

Briefing

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Substantive Elements of Potential Legislation on Human Rights Due Diligence



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Substantive Elements of Potential Legislation on Human Rights Due Diligence

ABSTRACT

This briefing provides an overview of the existing legislative approaches to mandatory Human Rights Due Diligence and proposals by non-state actors, concerning the scope of potential European Union (EU) legislation on binding human rights due diligence (HRDD) obligations for companies. The briefing discusses key substantive elements of potential EU HRDD legislation including options for human rights covered by the due diligence requirement; types of violations; specific references regarding women and persons in vulnerable situations and the duties of companies to respect and protect human rights. It is recommended that a potential EU HRDD legislation should comprise all human rights and cover all types of violations. The legislation should refer to additional duties, which can be based on existing human rights treaties and instruments such as CEDAW, CRC, CRPD and UNDRIP. The legislation should cover all companies independently of their size and take a non-sector specific approach. Furthermore, the legislation should not apply solely to the company's own activities, but also to its business relations including the value chain. Finally, the legislation should adopt a substantive due diligence model and require companies to engage actively in analysing, mitigating and remedying any adverse impacts on human rights based on their own activities and connected to them in their business relations.

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Table of contents

Acronyms and Abbreviations	iv
1 Introduction	1
2 Methodology	2
3 Key elements of future HRDD legislation	4
3.1 Scope of human rights covered	4
3.2 Types of human rights violations covered	6
3.3 Vulnerable groups	6
3.4 Companies covered	7
3.5 Business activities covered	10
3.6 Duties of companies and enforcement	11
4 Conclusion and Recommendations	14
Bibliography	16

Acronyms and Abbreviations

BHR	Business and Human Rights
BHRRC	Business and Human Rights Resource Centre
CEDAW	Convention on Elimination of All forms of Discrimination Against Women
CEO	Chef Executive Officer
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisations
CSR	Corporate Social Responsibility
EC DG JUST	European Commission's Directorate-General for Justice and Consumers
ECCJ	European Coalition for Corporate Justice
EP	European Parliament
EP DROI	European Parliament's Human Rights Subcommittee
ESD	EU Employers' Sanctions Directive
ETUC	European Trade Union Confederation
EU	European Union
HRDD	Human Rights Due Diligence
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on All Migrant Workers and Members of Their Families
ILO	International Labour Organization
mDD	Mandatory Due Diligence
mHRDD	Mandatory Human Rights Due Diligence
OECD	Organization on Economic Co-operation and Development
SMART	Sustainable Market Actors for Responsible Trade
SME	Small and Medium Enterprises
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council

1 Introduction

This briefing aims to provide a concise and targeted legal overview of options for key elements of mandatory Human Rights Due Diligence (mHRDD) including their material scope, so as to support the European Parliament (EP) Committees in preparing Parliament's position on possible future human rights due diligence legislation at the European Union (EU) level. The briefing will focus on key issues requested by the EP's Human Rights Subcommittee (EP DROI). For a comprehensive analysis of existing national and European level legislation along with stakeholders' current mind-set and awareness of the issues covered, readers are advised to consult the study on due diligence requirements through the supply chain (EC DG JUST Study 2020) commissioned by the European Commission's Directorate-General for Justice and Consumers (EC DG JUST).

The concept of human rights due diligence is understood here as being in line with the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs) (UNHRC 2011a, UNHRC 2011b), which described it as a process aimed at operationalising corporate responsibility to respect human rights. The UNGPs' approach indicating that business enterprises – irrespective of their size and sector – should have in place 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights' (UNGPs Principle 15, Principle 17 and the commentary to it) has been subsequently reinforced by other international organisations, such as the Organization on Economic Co-operation and Development (OECD, 2011; OECD, 2018) and the Council of Europe (CoE, 2016), amongst others (EC DG JUST Study 2020, Ch.III (3), p. 156-191). Of particular importance in this context is the [OECD Due Diligence Guidance for Responsible Business Conduct](#) (OECD 2018), the plain, accessible language explanations of which help to promote a common understanding among all stakeholders on due diligence compliant with that of the UNGPs.

Over recent years, some states have at least addressed certain elements of Human Rights Due Diligence (HRDD) by establishing laws and policies (e.g. the United Kingdom (UK)'s *Modern Slavery Act 2015*, France's *Corporate Duty of Vigilance Law* and the Netherlands' *Child Labour Due Diligence Law*) that business enterprises within their scope are required to follow. Furthermore, the EU has implemented certain actions listed in a renewed strategy for Corporate Social Responsibility (CSR) adopted in 2011 (EC COM (2011) 681 final) and made progress through the Business and Human Rights agenda (EC SWD (2019)143 final). The past few years have seen a revision of the Public Procurement Directives (2014), the adoption of the EU Regulation on Conflict Minerals (2017) and of the Non-financial reporting Directive (2014), to name just a few. Yet, those efforts are insufficient. As is pointed by the EC DG JUST 2020 study, while the introduction of reporting requirements has created positive impact by raising awareness and stimulating internal conversations within companies, its effect on the actual improvement of due diligence seems to be minimal. Its inherent limitation lies in the requirement for enterprises to report on their due diligence only if they have introduced such policies, but none are obligated to do so. Thus despite efforts undertaken so far, the voluntary part of the 'smart mix' called for by the former UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie, seems to have reached the limits of its potential and, as - stressed by Heidi Hautala, Vice-President of the European Parliament, 'There is more and more understanding that the smart mix prescribed by the UN Guiding Principles on Business and Human Rights means that there needs to be legislation in order to reach the stated aims' ([BHRRRC mDD portal](#))¹.

