

TOWARDS MANDATORY DUE DILIGENCE IN GLOBAL SUPPLY CHAINS

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at the request of the International Trade Union Confederation (ITUC)

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EXECUTIVE SUMMARY

Human rights due diligence refers to the duty of companies to avoid infringing on the rights of others and to address adverse impacts with which they are involved by identifying, preventing, mitigating and accounting for how they address their impacts on human rights, whether such impacts are caused by the business enterprise itself or are linked to its operations, products or services by its business relationships. The duty to practice human rights due diligence was first introduced in the United Nations Guiding Principles on Business and Human Rights in 2011, as a component of the responsibility of business enterprises to respect human rights. Since then, it has been incorporated in a number of processes and fora, including the OECD Guidelines on Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the Sustainability Framework of the International Finance Corporation, the private sector lending arm of the World Bank Group. We are now seeing human rights due diligence obligations increasingly influencing the conduct of business.

The introduction in domestic legislation of the duty to practice human rights due diligence should be seen as an opportunity to counter the potentially negative impacts of economic globalization on human rights and workers' rights as stipulated in the core ILO conventions. However, to allow the rise of human rights due diligence, in particular, for the strengthening of workers' rights in multinational groups and in global supply chains, a number of conditions should be met, and best practices should be taken as a source of inspiration for legal reform efforts.

In order to contribute to this stock-taking exercise, this report examines a number of instruments adopted at the domestic level in order to implement human rights due diligence. It reviews the EU's non-financial reporting directive (2014/95/EU) as well as two regulations, the 2010 Timber Regulation (No. 995/2010) and the 2017 Conflict Minerals Regulation (No. 2017/821) that seek to impose due diligence obligations in particularly sensitive sectors. It also examines in detail the French Law of 27 March 2017 on due diligence, the Dutch Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid - WZK) of 2019, and the Modern Slavery Act which the United Kingdom adopted in 2015. The presentation of the situation of the United Kingdom includes a discussion of how British courts have interpreted the duty of care owed by parent companies to individuals (including both employees and community members) affected by the activities of their subsidiaries, in order to illustrate the growing legal uncertainty in this area. It also presents a brief overview of the California Transparency in Supply Chains Act 2010 and of the US legislation on conflict minerals, as codified in 2010 in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

On the basis both of the state of international human rights law and of this comparative exercise, the report explores five questions in greater detail:

1. To what extent should States control the activities of business enterprises beyond their national territory?

It is uncontroversial that States have a duty to impose human rights due diligence on corporations domiciled within their jurisdiction (incorporated under their laws or having located their central place of business within the national territory). This report argues that States should be encouraged, in addition, to provide that the domestic courts can receive claims filed against corporations having a reasonable link to the State, for instance as a result of substantial business activities being conducted within that State. The case is particularly strong in favour of such a broad understanding of the duties of the State where victims otherwise would not have access to remedy.

2. Should the scope of the duty to practice human rights due diligence be made to

depend on the proximity of the link between the company concerned and the situation in which it is alleged to share responsibility, where the harm caused is the result not of the operations of the company itself, but of a subsidiary or a business partner?

The report explains why all companies should be required to practice human rights due diligence to the fullest extent possible by ensuring that the other entities to which they are connected by an investment nexus (whatever the degree of ownership) or by a contractual nexus (whatever the actual leverage they may exercise) comply with human rights. The workers of these entities should therefore be protected from abuse, and they should be able to seek remedies against the parent company or the buyer, where that parent or buyer have failed to take measures that might have prevented the violation from occurring. This should also extend to the workers employed by the sub-contractors of these entities. The only restriction to the scope of the liability of the company should be based not on a formal criterion based on the "degree of proximity", as this could lead to abuse — organising the corporate structure or segmenting the supply chain into a larger number of sub-contractors in order to limit liability —, but on considerations of practicability: liability might stop where it would be unreasonable to expect the company against which a liability claim is filed to adopt a broader range of measures to prevent the violation from occurring.

3. To what extent should a company that has fully discharged its due diligence obligations be considered immune from legal liability claims for human rights abuses occurring within the group (of multinational enterprises) or in the supply chain, based on general civil liability provisions?

The report emphasizes that the requirement to practice human rights due diligence and the requirement to compensate for any harm resulting from human rights violations should be treated as separate and complementary obligations. The requirement to practice human rights due diligence is a duty to prevent the risk of human rights violations occurring within the corporate group or in the supply chain. Ideally, this duty should be subject to some form of monitoring, administrative and/or judicial, in order to ensure that human rights due diligence is not a mere box-ticking exercise of a purely cosmetic nature. However, even where such monitoring exists, the fact that a company has adequately discharged its human rights due diligence obligation should not lead to grant it immunity from civil liability claims by victims. In the legislation implementing human rights due diligence, a specific provision should be inserted to avoid courts interpreting general civil liability provisions as ensuring a form of immunity from legal claims to companies which practiced human rights due diligence.

Such legislation should also provide that the burden is on the company's shoulders to prove that it could not have done more to avoid the causation of harm, once the victim has proven the damage inflicted and the connection to the business activities of the company, whether the damage was caused directly by the operations of the company or whether it has its immediate source in the conduct of a subsidiary or of a business relationship. This would take into account the fact that the relevant information concerning the operations of the company and the organisation of its relations with its subsidiaries or business partners resides with the company, and is generally not easily accessible to the victim.

4. Should the understanding of the duty to practice human rights due diligence vary in accordance with the size of the company, its structure, or ownership?

Human rights due diligence is imposed on all companies, regardless of their size, structure, or ownership whether public or private. Whereas the specific situation of micro-enterprises, or of small and middle-size enterprises, may be taken into account in order to alleviate the reporting burden for such companies, and while such enterprises could be supported to discharge their obligations (for instance by being provided training or guidance documents), the general duty to "identify, prevent, mitigate and account for how [corporations] address

their impacts on human rights", also applies to such companies, both in their own operations and in their business relationships.

1. Introduction

According to the Guiding Principles on Business and Human Rights, endorsed on 16 June 2011 by the Human Rights Council, human rights due diligence refers to the duty of companies to "avoid infringing on the rights of others and to address adverse impacts with which they are involved" by identifying, preventing, mitigating and accounting for how they address their impacts on human rights, whether such impacts are caused by the business enterprise itself or whether they are "directly linked to its operations, products or services by its business relationships".¹

The introduction of this duty in domestic legislation should be seen as an opportunity to counter the otherwise ambiguous, and potentially negative, impacts of economic globalization on human rights, including workers' rights.² Section 2 explains how the introduction of human rights due diligence fits within the broader context of economic globalization and the need to move towards a fairer form of globalization. Section 3 recalls how human rights due diligence emerged in international human rights law, as a requirement that companies take responsibility for abuses committed either by entities in which they own stock (subsidiaries), or by their business partners in global supply chains.

Despite the rise of corporate social responsibility in recent years, and despite the pressure that can be exercised by critical consumers, by socially responsible investors or active shareholders, the full protection of human and labor rights rights from abuse in global supply chains and groups of companies cannot depend on the adoption of voluntary measures. Indeed, under international human rights law, States have a duty to protect human rights: this implies an obligation to use all the tools at their disposal to ensure that business enterprises respect human rights, which includes ensuring that companies act with due diligence in order to avoid violating such rights. It is especially important to ground this obligation of States in international human rights law. This is one way to counteract the call of businesses to avoid further impositions, including regulatory requirements, by the States in which they operate. Faced with such calls, States may fear that exercising control over transnational corporations by the adoption of extraterritorial legislation will be seen as inimical to the host State, or as creating an incentive for companies incorporated under their jurisdiction to reincorporate elsewhere.³ Grounding the due diligence obligations of companies in international human rights law, which imposes on all States certain duties to protect, shall be essential to shield States from such forms of pressure: indeed, because the duties to protect are universal in that they apply to all States creating the kind of "level playing field" that corporations should welcome, as a means to avoid the distortions of competition that could result from States advancing in a non-coordinated fashion.

In order to clarify the content of human rights due diligence and the various implementation challenges involved, this report proceeds in five steps. The next section assesses the contribution of human rights due diligence to reshaping economic globalization. Economic globalization is a complex process of integration of the global economy across national jurisdictions, resulting from technological progress in the information and communication areas, reduction of transportation costs, the rise of services, and the lowering of barriers to

¹ Guiding Principles on Business and Human Rights approved by the Human Rights Council on 16 June 2011 (HRC Res. 17/4), principles 6, 15 b) and 17 b).

² In this document, the reference to 'human rights' is intended as a generic reference to UN human rights instruments and ILO conventions. Although they are subject to separate monitoring mechanisms, 'labor rights' protected by the ILO are considered to constitute a part of international human rights.

³ This concern may be especially important in the EU, where the rules concerning freedom of establishment of corporations facilitate such reincorporations, even when they are for the sole purposes of seeking refuge under a more hospitable regulatory environment. See, in particular, Case C-212/97, *Centros Ltd v. Ervers-og Selskabsstyrelsen*, (1999) ECR I-1459 ; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH* (2002) ECR I-9919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, (2003) ECR I-10155.

cross-border trade and investment. This process has generally been seen as entailing the risk that companies shall choose to organize the international division of labour by locating segments of an increasingly parcellized production process to increase the profitability of their investments: by locating the most polluting production plants where the environmental rule are lax, by hiring workers in the most labor-intensive segments where wages are low and unions weak, and by declaring their profits where the taxes on corporate profits are low. However, the imposition of human rights due diligence on corporations can reverse this, at least in part, by ensuring that the growth of global supply chains serve to strengthen workers' rights and human rights, rather than become an incentive for States to weaken such protections (section 2).

Section 3 then recalls the rise of human rights due diligence at the universal or multilateral levels. Human rights due diligence was first introduced in the United Nations Guiding Principles on Business and Human Rights in 2011. Since then, it was incorporated in a number of processes and fora, and it has gradually influenced the conduct of business. However, the incorporation of human rights due diligence in binding (regulatory) instruments is still relatively new, and legislators in all world regions are now considering how to approach the issue.

Human rights due diligence requires from companies that they identify their impacts on human rights; that they prevent and mitigate such impacts; and that they account for how they address their impacts on human rights. Section 4 examines a number of instruments adopted at domestic level in order to implement human rights due diligence. It reviews the EU's non-financial reporting directive (2014/95/EU) as well as two regulations, the 2010 Timber Regulation (No. 995/2010) and the 2017 Conflict Minerals Regulation (No. 2017/821) that seek to impose due diligence obligations in particularly sensitive sectors (4.1.). It then turns to the French Law of 27 March 2017 on due diligence (4.2.), to the Dutch Child Labour Due Diligence Law (*Wet Zorgplicht Kinderarbeid - WZK*) adopted in 2019 (4.3.), and to the Modern Slavery Act which the United Kingdom adopted in 2015 (4.4.). The presentation of the situation of the United Kingdom includes a discussion of how British courts have interpreted the duty of care owed by parent companies to individuals (including both employees and community members) affected by the activities of their subsidiaries, in order to illustrate the growing legal uncertainty in this area.

Section 5 then explores in depth the four questions that have emerged as the most controversial as States have gradually sought to implement human rights due diligence for companies. Section 5.1. asks what is the precise scope of the duty of States to control the activities of business enterprises beyond their national territory. It examines, specifically, whether States have a duty to control not only the companies domiciled in their territory (i.e., incorporated under their laws, or having their centre of operations or their principal place of business within the territory), but also companies having "substantial interests" or "substantial business operations" within their territory. It also asks whether States should provide access to remedy to victims of transnational corporations' activities, even when the defendant company is not domiciled within the State, where such victims otherwise would have no other judicial forum where to file a claim — a doctrine known as the "forum necessitatis" doctrine.

