diligence obligation. In terms of review of current approaches, "where the due diligence duty covers business partners, companies' monitoring duties follow accordingly (e.g. monitoring under the French Corporate Duty of Vigilance Act covers subsidiaries and subcontractors/suppliers linked by an 'established commercial relationship; under the Dutch Child Labour Due Diligence Act it should cover the entire supply chain)"¹⁵⁹. Another useful example is Article 19a) of the Accounting Directive, which indicates that non-financial statements under Directive 2014/95/EU cover "business relationships, products or services which are likely to cause adverse impacts... and how the undertaking manages those risks', where 'relevant and proportionate'".

To begin with, it is important to clarify who (authority and third parties) is in charge of monitoring. Second, complaint mechanisms should be clearly spelled out. Complaint mechanisms have both monitoring and remedial functions. In particular, the abovementioned briefing to the European Parliament highlights that the "role of third parties in monitoring has been sharpened under some Member States schemes such as the French Vigilance Act, or the Dutch law on Child Labour, via associated enforcement mechanisms"¹⁶⁰. In this respect, recognizing a right of information is an interesting example of what happens in practice. Indeed, during the consultation, one interviewee has highlighted that "it should be taken into account that there is sometimes a discrepancy between what the companies report and what they actually put in place". The consultation showed that adequate and proper monitoring is paramount to achieving the objectives foreseen.

The briefing reports that "draft legislation on transparency in Norway goes further. This would support monitoring by establishing a right to information on 'how an enterprise conducts itself with regard to fundamental rights and decent work within the enterprise and its supply chains', along with an information request procedure, applicable to all businesses, not just to large companies subject to formal reporting requirements (Norway Ethics Information Committee, 2019)"¹⁶¹. This could also be explored in the context of an EU-level measure. Thus, ineffective monitoring thwarts the purpose of the law and an information-request procedure could help in this case.

Consistency with the EU law *acquis* or potential future revision of Directive 2014/95/EU should be guaranteed when monitoring obligations come into play. In this respect, as the briefing to the European Parliament reports, "Monitoring provisions of an EU due diligence law will be influenced by

¹⁵⁷ This is the risk arising under the latest English case law; see in particular: *Thompson v Renwick* [2014] EWCA Civ 635; *Lungowe v Vedanta Resources PLC* [2017] EWCA Civ 1528; *Okpabi v Royal Dutch Shell PLC* [2018] EWCA Civ 191; *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA.

¹⁵⁸ Claire Methven O'Brien, Olga Martin-Ortega, Briefing for the European Parliament, EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims, April 2020.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

the legislation's scope and approach in other areas as well as wider EU legal and policy frameworks. For example, if only larger companies are addressed by a due diligence duty, it should be considered how that class of companies relates to the class of companies addressed by existing (or revised) EU NFR legislation. It would make little sense to oblige companies to report on due diligence (via NFR) but not to monitor its impact under a new due diligence law"¹⁶².

A good example in this case comes from the Netherlands public procurement processes. RVO has a checklist (or monitoring too for each fund or call) on the basis of which it assesses whether the companies, beneficiaries of funding, comply these criteria and how they do so: it carries out inspections as well as local visits in the countries where the projects are executed, etc. Indeed, a Dutch interviewee mentioned that standardized guidance from the government on the criteria that must be filled in by the company benefitting from funding could help. EU-level certifications and standards could also be considered and lower the administrative burden since they can do away with inconsistencies and scattered approaches.

To conclude, as the briefing points out, "repositories and lists could enhance EU level evaluation, and thus convergence, particularly if supplemented by an EU-wide repository, and e.g. regional sector analyses". In this respect, business chambers of commerce could be also candidates at Member State level. In particular, aspects to consider are: (a) who should carry out the monitoring? (b) at what level? (c) how can third party monitoring be complemented by other accountability mechanisms such as complaint mechanisms, public registers and a right to know/information request procedure?

One should also learn from negative Member State experience, such as the insufficient monitoring of the French Vigilance Act that became clear during the consultation. As seen above, French stakeholders consider "the monitoring of the implementation of the law is not sufficient". According to the consulted stakeholder, "an example of good monitoring is the German monitoring process, which reviews to what extent companies based in Germany are meeting their due diligence obligations in line with the National Action Plan for Business and Human Rights".

When it comes to enforcement in terms of administrative or criminal penalties, one relevant interviewee has stressed explicitly that "fines and penalties for non-compliance should be envisaged". Also in this respect, it is important to learn from Member States' experiences. In France, for instance, Articles L. 225-102-4 and Article L. 225-102-5 of the French Duty of Vigilance Act provide that a company that breaches the statutory obligations may be ordered to comply with them, following the issuance of a formal notice. It may also be ordered to pay a fine of maximum ten million euros. The amount of this fine could be tripled if a company's responsibility is based on a breach of its obligations that caused damage. As seen above, in its decision of 23 March 2017, No 2017-750 DC, para. 27, the Constitutional Council ruled that the definition of these obligations was not sufficiently precise¹⁶³. Thus, in a future initiative, the principles of clearly and precisely defining the contours of enforcement mechanisms to avoid ambiguities should be followed: when it comes to criminal fines, they must respect the principle *nullum crimen, nulla poena, sine lege*.

Eventually, it is to be mentioned that, in the Netherlands, the implementation of the Child Labour Law is supervised by a regulatory authority (*Toezietherouder*), which publishes all reports and may impose administrative fines for non-compliance. Other than fining the company, also enforcement mechanisms for its directors, responsible for the duties, could be envisaged (possible director

¹⁶² Id.