While demands for mandatory due diligence covering EU-based companies have been in place for a while – for instance, the 2016 [corporate accountability 'green card initiative' from eight national parliaments](#) and [Council Conclusions](#) from the same year as well as the European Parliament 2016 Resolution on corporate liability for serious human rights abuses in third countries ([P8_TA\(2016\)0405](#)), the European Parliament

¹ Business and Human Rights Resource Centre (BHRRRC) - Mandatory Due Diligence (mDD) Portal, <https://www.business-humanrights.org/en/mandatory-due-diligence>, last accessed on 24 April 2020.

2017 Resolution on the impact of international trade and the EU's trade policies on global value chains ([2016/2301\(INI\)](#)) together with the European Parliament's Resolution of 29 May 2018 on sustainable finance ([P8_TA\(2018\)0215](#)) – during recent months there has been an intensification of calls for concrete actions, especially a general message from the December 2019 Finnish Presidency event, [Business & Human Rights: Towards a Common Agenda](#). This suggests that legislation on human rights and environmental due diligence with enhanced access to judicial remedy as well as a comprehensive EU Action Plan on Business and Human Rights (Agenda for Action on BHR – Outcome Paper, 2019) is clearly expected from the current Commission (Patz & Saller, 2020). While such expectations have traditionally come mainly from civil society organisations (CSOs) (e.g. 100 CSO Statement 2019) and trade unions, more and more businesses are now calling for additional specific regulation to provide clarity and thereby a “level playing field for all” (Grabitz, Zacharakis, 2020; Fox 2019), as the patchwork of national laws and EU level legislation in some areas and sectors is becoming increasingly difficult to navigate (EC DG JUST Study, 2020, p. 226). Such an approach is aligned with shifting international trends, exemplified by the Business Roundtable Statement on the Purpose of a Corporation (Business Roundtable Statement on the Purpose of a Corporation, 2019), signed by 181 chief executive officers (CEOs). This statement attracted international public attention, because it moved away from the shareholder primacy in its Principles of Corporate Governance which it had endorsed ever since 1997, towards a commitment ‘to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders’.

This briefing will undertake a comparative review of already existing – often contradictory – approaches (positions, proposals and recommendations) concerning various aspects of the envisaged mHRDD legislation at European level. Along with a substantive assessment of the feasibility, strengths and weaknesses of different approaches, the review's aim is to provide a clear picture of the current discussion to identify which approaches and solutions convey broader as well as more diversified support by experts and professionals active in the human rights and business areas.

The briefing has been developed on an assumption that EU human rights due diligence legislation would be horizontal (cross-sectoral) and would address a broad spectrum of negative effects on human rights. These could cover business-related abuses linked with companies operating in and from the EU, including their foreign subsidiaries and supply chains, particularly in situations where parent companies issue consolidated accounts covering foreign subsidiaries (as is the case in anti-trust and competition laws), and especially where they are linked either directly through their presence and investment in third countries or indirectly through liability along supply chain/established commercial relations (See also EC DG JUST Study, 2020, p. 206, 274-276).

Based on EU documents and instruments as well as national laws and proposals together with any gaps identified in previous sections, the final part of this briefing will develop recommendations on how the EP might approach the advancement of its position on mHRDD.

2 Methodology

Our briefing is based on a systemic desk-based, comparative review of existing relevant national and supranational level legislation along with selected proposals for legislation which are significantly concrete in addressing the key questions covered in this briefing. More specifically, we review existing national laws in the United Kingdom, France and the Netherlands; four EU legislative acts, and two proposals for national legislation from Switzerland and Norway. These instruments were selected because they are frequently referred to in the mHRDD debate, even though they do not all exemplify such legislation in the strict sense. However, the different instruments do illustrate the range of regulatory options available for the scope of potential EU legislation on binding HRDD obligations. Additionally, three position papers by non-state actors were examined, to explore whether or not the arguments they raise introduce new ideas and

different perspectives into the discussion. Where appropriate and relevant, the briefing also took other material into account, including policy proposals, institutional studies, scholarly materials as well as civil society and other non-state actors' reports, statements and proposals, as listed below. The latter were selected on the basis that they might suggest elements for legislation not found in the existing laws. While not necessarily exhaustive, this selection does cover all central aspects shaping the mHRDD debate.

National laws:

- Modern Slavery Act 2015 (c.30) (UK);
- Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2015 (France);
- Wet zorgplicht kinderarbeid, 2019 (the Netherlands).

EU legislative acts:

- 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 (hereafter: NFR Directive);
- Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (hereafter: Conflict Minerals Regulation);
- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (hereafter: EU Employers' Sanctions Directive);
- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (hereafter: EU Timber Regulation).

Proposals for national laws:

- Proposal of the Swiss Responsible Business Initiative (Verein Konzernverantwortungsinitiative 2019);
- Draft for an Act relating to transparency regarding supply chains, the duty to know and due diligence of the Ethics Information Commission of Norway (Etikkinformasjonsutvalget, 2019).

Non-state actors position papers and recommendations:

- European Coalition for Corporate Justice (ECCJ) Legal Brief: EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment, February 2020 (ECCJ, 2020) and Position Paper, June 2018 (ECCJ, 2018);
- Amfori, Human Rights Due Diligence Legislation in Europe. Position paper, February 2020 (Amfori, 2020);
- The European Trade Union Confederation (ETUC), ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct, Adopted at the Executive Committee Meeting of 17-18 December 2019 (ETUC, 2019).

Additionally, attention was given to the recently released Study on due diligence requirements through the supply chain commissioned by the European Commission DG JUST (EC DG JUST Study, 2020).

3 Key elements of future HRDD legislation

The key elements of human rights due diligence regulations concern (i) human rights abuses and other types of violations covered by the legislative instruments, with special reference to vulnerable groups, (ii) the companies covered by the legislation and (iii) duties of companies imposed by the legislation.