Section 5.2. explores whether the scope of the duty imposed on companies to practice human rights due diligence, both as regarding the human rights it extends to and regarding the degree of scrutiny applied, should be made to depend on the proximity of the link between the company concerned and the situation in which it is alleged to share responsibility. Section 5.3. considers whether, if a business enterprise has fully discharged its due diligence obligations, it thereby shall be considered immune from legal liability claims for whatever human rights abuse occurs within the group (in multinational enterprises) or in

the supply chain. Finally, section 5.4. considers whether the scope of the human rights due diligence obligation should be made to depend on the size of the company.

2. Economic globalization: how companies transnationalize their activities

As a result of the lowering of barriers to trade and investment and of technological progress particularly in information and communications, the process of economic globalization has significantly accelerated since the early 1980s and, even more so, since the 1990s. Large, transnational firms have been best positioned to capture these new opportunities. They have been able to do so by relying on three tools:

1. Corporations have sought to operate in foreign jurisdictions by creating new agencies, or branches, in those jurisdictions. Such branches do not have a legal personality separate from that of the main corporation. The expansion of its activities in foreign jurisdictions does allow that corporation, however, to reach new clients, as well as, occasionally, to enjoy more favourable fiscal conditions, lower labour costs, or less stringent environmental standards.
2. Alternatively, these firms have sought to invest in foreign jurisdictions, by creating a new legal entity domiciled in that jurisdiction. This may occur either through so-called "greenfield investments", where the parent company creates a subsidiary in a different country, building its operations from the ground up (constructing new production facilities, and sometimes building new distribution hubs, living quarters, etc.); or by acquiring equity in an existing foreign firm, which the transnational firm shall therefore own in part or in full. The massive process of privatisation of publicly-owned companies in a range of developing countries in the 1980s, and of Eastern and Central European countries in the 1990s, has greatly facilitated this latter mode of transnationalization of large, multinational firms.
3. Finally, the greater segmentation of the production process and the easiness with which production can be controlled from afar, as well as the reduction of obstacles to cross-border trade, has allowed a third form of transnationalization: global supply chains have grown, allowing the lead company to deepen an international division of labour in which it may be tempted to locate the most labour-intensive portions of the production process in countries where wages are low and union weak, while sourcing its raw materials from resource-rich countries (preferably where environmental constraints are less important or poorly enforced).

The emergence of "human rights due diligence" in international human rights law should primarily be seen as a means to combat potential abuses linked to the two latter forms of transnationalization of economic activities. In other terms, if adequately implemented, it should ensure that, within multinational groups of companies (sometimes referred to as "transnational corporations", but comprising in reality a number of separate legal entities), the parent company deploys its best efforts to ensure that the subsidiaries comply with certain requirements; and that, within global supply chains, the "lead company" (in particular, the buyer seeking to acquire certain products or to be provided certain services) ensures that, by imposing its conditions on the sub-contracted seller or service-provider, human rights are fully complied with across the whole chain.

Due diligence, thus, may be treated as a tool to counteract the most problematic impacts of the transnationalization of economic activities. Within multinational groups, it may be difficult to hold the parent company liable for the acts of subsidiaries causing harm, and within global supply chains, it may be difficult to hold the lead company responsible for any human rights violation committed by one supplier, or sub-contractor, involved in the production process. Moreover, the resulting accountability gap may lead to a form of regulatory competition between States, that may be tempted to seek to attract investment, or to improve the competitiveness on global markets of the firms domiciled under their jurisdiction, by lowering standards applying under their jurisdiction, or by poorly enforcing whatever standards are

nominally imposed, even where this may be in violation of their international human rights obligations.

Due diligence is intended as a tool to counteract these risks, ideally turning economic globalization from a threat to global standards into an opportunity to move towards a form of globalization that is fair and conducive of social progress. However, it is a tool that is also highly ambiguous and contested, and its implementation raises a number of issues of interpretation due to the diversity of situations it aims to cover. For instance, whereas the "parent company" and its subsidiaries are connected through an investment nexus, the degree of control exercised by the former on the latter varies widely, depending not only on the proportion of the equity of the subsidiary owned by the parent (from 100% of the shares to a minority stake in the subsidiary), but also, for instance, on the presence on the management boards of the subsidiaries of board members appointed by the parent. Relationships also vary widely within global supply chains between the firms involved. Such firms are connected in a number of ways (through supply contracts or franchising contracts, for example); their relationships may be short- or long-term; the degree of influence the "lead company" may exercise on its suppliers, sub-contractors, or franchisees, may be more or less important. The table below provides a stylized, and thus simplified, mapping of different modes of transnationalization:

Table I. Different modes of transnationalization of corporate activity.

Mode of transnationalization	Tool	Degree of control
A firm operates directly in a foreign jurisdiction	Creation of an agency or branch in the foreign jurisdiction	Total
A firm has an equity stake in a company domiciled in a foreign jurisdiction (investment nexus)	Parent wholly owns the foreign subsidiary	Total (though subsidiary may have some operational autonomy)
	Parent is the majority shareholder in the foreign subsidiary	Strong
	Parent is a minority shareholder in the foreign subsidiary	Weak
A firm has a sub-contractor (seller, provider of services, franchisee) domiciled in a foreign jurisdiction (contractual nexus)	Sub-contractor in a long-term relationship with the lead company which it its only client	Strong
	Sub-contractor ("primary supplier") in a long-term relationship with the lead company as one of its clients	Relatively weak
	Sub-contractor in a short-term / ad hoc relationship with the lead company, which is one occasional client	Weak

Notes. 1. The areas highlighted in blue correspond to the areas to which due diligence are relevant. 2. The notion of 'primary supplier' in this table corresponds to the expression as used in the IFC

Performance Standards, which define such suppliers as 'those suppliers who, on an ongoing basis, provide goods or materials essential for the core business processes of the project' (IFC Performance Standard 2: Labour and Working Conditions, footnote 4).

3. The gradual recognition of human rights due diligence

3.1. The UN Guiding Principles on Business and Human Rights

The concept of due diligence was included in the Guiding Principles on Business and Human Rights in order to ensure that corporate entities would act proactively to prevent the risks of human rights violations in their business relationships. The Guiding Principles were prepared for endorsement by the Human Rights Council by professor John Ruggie, appointed in 2005 the Special Representative of the UN Secretary-General on the issue of transnational corporations and other business enterprises and human rights. Following three years of studies and consultations after his appointment, the Special Representative proposed a framework resting on the 'differentiated but complementary responsibilities' of the States and corporations. The framework comprised 'three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies'.⁴ Hence, while restating that human rights are primarily for the State to protect as required under international human rights law, the framework does not exclude that private companies may have human rights responsibilities: although companies essentially should comply with a 'do no harm' principle, this also entails certain positive duties: 'To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.⁵

Building on this framework, the Guiding Principles on Business and Human Rights approved by the Human Rights Council in its resolution 17/4 of June 2011 recognize that: (a) States have obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) business enterprises are required to comply with all applicable laws and to respect human rights; and (c) rights and obligations need to be matched to appropriate and effective remedies when breached. The requirement that business enterprises respect human rights - the second component of the 'Protect, Respect, Remedy' framework — includes the requirement to act with due diligence. According to the Guiding Principles on Business and Human Rights, corporations should 'act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved' (para. 6). Principle 15 provides:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

...

(b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.

This is further explained under Principles 17-24 of the Guiding Principles on Business and Human Rights, which note in particular that human rights due diligence 'should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships' (Principle 17, b).

Since then, a number of instruments have relied on the notion of human rights due diligence to emphasize these positive duties of companies. The following paragraphs provide a brief

⁴ *Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/8/5, 7 April 2008, para. 9.*

⁵ *Id.*, para. 56.

overview of multilateral initiatives that have sought to build on this notion to strengthen existing instruments on enterprises' duties or responsibilities.

3.2. The OECD Guidelines on Multinational Enterprises

Originally adopted in 1976 as part of the Declaration on International Investment and Multinational Enterprises⁶ and revised on a number of occasions since, the OECD Guidelines on Multinational Enterprises are probably the most influential of such instruments, particularly since, in the early 2000s, adhering countries have set up National Contact Points (NCPs) to promote the Guidelines and address 'specific instances' alleging failures to comply by corporate actors. Following their revision in March 2011 to insert a human rights chapter (chapter IV), the OECD Guidelines include due diligence in the definition of the responsibility of business enterprises to respect human rights. These Guidelines define as follows the responsibility to respect human rights:

Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate, as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*
4. Have a policy commitment to respect human rights.
5. *Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*
6. *Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.*

The OECD Council subsequently adopted guidance instruments on due diligence for the supply of minerals from conflict and high-risk zones⁷ and in the context of designing policy frameworks for investment⁸, as well as in a number of sectors: in agricultural supply chains⁹, in the extractive sector¹⁰, in the garment and footwear sector¹¹, and in the financial sector.¹² In 2018, these sectoral guidance tools were built upon for the adoption of the OECD Due Diligence Guidance for Responsible Business Conduct. The Guidance was intended as a tool adopted to support companies in discharging their due diligence obligations across all sectors. It was approved by the OECD Working Party on Responsible Business Conduct on 6 March 2018 and by the OECD Investment Committee on 3 April 2018. On 30 May 2018, the OECD Ministerial Meeting recommended that the OECD Member States and other

⁶ OECD doc. C(76)99/FINAL.

⁷ Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas [C/MIN(2011)12/FINAL].

⁸ Recommendation of the Council on the Policy Framework for Investment [C(2015)56/REV1].

⁹ Recommendation of the Council on the OECD-FAO Guidance for Responsible Agricultural Supply Chains [C(2016)83].

¹⁰ Recommendation of the Council on the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector [C(2016)100].

¹¹ Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector [C(2017)63].

¹² OECD (2017), Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises.

States adhering to the recommendation 'actively support and monitor the adoption of' the due diligence framework set out in the OECD Due Diligence Guidance for Responsible Business Conduct, providing that governments should ensure that 'the enterprises operating in or from their territories should:

1. embed responsible business conduct into their policies and management systems;
2. identify and assess actual and potential adverse impacts associated with their operations, products or services;
3. cease, prevent and mitigate adverse impacts;
4. track implementation and results;
5. communicate how impacts are addressed;
6. provide for or cooperate in remediation when appropriate.'

The following figure captures the key components of due diligence thus described:

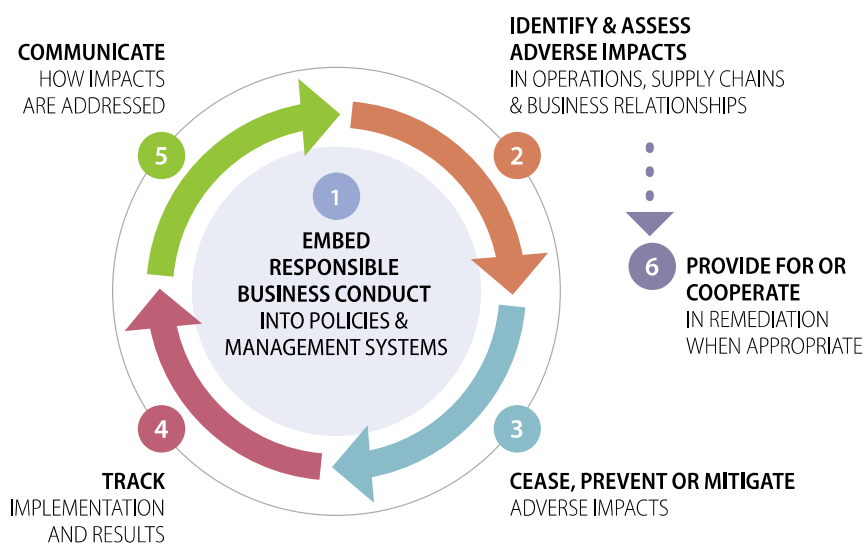


Fig. 1. Due diligence process & supporting measures.