¹⁶³ Chapter 3.

disqualification, akin to some countries, such as the UK, for violation of competition laws), so as to increase individual accountability. Such mechanisms could be explored at EU level.

4.7 General procedural rules applicable and possible revisions of the EU instruments of private international law

Jurisdiction

The **Brussels I Recast Regulation**¹⁶⁴ deals with the jurisdiction, recognition and enforcement of judgments that fall within its scope and which are to be executed in an EU Member State. In terms of jurisdiction, Brussels I Recast applies “in civil and commercial matters whatever the nature of the court or tribunal” when a defendant is domiciled within an EU Member State or when a valid choice of court has been made. A case involving SCDD will usually be characterised as a ‘civil or commercial matter’ and most jurisdiction issues will thus be dealt with according to the Brussels I Recast when the defendant is domiciled in the EU.

The main criterion to establish the competent venue under Brussels I Recast is the place of the defendant’s domicile unless a special criterion outlined in the Regulation applies. In this regard, according to the special criteria for tort actions, courts of the country where the harmful event occurred or may occur may also hear such cases (art. 7(2) Brussels I Recast). Hence, the notion of a ‘harmful event’ is crucial to establish whether a European court can hear a tort action against domestic holding companies for activities committed abroad by a foreign subsidiary or by a supplier (regardless of the question of applicable substantive law). In this regard, the European Court of Justice follows a flexible approach, according to which the notion of ‘place of the harmful event’ should be understood as either the place where the damage occurred or the place of the event giving rise to it.¹⁶⁵

Therefore, the question arises as to whether holding companies can be sued before a court of their country of domicile for torts committed by a foreign subsidiary or by a supplier situated along the value chain. This question is to be decided on a case-by-case basis and is still highly controversial. In general, the indication of the European Court of Justice is that a country can only be considered the place of the event giving rise to a damage, when there is a close connection between the event that had occurred in that country (such as, for instance, a decision of a corporate body of the parent company) and the damaging activities.¹⁶⁶ As a consequence, in most cases holding companies are unlikely to be legitimately sued before courts of their domicile, unless the plaintiff shows such a close connection between that company’s decisions and actions committed by a foreign subsidiary (which have allegedly produced a damage). Under the law of most countries, companies do not face a stringent duty to carry-out a human right and environmental due diligence across the whole value chain and concerning all subsidiaries; as a consequence, in most cases, it will be difficult to show such a close connection between their actions (or their passivity) and a specific damage.

Therefore, we would recommend amending the Brussels I Regulation Recast in a way that allows plaintiffs to sue European companies before courts of their corporate domicile for tort damages

¹⁶⁴ Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter ‘Brussels I Regulation Recast’) regulates jurisdiction and the recognition and enforcement of judgments between EU member states.

¹⁶⁵ C-21/76 *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d’Alsace S.A.*, ECLI:EU:C:1976:166. This decision was related to Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters, whose content is now reproduced in article 7 Brussels I Regulation Recast.

¹⁶⁶ See: C-68/93 *Shevill and Others v Presse Alliance* ECLI:EU:C:1995:61.

committed by foreign subsidiaries or by foreign suppliers. This should be the case at least where no alternative available forum would be able to guarantee the right to a fair trial ('forum of necessity') or if there is a real risk that substantial justice cannot be obtained before courts of the country where the subsidiary is domiciled.¹⁶⁷

Additionally, it is advisable to provide for choice-of-court criteria that aim at avoiding forum shopping or manipulations of the corporate domicile and the competent venue; in particular, corporate groups might opportunistically relocate their parent company, from which the ultimate directives and strategies stem, outside the European Union. Therefore, it is advisable to allow plaintiffs to sue parent companies in the EU, wherever they are incorporated and provided that the corporate group has a significant connection with the EU. Eventually, to avoid inefficiently splitting lawsuits, it is advisable to provide for mandatory procedural rules that allow a court competent to hear lawsuits against a European company, to also hear connected lawsuits brought against a foreign subsidiary or a business partner, such as a supplier, where it is submitted that both defendants are proper and necessary parties to the claim.

Applicable law

The tender specifications ask to also look onto whether there may be a need for the **Rome II Regulation** to be updated. In general, it is crucial to enquire whether human right violations are to be properly enforced before European courts. This issue is particularly sensitive regarding human right or other tort violations committed by subsidiaries of European companies situated in other countries. Additionally, the same question arises regarding tort damages produced by foreign suppliers of European companies, having no autonomy nor market power vis-à-vis the European company. As we have stressed in the introduction, as a general rule all jurisdictions respect the principle of separate legal personalities of each subsidiary, with the consequence that companies are not liable for their subsidiaries' or suppliers' liabilities. Parent companies, however, might be held liable for tort misbehaviours committed by their subsidiaries; additionally, violations of human right due-diligence or misbehaviours vis-à-vis subsidiaries' employees might fall within the concept of tort violations.

In this respect, the cross-border character of the circumstances where a human rights harm claim is raised in a national court raises the question of which national law competent courts should base their decision on. While procedural rules to be applied in each case are those of the country of the forum, the applicable substantive law is established following choice-of-law criteria. The competent court must first determine which country's substantive law shall be applied. Concerning the law applicable to tort, Regulation (EC) No 864/2007¹⁶⁸ (hereinafter 'Rome II Regulation') applies to 'non-contractual obligation', a concept autonomously interpreted without reference to the national interpretation and thus capable of covering a wide range of situations. This Regulation has a universal application; hence, its criteria are also triggered concerning extra-EU tortious actions.