3.1 Scope of human rights covered

The first question concerning any HRDD legislation relates to the scope of human rights it should cover. The UNGPs themselves are ambiguous in this regard as they state in Principle 12 that the responsibility of business enterprises to respect human rights ‘refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights (IBHR) and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work’. As explained in the respective commentary, the International Bill of Rights comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Commentary to UNGPs Principle 12). These three instruments are central to the international human rights regime and cover many human rights which have been further detailed in additional conventions and instruments. However, this approach is not exhaustive. It does not refer to other core human rights instruments such as the Convention on Elimination of All forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) or the International Convention on All Migrant Workers and Members of Their Families (ICRMW)². In this respect, it needs to be recalled that the Commentary to UNGPs Principle 14 clarifies that ‘depending on circumstances, business enterprises may need to consider additional standards’, including both human rights group-specific or issue-specific UN instruments and, in situations of armed conflict, also the standards of international humanitarian law³. Furthermore, in light of close links between the protection of human rights and the environment, consideration should be given to the inclusion of references to environmental protection and impact assessments, as suggested in the Framework Principles on Human Rights and the Environment developed by the Special Rapporteur on human rights and the environment in 2018⁴.

While the UNGPs’ approach seems to leave the decision up to a company as to whether or not it will follow more detailed, group- or issue-specific standards, the UNGPs should not be read as limiting the list of rights to be respected to the IBHR or the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. It is noteworthy in this context, that the OECD Guidelines expect due diligence to cover all human rights and environmental impacts. As reinstated in the 1993 Vienna Declaration and Programme of Action (Optional Protocol 5), given that ‘all human rights are universal, indivisible and interdependent and interrelated’, excluding any single right from the protection or obligation to respect, would at the very least inevitably result in adverse impact and abuse of other rights, some of which might in fact fall within the scope of the IBHR and the ILO Declaration. The EP has also regularly reaffirmed that ‘the activities of all companies, whether operating domestically or across borders,

² While ratification level of ICRMW is low (only 55 countries ratified it and 13 signed it; including none of the EU Member States), migrant workers are among the most vulnerable groups, and more easily subjected to forced labour and/or human trafficking than non-migrant population. They are also often less protected due to the specifics of temporary, posted, outsourced etc. work contracts than workers employed on standard employment terms. This situation is exacerbated during economic crisis. For more information about the ICRMW please see dedicated United Nations website <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>. For up to date information on the status of ratifications see: <https://indicators.ohchr.org/>

³ On the importance of human rights of persons in vulnerable situations see Section 3.3.

⁴ Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Annex, 24/01/2018, A/HRC/37/59.

must be in full compliance with international human rights standards’ (European Parliament, 2020, para. 50).

Existing and proposed HRDD laws differ concerning the scope of human rights covered. Three models can be identified:

1. A first model covers only a very narrow set of human rights. For example, the UK Modern Slavery Act of 2015 covers only the prohibition of slavery, servitude, forced or compulsory labour and human trafficking whilst the Dutch Child Labour Due Diligence Act of 2019 addresses only the prohibition of child labour, as understood in International Labour Organization (ILO) Conventions 182 and 138. While these specific human rights are arguably among the most commonly affected in supply chains, such a limitation significantly deviates from the approach of the UN Guiding Principles and relevant EP resolutions calling for HRDD (e.g. European Parliament, 2018, para.11, 2016, para.18, 19).
2. A second model covers all human rights. While the terminology differs among various instruments and proposals (e.g. ‘droits humains et les libertés fondamentales’ in the French Loi de Vigilance, ‘internationally recognised human rights’ in the Swiss initiative proposal or simply ‘human rights’ in the EU NFR Directive⁵), it is clear that these instruments are not limited in regard to the scope of human rights covered. The majority of existing and proposed HRDD obligations seem to follow such an approach. This concurs with the 2020 EC DG JUST Study, according to which the majority of respondents, including those in businesses, would prefer a non-issue specific approach (EC DG JUST Study 2020). Similar suggestions can be found in non-state actors’ policy papers (Amfori 2020, p. 4; ECCJ 2020).
3. A third model covers all human rights, but refers to specific treaties. The legislative proposal in Norway covers ‘internationally recognised human rights as expressed in the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the ILO’s fundamental conventions on fundamental rights and principles at work.’ It also contains special duties concerning forced labour, child labour and other collective labour rights and hence seems to combine both models. Some non-state actors’ proposals highlight the need for specific rights to be given special attention (e.g. ETUC – worker’s rights, 2019).

In light of the above arguments and existing laws and legislative proposals, it is suggested that any future HRDD should apply to all human rights. This would avoid legal uncertainties and the artificial separation of human rights, which could be the consequence of an approach focussing only on slavery or child labour. However, by way of clarification, it might be useful to mention the most important human rights instruments in order to avoid the uncertainties of an approach referring only to ‘fundamental rights’. In light of its broad acceptance, the UNGPs seems to be a useful basis. The legislation could thus refer to the Universal Declaration on Human Rights (UDHR), the two covenants (ICCPR and ICESCR) and the human rights conventions addressing rights of persons in vulnerable situations such as CEDAW, CRC, CRPD and the ICRMW. 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), could be mentioned. These legal instruments and documents are specifically mentioned in the UNGPs, which are widely accepted both by businesses and their associations, as well as by civil society organisations. It is therefore suggested to build on this global consensus.

Human rights, as enshrined in the International Bill of Rights and other global instruments, are also reflected in regional instruments such as the European Convention on Human Rights, the European Social Charter, the Inter-American Convention on Human Rights (including the Protocol of San Salvador) and the

⁵ It should be noted that while the Non-financial reporting directive refers to human rights generally, its operative elements may have a more limited approach. In particular, companies can choose to base their reporting only on the ILO Tripartite Declaration on MNEs. Companies choosing this option would then NOT report on all human rights.

African Charter on Human and Peoples' Rights. However, to the extent that these regional instruments contain substantially the same rights as global instruments, it seems that there is no additional value to be gained from referring to them in HRDD legislation. To the extent that they go beyond global instruments - for instance in the case of collective rights within the African Charter - they do not reflect a global consensus. Generally, references to regional instruments could be misunderstood as suggesting that EU companies would have to take different regional instruments into account depending on the country in which they operate.