Source: OECD Due Diligence Guidance for Responsible Business Conduct (2016).

3.3. ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, initially adopted in 1977¹³, and revised on a number of occasions since then, was most recently amended in March 2017 at the 329th session of the Governing Body of the ILO. The latest revision sought in part to consider the UN Guiding Principles on Business and Human Rights. The most recent version of the Tripartite Declaration therefore reiterates the respective duties and responsibilities of States and business enterprises, as stipulated in the Guiding Principles. As regards the human rights responsibilities of companies, it restates that:

- b. The Guiding Principles apply to all States and to all enterprises, both multinational and others, regardless of their size, sector, operational context, ownership and structure.

¹³ The Tripartite Declaration was adopted by the Governing Body of the ILO at its 204th session (Geneva, November 1977).

c. The corporate responsibility to respect human rights requires that enterprises, including multinational enterprises wherever they operate: (i) avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur; and (ii) 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.

d. Enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

e. In order to gauge human rights risks, enterprises – including multinational enterprises – should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should involve meaningful consultation with potentially affected groups and other relevant stakeholders including workers' organizations, as appropriate to the size of the enterprise and the nature and context of the operation. For the purpose of achieving the aim of the MNE Declaration, this process should take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process.¹⁴

The ILO Tripartite Declaration also emphasizes that “Multinational enterprises should use their leverage to encourage their business partners to provide effective means of enabling remediation for abuses of internationally recognized human rights.”¹⁵

3.4. The International Finance Corporation's Sustainability Framework

Other developments too are worth mentioning. When, in 2012, the International Finance Corporation revised its Sustainability Framework, including both Sustainability Principles and the Performance Standards all IFC clients are expected to comply with, references to human rights were included, reflecting core concepts of the Guiding Principles such as the responsibility of IFC clients to respect human rights and to exercise due diligence in order to ensure that they do not negatively affect human rights.

Specifically, following the revision of the Performance Standards, Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts) requires that the IFC clients design and maintain an Environmental and Social Management System (ESMS) to mitigate risks, including risks associated with human rights impacts of specific projects financed by the IFC. The Guidance note to Performance Standard 1 provides that:

Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards¹⁶ has elements related to human

¹⁴ ILO Tripartite Declaration, para. 5.

¹⁵ Id., para. 65.

¹⁶ The IFC has eight performance standards in total, related respectively to: Assessment and Management of Environmental and Social Risks and Impacts (Performance Standard 1); Labor and Working Conditions (Performance Standard 2); Resource Efficiency and Pollution Prevention (Performance Standard 3); Community Health, Safety, and Security (Performance Standard 4); Land Acquisition and Involuntary Resettlement (Performance Standard 5); Biodiversity Conservation and Sustainable Management of Living Natural Resources

rights dimensions that a project may face in the course of its operations.¹⁷ Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project.¹⁸

Writing in his academic capacity, J. Ruggie has remarked that these Principles and Standards 'affect companies' access to international capital, amplified manifold because they are tracked by private sector lending institutions party to the so-called Equator Principles, which account for more than three-fourths of all project financing worldwide'.¹⁹

* * *

States are now expected to adopt domestic legislation, in order to make human rights due diligence mandatory for the companies domiciled under their jurisdiction, wherever such companies operate. In November 2016, the UN Working Group on business and human rights, a group of five independent experts established as a Special Procedure of the UN Human Rights Council to ensure the follow-up of the UN Guiding Principles on Business and Human Rights, adopted a guidance tool addressed to States for the preparation of National Action Plans (NAPs) on Business and Human Rights. The guidance tool includes a number of references to human rights due diligence. In particular, States should provide companies with practical guidance on specific steps of human rights due diligence processes (e.g. on human rights impact assessments (HRIA), the definition and implementation of mitigation measures, or reporting)²⁰, including online tools to that effect.²¹ As part of their duty to address gaps in the legal framework, States are expected to introduce human rights due diligence requirements in procurement law, by 'requiring human rights due diligence from bidders in cases where risks of adverse human rights impacts, including in the supply chain of a given product, are identified' (see also Guiding Principle 6)²², and by examining human rights due diligence policies in assessing the eligibility of projects for support by export credit agencies (see also Guiding Principle 4).²³ The guidance on NAPs on business and human rights uses rather cryptic language to describe how due diligence should extend, for parent companies, to the monitoring of the acts of their subsidiaries (States should "ensure that parent companies are legally responsible for acts conducted by other members of the enterprise they control"²⁴).

It is perhaps on reporting requirements that the guidance is the most robust. Under the heading 'Encouraging corporations to report on human rights due diligence', the guidance notes:

Governments can support efforts to have transparency in relation to business and human rights issues by clarifying their expectations regarding the disclosure of

(Performance Standard 6); Indigenous Peoples (Performance Standard 7); and Cultural Heritage (Performance Standard 8).

¹⁷ For instance, the Guidance Note on Performance Standard 2: Work and Labor Conditions, provides that: 'The applicability of this Performance Standard is established during the environmental and social risks and impacts identification process. The implementation of the actions necessary to meet the requirements of this Performance Standard is managed through the client's Environmental and Social Management System (ESMS), the elements of which are outlined in Performance Standard 1' (para. 3).

¹⁸ International Finance Corporation (IFC), Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts), Guidance Note (2012), para. 3.

¹⁹ J. G. Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights', *Global Governance* 20 (2013), 5, at 11.

²⁰ *Id.*, p. 20.

²¹ *Id.*, p. 21.

²² UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (Geneva, November 2016), p. 26.

²³ *Id.*, p. 24.

²⁴ *Id.*, p. 21.

information on human rights due diligence and related impacts. In this regard, Governments should consider:

- Clarifying their expectations regarding reporting on human rights as part of the definition of general expectations of companies (see Guiding Principle 2).
- Specifying that companies are expected to include information on the human rights impacts identified, the measures taken to address them, as well as the effectiveness of those measures.
- Referring to established reporting standards such as the Global Reporting Initiative.²⁵

Under the heading "Introducing legally binding reporting requirements on non-financial issues", the guidance continues:

Legal reporting requirements on non-financial issues can provide a common standard for transparency and strengthen incentives for companies to engage in human rights due diligence processes. In this regard, Governments should consider:

- Establishing non-financial reporting requirements on human rights due diligence processes and the results thereof for companies working in or having substantial presence in the country's territory and/or jurisdiction.
- Introducing transparency requirements in host State legislation and contracts with multinational enterprises.
- Including reporting requirements on human rights issues in stock exchange listing requirements.
- Ensuring the verification of information by arranging an independent audit of the reports, and issuing sanctions where inaccurate and/or incomplete information is provided.²⁶

Despite such guidance however, States still retain a considerable freedom of appreciation in the implementation of the requirement to practice human rights due diligence. The next section reviews a sample of approaches taken so far. The following section will discuss a number of key questions which have been raised during this initial implementation phase.

²⁵ Id., p. 23.

²⁶ Id., p. 23.

4. Implementation of human rights due diligence at domestic level

Human rights due diligence thus includes a set of four duties: the companies imposed such obligation should (i) identify their impacts on human rights, (ii) prevent and mitigate such impacts, (iii) account for how they address their impacts on human rights (a requirement of transparency or reporting), and finally (iv) provide a remedy to victims or cooperate in the provision of such a remedy.²⁷ These duties apply whether these human rights impacts are caused by the business enterprise itself or whether they are “directly linked to its operations, products or services by its business relationships”, to quote again from the UN Guiding Principles.

However, the various examples we have of the domestic implementation of the human rights due diligence obligation confirm that a broad spectrum of approaches exist, from the more modest (simple reporting obligations) to the most ambitious (including the introduction of a duty of care on the parent company or on the lead company in global supply chains). Some of the examples are sector-specific; others are trans-sectorial in scope. Some requirements apply only to companies of a certain size; others apply to all companies, whatever their size. Moreover, the various legislations under consideration are more or less explicit concerning their territorial scope of application (in other terms, the definition of the companies they apply to as regards operations beyond the national territory), and they may or may not specify the duties of the company towards victims (workers or community members) affected by the activities of their subsidiaries or suppliers. The following paragraphs provide some illustrations, focusing on the most important examples, using a common template in order to assess them.

4.1. European Union

In the EU, Directive 2014/95/EU of 22 October 2014 on the disclosure of non-financial information by certain large undertakings and groups²⁸ imposes on large companies that they include in the management report

a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters [²⁹], respect for human rights, anti-corruption and bribery matters, including:

²⁷ The most narrow definitions of human rights due diligence do not include the remedial dimension, in part because, under the three-pillar structure of the UN Guiding Principles on Business and Human Rights, this duty falls under the third (rather than the second) pillar. However, this dimension is included here, consistent with the OECD definitions of due diligence.

²⁸ 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, p. 1.

²⁹ According to the Preamble of the directive, the information concerning social and employee matters may concern 'the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities' (Directive 2014/95/EU, Preamble, Recital 7). The guidelines provided by the European Commission in June 2017, discussed further below, are more detailed in this respect. They list "social and employee matters" as including: implementation of fundamental conventions of the International Labour Organisation; diversity issues, such as gender diversity and equal treatment in employment and occupation (including age, gender, sexual orientation, religion, disability, ethnic origin and other relevant aspects); employment issues, including employee consultation and/or participation, employment and working conditions; trade union relationships, including respect of trade union rights; human capital management including management of restructuring, career management and employability, remuneration system, training; health and safety at work; consumer relations, including consumer satisfaction, accessibility, products with possible effects on consumers' health and safety; impacts on vulnerable consumers; responsible marketing and research; and community relations, including social and economic

- (a) a brief description of the undertaking's business model;
- (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
- (c) the outcome of those policies;
- (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;
- (e) non-financial key performance indicators relevant to the particular business³⁰.

Directive 2014/95/EU imposes such non-financial reporting requirements on 'public-interest entities [³¹] exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year': in practice, 6,000 large companies in the EU are concerned, that are publicly listed, or that are banks, insurance companies or other companies listed as public-interest entities in domestic legislation.

In June 2017, six months behind schedule, the European Commission adopted non-binding guidelines on how to discharge the new non-financial information reporting requirements.³² As regards the disclosure on the policy concerning due diligence, these guidelines — which, the Commission emphasizes, are without prejudice of the interpretation that the Court of Justice of the European Union may give to the directive — provide:

Due diligence processes relate to policies, to risk management and to outcomes. Due diligence processes are undertaken by a company to ensure that it delivers against a concrete objective (e.g. to ensure that carbon emissions are below a certain level or that supply chains are free from trafficking in human beings). They help identify, prevent and mitigate existing and potential adverse impacts.

Companies should provide material disclosures on due diligence processes implemented, including, where relevant and proportionate, on its suppliers and subcontracting chains. They may also consider disclosing appropriate information on the decisions taken to set them up and how the processes are intended to work, in particular as regards preventing and mitigating adverse impacts. Companies may also consider providing relevant information on setting targets and measuring progress.