In particular, according to **Art. 4(1) Rome II Regulation**, the law of the state in which a damage occurred shall be applicable. Other criteria, such as the place where the violation is committed or decided, are therefore irrelevant¹⁶⁹. As a consequence, at least as a matter of general principle, the law

¹⁶⁷ See for this approach recently: England and Wales Court of Appeal (Civil Division) *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20.

¹⁶⁸ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). This Regulation is applicable to events that occurred after 11 January 2009.

¹⁶⁹ Access to Justice, 'The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts', 2015, available at: https://corporate-responsibility.org/wp-content/uploads/2015/02/eu_business.pdf, page 10: 'when courts consider cases concerning harm that occurred in another

of the country of a subsidiary or a supplier, which have allegedly violated human rights, should be exclusively applied¹⁷⁰.

In exceptional circumstances, when a 'manifestly closer connection' exists to the Member State law of the forum, substantive rules of that Member State apply (Art. 4 para 3 Rome II Regulation). This exception, however, is to be interpreted narrowly, with the consequence that the country where the decision to undertake a tortious action is taken, or where a lack of proper supervision and due diligence has occurred, cannot be considered having a connection to the misbehaviour closer than the country where the damage occurred.

An exception to this general rule is however entailed in article 7 of Rome II Regulation concerning environmental damages. Therefore, for damages connected or deriving from environmental actions, plaintiffs can invoke the law of the country in which the event giving rise to the damage occurred. If no environmental damages have occurred, however, the law of the subsidiary is only to be applied.

The Rome II Regulation, additionally, provides for other exceptions that might apply to violations of human right due diligence committed by foreign subsidiaries or suppliers. First of all, article 16 provides that, albeit general choice-of-law criteria point to another jurisdiction, overriding mandatory provisions of the law of the forum can be applied. In that case, domestic rules of the forum are to be applied despite the challenged tort misbehaviour is committed by a foreign subsidiary. In principle, each Member State can autonomously decide whether a given tort action, such for instance human right violations or employees' mistreatments, triggers a domestic 'overriding mandatory provision'. Nevertheless, it would be incompatible with the logic of **Rome II Regulation** if a Member State would declare all its tort law as overriding mandatory provision, hence such concept is to be interpreted narrowly. The Rome II Regulation does not provide for a specific definition of 'overriding mandatory provisions', yet this concept is broadly used in many circumstances and pieces of legislation. For instance, the Rome I Regulation on the law applicable to contracts defines such provisions as those 'regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation'¹⁷¹. In other words, only domestic rules that pursue a policy that is particularly imperative and shared by the society as a whole can be legitimately applied by courts of the country where a holding company is incorporated or domiciled, while in any other circumstance only the law of the place where the damage occurred applies.

The second exception is entailed in article 17 of Rome II Regulation, according to which courts should consider 'the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability'. This exception is also unlikely to lead to the application of tort law of a European company, instead of that of the country where the damage has occurred. It is probably true that due diligence should count among the 'rules of safety and conduct' within the meaning of Art. 17 Rome II Regulation, yet they are only 'to be taken into account' within the framework of the application of the

jurisdiction, they undertake analysis to determine which States' law should be applied to decide the claim. The Rome II Regulation, which harmonized the jurisdictional rules across EU Member States, establishes as a general rule that courts should apply the law of the State where the harm occurred. This may present barriers to victims if the host State: either does not recognize, or limits, vicarious or secondary liability (including parent company liability); requires claimants seeking remedies in tort to meet a higher burden of proof; provides stricter immunities than is provided in the laws of the forum State; or limits the remedies that claimants can be granted. The Rome II Regulation creates several exceptions to the application of the general rule that courts should apply the law of the State where the harm occurred, but these exceptions require further clarification'.

¹⁷⁰ See for instance the case decided by Landgericht Dortmund – 7 O 95/15 in the case 'KiK' (258 workers died in the fire of a Pakistani supplier of a German company: the LG Dortmund dismissed the lawsuit by applying a statutory limitation under Pakistani law). See: <https://www.ecchr.eu/en/case/pakistan-kik/>.

¹⁷¹ Article 9 Rome I Regulation.

foreign law and then only 'as appropriate'. Hence, it is extremely controversial whether, and to what extent, stricter liability rules of the country where the holding company is located are to be fully applied.

We can conclude that the Rome II Regulation does not ensure comprehensive enforcement of human right due diligence, including employees' mistreatments, committed by foreign subsidiaries. In order not to only pay lip service to human rights' protection, it is advisable to enlarge and clarify the scope of articles 16 and 17. In particular, it seems reasonable to specify that domestic and European rules protecting specific fundamental interests of firms' stakeholders, such as employees' or communities' health, are to be considered as overriding mandatory provisions and that these provisions also apply to situations involving exclusively private parties. Eventually, it is to be clarified that courts should fully apply domestic and European rules addressing violations of due diligence and, in general, human right claims. In other words, we would suggest enlarging the scope of article 16 and 17 of Rome II Regulation, so that they would evolve to fully-fledged exceptions to the general choice-of-law criterion entailed in article 4(1), to properly protect human rights across jurisdictions and the whole value and supply chain of European companies.