3.2 Types of human rights violations covered

The next aspect of HRDD legislation's material scope concerns a possible distinction between different types of human rights abuses/violations based on their severity. The UNGPs themselves do not refer to such a differentiation, but nevertheless indicate that some negative impacts on human rights are more severe than others (UNGPs Principle 14 and commentary thereof). Yet, the UNGPs are clear that they cover all types of human rights violations⁶.

Most existing legal instruments do not distinguish between different types of human rights violations based on their severity. Only the French *Loi de Vigilance* is limited to 'severe violations'. However, the law does not define this term. Moreover, there is no internationally recognised definition of 'severe violation' as such, which consequently makes its use ambiguous as well as problematic from the perspective of legal certainty and hence questionable as a model for EU level legislation. While international criminal law refers to 'severe violations', any reference to this term in mHRDD legislation would need to be defined for reasons of legal certainty.

It seems more appropriate to incorporate the seriousness of a human rights violation in companies' respective responses as part of the proportionality principle, as also indicated in the UNGPs. For example, Principle 24 states that '[w]here it is necessary to prioritise actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are **most severe** or where delayed response would make them irremediable' (emphasis added). This also seems to be the French legislator's intention although the wording used in the *Loi de Vigilance* is not clear in this regard (Brabant et al, 2017). It should be also noted that salient human rights issues will differ not only between companies, but also within the same company at different times. This is due to different internal and external context aspects coming into play with each newly employed person or each new localisation or even simply with a change of government in the country of operations.

In light of the above, it is recommended that potential HRDD legislation not be limited to severe violations but cover all types of violations. Concerning the actual obligations, the legislation could refer to the language used in UNGPs Principle 24 and suggest that when companies need to prioritise, they should focus on situations and activities with more severe impacts.

3.3 Vulnerable groups

International human rights law specifies that the human rights of women, children, indigenous people and other groups may require special attention as well as additional activities by states and other actors due to the vulnerable situations in which these people find themselves. While their rights are covered by the core universal instruments of the International Bill of Rights, thematic instruments such as for example CEDAW, CRC, CRPD, or relevant instruments at regional level provide further clarity as to what is required to ensure respect for human rights in the case of particularly vulnerable groups.

⁶ The present study uses the term 'violations' in general terms as suggested in the Specifications for this briefing, even though companies technically do not 'violate' human rights in the legal sense, because they are not formally and directly bound by international human rights. Hence, the UNGPs speak of human rights abuses or adverse impacts on human rights.

The UNGPs themselves do not spell out any specific obligations in this regard as far as the operative sections are concerned. However, the commentary to UNGPs Principle 12 clearly states that ‘enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, UN instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.’ (UNGPs, Commentary to Principle 12). This raises the question of whether, and if so, how human rights due diligence legislation should incorporate additional standards for groups or persons in vulnerable situations.

Existing legislation does not explicitly refer to any special duties in this regard with the exception of the Dutch Law which focusses only on the rights of children. In contrast, civil society organisations have called for ‘additional standards defined in international treaties for the protection of the rights of particularly vulnerable groups or individuals such as indigenous peoples, migrants or women.’ (ECCJ Position Paper, 2018). Furthermore, the CoE Recommendation on Business and Human Rights suggests that HRDD should contain additional protection for children and indigenous peoples (CoE Recommendation, 2016). It should be noted that these proposals do not go beyond a mere recognition of these groups’ special vulnerability and the requirement for additional measures.

In light of the existing standards of international human rights law, it is recommended that HRDD legislation should refer to those additional measures which can be based on current human rights treaties and instruments such as CEDAW, CRC, CRPD and UNDRIP as these instruments either have to be ratified by all EU Member States (and the EU itself as in the case of the CRPD) or constitute customary law (such as the main principles of UNDRIP). However, any HRDD legislation should also emphasise the universal and indivisible character of all human rights and focus on the notion of ‘special measures’ which may be required to discharge an HRDD obligation fully.

3.4 Companies covered

UNGPs 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.’ Yet, while this UNGPs Principle goes on to stress that ‘the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors’ it also highlights that the severity of any enterprise’s adverse human rights impacts, which is determined in this context by its graveness, scope and irreversibility of the negative impacts, also needs to be taken into account. The Commentary to UNGPs Principle 14 acknowledges 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.’

This raises the question of whether or not HRDD legislation should apply only to some companies – for instance, as far as size and sector are concerned. Existing legislation and proposals differ significantly in this regard. The French Due Diligence Law applies only to companies employing at least 5 000 employees, including its direct and indirect subsidiaries, for two consecutive financial years. The UK Modern Slavery Act’s transparency requirement applies only to commercial organisations fulfilling a minimum turnover, as prescribed in regulations issued by the Secretary of State, although it is not limited to companies registered in the UK. Similarly, EU rules on non-financial reporting apply only to large (i.e. above certain annual turnover or annual balance sheet thresholds) public-interest companies with more than 500 employees. The EU Conflict Mineral Regulation applies to EU importers, smelters and refiners, as long as their annual import volume of the minerals or metals concerned is above certain volume thresholds. Additionally, the EU Timber Regulation, which entered into force in 2013 although its adoption predates the UNGPs, applies only to timber importers who place timber and timber products on the EU market.

Conversely, the Dutch Law 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. The EU Employers' Sanctions Directive (ESD) imposes obligations on all employers (and *de facto* all companies if consideration is made to the joint liability regime it introduces), additionally providing for a joint liability (art. 8 ESD) of a contractor and subcontractor, where a subcontractor breaches the terms of the directive (i.e. employs an undocumented third country national, or does not pay him/her remuneration, or does not pay fines and penalties, and back taxes or social insurance contributions). This applies unless the contractor can prove fulfilment of due diligence obligations as defined by national law, including informing any subcontractor about existing regulations as well as the illegality of employing undocumented third-country nationals (i.e. those who have no authorisation to stay in a given country) and its consequences (art. 8 ESD).