For example, OECD Guidance documents for several sectors, UN Guiding Principles on Business and Human Rights, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, or ISO 26000 provide useful guidance on this.

development of local communities' (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).

³⁰ New article 29a inserted by Directive 2014/95/EU into Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182 of 26.6.2013, p. 19).

³¹ 'Public-interest entities' are defined in article 2 of Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, cited above.

³² 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).

As regards the provision of information on human rights issues, the guidelines presented by the Commission explain:

This commitment may define what the company expects from its management, employees and business partners in relation to human rights, including core labour standards. The information may explain whose rights the commitment addresses, for instance the rights of children, women, indigenous peoples, persons with disabilities, local communities, smallholder farmers, victims of trafficking in human beings; and the rights of workers, including those working under temporary contracts, workers in the supply chains or sub-contractors, migrant workers, and their families.

Companies should consider making material disclosures on human rights due diligence, and on processes and arrangements implemented to prevent human rights abuses. This may include, for instance, how a company's contracts with businesses in its supply chain deal with human rights issues, and how a company mitigates potential negative impacts on human rights and provides adequate remedy if human rights have been violated.

The risks of adverse impact may stem from the undertaking's own activities or may be linked to its operations, and, where relevant and proportionate, its products, services and business relationships, including its supply and subcontracting chains.

Certain legitimate expectations may be derived from these clarifications, and such expectations may influence the interpretation of general civil liability provisions by courts (in particular, by leading courts to define 'fault' in tort litigation as a failure to comply with the commitments announced by the company). The information conveyed to the public under the reporting requirements, moreover, can be considered as a form of advertising, which — if it is considered as misrepresenting the facts — may give rise to a specific form of liability for misleading advertising.³³ Strictly speaking however, the 2014 Directive on the disclosure of non-financial information does not impose on these companies a duty to take certain actions, such as to adopt a due diligence plan; instead, it relies on a 'comply or explain' approach, according to which 'Where the undertaking does not pursue policies in relation to one or more of those matters [i.e., environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters], the non-financial statement shall provide a clear and reasoned explanation for not doing so'. Moreover, the directive does not link the requirement to disclose non-financial information to the establishment of a new duty of care. In particular, it does not state that, in the absence of the adoption of certain policies to prevent risks in environmental, social, human rights and anti-corruption or bribery matters, the company may be held liable for any impacts that might have been prevented by the adoption of such policies.

³³ In the EU, the Unfair Commercial Practices Directive was adopted in 2005 (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22) in order to harmonize the rules on misleading advertising beyond certain minimum requirements initially set forth in 1984 (Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, OJ 1997 L 290/18, corrigendum OJ 1998 L 194/54). The Unfair Commercial Practices Directive provides that a misleading commercial practice may consist in practice which 'contains false information and is therefore untruthful or in any way, (...) deceives or is likely to deceive the average consumer', in relation, *inter alia*, to 'the main characteristics of the product, such as its (...) method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use (...) ' (art. 6(1)(b)). Article 6(2)(b) of the Directive explicitly defines as constituting a misleading commercial practice "non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code".

Finally, both the 2014 Directive on non-financial reporting and the 2017 guidelines state, as regards the information to be made available concerning the risks of adverse impacts in supply chains, that such information should only be provided 'where relevant and proportionate'. This leaves a considerable margin of appreciation to the companies concerned. A study covering a sample of four EU Member States in September 2017 (France, Germany, Italy and the United Kingdom) suggests that most countries may be tempted not to strengthen requirements further in this regard, although Italy constitutes a notable exception in this regard.³⁴ Another study examined in detail how four major companies implemented their obligations under the Non-Financial Reporting Directive, in the specific area of human rights due diligence: the study demonstrated that reporting on due diligence was generally very weak, despite the evidence, in the companies examined, of serious human rights challenges, leading the researchers to conclude that it would be important to clarify the scope of the reporting obligations in the area of human rights, relying on the framework provided by the UN Guiding Principles on Business and Human Rights.³⁵

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size / sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsubsidiary	Lead company-sub-contractor	
Directive 2014/95 (non-financial reporting)	Public-interest companies with more than 500 employees / across all sectors	Companies governed by the laws of an EU Member State	Duty to disclose the due diligence processes implemented to prevent risks related to the environment and to social and human rights issues; or to explain why it does not have such processes in place	Penalties should be effective, proportionate and dissuasive ³⁶	If the parent company includes the subsidiary in its reporting, the latter may be exempted from reporting	Information on supply chain risks to be provided 'where relevant and proportionate'	None

³⁴ *Comparing the Implementation of the EU Non-Financial Reporting Directive in the UK, Germany, France and Italy* (prepared by Claire Jeffery for the Frank Bold Foundation, Frank Bold, Nov. 2017, available at: <http://www.purposeofcorporation.org/comparing-the-eu-non-financial-reporting-directive.pdf>).

³⁵ European Coalition for Corporate Justice (ECCJ), *A Human Rights Review of the EU Non-Financial Reporting Directive* (2018). The companies were Ferrovial S.A., a Spanish multinational with 95,000 employees active in the building of transport infrastructure and urban services, but also (since it acquired Broadpectrum in 2016) in the management of "refugee processing centres" in Nauru and Manus Island for the Australian government; the Andritz Group, an Austrian company with more than 30,000 employees active in the pulp and paper and hydroelectric sectors; Anglo Asian Mining plc, a UK public company with 694 employees primarily exploiting gold mines in Azerbaijan; and H&M Group, a Swedish multinational and major fashion retailers, whose supplier factories (more than 1,600 in 2017) employ a total of more than 1.6 million workers.

³⁶ Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, cited above, art. 51.

The EU also adopted two regulations, the 2010 Timber Regulation³⁷ and the 2017 Conflict Minerals Regulation³⁸ (the latter to enter into force on 1 January 2021) that seek to impose due diligence obligations in particularly sensitive sectors. The Timber Regulation seeks to ensure that companies importing timber and timber products in the EU should take all appropriate steps required "in order to ascertain that illegally harvested timber and timber products derived from such timber are not placed on the internal market. To that end, [they] should exercise due diligence through a system of measures and procedures to minimise the risk of placing illegally harvested timber and timber products derived from such timber on the internal market".³⁹ As to the Conflict Minerals Regulation, it seeks to control trade in minerals from conflict areas, in order to ensure that such trade shall not contribute to the financing of armed groups: inspired in part by the US legislation on conflict minerals (in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, see Box 1), it imposes due diligence obligations on importers of minerals or metals containing or consisting of tin, tantalum, tungsten or gold.

Box 1. Conflict Minerals in the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁴⁰ requires companies with securities registered with the Securities and Exchange Commission to report on their due diligence with respect to conflict minerals⁴¹ originating in the Democratic Republic of the Congo or an adjoining country (the "Covered Countries").⁴² The SEC promulgated implementing rules under the Act on September 12, 2012.⁴³

As the SEC explains in its preamble to the rules, the objective of this section is "to accomplish the goal of helping end the human rights abuses in the DRC caused by the conflict", relying on securities laws disclosure requirements "to bring greater public awareness of the source of companies' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains."

If a company's conflict minerals originated in one of the Covered Countries, it is to submit a report to the SEC (a report that is also to be made public on the company's website) that includes a description of the measures it took to exercise due diligence on the conflict minerals' source and chain of custody. Such report should follow a nationally or internationally recognized due diligence framework, such as (as specified in the SEC's rules) the OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas". The measures taken by the company must include an independent private sector audit of the report that is conducted in accordance with standards established by the Comptroller General of the United States. The audit's objective, as expressed in the preamble, is "to express an opinion or conclusion as to whether the design of the issuer's due diligence framework as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is in

³⁷ 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, OJ L 295, 12.11.2010, p. 23.

³⁸ 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, OJ L 130, 19.5.2017, p. 1.

³⁹ Regulation (EU) No 995/2010 (Timber Regulation), Preamble paragraph 16.

⁴⁰ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁴¹ *Id.*, at § 1502(e)(4) ("conflict mineral" is defined as: "(A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country. The term does not include minerals that were outside of the Covered Countries prior to January 31, 2013, nor to any minerals that are derived from scrap or recycled materials.").

⁴² *Id.*, at § 1502 (e)(1) ("adjoining country" or "covered country" is defined as "a country that shares an internationally recognized border with the DRC, which presently includes Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.")

⁴³ Disclosing Use of Conflict Minerals, 17 C.F.R. 240 and 249b (2012).

conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook." The report must include a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin.

A company that finds conflict minerals in its supply chain that originated in the Covered Countries must determine and disclose whether those minerals directly or indirectly financed or benefited armed groups in the Covered Countries. Products are "DRC conflict free" when those products do not contain conflict minerals that "directly or indirectly finance or benefit armed groups" in the Covered Countries. If a Company is unable to determine, after conducting due diligence, whether its products are "DRC conflict free," it must report that they are "DRC conflict indeterminable." Issuers with "DRC conflict undeterminable" products are required to provide a Conflict Minerals Report that describes, among other matters, the measures taken by the issuer to exercise due diligence on the source and chain of custody of the conflict minerals.

The due diligence system established by the EU Timber Regulation has three components⁴⁴: *access to information* should be provided about the sources and suppliers of the timber and timber products being placed on the internal market for the first time, including relevant information such as compliance with the applicable legislation, the country of harvest, species, quantity, and where applicable sub-national region and concession of harvest; *risk assessment* should be prepared on the basis of that information, taking into account, for instance, the prevalence of illegal logging in the region concerned or for specific tree species and the complexity of the supply chain; finally, where a risk is identified, operators should *mitigate* such risk "in a manner proportionate to the risk identified, with a view to preventing illegally harvested timber and timber products derived from such timber from being placed on the internal market".⁴⁵ These mitigation measures shall "consist of a set of measures and procedures that are adequate and proportionate to minimise effectively that risk and which may include requiring additional information or documents and/or requiring third party verification".⁴⁶ The Regulation also provides that "monitoring organisations" shall ensure companies put in place effective due diligence systems and enforce them: such monitoring organisations are independent organisations, with the required expertise and capacity, and which have no conflict of interest for the carrying out of their functions.⁴⁷ Dedicated public authorities should regularly perform checks to ensure these monitoring organisations properly fulfil their role. Moreover, the competent public authorities may directly monitor the economic operators putting timber on the market, for instance by audits or spot checks, and by examining the documentation and records that demonstrate the proper functioning of the due diligence system and procedures.⁴⁸

The Conflict Minerals Regulation defines supply chain due diligence as "an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof".⁴⁹ Union importers of tin, tantalum and tungsten, their ores, and gold are imposed due diligence obligations "in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to

⁴⁴ Described in article 6 of Regulation (EU) No 995/2010 (Timber Regulation).

⁴⁵ Regulation (EU) No 995/2010 (Timber Regulation), preambular paragraph 17.

⁴⁶ Regulation (EU) No 995/2010 (Timber Regulation), Art. 6(1)(c).

⁴⁷ Regulation (EU) No 995/2010 (Timber Regulation), Art. 8.

⁴⁸ Regulation (EU) No 995/2010 (Timber Regulation), Art. 10.