5. CONCLUSIONS

In 2019, a Commission document highlighted how the EU has made progress after the 2011 CSR Commission strategy, along three interlinked fronts: on the one hand, the promotion of CSR and RBC; on the other hand, upholding business and human rights, as well as fostering sustainability and the implementation of the UN 2030 Agenda for Sustainable development¹⁷². Along these lines, progress has been made in various areas including the following:

- fostering companies to act to respect and uphold human rights, providing adequate access to remedy for victims of business-related abuses;
- encouraging companies to carry out appropriate due diligence along the supply chain, including with respect to the human rights' protection;
- increasing transparency and promoting sustainable finance;
- encouraging socially and environmentally friendly business practices, including through public procurement;
- promoting the implementation of CSR and RBC, including outside the EU, through EU trade instruments and through EU's participation in multilateral fora;
- developing dedicated approaches for certain specific sectors or companies;
- pursuing horizontal approaches, including working with EU's Member States on National Action Plans¹⁷³.

The scope of the current Study does not extend to cover the trade-related aspects of the above-mentioned progress. It mostly focuses on what can be done from a company law standpoint, in the light of a legal analysis across chosen Member States. By providing recommendations to the European Parliament, we attempt at addressing the question how the EU can play a role in encouraging companies to carry out appropriate due diligence along the supply chain, including with respect to the human rights' protection.

One decade ago, in the context of his speech to the Leaders' Summit of the United Nations Global Compact, the then Vice-President of the Commission, Antonio Tajani, highlighted that the EU was aiming at issuing a proposal to renew European policy on CSR, putting greater emphasis on company transparency concerning environmental, social and governance issues. He also made clear that the EU would have contributed to the activities of the UN Special Representative, Professor John Ruggie, on Business and Human Rights, and was committed to assume its responsibilities for the implementation of the UN Framework on business and human rights¹⁷⁴. One decade later, the abovementioned ambitions of implementing the UN principles and Framework on business and human rights into the EU's legal framework still remain a work-in-progress.

This Study is an attempt to assist the European Parliament's JURI Committee in its work to contribute in comprehensively re-thinking CSR in the EU, through a coherent and all-encompassing approach, and provides some recommendations to this end.

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ European Commission, Corporate Social Responsibility, Responsible Business Conduct and Business and Human Rights.

More specifically, this Study aims at understanding how in selected Member States the legal framework supports the development of CSR, with particular insight into voluntary or mandatory due diligence requirements. It also aims at analysing the current EU legal framework, and, in the specific, how Directive 2014/95/EU has been transposed in those selected Member States. In the light of the Member States' analysis, this Study identifies both best practices and negative practices at Member State level. Finally, this Study draws conclusions on some possible recommendations which can assist the JURI Committee in suggesting to the European Parliament future steps to be taken on a coherent EU-approach to CSR.

First, in Chapter 2, the study tackles how the CSR and RBC notions are clarified in international law instruments, including the United Nations', the ILO, the OECD (in particular: the UN Guiding Principles, the ILO MNE Declaration, and the OECD Guidelines). Such documents outline what RBC principles are and lay out some principles that companies are encouraged to strive to respect in their corporate conduct and business operations. The focus is placed on international law instruments to set the scene for further delineating how public authorities, including at the EU level, have a role to play in fostering companies to carry out their business responsibly.

Once the scene is set, the Study then moves on to tackle how CSR has been approached under EU law, both in terms of soft law and in terms of mandatory EU legislation. It does so through a historical excursus as to how the CSR concept has evolved over the last decade, both in terms of soft law and mandatory EU legislation. In this respect, the Study tackles how the NFR Directive has been transposed in the law of several chosen Member States, namely, France, Germany, Italy, the Netherlands, Poland and Spain. Finally, conclusions are drawn on how, going forward, the NFR Directive has met or not its goals and what could be some possible improvements going forward as emerged from the stakeholder consultation.

When it comes to the transposition of the Directive, several conclusions can be drawn from abovementioned analysis: first, it creates a gap as to what the substance of the non-financial reporting is, since it does not provide a level playing field as to what such reporting must cover, which harmonises the reporting obligations across the companies that are subject to its obligations in the Member States. Second, the NFR Directive does not cover the supply chain and leaves a gap in this respect. Third, its scope *rationae materiae* is also limited as it covers only certain large corporations and it excludes Small and Medium Enterprises (SMEs), which make up most enterprises across Member States.

Subsequently, Chapter 3 zooms onto due diligence requirements across the six chosen Member States, and aims at depicting how in most cases "due diligence" is not spelled out in a piece of legislation, with the result that there is legal uncertainty for companies across the various Member States. There are exceptions, such as France and the Netherlands, where laws on due diligence have been adopted, as well as Germany, where a bill is pending in this respect. From a methodology standpoint, this analysis draws on desk research. It also draws from consultations with several stakeholders at national level.

In 2019, the Netherlands adopted the Child Labour Due Diligence Act. Such law requires companies to identify, prevent, and, when necessary address the issue of child labour in their supply chains. Prior to the enactment of this legislation, the Dutch government did not compel, but merely encouraged, businesses to adopt a voluntary approach to CSR-related due diligence, including the issue of child labour. The Child Labour Due Diligence Act applies to companies that sell or supply goods or services to Dutch end-users, including companies registered outside the Netherlands (Article 4(1)). The Act

introduces a “duty of care” (*zorgplicht*): this duty consists in preventing the supply of goods or services produced using child labour. A company falling under the scope of this law has to “first determine whether there is a reasonable suspicion that a product, or service, involves child labour. If such a suspicion exists, it has to develop and implement an action plan (Article 5.1)”. The notion of ‘suspicion’ is not defined in the act, which only requires companies to base themselves on sources which are “reasonably knowable and consultable” (Article 5.2). According to this legislation, companies falling under its scope must produce a statement declaring that the company has conducted due diligence.