It is, therefore, clear that the majority of existing legislation applies only to companies of a **certain size**, as legislators seem to have considered that the respective requirements would be too burdensome for smaller companies. However, this is not the approach taken by the UNGPs. It is also difficult to come up with clear and coherent thresholds, as can be seen by the variety of approaches taken by existing legislation. Furthermore, any threshold carries with it a risk of circumvention or creative restructuring by companies. Finally, the risk of negative impact resulting in the irreversible abuse/breach of human rights is not limited only to bigger companies – lack of diligence by a small company can just as well result in serious violations as loss of health and life⁷.

Regarding the issue as to whether the legislation should be **sector or non-sector specific**, national legislation has been adopting to date a non-sector specific approach, whereas EU legislation has so far taken a mixed approach. The NFR Directive takes a non-sector specific approach. However, the Conflict Minerals Regulation and the Timber Regulation apply to specific sectors (importers of minerals and metals and smelters, and in case of the latter, importers of wood). The EC DG JUST study, though, points out that 'stakeholders have confirmed that there is no sector of business which does not pose any potential risks to human rights or the environment' (EC DG JUST study, 2020, p. 226).

The EC DG JUST Study (in section 5 of Chapter II Market Practices and IV Problem analysis) provides a thorough breakdown of various regulatory options⁸. Option 4 ('New regulation requiring mandatory due diligence as a legal duty of care'), appears to have, depending on proper monitoring and enforcement, the most significant and positive human rights and environmental impacts (EC DG JUST mHRDD study, 2020, p. 23). It is divided into the following sub-options in regard to different scopes of business which should potentially be covered and different types of requirements:

- 'Sub-option 4.1: New regulation applying to a narrow category of business (limited by sector);
- Sub-option 4.2: New regulation applying horizontally across sectors:

⁷ For example, the Interpretive Guide to the Corporate Responsibility to respect human rights highlights that while "in many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations" yet "size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor. For instance, a small company of fewer than 10 staff that trades minerals or metals from an area characterized by conflict and human rights abuses linked to mining has a very high human rights risk profile. Its policies and processes for ensuring that it is not involved in such abuses will need to be proportionate to that risk." (OHCHR, 2012, p.20)

⁸ Apart from Option 4 referred to above, the EC DG JUST mHRDD study presents also pros and cons and initial impact assessment of three other main options i.e. no policy change (option 1), new voluntary guidelines/guidance (option 2) and new regulation requiring due diligence reporting (option 3). Yet it states also that the 'Options 2 and 3 are expected to have only a minor positive social impacts. Since these options only provide new guidance or require reporting but do not substantively require companies to take any due diligence measures, it is not expected that substantial additional measures would be taken by companies to address social matters.' (EC DG JUST mHRDD study, 2020, p. 23). This footnote is of relevance also to section 3.6 below.

- Sub-option 4.2(a): applying only to a defined set of large companies;
- Sub-option 4.2(b): applying to all business, including SMEs;
- Sub-option 4.2(c): 4.2 (c) general duty applying to all business plus specific additional obligations applying only to large companies;
- Sub-option 4.3: Sub-options 1 and 2 accompanied by a statutory oversight and/or enforcement mechanism:
 - Sub-option 4.3(a): mechanisms for judicial or non-judicial remedies;
 - Sub-option 4.3(b): state-based oversight body and sanction for non-compliance.'

Since the limited scope of this briefing does not allow for an analysis of the advantages and disadvantages of each option in terms of improved human rights protection as well as impacts and potential costs for businesses and states, readers are recommended to consult the full EC DG JUST Study or the Synthesis Report in Annex 1 thereof which provides a condensed overview of the different options⁹.

However, aside from the variety of possible approaches to the scope of companies to be covered by mHRDD, the legislator should take into account that most companies' activities, irrespective of their size or sector, can have adverse impacts on human rights. Accordingly, size and sector should not be determining factors in allocating human rights obligations, as suggested by the Dutch Law on Due Diligence concerning Child Labour. However, it is a different matter whether all companies should comply with the same mHRDD requirements.

It is, therefore, suggested that HRDD legislation should not exclude a priori any company from its obligation to implement HRDD, but should address the special challenges of small and medium enterprises (SME) and/or specific sectors through various regulatory options, thereby concretising the proportionality principle which would allow for a differentiation of obligations. 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 stage¹⁰. This would also be in line with the EP (EP, 2016, OP 8, 9) indication that 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 EU¹¹, with many not being in a position to carry the same burden of additional obligations large, multinational companies¹².

This approach (i.e. that all companies operating in the EU are to carry out HRDD, but proportionate to the size/leverage in the supply chain and commensurate with the nature of the adverse impact), seems also to be recommended by NGOs and some businesses organisations (e.g. Amfori, 2020) and coincides with the

⁹ It should be stressed, though, that this study did not aim to provide recommendations as to any specific approach that the EU should take, but to provide pros and cons of various options.

¹⁰ It should also be noted that even for large companies a certain time will be needed to adjust procedures, provide necessary training and budgets to ensure proper implementation of the potential new legislation. Hence some of the stakeholders (see e.g. Amfori, 2020) recommend that a phased/delayed approach is taken in terms of consequence for non-compliance. This approach has also been adopted by the EP.

¹¹ In 2015, the overwhelming majority (92.8 %) of enterprises in the EU's [non-financial business economy](#) were those with less than 10 persons employed (micro enterprises). In contrast, just 0.2 % of all enterprises had 250 or more persons employed and were therefore classified as large enterprises: *European Commission, Small and medium-sized enterprises: an overview*, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20181119-1>.