⁴⁹ Regulation (EU) 2017/821 (Conflict Minerals Regulation), Preambular paragraph 11.

identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities".⁵⁰

To this effect, these economic operators are expected to establish *management systems* to prevent such risks from materializing: they must "adopt, and clearly communicate to suppliers and the public up-to-date information on, their supply chain policy for the minerals and metals potentially originating from conflict-affected and high-risk areas"; "incorporate in their supply chain policy standards against which supply chain due diligence is to be conducted consistent with the standards set out in the model supply chain policy in Annex II to the OECD Due Diligence Guidance"; "[assign] responsibility to senior management [...] to oversee the supply chain due diligence process"; "strengthen their engagement with suppliers by incorporating their supply chain policy into contracts and agreements with suppliers consistent with Annex II to the OECD Due Diligence Guidance"; "establish a grievance mechanism as an early-warning risk-awareness system or provide such mechanism through collaborative arrangements with other economic operators or organisations, or by facilitating recourse to an external expert or body, such as an ombudsman"; and finally, "operate a chain of custody or supply chain traceability system".⁵¹ Importers of minerals and gold should also ensure *risk management* by identifying risks and mitigating the risks identified, *inter alia*, by

considering their ability to influence, and where necessary take steps to exert pressure on suppliers who can most effectively prevent or mitigate the identified risk, by making it possible either to:

- continue trade while simultaneously implementing measurable risk mitigation efforts,
- suspend trade temporarily while pursuing ongoing measurable risk mitigation efforts, or
- disengage with a supplier after failed attempts at risk mitigation

The Conflict Minerals Regulation also provides that independent third party auditors shall be tasked with ensuring that the importer of minerals complies with its due diligence obligations.⁵² It includes certain disclosure requirements: importers shall "make available to their immediate downstream purchasers all information gained and maintained pursuant to their supply chain due diligence"⁵³, and "on an annual basis, publicly report as widely as possible, including on the internet, on their supply chain due diligence policies and practices for responsible sourcing".⁵⁴

The Timber Regulation and the Conflict Minerals Regulation thus illustrate the level of detail with which legislation may define different components of the due diligence obligation, where specific sectors are concerned. Such a level of detail may be difficult to achieve in general (i.e., non sector-specific) legislation.

⁵⁰ Regulation (EU) 2017/821 (Conflict Minerals Regulation), Article 2(d).

⁵¹ Regulation (EU) 2017/821 (Conflict Minerals Regulation), Article 4.

⁵² Regulation (EU) 2017/821 (Conflict Minerals Regulation), Art. 6.

⁵³ Regulation (EU) 2017/821 (Conflict Minerals Regulation), Art. 7(2).

⁵⁴ Regulation (EU) 2017/821 (Conflict Minerals Regulation), Art. 7(3).

Source	Scope (companies concerned)		Disclosure/reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size / sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsubsidiary	Lead company-sub-contractor	
Reg. (EU) 995/2010 (Timber Reg.)	Any natural or legal person that places timber or timber products on the market	The operators or traders concerned may or may not be domiciled in the EU	None, however the operators should maintain documentation for inspection by public authorities	EU Member States set penalties that are effective, proportionate and dissuasive. Where shortcomings are detected, remedial actions should be taken by the operator. Additionally, interim measures may include (a) seizure of timber and timber products; (b) prohibiting the marketing thereof.		The due diligence requirement operates throughout the supply chain; obligations of traceability are imposed in this regard	None
Reg. (EU) 2017/821 (Conflict Minerals Reg.)	'Union importers' of certain minerals or metals, defined as any natural or legal person declaring minerals or metals for release for free circulation in the EU	Union importers may or may not be domiciled in the EU	Union importers shall publicly report on an annual basis, on their supply chain due diligence policies and practices for responsible sourcing.	The EU Member States are responsible for monitoring compliance; where an infringement is found, they shall issue a notice of remedial action to be taken by the Union importer.		Union importers should monitor suppliers and operate a chain of custody or supply chain traceability system	None

In particular since the adoption in 2017 of the French law on due diligence (see below, 4.2.), there exists currently a strong momentum in Europe to move beyond approaches to human rights due diligence that are based on either sector-specific or voluntary initiatives, and to include HRDD as a binding requirement across all sectors. Thus, the Fundamental Rights Agency adopted Opinion 1/2017: Improving access to remedy in the area of business and human rights at the EU level, in which it calls for "incentivising due diligence obligations for companies". More recently, a study on '*Access to legal remedies for victims of corporate human rights abuses in third countries*' commissioned by the European Parliament,⁵⁵ based on a review of 35 business and human rights cases brought in the EU (12 of which were studied in detail), concluded that the European Commission should propose legislation on

⁵⁵ Policy Department for External Relations Directorate General for External Policies of the Union PE 603.475 - February 2019.

mandatory due diligence at the EU level modelled on the French law, but with a wider scope of application and a reversed burden of proof. It recommends, alternatively, that if mandatory due diligence, either in specific sectors or more broadly, is not achievable or is only limited to a small number of companies, the European Commission might consider making the adoption of stringent company-based human rights due diligence instruments a requirement for companies in the context of public procurement or investment funds.

It follows from the "Brussels I" Regulation (now the "Brussels I" (Recast) Regulation No 1215/2012⁵⁶) that all companies domiciled in the EU may be sued, in tort liability cases, by any person to whom they have caused harm through their activities, whether within the EU Member States' territory or outside the EU.⁵⁷ Such claims may be filed before the domestic courts of the EU Member States against companies that have their statutory seat in the State concerned, or that have their central place of administration or their principal place of business in that State.⁵⁸ The substantive rules applicable to such cases shall in principle be the rules of the jurisdiction where the damage occurred,⁵⁹ although if these rules are insufficiently protective of victims' rights, the rules of the forum State may apply instead.⁶⁰

This regime may provide a remedial avenue for victims of abuse in global supply chains, or for victims of violations in multinational groups, where the lead buyer is domiciled in the EU or, should the violation be the result of the conduct of a subsidiary company, where the parent company is domiciled in the EU. Indeed, it has been proposed to strengthen further the protection afforded by this regime, in order to include in particular:

- a provision extending the jurisdiction of the courts of the EU Member States where the EU parent company is domiciled to the claims over its foreign subsidiary or business partners when the claims are so closely connected that it is expedient to hear and determine them together; and
- a provision establishing a *forum necessitatis* on the basis of which a court of an EU Member State may, on an exceptional basis, hear a case brought before it when the right to

⁵⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1..

⁵⁷ Article 4(1) of the Brussels I Regulation provides that "Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state". The Court of Justice of the European Union confirmed that the jurisdiction established by the 1968 Brussels Convention (or, now, the "Brussels I" Regulation (Recast)) is mandatory, and cannot be set aside even on the basis of the *forum non conveniens* doctrine relied on in common law jurisdictions, which allows courts to dismiss claims where the claimants would have access to another judicial forum more closely connected to the case concerned: Case C-281/02, *Owusu v. Jackson*, judgment of 1 March 2005 (EU:C:2005:120), para. 41 ("Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention"). For a recent application of this rule, see the judgment delivered by the United Kingdom Supreme Court on 10 April 2019, *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)* [2019] UKSC 20.

⁵⁸ This follows from a combination of article 4(1) and 63(1) of the "Brussels I" Regulation.

⁵⁹ This follows from the "Rome II" Regulation on the law applicable to non-contractual obligations (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), OJ L 199, 31.7.2007, p. 40), article 4(1) of which provides that "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

⁶⁰ Indeed, article 16 of the "Rome II" Regulation provides (under the title "Overriding mandatory provisions") that "Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation".

a fair trial or access to justice so requires, and the dispute has sufficient connection with the EU Member State of the court seized (see also on this issue Box 2, in section 5.1.).⁶¹

Although this regime is not directly related to the imposition of human rights due diligence obligations on companies domiciled in the EU, it does allow to anticipate a situation in which EU-based companies may be liable for human rights violations occurring in the multinational group of companies or in the supply chain on two separate grounds, either based on general civil liability rules, or based on the imposition of a duty of care (or due diligence obligations) modelled, for instance, on the 2017 French law. The establishment of a duty of care could help overcome barriers, linked to the difficulties encountered in seeking to pierce the corporate veil or to the indirect nature of the link between suppliers' conduct and the conduct of the buyer, that typically have made it difficult for victims of violations in transnational situations to seek remedy. It could also provide businesses operating from within the EU with much needed clarity, as well as reduce the risks associated with distortions of competition within the EU, since the civil liability rules that would currently apply to such legal actions not only would be those of the countries where the damage occurred, which per definition allows for a great variability, but could also be interpreted very differently by different courts.

4.2. France

The French Law of 27 March 2017 on due diligence imposes on large companies domiciled in France or doing business in France, that they adopt and effectively implement a 'vigilance plan' ('plan de vigilance'), which should include measures to identify risks to human rights, health and safety, and to environment, that might be caused by the activities of the company itself, by those of the companies it controls, directly or indirectly, or by the activities of sub-contractors or suppliers with whom the company has a permanent business relationship (where such activities are linked to that relationship).⁶² In French law, a company is considered to 'control' another company either where it owns enough stock to detain (directly or indirectly) the majority of the votes in that other company, or when it is in a position to appoint, for two consecutive years, the majority of the members of the board of directors; such 'control' may also result from a contractual agreement between the two companies.⁶³ As to the 'permanent business relationship', this refers to 'a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'.⁶⁴ The objective of thus limiting due diligence obligations to the suppliers with which a company has a long-term business relationship is clear: only where the buyer has such a long-term relationship can it expect to bring about changes in the conduct of the operations of the supplier, and only then, it could be argued, is it easy for a company to monitor its supplier. However, while perhaps explainable for practical reasons, there is no reason in principle why even a one-time buyer should not be able to insert into the supply contract a clause referring to compliance, by the supplier, with international human rights standards (including complying with the core ILO conventions), imposing this as an essential condition of the contract. Moreover, it cannot be excluded that in some cases, this condition of the French law shall lead buyers to avoid

⁶¹ These were among the proposals included in the aforementioned 2019 study on *Access to legal remedies for victims of corporate human rights abuses in third countries*.

⁶² See Art. L. 225-102-4.-I, inserted into the Commercial Code (Code de commerce), al. 3 ("Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle au sens du II de l'article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation").

⁶³ Article L. 233-6 of the Commercial Code.

⁶⁴ Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, at 320.

developing long-term relationships with suppliers, and opt instead for more *ad hoc*, one-time relationships. While this danger should not be exaggerated (a buyer generally cannot afford the high transaction costs that such an option would imply), it may in theory reduce the ability of the supplier to plan sales in advance, which in turn may lead to a further casualization of labour down the supply chain — for instance, if the supplier only hires workers on fixed-term contracts, given the lack of certainty as to future sales.

The 'vigilance plan' should be designed in consultation with the stakeholders of the company, and include five elements: a mapping of the risks; a procedure for the regular assessment of the subsidiary companies, the sub-contractors or suppliers with whom the company has a permanent business relationship; actions for the mitigation of the risks identified or the prevention (i.e., avoidance) of the most serious abuses; an alert mechanism, established in agreement with the representative unions, allowing for the identification of risks; a mechanism to ensure an adequate follow-up of the measures adopted and an assessment of their effectiveness.⁶⁵ The vigilance plan is to be made public.