The Act also imposes sanctions for failure to exercise due diligence. First, Article 7.2a) provides that if the company fails to produce the statement, or fails to carry out an investigation, or fails to set up an action plan, then the regulator may impose a symbolic fine of EUR 4.100. Such penalty may also be imposed by the regulator for adopting an “inadequate” investigation or action plan (Article 7.2b). Second, should there be a repetition, within five years, of such a failure to adopt due diligence, the conduct falls under the notion of economic offence which triggers the application of the Economic Offences Act (*Wet op de economische delicten*). As such, the company may face criminal penalties, or higher fines. Further mechanisms for its enforcement are to be spelled out in decrees that are yet to be adopted.

In France, the 2017 Vigilance Act, sets out an obligation for large French companies to develop, publish and implement appropriate measures to identify risks and prevent violations of human rights, fundamental freedoms, human health and safety, and the environment. This is a horizontal piece of legislation which sets out a mandatory cross-sector due diligence requirement for French companies falling under its remit. Under the Act, the duty of due diligence takes the form of a vigilance plan, which should be established and effectively implemented by “any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad”. The Vigilance Act covers “the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship”. Yet, no minimum specific standards for this plan are laid down in the law. In 2017, the Constitutional Council declared the provisions relating to civil fines in that law, insofar as they were to sanction ‘indefinite’ obligations, unconstitutional.

In Germany, a legislative proposal to regulate corporate human rights and environmental due diligence through global value chains has been put forward in 2019. Such initiative was amended in July 2020. The bill is still being discussed prior to being voted in Parliament, which is likely to happen by 2021.

The abovementioned examples at national level can, as such, be considered as good practices, though in France and the Netherlands the laws have been adopted only in recent years and the stakeholder consultations showed that it may still be too early to assess them. Yet, in order to avoid both a lack of level playing field across the various Member States, and because desk research showed that a “duty of due diligence” is only seldomly included into national ‘hard law’, several stakeholders advocate for various strategies for improving this situation at EU level. Based on the analysis carried out, Chapter 4 specified several recommendations to the European Parliament on what the EU can do in this respect.

Our recommendations center around the need for a cross-sector mandatory instrument which would not only encourage but which would mandate companies across the EU to carry out appropriate due

diligence along the supply chain, including with respect to human rights' protection. Also taking stock of the recent impact assessment 2020 Study, carried out for the European Commission's Directorate General for Justice and Consumers ¹⁷⁵, a legislative initiative would entail mandatory due diligence as a legal standard of care (what is considered as Option 4 in that study). We agree with the results of that Study that the "creation of a corporate duty of due diligence would indirectly create fiduciary duties for the directors, who would need to ensure compliance with this duty in the interest of the company (but which duty is owed to the company i.e. the shareholders only). This legal duty would apply regardless of whether the individual director, company or shareholders apply an "enlightened" understanding of what is "material" or "in the company's interest". The same duty would apply to directors whether they believe sustainability issues to be in the company's long-term interest or not".

Yet, much is to still be clarified as to how such piece of legislation should be carved out to fit the EU's company law *acquis* and many questions still remain open. In particular, we opine that, at a minimum, a mandatory due diligence requirement would compel companies to carry out due diligence to identify, prevent, mitigate and account for human rights and environmental adverse impacts in their supply chain. Due diligence in such future piece of legislation would need to go beyond reporting obligations. This is in line with the UN principles. In addition, we also opine that, as to the scope *rationae personae*, the initiative should not only cover large companies but also SMEs, while also considering their specificities. More research may be needed to understand how the duty of due diligence may be carved out for SMEs.

In accordance with the briefing paper rendered to the DROI Subcommittee of the European Parliament in June 2020, we agree that a human Rights mandatory due diligence legislation should apply to all human rights, as laid down in international instruments, and that also the violations should be spelled out in a comprehensive manner to increase legal certainty.

Finally, mechanisms should be put in place for effective monitoring and enforcement of due diligence obligations, when violation of contract or torts are committed. These mechanisms need to be thoroughly analysed in order to comply with principles of primary EU law, including the principle of procedural autonomy of Member States, and to respect Member States' company laws and. In this respect, we have highlighted that certain pieces of procedural EU law may need to be amended to harmoniously accommodate remedies in adopting such EU legal instrument.

As mandatory due diligence legislation gains momentum throughout the world, including in the EU, the European Parliament can play a role in encouraging the Commission to come forward with a legislative proposal, as it has announced by 2021. Focusing on corporate law instruments, and taking stock of some Member States' initiatives in this respect, our study provided some proposals, while also laying down some avenues for future research

¹⁷⁵ Cited.

ANNEX

Table 1 Transposition of Directive 2014/95/EU in France, Germany, Italy, Netherlands, Poland and Spain.