¹² The extent to which the SMEs should meet the same mHRDD obligations is one of the most discussed issues. For example the EC DG JUST mHRDD study points that according to the survey results 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 other argued that many of the risks in their supply chain relate to the activities of SMEs.' (EC DG JUST mHRDD Study, 2020, p. 17, See also p. 254-255).

preferences of business in the EC DG JUST mHRDD study (EC DG JUST mHRDD study, 2020, Chapter II – Market Practices).

Existing legislation and proposals do not specifically address the obligations and roles of **state-owned enterprises**. However, UNGPs Principle 4 clearly state that states ‘should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies’, and thus lead by example. This was also emphasised by the European Parliament which called on the EU and Member States to prioritise for immediate action the establishment of mandatory human rights due diligence for business enterprises which are owned or controlled by the state and/or receive substantial support and services from state agencies or European institutions as well as for businesses that provide goods or services through public procurement contracts (EP, resolution 2016). It is also noteworthy that some EU Member States have applied the non-financial reporting requirements to all state-owned enterprises (for example, Sweden: Swedish Government, 2017, p. 9; Swedish Government, 2018; Denmark: Danish Financial Statements Act¹³, that covers also non-financial reporting, applies to all listed companies and to state-owned limited liability companies, irrespective of their size). It is, therefore, recommended that the special role and function of state-owned enterprises be addressed in potential mHRDD legislation. These enterprises should have the same duties as other larger enterprises, regardless of their size.

Finally, if the legislation is really to provide an equal level playing field, it should apply to companies domiciled in an EU Member State and also to those companies placing products or providing services in the internal market. Otherwise, EU companies bound by the rules will be competing with non-EU companies not subject to the same due diligence obligations.

3.5 Business activities covered

A key issue in the debate about the scope of potential HRDD legislation concerns whether the relevant obligations should cover only the activities of the parent company or extend to subsidiaries and contractors in the supply chains. The UNGPs refer to this issue in Principle 13 which states that companies should (also) seek to prevent or mitigate adverse human rights impacts ‘that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.’ The commentary states that business relationships ‘include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.’

The French Due Diligence law requires that risk assessment covers the ‘situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship.’ This wording clarifies that due diligence extends to subsidiaries and entities with which the company has an established commercial relationship. It is unclear whether this refers exclusively to the first tier of a supply chain (direct contractual partner) or to additional tiers further along the chain. Due diligence according to the Dutch Law addresses the question of whether ‘goods or services to be supplied have been produced using child labour’, which could also be understood as covering only the first tier of a supply chain if interpreted narrowly. The law stipulates that “a company which receives goods or services from companies which have issued a [due diligence] declaration [...] is also exercising due diligence with respect to those goods and services” This suggests that a company may discharge its due diligence obligation by only considering its immediate contractual partner, because it refers to the direct reception of goods and services from other companies.

Most civil society actors and trade unions have suggested that due diligence should include supply and subcontracting chains, including suppliers and contractors operating abroad (ECCJ 2020, ETUC 2019, EC

¹³ Årsregnskabsloven, LBK nr 838 of 08/08/2019, available at <https://www.retsinformation.dk/eli/lt/2019/838>

DG JUST Study 2020), in particular where parent company provides consolidated accounts for its foreign subsidiaries, as is often the case in anti-trust proceedings (Riesenkamff and Krauthausen, 2010), or in situations covered by the (rebuttable) presumption of parental liability as in cases concerning competition regulations¹⁴.

In light of the UNGPs' approach and existing proposals for legislation, it is recommended that future HRDD 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 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. Accordingly, for the sake of greater clarity, it would be beneficial if the legislation could explicitly state that companies' due diligence not only covers first-tier contract partners, but that obligations extend to a company's potential influence over additional tiers of the supply chain ('n-tier' suppliers).

3.6 Duties of companies and enforcement

The core concern about any HRDD legislation pertains to companies' duties and their enforcement. The UNGPs clearly state that human rights due diligence forms the main element of a corporate responsibility to respect human rights, but they do not specify the regulatory approach that states should be using regarding reporting, substantive due diligence obligation, civil/criminal liability, administrative fees, or all the aforementioned combined.

Existing state practice indicates two different approaches: a reporting (transparency) model and a due diligence model.

1. The UK Modern Slavery Act and the EU NFR Directive are typical examples of a reporting (transparency) model and rely on companies' requirement to inform. The UK Modern Slavery Act requires either a statement of the steps an organisation has taken during the financial year to ensure that slavery and human trafficking has not taken place or a statement that the organisation has taken no such steps. Hence, there is no obligation to engage in any activity. The EU NFR directive requires a statement of the company's impact on human rights. Existing evidence suggests that relying solely on reporting obligations has only a limited effect in incentivising companies to respect human rights. (ACT Research Report, 2019; EC DG JUST mHRDD study, 2020; Valuing Respect Project, 2019)¹⁵.
2. The French Due Diligence Law and the Dutch Child Labour Law are examples of the due diligence model. The French Law requires companies to engage in due diligence and publish a vigilance plan

¹⁴ The rebuttable presumption of parental liability is an instrument of the Commission in fighting Article 101 TFEU infringements.