Certain sanctions attach to the failure of the companies concerned to adopt the vigilance plan as required by the law. French courts may oblige the company to comply, if a company fails to do so after a three-months period following a request that it take action, that any interested person may file. Moreover, where a company fails to adopt a vigilance plan, and a risk materializes that the plan might have prevented from occurring, the civil liability of the company may be engaged.⁶⁶ Crucially therefore, a duty of care is implicitly introduced through the French law: a company shall be liable if the victim can show that the company could have prevented the harm from occurring, by the adoption of a vigilance plan prepared in accordance with the legislative requirements set out above. However, this is an ambiguous victory: a plausible reading of the new regime is that, where a vigilance plan has been adopted in accordance with the requirements set out in the Law of 27 March 2017, and a violation of human rights or an environmental harm nevertheless do occur in the group of companies or in the supply chain, the liability of the parent company or of the lead company cannot be engaged. Though the Law of 27 March 2017 reaffirms the applicability, to legal actions filed by victims alleging civil liability, of the general provisions of the Civil Code governing such liability, the new duty of care it introduces thus does not introduce a regime of liability without fault, such as has become common in the area of occupational accidents.⁶⁷

⁶⁵ The French version lists as follows these different components of the vigilance plan: "1° Une cartographie des risques destinée à leur identification, leur analyse et leur hiérarchisation ; 2° Des procédures d'évaluation régulière de la situation des filiales, des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, au regard de la cartographie des risques ; 3° Des actions adaptées d'atténuation des risques ou de prévention des atteintes graves ; 4° Un mécanisme d'alerte et de recueil des signalements relatifs à l'existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société ; 5° Un dispositif de suivi des mesures mises en œuvre et d'évaluation de leur efficacité".

⁶⁶ Article L. 225-102-5 of the Commercial Code.

⁶⁷ This also appears to be the interpretation of the French Constitutional Council, in its decision n° 2017-750 of 23 March 2017, which led to a partial annulment of the draft law: see, in particular, paras. 27-28 of the decision ("27. En renvoyant aux articles 1240 et 1241 du code civil dans le nouvel article L. 225-102-5 du code de commerce, le législateur a seulement entendu rappeler que la responsabilité de la société à raison des manquements aux obligations fixées par le plan de vigilance est engagée dans les conditions du droit commun français, c'est-à-dire si un lien de causalité direct est établi entre ces manquements et le dommage. Les dispositions contestées n'instaurent donc pas un régime de responsabilité du fait d'autrui ...").

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size / sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsubsidiary	Lead company-sub-contractor	
French Law of 27 March 2017 on due diligence	Companies of > 5,000 employees (domiciled in France) or > 10,000 employees (foreign but operating in France) / across all sectors	Extends to companies either domiciled in France or operating in France	Present a "vigilance plan" including five components	May be enforced through judicial injunctions	Parent 'controlling' the subsidiary must include the subsidiary in its vigilance plan	Lead company to extend the vigilance plan to suppliers / sub-contractors in a permanent business relationship	Civil liability engaged where vigilance plan might have prevented an abuse; liability may not be engaged where a vigilance plan was adopted

4.3. The Netherlands

The Dutch Child Labour Due Diligence Law (*Wet Zorgplicht Kinderarbeid - WZK*) was promulgated on 24 October 2019.⁶⁸ The law applies to all companies that sell goods or provide services on the Dutch consumers, whether or not they are registered in the Netherlands.⁶⁹ This may include companies selling goods or providing services online, to the extent that they address themselves explicitly to the Dutch consumer. The scope of application *ratione personae* of the legislation is therefore particularly broad. All the companies concerned should provide a declaration that they have practiced due diligence with a view to preventing child labour in the supply chain. The declaration is filed with a Supervisory Body, and published on the website of that Body.

All companies operating on the Dutch market are expected to assess whether there is a risk that child labour occurs in the supply chain: such assessment should be made following the prescriptions of the ILO-IOE Child Labour Guidance Tool for Business, adopted in 2015.⁷⁰ (Section C.2 of this Tool describes what steps companies are expected to take in order to identify the risk of child labour occurring in the supply chain: such assessment involves impact assessments; prioritisation of the suppliers in accordance with the potential severity of the impacts; engaging with potentially affected stakeholders; and monitoring of potential impacts on an ongoing basis. The WZK specifies, however, that the inquiry of the company into the practices of its supplies should involve reasonable efforts: the company is not expected to seek information that is not accessible with such efforts.⁷¹) The company which, on the basis of such assessment, identifies the occurrence of child labour or has reasons to suspect that child labour is occurring, should adopt an action plan in accordance with its due

⁶⁸ Wet van 24 oktober 2019 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). The law shall enter into force, at the earliest on 1 January 2020, if the necessary Executive Decree is adopted by then.

⁶⁹ WZK, Art. 4(1).

⁷⁰ *How to do business with respect for children's right to be free from child labour: ILO-IOE child labour guidance tool for business* / International Labour Office, ILO International Programme on the Elimination of Child Labour; International Organisation of Employers - Geneva: ILO, 2015.

⁷¹ WZK, Art. 5(2).

diligence obligations.⁷² While the WZK does not provide guidance as to how this action plan should be prepared, this can be determined later by government. Article 5(4) of the WZK provides that the Government (the Minister of Foreign Trade and Development Cooperation) may approve a plan of action negotiated between employers' and workers' organisations and civil society organisations; the implementation of such an officially approved plan of action is considered to be a sufficient implementation of the due diligence obligation.

The obligations imposed under the WZK are subject to administrative controls in that failure to comply may result in the imposition of fines (for an amount of 4100 euros), and criminal sanctions, including imprisonment, may be imposed if the failure to comply persists for five years.

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size / sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsubsidiary	Lead company-sub-contractor	
Dutch Child Labour Due Diligence Law of 24 October 2019	All companies, whatever their size, across all sectors	Extends to all companies doing business in the NL, whether or not physically (i.e., companies selling online to Dutch consumers are included)	Provide a declaration that the company has assessed the risks of child labour in the supply chain and, if such a risk is deemed to exist, adopted a plan of action	May be enforced through administrative fines, and exceptionally criminal sanctions	Unclear	Buyer should practice due diligence vis-à-vis all suppliers	Unclear

4.4. United Kingdom

Due diligence was formally introduced in the United Kingdom with the adoption of the 2015 Modern Slavery Act. The MSA defines as an offence to hold a person in slavery or servitude, to require a person to perform forced or compulsory labour, or (under the qualification of human trafficking) to arrange for or facilitate the travel of a person with a view of that person being exploited. Under the heading "Transparency in supply chains etc.", section 54 of the MSA provides that businesses ("commercial organisations") doing business in the United Kingdom, beyond a certain annual turnover (determined by Regulations at 36 million GBP, including the turnover of any subsidiaries, whether or not operating wholly within the UK⁷³), must prepare an annual "slavery and human trafficking statement".

⁷² WZK, Art. 5(1).

⁷³ *Transparency in Supply Chains etc. A practical guide. Guidance issued under section 54(9) of the Modern Slavery Act 2015* (hereafter referred to as "Guidance") (initially published on 29 October 2015, last updated on 22 October 2018), para. 3.2. The requirement to produce an annual statement applies to any organisation meeting these requirements. However, the Guidance provides that: "Where a parent and one or more subsidiaries in the same group are required to produce a statement, the parent may produce one statement that subsidiaries can use to meet this requirement (provided that the statement fully covers the steps that each of the organisations required to produce a statement have taken in the relevant financial year)".

The requirement applies to all companies, whether or not incorporated in the United Kingdom, doing business in the UK.⁷⁴ In contrast, "organisations that do not have a demonstrable business presence in the United Kingdom will not be caught by the provision".⁷⁵ A parent company will not be considered to have a "business presence" in the UK by the mere fact that it owns a subsidiary in the UK, since "a subsidiary may act completely independently of its parent or other group companies"⁷⁶; however, "Where a foreign parent is carrying on a business or part of a business in the UK, it will be required to produce a statement".⁷⁷ Moreover, "If a foreign subsidiary *is part of the parent company's supply chain or own business*, the parent company's statement should cover any actions taken in relation to that subsidiary to prevent modern slavery".⁷⁸ In contrast, non-UK subsidiaries that are not part of the supply chain or business operations of the company to which the requirement applies are not required to produce a statement, although this "would represent good practice and would demonstrate that the company is committed to preventing modern slavery".⁷⁹ In other terms, the disclosure requirement of section 54 applies to all businesses of a certain size doing business in the UK, and the requirement extends to any subsidiaries such businesses may own, even incorporated or doing business abroad.

The annual "slavery and human trafficking statement" must either describe "the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business", or state that "the organisation has taken no such steps".⁸⁰ The MSA thus adopts an approach similar to the "comply or explain" approach of the EU's Non-Financial Reporting Directive: the objective, as explained in the Guidance provided by the Home Secretary, is to "increase transparency by ensuring the public, consumers, employees and investors know what steps an organisation is taking to tackle modern slavery",⁸¹ consistent with the overall aim of the disclosure requirements established by the MSA, which is "to create a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards".⁸²

The MSA also determines, albeit on an indicative basis⁸³, what information the slavery and human trafficking statement may contain: this includes the structure of the business and its supply chains, but also, in particular:

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

⁷⁴ See MSA, s 54(12), referring to "commercial organisations" as corporations (wherever incorporated) or partnerships (wherever formed) "which carry on a business, or part of a business, in any part of the United Kingdom".

⁷⁵ Guidance, para. 3.8.

⁷⁶ Guidance, para. 3.8.

⁷⁷ Guidance, para. 3.11.

⁷⁸ Guidance, para. 3.11. (emphasis added; the Guidance adds in Annex C that "Whether a parent organisation's statement must include the steps taken in relation to its subsidiaries needs to be determined on a case-by-case basis").

⁷⁹ Guidance, para. 3.13.

⁸⁰ Modern Slavery Act, s. 54(4).

⁸¹ Guidance, para. 1.5.

⁸² Guidance, para. 2.5.

⁸³ See *Explanatory Note to the 2015 Modern Slavery Act* (prepared by the Home Office), para. 254: "The Government expects many businesses would choose to cover these areas, and this in turn would make statements easier to assess and compare".

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate...

This last suggestion is innovative, since it creates an expectation that the business shall seek to assess how effectively its policies operate to prevent the risks of slavery or human trafficking occurring, with a view to permanently improving the system of prevention.

The disclosure requirements are stipulated in section 54, (7) and (8):

(7) If the organisation has a website, it must—

(a) publish the slavery and human trafficking statement on that website, and

(b) include a link to the slavery and human trafficking statement in a prominent place on that website's homepage.

(8) If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.

These duties are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; a failure to comply with a judicial injunction may result in a finding of contempt of court, sanctioned by an unlimited fine.⁸⁴

In principle, the disclosure requirements imposed under section 54 of the MSA are without prejudice of any liabilities that might result from slavery or human trafficking occurring in the supply chain: "When the Act refers to ensuring that slavery and human trafficking is not taking part in any part of its supply chain [by specifying that the slavery and human trafficking statement must include 'the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business'], this does not mean that the organisation in question must guarantee that the entire supply chain is slavery free. Instead, it means an organisation must set out the steps it has taken in relation to any part of the supply chain (that is, it should capture all the actions it has taken)".⁸⁵

⁸⁴ Modern Slavery Act, s. 54(11); Guidance, para. 2.6.

⁸⁵ Guidance, para. 2.3.

Source	Scope (companies concerned)		Disclosure/reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size / sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
UK 2015 Modern Slavery Act	Companies with a turnover > £36m	Companies doing business in the UK, whether incorporated in the UK or foreign; as well as subsidiaries provided they are part of the supply chain or business operations of the parent company.	Present an annual "slavery and human trafficking statement"	May be enforced through judicial injunctions	Parent must include the subsidiary in its statement provided the subsidiary is part of the parent company's supply chain or own business	Statement from the lead company must describe the due diligence processes in relation to slavery and human trafficking in its business and supply chains	None

However, there is another dimension to the rise of due diligence obligations in the UK. In a number of cases, courts have sought to define the contours of a duty of care to be imposed on corporations operating in the United Kingdom, in particular as regards risks of human rights abuses in the supply chains or in the multinational group of companies. The case law in this area remains nevertheless unsettled. The main area of controversy concerns whether or not parent companies owe a duty of care to individuals or communities affected by the activities of subsidiary companies, and if so, whether such a duty arises merely due to the existence of an investment nexus between the parent and the subsidiary, or whether it stems from the control the parent effectively exercises on the subsidiary. Two approaches may be distinguished in this regard.