M/S	How is Directive 2014/95/EU transposed? .Ordonnance n° 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises (« Order of 19 July 2017 »), which replaces	Which undertakings are concerned (500 employees, Art. 19a) and how is this size measured? E.g.: is there a list of companies, updated regularly? Are there exceptions?	What shall the report contain? Are there data protection issues for your business secrets?	What areas should it cover?	How should compliance be ensured?	Are there penalties for non-compliance? (is "gold plating" an issue?)
FR	1 provisions to the French Commercial Code; 2.Décret n° 2017-1265 du 9 août 2017 pris pour l'application de l'ordonnance n° 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et	Art. L.225-102-1 and Art. Article R225-104 of the French Commercial Code ¹⁷⁶ : I) Companies whose securities are admitted to trading on a regulated market, when the total of their balance sheet or their turnover and their number of employees exceeds the	Art. R. 225-105 (I) of the French Commercial Code: the report shall contain the following information -a description of the main risks linked to the activity of the company, including, where relevant, the risks created by its business relationships, its products or	As per Art. R. 225-105 (II) the report shall include information on: 1 ° Social information (employment, work organization, health and safety, social relations, training, equal treatment) 2 ° Environment al information	Article L. 225-102-1 (VI): When the report does not include the necessary information according to para I and III of Art. L. 225-102-1 of the French Commercial Code, any interested person may request from the president of the court ruling in summary proceedings to	Under Article L. 225-102-1 (VI) when the request is granted, the penalty and the procedural costs are borne, individually or jointly, by the directors or members of the management board.

¹⁷⁶ Article 1 of the Order of 19 July 2017 states: 'A statement of extra-financial performance is inserted in the management report provided for in the second paragraph of article L. 225-100, when the total balance sheet or the turnover and the number of employees exceed the thresholds set by decree of the Council of State: 1 ° For any company whose securities are admitted to trading on a regulated market; 2 ° For any company whose securities are not admitted to trading on a regulated market. II. - The companies mentioned in paragraph I which draw up consolidated statements in accordance with Article L. 233-16 are required to publish a consolidated statement of extra-financial performance when the total balance sheet or turnover and the number of employees of all the companies included in the scope exceed the thresholds mentioned in paragraph I.'

	certains groupes d'entreprises.	<p>following thresholds: EUR 20 million for the balance sheet total, EUR 40 million for the net amount of turnover and 500 for the average number of permanent employees employed during the financial year.</p> <p>II) Companies whose securities are not admitted to trading on a regulated market, when the total of their balance sheet or their turnover and their number of employees exceed, where applicable on a consolidated basis, the following thresholds: EUR 100 million for the balance sheet total, to EUR 100 million for the net amount of business and 500 for the average number of permanent employees employed during the year.</p>	<p>its services;</p> <ul style="list-style-type: none"> -a description of the policies applied by the company as well as the due diligence procedures implemented to prevent, identify and mitigate the occurrence of risks; -the results of these policies, including key performance indicators. <p>When the company does not apply a policy regarding one or more of these risks, the statement must include a clear and reasoned explanation of the reasons justifying it.</p> <p>Concerning data protection issues, under Art. 225-105-1 (III), these declarations are made freely available to the public and made easily accessible on the company's website within eight months from the end of the financial year and for a period of five years.</p> <p>As per the opinion of the Representative of the RSE Platform, there is an issue and incompatibility</p>	<p>(general environment al policy, pollution, sustainable use of resources, climate change)</p> <p>3 ° Information on the company (commitments in favor of sustainable development, subcontractors and suppliers, fair practices: measures taken in favor of the health and safety of consumers).</p> <p>In addition, for the companies mentioned in 1 ° of I of article L. 225-102-1, the following additional information is requested:</p> <p>1 ° Information relating to the fight against corruption;</p> <p>2 ° Information relating to actions in favor of human rights:</p> <p>a) Promotion and respect of the fundamental standards (respect of freedom of association, elimination of discriminatio</p>	<p>order, if necessary under penalty, to the board of directors or the management board, to communicate the information mentioned in III.</p>	
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			with the Trade Secrets Directive, when for example a company in publishing its information, has to be transparent about the contractual relationships.	n in employment, elimination of forced or compulsory labor, abolition of child labor) b) Other actions taken in favor of human rights.		
DE	Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz).	Corporations, cooperatives as well as limited liability commercial partnerships, which cumulatively fulfil at least two of the following criteria: (i) balance-sheet sum of EUR 20 000,000, annual sales of EUR 40 000,000, on annual average 250 employees, (ii) are capital market-oriented, (iii) and employ more than 500 people on average per year. Large credit institutions and insurance companies are obliged to perform non-financial reporting regardless of their capital market orientation.	The management report or the non-financial report (within 4 months of the balance sheet date) shall contain: (a) A description of the undertaking's business model (b) Company policies relating to nonfinancial matters, and the outcomes of those policies (c) Principle risks related to nonfinancial matters and business activities (d) Any non-financial KPIs which are Used. Diversity statement: applies to large listed stock corporations.	For the following matters ¹⁷⁷ : (a) Environmental performance ¹⁷⁸ ; (b) Social and employee matters; (c) Human rights performance; (d) Corruption and anti-bribery matters.	Comply and explain principle. Auditor's involvement: Sec. 317 para. 2 sentence 4 HGB extends the audit duty to the non-financial information, but only to a limited extent: the auditor must determine the formally accurate presentation of a non-financial statement or, as the case may be, a separate non-financial report together with the management report.	Fines: up to the amount which is the highest of the following: EUR 10 million or 5 % of the total annual turnover of the company or twice the amount of the profits gained or losses avoided because of the breach (See Sec. 331 et seq. HGB)
IT	DECRETO LEGISLATIVO 30 dicembre 2016, n. 254	Public-interest entities as defined by Article 16(1) of	in line with Article 3(1) of the Decree, the non-financial	Under Art. 3 of the Decree, the report shall contain	Under Article 3(7), the directors of a large public-	The Decree (Article 8) provides for administrative

¹⁷⁷ CSR Europe, Member State Implementation of Directive 2014/95/EU:

https://www.globalreporting.org/resource/library/NFRpublication%20online_version.pdf.