¹⁵ According to [Corporate Human Rights Benchmark 2018 results](#), in 2018 40 % of the largest companies in the world failed to show any evidence of identifying or mitigating human rights risks in their supply chains, while the findings of the 2019 CHRB assessment which covered twice as many companies, show quite similar results – with companies scoring on average 21 % (3.2 out of 15) under the human rights due diligence assessment area, and nearly half (49 %) of the companies assessed scoring zero against every HRDD indicator. (CHRB, 2019, p. 8). According to the '[Study on due diligence requirements through the supply chain. Final Report](#)' (European Commission, Study, 2020, p. 16), 'just over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts, and a further one-third undertake due diligence limited to certain areas. However, the majority of business respondents which are undertaking due diligence include first tier suppliers only.' Also the [Alliance for the Corporate Transparency 2019 Research Report](#), based on the analysis of 1 000 EU companies reporting pursuant to the EU Non-financial Reporting Directive, underlines in its main conclusion that 'while there is a minority of companies providing comprehensive and reliable sustainability-related information, at large quality and comparability of companies' sustainability reporting is not sufficient to understand their impacts, risks, or even their plans.' (ACT, [Research Report 2019](#), Executive summary, p. 10). This is also confirmed by the non-financial reporting analysis results conducted as part of the Valuing Respect Project (www.valuingrespect.org), which looked at non-financial disclosure across the globe (Valuing Respect Project, 2019) and specifically in as yet far-overlooked regions (Faracik & Mężyńska, 2019).

addressing the relevant issues. The law is enforced through a court action by 'any person with legitimate interest in this regard' in which the court is asked to urge the company to comply with the law. Furthermore, a company which has failed to meet its duties under the law shall be liable and obliged to compensate for any harm that due diligence would have sought to avoid.

The Dutch Child Labour Law requires companies to engage in due diligence regarding child labour in the supply chain and to disclose these activities. Implementation of the law is supervised by a regulatory authority (Toezichthouder), which publishes all reports and may impose administrative fines for non-compliance. Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to the Law may submit a complaint to the regulatory authority.

If future legislation were to adopt a reporting (transparency) approach, be it as part of more comprehensive HRDD legislation or stand-alone, it would be advisable to state clearly what and how companies should report, by providing, for instance, a defined set of precise and universally applicable indicators (and underlying methodologies) at least as far as core labour rights, including living wages and gender pay-gaps, are concerned (see Gregor & Houston, 2020)¹⁶. For example, companies could be required to follow the UNGPs' Reporting Framework (UNGP's RF, 2015). Mandatory supply chain disclosure, suppliers' lists and subsidiary ownership, could also form part of such a report (or be provided online and with a link provided in the report). Legislation should define the minimum scope of information that needs to be provided in order for the report to meet the required standards and to allow comparability between companies (see: European Parliament, 2018, para. 17). Moreover, to ensure the credibility and accuracy of the information provided, the HRDD legislation should also consider including the requirement for third-party audited reporting (e.g. European Parliament resolution on sustainable finance, 2018, para. 17).

As the effectiveness of mere reporting and transparency requirements have proved limited. It is recommended that future HRDD legislation adopt a substantive due diligence model. It should require companies to engage actively in analysing, mitigating as well as remedying any adverse impacts on human rights based on and connected with their own activities in business relations. It should be mentioned that such an approach is recommended by certain business associations and networks, such as Amfori, which stresses that 'HRDD should be informed by an ongoing risk-assessment and impact-oriented approach to not only identify risks but also remediate adverse impacts' and should be regarded as 'a dynamic process of continuous improvement.' (Amfori, 2020, p. 4) This approach would also be in line with recommendations from both the EP and non-state actors, who point to the need for basing future mHRDD legislation on such recognised international frameworks as the UNGPs and OECD Due Diligence Guidance for Responsible Business Conduct, that set out the HRDD process in order to ensure the approach's conformity and coherent minimum standard (e.g. European Parliament, 2018, para. 11, ECCJ 2020). It would also build on provisions in the EU Timber Regulation, which not only requires timber importers to develop or use a due diligence system to assess the risk that timber has been logged or traded illegally¹⁷, but also

¹⁶ So far it seems that the greatest value gained from NFR reports lay in their shedding light on companies' low level of awareness in regard to human rights. Thus, further steps are needed to ensure that NFR reporting forms a meaningful part of the HRDD process, which informs strategic decision making in the company and results in changes as well as improvements that in turn lead to better respect for human rights. At the same time, research into the non-financial disclosure proved that the lack of clear obligations as to the minimum set of data that needs to be disclosed results in the lack of comparability between reporting companies (and thus limited usefulness to investors or the general public) caused by the companies taking a 'pick & choose' approach to what they want and do not want to show. This could easily be remedied, because as the ACT Research report documented (e.g. 70% of Spanish companies reporting on the gender pay gap compared to the European average of 7,4%), if companies are required by national law to disclose specific information, they do so (see also Gregor, Houston, 2020).

¹⁷ This includes gathering information, evaluating on the basis of the information identified the risk of illegal timber in the supply chain, and taking steps to prevent importing illegal timber, including e.g. by requiring additional information and verification from the supplier.

regards failure to carry out due diligence as an offence, even if the wood itself is shown to be legal. Furthermore, the future mHRDD would also be building on existing EU legislation, given that the EU Employers' Sanctions Directive makes companies jointly liable for the misconduct of their subcontractors, unless they can prove that they have undertaken due diligence in line with the national legislation (art. 8 of the ESD)¹⁸.

During the legislative process, attention should be paid to proposals coming from non-governmental spheres, which sometimes put emphasis on aspects overlooked by other actors. For example, the ECCJ Legal Brief calls for the duty of reporting, under which 'undertakings should publicly report on their due diligence and consultation processes and their results' (in particular actions taken to cease and remedy existing impacts or prevent future recurrences) 'in a public, accessible and appropriate manner' and the 4-stage Duty of due diligence (comprising a) Identification and assessment of real and potential impacts; b) Ceasing and remedying existing abuses; c) Preventing and mitigating risks of abuse; d) Monitoring the implementation and effectiveness of the adopted measures). It also puts strong emphasis on the need for the future legislation to make it clear that consultation – present in all HRDD standards- with stakeholders, representative trade unions and workers' representatives, is vital to HRDD operationalisation at the company level. It also points to the importance of adequate documentation, i.e. the obligation to maintain a written record of all due diligence actions and their results (ECCJ, 2020, p. 5).