A first approach is to allow for the liability of the parent company to be engaged where it has played an active role in the commission of the harm, in other terms, where it has been complicit in the conduct of the subsidiary. The case of *Connelly v. RTZ Corporation plc and Others* may serve as an illustration.⁸⁶ The claimant in that case was a former employee for Rossing Uranium Ltd. (R.U.L.), a Namibian subsidiary of the defendant corporation (RTZ Corporation plc, incorporated in the United Kingdom). He had been employed by R.U.L. in a uranium mine, following which it was discovered, three years after his return, that he was suffering from cancer of the larynx, apparently due to exposure to radioactive material in the mine. According to the description by the House of Lords, the claim was based on the allegation that 'R.T.Z. had devised R.U.L.'s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy', and that 'an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine'. The argument was therefore not (as in classical piercing-the-veil analysis) that separation between the parent and the subsidiary should be treated as a mere fiction, a fraudulent means of limiting the liability of the parent corporation, without any correspondence in economic reality: it was that R.T.Z. corporation had itself contributed, by its acts, in causing the damage for which the victim sought compensation. Such an argument would have had no chance to succeed if, instead of being involved in defining the policy of its subsidiary on health and safety or environmental issues, R.T.Z. corporation had simply ignored any risks associated with the

⁸⁶ *Connelly v. RTZ Corporation plc and Others* [1997] UKHL 30; [1998] AC 854; [1997] 4 All ER 335; [1997] 3 WLR 373 (24th July, 1997).

mining of uranium, and had acted merely as a shareholder, monitoring the financial performances of its subsidiary, but without seeking to be informed about, let alone participate in, the definition of its everyday policies in such areas.

In *Connelly*, the direct liability of the parent corporation was asserted on the basis of the *actions* it had taken in defining the policies of its subsidiary. A regime in which the liability of the parent company would be engaged for its actions alone (for the role it played in aiding and abetting the subsidiary to commit the alleged violation, in particular) presents a major disadvantage, however, it could create a disincentive on parent companies to monitor the behaviour of their subsidiaries, since any amount of 'excessive' control might allow to conclude either that the subsidiary is merely acting as an agent of the parent, or that the implication of the parent in the operations is such that it should be held liable alongside the subsidiary.⁸⁷

By contrast, the *omissions* of the parent corporation were at stake in *Lubbe and 4 Others v. Cape plc*, which the House of Lords was presented with again only three years later.⁸⁸ The *Lubbe* case illustrates the second approach to this question, which imposes on the parent corporation a duty of care. Over 3,000 plaintiffs claimed damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos in South Africa, either upon working in mines owned by the defendant (until 1948) or by a fully-owned South African subsidiary of the defendant, or as a result of living in an area contaminated by the mining activities of the defendant or its subsidiaries. As noted by the leading opinion of Lord Bingham of Cornhill, 'the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, *failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group*. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)'.⁸⁹

Central to the *Cape plc* case was, therefore, the question 'whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company'.⁹⁰ It does not matter whether the parent company in fact was closely involved in setting up the procedures aiming at protecting the health and safety of the workers in the subsidiary: all that matters for the duty of care to be established, is that the relationship between the parent company and the subsidiary was such that the parent could have done more to ensure that such procedures provide adequate protection to the employees.

⁸⁷ S. Joseph, *Corporations and Transnational Human Rights Litigation*, supra note 86, at 134 (citing A.J.. Natale, 'Expansion of Parent Corporate Shareholder Liability through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary', *Univ. of Cincinnati L. Rev.*, 57 (1988) 717-750, at 736 ; and J. Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law', *Cumberland L. Rev.*, 31 (2000) 311-335, at 326).

⁸⁸ On 14 December 1998, the House of Lords had already refused to allow leave to the defendants for filing a further appeal against an initial decision by the Court of Appeal. Following this, over 3,000 new plaintiffs emerged, fundamentally transforming the nature of the litigation presented before the United Kingdom courts.

⁸⁹ Emphasis added.

⁹⁰ As indicated by the opinion of Lord Bingham of Cornhill, this is the issue as reformulated during the first Court of Appeal hearing in the case.

This approach was confirmed the more recent case of *Chandler*, also concerning Cape plc.⁹¹ In confirming the conditions under which a company owes a duty of care to its employees, the Court of Appeals in *Chandler* considered that a parent company may be liable for the conduct of its subsidiary in certain circumstances. Among the factors that have to be taken into account in this regard, is that "the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection", for the purpose of which determination "it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary", as it would be sufficient to show that "the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues".⁹² The same judgment states explicitly that the imposition of a duty of care is unrelated to the lifting of the corporate veil ("A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company"⁹³). It is clear however that the two problems are closely interrelated: the imposition of a duty of care dispenses the victim from the burden of having to pierce the separation between the two legal entities.

British courts have still not made a clear choice between these two routes. The cases of *Okpabi and others v Royal Dutch Shell Plc and another* and *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*, which are currently pending final resolution, could shed further light on how such a duty of care might be imposed in the future. In *Vedanta*, the claimants are 1,826 Zambian citizens living in the vicinity of a copper mine operated by Konkola Copper Mines plc (KCM), who allege that their health and farming activities have been damaged by the discharge of toxic matters by the mine. The case is filed against Vedanta Resources Ltd, the parent company of KCM, which is incorporated in the UK, on the basis of article 4(1) of the "Brussels I" (Recast) Regulation.⁹⁴ The claimants allege that Vedanta has committed a tort of negligence by reason of the "very high level of control and direction that [Vedanta] exercised at all material times over the mining operations of [KCM] and its compliance with applicable health, safety and environmental standards".⁹⁵ This framing suggests that, whereas a duty of care may arise in the common law where a tort of negligence is asserted, in circumstances where the parent is actively involved in the operations of the subsidiary, the mere existence of an investment nexus does not, as such, give rise to such a duty. It is this (pre-*Cape*) reading of the law of negligence that Lord Briggs, who delivered the lead judgment in *Vedanta*, seems to endorse:

Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that

⁹¹ *Chandler v Cape plc*, [2012] EWCA (Civ) 525. The Court of Appeals confirms the approach of the High Court in *Chandler v. Cape plc*, [2011] EWHC 951 (QB).

⁹² *Chandler v Cape plc*, [2012] EWCA (Civ) 525, par. 80 (emphasis added).

⁹³ *Id.*, par. 69.

⁹⁴ Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, referred to above.

⁹⁵ Particulars of Claim, para. 79, as quoted from by the Supreme Court of the United Kingdom in its judgment of 10 April 2019, *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)* [2019] UKSC 20 (leading judgment by Lord Briggs, with whom the other four members of the Court stated to agree), para. 3.

the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.⁹⁶

There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant ...⁹⁷

Although the judgment of the Supreme Court in *Vedanta* concerned exclusively the procedural issue of whether or not English courts could exercise jurisdiction in this case, these statements do suggest that the decisive criterion to impose a duty of care on the parent company, is that it exercises an effective control, at the operational level, on the activities of the subsidiary, or that it has at least presented itself as doing so, by adopting group-wide policies related for instance to the environment or to occupational health and safety; in contrast, the mere existence of an investment nexus would not be sufficient to give rise to such a duty of care.

This was also the position of the majority of the Court of Appeals in the case of *Okpabi and others v Royal Dutch Shell Plc and another*. In a judgment of 14 February 2018, the Court of Appeal held that the English courts do not have jurisdiction to hear claims against two companies in the Shell group (Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd., domiciled in the UK and Nigeria respectively) relating to alleged pollution in the Niger Delta in Nigeria. The majority found that the claimants were unable to demonstrate that Royal Dutch Shell, a UK listed company, owed a duty of care to those affected by leaks from pipelines and associated infrastructure operated by its Nigerian subsidiary. The claimants argued that Royal Dutch Shell "... owed a common law duty of care to the claimants ... to take all reasonable steps to ensure that oil spills from the ... pipelines and Infrastructure did not cause foreseeable damage [to community land and other common interests of the community]".⁹⁸ Indeed, they noted, Royal Dutch Shell exerts significant control and oversight over [SPDC's] compliance with its environmental and regulatory obligations and has assumed responsibility for ensuring observance of proper environmental standards by [SPDC] in Nigeria. [RDS] carefully monitors and directs the activities of [SPDC] and has the power and authority to intervene if [the Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd.] fails to comply with the Shell Group's global standards and/or Nigerian law".⁹⁹ The Court of Appeal however considered that the claimants has failed to demonstrate "a sufficient degree of control of SPDC's operations in Nigeria by RDS to establish the necessary degree of proximity. [...] There were reputational concerns (in part in relation to personnel), there was concern about losses of oil and environmental damage, there was a desire to ensure that proper systems were put in place to reduce such losses and environmental damage; and there was the establishment of an overall system which was there to ensure best uniform practices. However, the claimants

⁹⁶ *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)* [2019] UKSC 20, para. 49.

⁹⁷ *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)* [2019] UKSC 20, para. 51.

⁹⁸ *Okpabi and Others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 (the quote appears in para. 35 of the judgment (14 Feb. 2018)).

⁹⁹ *Id.* (the quote appears in para. 47 of the judgment).

have not demonstrated an arguable case that RDS controlled SPDC's operations, or that it had direct responsibility for practices or failures which are the subject of the claim".¹⁰⁰

Like the *Vedanta* case referred to above, the judgment illustrates the persistence of an approach that makes the imposition of a duty of care in parent-subsidary relationships conditional upon the parent exercising a sufficient degree of control on the subsidiary. This approach is based, to a large extent, on a concern for fairness: it might be perceived as unfair to impose on a company a liability for actions taken by a subsidiary in which it was not effectively involved. The implication, however, is that parent companies that minimize their implication in the operations of their subsidiaries may limit their liability, creating an incentive for them to adopt a "hands-off" approach towards the subsidiary's operations. This is problematic, just like it is problematic, both for potential victims of harms caused by a subsidiary company (where that subsidiary cannot be sued directly, either because it has disappeared or because the victims do not have access to effective remedies against it, or where the subsidiary is insolvent) and for the corporations themselves, that the standards applicable to the liability of the parent company for acts adopted by the subsidiary remain under dispute.

¹⁰⁰ *Id.*, para. 127.

5. Areas of controversy

The developments described above illustrate the growing trend of imposing human rights due diligence in multinational groups and in supply chains. As noted above, this trend could in the future play an important role to ensure that economic globalisation, with the facilitation of transborder investment and the deepening of the international division of labour, shall lead to improve accountability of corporations for human rights violations, rather than weaken it. However, these examples also show that States (or regional organisations such as the EU) are adopting a variety of approaches in implementing human rights due diligence. Five issues are particularly controversial.

5.1. Due diligence and extraterritorial jurisdiction

The minimum view: a State duty to control corporations domiciled in that State or operating from that State

Different views exist as to the duty of States to control the activities of business enterprises beyond their national territory. Consistent with the scope of adjudicative extraterritorial jurisdiction allowed in international law (i.e., the freedom States are recognized to give their national courts competence to adjudicate claims originating from situations located outside the national territory),¹⁰¹ a State may extend the reach of due diligence obligations to all companies which are domiciled within its territory or operate under its jurisdiction. Indeed, there is a growing consensus that, in imposing on companies that they discharge their human rights due diligence obligations, States should at a minimum impose such obligations on all companies domiciled in, or operating from, the State concerned.