¹⁷⁸ To more precisely specify the environmental aspects of relevance in the statement, sec. 289c para. 2 No. 1 of the German Commercial Code (Handelsgesetzbuch, "HGB") refers by way of example to the items named in Recital 7 of the CSR Directive.

	(Legislative Decree No 254/2016, the "Decree").	Legislative Decree No 39/2010 179: (Article 1(a) of the Decree) that meet the following requirements: 1. prepare for each financial year a financial statement in accordance with Article 3 of the Decree 180, if they had exceeded five hundred employees on average during the financial year and, at the closure of the financial report, have crossed at least one of the two following thresholds: a) balance sheet total: EUR 20 000,000; b) total net revenues from sales and services: EUR 40 000,000 (Article 2(1) of the Decree); 2. Public interest entities that are 'parent' companies of a large group ¹⁸¹ and draw up for each financial year a statement	statement should at least contain: a) the business model for the management and organization of company activities; b) the policies applied by the company, including those due diligence, the results achieved through these policies and the pertinent key indicators of non-financial nature; c) the main risks connected to the aforementioned themes and that derive from the company's activities, its products, services or commercial relationships, including, where relevant, the chains of supply and subcontracting; 2. With regard to the areas referred above, the declaration	information on the following areas: environmental performances of the entity concerned; social and employee matters; human rights performance; corruption and anti-bribery matters.	Interest undertaking are responsible for ensuring that the non-financial statement is prepared in accordance with the Decree and the directors must act with due diligence and professionalism. According to the same provision, the board of statutory auditors (or the different internal control corporate body) oversees compliance with the relevant provisions and reports on its control activities to the general shareholders' meeting in its annual report.	monetary penalties for late filings which be imposed by the Italian Securities Commission (Commissione Nazionale per le Società e la Borsa, CONSOB) according to the rules on administrative proceedings set forth in the Italian Securities Act (Decree n.58 of 1998) ¹⁸⁵ .
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¹⁷⁹ Article 16 (1) of Legislative Decree No 39/2010: 'Public-interest entities are:

a) Italian companies issuing securities admitted to trading on the Italian and EU regulated markets;

b) banks;

c) insurance companies referred to in Article 1(1) letter u) of the Code of Private Insurance;

d) insurance companies under article 1 (1), paragraph 1, letter cc), of the Italian Code of Private Insurance, with registered office in Italy, and Italian branches of non-EU reinsurance companies under article 1 (1) letter cc-ter), of the Italian Code of Private Insurance'.

¹⁸⁰ Article 3 is about individual non-financial statement.

¹⁸¹ Article 1(b) of the Decree defines a 'large group' as a group consisting of one 'parent' company and one or more 'subsidiary' companies that overall during the financial year had more than five hundred employees and whose consolidated financial statements meet at least one of the following two criteria: 1) total assets in the balance sheet above EUR 20 000,000; 2) total net revenues from sales and services above EUR 40 000,000.

		<p>in accordance with article 4¹⁸² (Article 2(2) of the Decree). Issuers whose securities (debt or equity) are listed on a multilateral trading platform (e.g. AIM, EuroMTF, GEM or ExtraMOT PRO) or other listing venues which do not fall within the definition of 'regulated markets' pursuant to the applicable EU rules, are not subject to the Decree and are not required to comply with it¹⁸³. There are some exemptions¹⁸⁴ under Article 6 of the Decree.</p>	<p>of non-financial nature shall contain at least information regarding:</p> <p>a) the use of energy resources, distinguishing between those produced from renewable and non-renewable sources, and the use of water resources;</p> <p>b) greenhouse gas emissions and polluting emissions in the atmosphere;</p> <p>c) the impact, where possible on the basis of hypotheses or realistic scenarios even in the medium term, on the environment as well as on health and safety, associated with the risk factors referred to in paragraph 1, letter c) of Article 3, or to other relevant environmental</p>			
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¹⁸² Article 4 is about consolidated non-financial statement.

¹⁸³ Available at:

<https://www.lw.com/thoughtLeadership/italy-directive-non-financial-disclosures-large-european-undertakings>.

¹⁸⁴ 1) A Large Public-Interest Undertaking is exempted from the obligation to issue its standalone non-financial statement pursuant to Article 3 of the Decree if either: – It issues a consolidated non-financial statement according to Article 4 of the Decree – It and its subsidiaries are included in the consolidated non-financial statement issued by:

(a) by another parent company subject to the same obligations to issue a non-financial statement or

(b) by a European 'parent' company that draws up these declarations to pursuant to and in accordance with articles 19-bis and 29-bis of Directive 2013/34/EU.

2) A public-interest undertaking that is the parent company of a large group, that is exempted from the obligation to issue the consolidated non-financial statement pursuant to Article 4 of the Decree, if it is a subsidiary included in the consolidated non-financial statement issued by (a) a parent company subject to the same requirement to issue the non-financial statement or (b) a EU parent company that issues the non-financial statement and the consolidated non-financial statement according to Directive 2013/34/EU, as amended by the Non-Financial Reporting EU Directive.