Considering the diversity of implementing and enforcement mechanisms for company obligations in EU Member States, it may not be possible to adopt one implementation mechanism which would be universally suitable and effective. It might be more appropriate, therefore, to leave the choice of implementation mechanism to the Member States themselves, or to aim at a mix between EU and Member State responsibilities and mechanisms. The HRDD legislation could and should, though, apart from the definition of what due diligence needs to cover and ensure, include a set of different implementation mechanisms, including administrative, civil and possibly even criminal law instruments together with sanctions, requiring states to adopt approaches which will include penalties deemed sufficient to produce a deterrent effect. In any event, Member States would be required to implement the HRDD legislation effectively in accordance with generally accepted principles of EU law.¹⁹

Finally, it should be also born in mind, that adoption of HRDD legislation at the EU level will not solve all the problems unless at the same time effort is made to ensure consistency and coherence with the goals of existing legislation, lack of which not infrequently affects companies' ability to act responsibly and exert positive leverage on others²⁰.

Regularly updated information on developments relevant to the implementation and enforcement of the EU Timber Regulation can be accessed at the dedicated European Commission's website: https://ec.europa.eu/environment/forests/timber_regulation.htm#diligence.

¹⁸It should be noted however, that with the directive not providing even minimum standard of what that due diligence should entail, in some countries, e.g. Poland, it is enough to inform subcontractor of the legal consequence of employing third-country nationals staying illegally in the country to absolve oneself from responsibility. On the other hand, due to the very narrow interpretation of the General Data Protection Regulation by at least some of the national offices for the personal data protection, the companies have very limited, if any at all, possibility and tools to verify if the statements made by its subcontractors and temporary work agencies are reflecting truth.

¹⁹For an in-depth examination of those aspects within mHRDD legislation, readers may consult the EP 'Briefing on the EU human rights due diligence legislation: monitoring, enforcement and access to justice for victims' along with the EC DG JUST Study. Novel input into the ongoing discussion on this issue can be also found in the non-state actors recommendations, e.g. ECCJ recommends *i.a.* the **civil liability regime that foresees a different liability rules depending on the link between the parent company and the entity directly involved in the harm** (absolute liability for harm caused by controlled and economically dependent entities; strict liability otherwise); disclosure of evidence rules establishing a **fair distribution of the burden of proof**, making sure that it is the company that would have to, at least, clarify its relationship with the entities involved in the harm, and whether it acted with due care and took all reasonable due diligence measures; and **harmonised rules on the limitation period for bringing legal actions**. (ECCJ, 2020)

²⁰See for example findings and recommendations of the project SMART (Sustainable Market Actors for Responsible Trade) funded under the European Union's Horizon 2020 research and innovation programme, available at: https://www.smart.uio.no/reform_proposals.

4 Conclusion and Recommendations

While development of the mHRDD is a very complex endeavour, it should nevertheless be borne in mind that its aim is to ensure respect for the rights of humans, who should not be sacrificed for the sake of company profits and accumulation of wealth. With a shift in the purpose of company paradigms, the time is ripe for adequate provisions to take on a legally binding form, not only to ensure protection of individual rights-holders, but also to ensure a level playing field for companies operating in and from the EU, so that those undertaking efforts to prevent and mitigate negative human rights impacts are not driven out of the market by other companies seeking a competitive advantage through the exploitation of human beings and their environment.

Recommendations:

- **Scope of human rights covered**

It is recommended that any future mHRDD legislation should cover all human rights. To clarify what this refers to, it is important to emphasise the UDHR, the two covenants, further global human rights treaties, the ILO core standards and other internationally accepted instruments of human rights, such as the UNDRIP.

- **Types of human rights violations covered**

It is recommended that a potential HRDD legislation is not limited to severe violations but covers all types of violations. Legislation could however build on the language used in UNGPs Principle 24 stating that when companies need to prioritise, they should focus on situations and activities with more severe impacts.

- **Vulnerable groups**

In light of the existing standards of international human rights law, it is recommended that HRDD legislation should refer to those additional measures, which can be based on existing human rights treaties and instruments, such as CEDAW, CRC, CRPD and UNDRIP. However, any HRDD legislation should also emphasise the universal and indivisible character of all human rights and focus on the notion of special measures which may be required to discharge fully an HRDD obligation.

- **Companies covered**

It is recommended that the overarching mHRDD legislation should cover all companies - either domiciled in an EU Member State or placing products or providing services in the internal market - regardless of their size and take a non-sector specific approach. However, special challenges faced by SMEs and/or issues specific to certain sectors should be addressed through various regulatory options, concretising the proportionality principle which would allow for carefully weighed differentiation of obligations and duties foreseen for enterprises.

- **Business activities covered**

It is recommended that future HRDD legislation should make explicit its application not only to the company's own activities, but also other business relations, including the supply chain. For greater clarity, it would also be beneficial for the legislation to state that it affects not only first tier contract partners, but that a company's obligations and influence must also extend to n-tier suppliers along the value chain.

- **Duties of companies and enforcement**

Having regard to the limited effectiveness of mere reporting and transparency requirements, it is recommended that future HRDD legislation should adopt a substantive due diligence model and require companies to engage actively in analysing, mitigating and remedying any adverse impacts on human

rights, based on their own activities and connected to them in their business relations. To ensure that those duties are implemented adequately, the mHRDD legislation should take a comprehensive approach by highlighting that meeting the duty of diligence requires adequate levels of consultation with stakeholders, documentation together with meaningful reporting that informs strategic decision-making by top management and ensures comparability with other enterprises.

The mHRDD legislation should also foresee provisions that would require EU member states to guarantee adequate country level enforcement and remedy mechanisms. The HRDD legislation should thus include a set of different implementation mechanisms, including administrative, civil and possibly even criminal law instruments together with sanctions in requiring states to adopt approaches that will result in penalties sufficient to have a deterring effect. In any event, Member States would be required to implement the HRDD legislation effectively in accordance with generally accepted principles of EU law.

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