			<p>risk factors e health;</p> <p>d) social aspects relating to staff management, including actions taken to ensure gender equality;</p> <p>e) respect for human rights, the measures taken to prevent violations, as well as actions taken to prevent discriminatory attitudes and actions;</p> <p>f) fight against corruption, both active and passive, with indication of the tools adopted for this purpose.</p>			
NL	<p>Implementation Act, which entered into force on 6 December 2016 (1)</p> <p>La w of 28 September 2016, amending Book 2 of the Civil Code implementing Directive 2014/95 with regard to the publication of</p>	<p>Listed companies and other public interest entities ("PIEs")¹⁸⁶, such as non-listed banks and (certain) insurance companies, if they have more than 500 employees, must set out certain items in a non-financial statement within</p>	<p>Article 2:391(5) of the Dutch Civil Code ("DCC"), which provides a legal basis for prescribing further requirements on the content of the directors' report by governmental decree, has been amended. Article 391.5 of the Dutch Civil</p>	<p>The report should contain non-financial disclosure of information on environmental, social, personnel, human rights, anti-bribery, corruption matters and diversity.</p>	<p>Under the Disclosure of Non-Financial Information Decree, an auditor must verify whether the non-financial statement has been prepared in accordance with the Decree and is consistent with the annual report, and</p>	<p>Fines: not specified.</p>

¹⁸⁶ Public interest entities as defined in Book 2 Title 9 of the Dutch Civil Code: in particular, 'public interest entities' are those which

(a) have outstanding securities admitted to trading on a regulated market of a member state as meant in Article 4, section 1 under 14 of Directive 2004/39/EG 4 in respect of markets for financial instruments (PbEU 2004, L 145);

(b) are credit institutions as meant in Article 3, under 1, of Directive 2013/36/EU with respect to the access to the trade of credit institutions and the prudential supervision of credit institutions and investment companies, (PbEU 2013, L 176), and that are not institutions as meant in Article 2, paragraph 5 of the aforementioned Directive 2013/36/EU;

(c) are insurance companies as meant in Article 2, paragraph 1 of Directive 91/674/EEG with respect to the financial statements of insurance companies (PbEG 1991, L 374); or

(d) are appointed as such by Regulation because of their size or function in society.

	<p>non-financial and diversity information by certain large companies and groups (PbEU 2014, L 330)</p> <p>The Disclosure of Diversity Policy Decree, which entered in force on 31 December 2016 (</p> <p>The Disclosure of Non-Financial Information Decree, which entered into force on 24 March 2017.</p>	<p>the directors' report.</p> <p>The Diversity Decree applies solely to listed companies as spelled out above.</p> <p>In particular, this is the scope of the obligation for large companies which have at least 2 of these three criteria:</p> <p>1. Employees: over 500</p> <p>2. Net turnover: over EUR 40 million;</p> <p>3. or Balance sheet total: over EUR 20 million,</p>	<p>Code reads:</p> <p>"Additional requirements may be set by Order in Council regarding the content of the annual report. These additional requirements may relate particularly to the compliance with a code of conduct which is pointed out for this purpose in that Order in Council and to the content, disclosure and audit of an opinion (certificate) on corporate governance".</p> <p>Under the amended rules, the non-financial statement must be included in addition to the corporate governance statement.</p> <p>Under Article 391.1 of the Dutch Civil Code:</p> <p>"if necessary for a proper understanding of the developments, the results or the position of the legal person and group companies, the analysis shall include both financial and non-financial performance-</p>		<p>whether the non-financial statement contains any material misstatements considering the knowledge and understanding of the undertaking and its environment obtained during the performance of the audit procedures.</p> <p>Under the Decree adopting further requirements on the contents of the management report, as amended by the Disclosure of Diversity Policy Decree, an auditor must verify whether the statement on the diversity policy in relation to management and supervisory boards' composition are included in the corporate governance statement.</p>	
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			<p>indicators, including environmental and personnel matters”.</p> <p>The details of the report are foreseen in the Disclosure of Non-Financial Information Decree.</p> <p>The Disclosure of non-financial information decree requires companies to include the following items within the directors’ report: (i) a brief description of the undertaking's business model, ii) a description of the policies of the undertaking in relation to environmental, social and employee matters, respect for human rights, and anti-corruption and bribery matters, including the implemented due diligence processes, (iii) the outcome of those policies, (iv) the principal risks related to the policies and how the risks are managed, and (v) disclosure of non-financial</p>			
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			<p>key performance indicators relevant to its particular business. The statement must also contain all the information that is necessary for an understanding of the undertaking's development, performance, position and impact of its activities</p> <p>When a company does not have policies on one or more of those matters, the non-financial statement provides a clear and well-founded explanation for not doing so. Companies may rely on national, European Union-based or international frameworks for their reports.</p> <p>"In the corporate governance statement within the directors' report, large listed companies must also provide information about their diversity policy for the management</p>			
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			<p>board (for one-tier boards) or the management and supervisory boards (for two-tier boards). The undertaking has to set out the objectives of the diversity policy, how it has been implemented and the results in the reporting period. If the undertaking does not follow this policy, the statement must contain an explanation as to why this is the case.</p> <p>Article 2:391(5) of the DCC already provides a legal basis for the diversity policy statement. Further details of this regulation are included in the Disclosure of Diversity Policy Decree, which amended the Decree adopting further requirements on the contents of the management report”¹⁸⁷.</p> <p>If the company is parent company of a group of</p>			
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¹⁸⁷ <https://www.stibbe.com/en/news/2017/april/act-implementing-the-directive-on-disclosure-of-non-financial-information-and-diversity>.

			companies, the statements should also cover the group.			
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Building on both European Union (EU) law and chosen Member States' legislation, this study aims at understanding to what extent Member States are supporting the development and the implementation of CSR strategies in the business community, with particular focus on due diligence requirements. It also attempts at providing some recommendations aimed at possibly developing a comprehensive and structured approach to CSR for the whole of the EU.