The Guiding Principles on Business and Human Rights themselves are cautious in this regard. They provide that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations” (Principle 2). Though this includes operations abroad, the Commentary to the Guiding Principles qualifies this principle by stating:

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support.

These formulations are excessively timid. The OECD Guidelines on Multinational Enterprises and the Due Diligence Guidance for Responsible Business Conduct are addressed to adhering countries and to “enterprises operating *in or from their territories*”, which at a minimum implies that States are expected to apply these guidelines to activities conducted outside the national territory, by all companies domiciled within their jurisdiction.¹⁰² We find

¹⁰¹ For a detailed discussion of this issue, see Olivier De Schutter, “Les affaires *Total* et *Unocal*: complicité et extraterritorialité en matière d'imposition aux entreprises d'obligations en matière de droits de l'homme”, *Annuaire français de droit international*, vol. LII (2006), pp. 55-101.

¹⁰² This was clarified when the Guidelines for Multinational Enterprises (initially adopted on 21 June 1976 by the Organization for Economic Cooperation and Development (OECD)) were revised in 2000, leading to a revitalization of the supervisory mechanism and to the introduction of a general obligation on multinational

similar references to the extraterritorial jurisdiction which States may exercise in a number of treaties, some of which are closely related to situations of human rights abuses, and also motivated by the perceived need to moralize economic globalization. Article 4(2) of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions¹⁰³ provides that 'Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official'.¹⁰⁴ The reference to the 'nationals' of the States parties includes both natural persons and legal persons.¹⁰⁵ The 2003 UN Convention against Corruption also provides that a State party may establish its jurisdiction over an offence as established under the Convention where it is committed by a national of that State party.¹⁰⁶

Indeed, the obligation of a State to control the conduct of non-State actors where such conduct might lead to human rights violations outside its territory has been explicitly affirmed by various United Nations human rights treaty bodies. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should "prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".¹⁰⁷ Specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated that "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host

enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments" (para. 2 of the Chapter on 'General Policies'). It was stated on that occasion that the OECD Member States and the other countries adhering to the guidelines were to encourage their multinationals to observe these guidelines wherever they operate. In the introduction to the OECD Declaration on International Investment and Multinational Enterprises, the OECD Member States "jointly recommend to multinational enterprises *operating in or from their territories* the observance of the Guidelines". Para. 2 of the operative part, under the chapter of the Guidelines relating to the 'Concepts and principles', states: "Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country". (On the context in which the OECD launched the revitalization of the Guidelines for Multinational Enterprises, see J. Murray, 'A new phase in the regulation of multinational enterprises: the role of the OECD', 30 *Industrial Law Journal* 255 (2001); Jan Huner, 'The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000, at 197-205).

¹⁰³ The OECD Bribery Convention was adopted on 21 November 1997 and entered into force on 15 February 1999. On the contribution of this instrument, see P. M. Nichols, 'Regulating Transnational Bribery in Times of Globalisation and Fragmentation', 24 *Yale J. Int'l L.* 257 (1999).

¹⁰⁴ Moreover, Article 4(1) provides that 'Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory'. Thus for instance, the home State, party to the Anti-Bribery Convention, must establish its jurisdiction when a decision is made in the headquarters of a transnational corporation located in that State to bribe a foreign public official in another State where the corporation seeks to develop its activities.

¹⁰⁵ See Article 2 of the Convention ('Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official'). This does not impose an obligation to establish the *criminal* liability of legal persons, since such liability may be civil or administrative. See para. 20 of the Commentaries to the OECD Anti-Bribery Convention, adopted by the Negotiating Conference on 21 November 1997.

¹⁰⁶ See Art. 42(2), b). The Convention was adopted by the UN General Assembly by resolution 58/4 of 31 October 2003 and entered into force in December 2005, after the number of 30 ratifications was reached.

¹⁰⁷ See, eg, Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), para. 39; or Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31.

states under the Covenant".¹⁰⁸ In General Comment No. 24, which it adopted in 2017 on the issue of how the International Covenant on Economic, Social and Cultural Rights applies to business activities, the Committee is more explicit, stating that the duty of the State to protect human rights "extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law. Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory".¹⁰⁹

The Human Rights Committee, the expert body tasked with supervising compliance with the International Covenant on Civil and Political Rights, has taken the same view. In a case concerning the role of two Canadian corporations in building a settlement on Occupied Palestinian territory, it stated that

The extraterritorial obligation to protect or to ensure human rights also entails regulating corporations incorporated under a State's jurisdiction. Since the two corporations are incorporated in Canada, the State party has an obligation to ensure that they do not violate human rights at home or abroad, including human rights protected by the Covenant.¹¹⁰

There appears thus to be broad agreement that States should take measures to ensure that corporations domiciled under their jurisdiction act with due diligence to prevent human rights violations within the scope of their operations: this applies to all such companies, whether they are incorporated under that State's law (and thus have their statutory seat in that State), or whether they have their main place of business or place of central administration within that State's territory.¹¹¹ There is broad acceptance across governments that States should empower their national courts to adjudicate claims filed by victims of conduct of all corporations "domiciled" under their jurisdiction. But two issues are more controversial.

The duty to control corporations with "substantial business interests" or "substantial activities" on the State's territory

The acceptance of a duty of the State to regulate corporations as regards their extraterritorial business operations does not necessarily extend to situations where such corporations merely have "substantial business interests" in the State concerned. The contrasted approaches of the Committee on the Rights of the Child, on the one hand, and of the Committee on Economic, Social and Cultural Rights, on the other hand, which are reflected in their respective general comments (adopted in 2013 and 2017), illustrate this hesitation. The position of the Committee on Economic, Social and Cultural Rights has already been

¹⁰⁸ Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights', UN Doc. E/C.12/2011/1 (20 May 2011), para. 5.

¹⁰⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017): State parties' obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 31.

¹¹⁰ Human Rights Committee, *Yassin et al. v. Canada*, Comm. n°2285/2013, final views of 26 July 2017, para. 3.10. This statement is not new. The Human Rights Committee routinely has encouraged States parties to the International Covenant on Civil and Political Rights, in various Concluding Observations to 'set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations', and to 'take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad' (Concluding Observations: Germany (CCPR/C/DEU/CO/6 (2012)), para. 16).

¹¹¹ This is also the position been adopted by the Committee of Ministers of the Council of Europe in the 2016 Recommendation it adopted on human rights and business: see recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, on human rights and business, adopted on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, Annex, para. 13.

quoted from. The Committee on the Rights of the Child adopts a broader understanding of States' extraterritorial obligations referred to above. In its view, the States parties to the Convention on the Rights of the Child have obligations

to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or *substantial business activities* in the State concerned [see Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, principle 25 (2012)]. (Emphasis added).¹¹²

This was also the position taken in the Maastricht Principles on Extraterritorial Duties of States in the Area of Economic, Social and Cultural Rights, adopted in 2011 by a group of academic experts and non-governmental actors,¹¹³ which opt for the more progressive view:

States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

- a) the harm or threat of harm originates or occurs on its territory;
- b) where the non-State actor has the nationality of the State concerned;
- c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or *substantial business activities*, in the State concerned;
- d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-state actor's activities are carried out in that State's territory;
- e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.

It is important to note however that this broad understanding of States' extraterritorial human rights obligations is contained not only in statements adopted by independent experts, but also in positions adopted in intergovernmental settings. The Recommendation adopted in 2016 by the Committee of Ministers of the Council of Europe on human rights and business provides that the Council of Europe Member States should:

- apply such measures as may be necessary to encourage or, where appropriate, require that:
 - business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations;
 - business enterprises *conducting substantial activities within their jurisdiction* carry out human rights due diligence in respect of such activities;

¹¹² Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), para. 43.

¹¹³ The Maastricht Principles on Extraterritorial Duties of States in the Area of Economic, Social and Cultural Rights were adopted on 28 September 2011 by a range of academics, non-governmental organisations and research institutes, as well as by some mandate-holders of the Special Procedures of the Human Rights Council. They can be seen as an attempt at a "progressive development" of international human rights, as they are based on the jurisprudence of judicial and quasi-judicial human rights bodies.

including project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation.¹¹⁴

More recently, this broad understanding of States' extraterritorial obligations was reflected in the choice of wording made in the draft Legally Binding Instrument on Business and Human Rights, presented in July 2019.¹¹⁵ Article 7 (Adjudicative Jurisdiction) reads:

1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

1. such acts or omissions occurred; or
2. the victims are domiciled; or
3. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.

2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its:

1. place of incorporation; or
2. statutory seat; or
3. central administration; or
4. substantial business interests.

There is no doubt that, in international law, States are *authorized* to impose obligations on companies operating under their jurisdiction, including when the only link to the State is that they have "substantial business interests" within the State or conduct "substantial activities" within their jurisdiction. Although some governments remain reluctant to accept that they have a *duty* to exercise extraterritorial jurisdiction in such broadly defined circumstances, there now appears to exist a growing consensus on this issue within the Council of Europe (as illustrated by the above-cited recommendation), and at universal level (as reflected by the terms of the July 2019 version of the Draft Legally Binding Instrument on Business and Human Rights).

The "forum necessitatis" rule

It is arguable that, as a requirement resulting from the right to an effective remedy, States should provide remedies to victims where such victims seek compensation from a corporation connected to the forum State, even if the connection is weak, where the victims otherwise would not have access to a remedy. The right of access to a court is invoked in this regard, as the foundation of a *forum necessitatis* rule — a rule according to which all States with a sufficient connection to the facts of the case should provide access to a

¹¹⁴ Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business (adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies), para. 20 (emphasis added).

¹¹⁵ Revised Draft for a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, presented on 16 July 2019 by the Chair of the Open-Ended Intergovernmental Working Group the Human Rights Council established under HRC Res. 26/9 (26 June 2014), *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*.

remedy, in order to avoid a situation of denial of justice. Thus, in addressing the 'third pillar' (access to remedy), the Guiding Principles on Business and Human Rights themselves provide that

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. (Principle 25)

The Commentary of this Principle adds that "[l]egal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed" include the situation "[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim". Despite the rather ambiguous formulation of Principle 25 and its reliance on the territory/jurisdiction distinction, the commentary thus acknowledges the duty of the State to provide access to remedies in home State courts for human rights violations occurring in a host State, whenever victims cannot have access to effective judicial remedy in that State. This would not be without precedent: as recalled in greater detail in Box 2, this was also the suggestion of the European Commission when, in 2009, it put forward its proposal for a "recasting" of the Brussels I Regulation.

Box 2. The *forum necessitatis* rule in the EU: the proposals for a revision of the "Brussels I" regulation

When work was launched on the revision of the Brussels I Regulation,¹¹⁶ the European Commission suggested that it might be useful to include a *forum necessitatis* rule, "which would allow proceedings to be brought when there would otherwise be no access to justice".¹¹⁷ The idea, inspired by Article 7 of Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,¹¹⁸ was to avoid negative conflicts of jurisdiction leading, potentially, to a denial of justice. Following an initial consultation launched by its 2009 Green Paper, the European Commission proposed various revisions to the 'Brussels I' Regulation.¹¹⁹ In particular, it suggested the creation of two additional fora for disputes involving defendants domiciled outside the EU.

¹¹⁶ Council Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1. This Regulation sought to implement in European Community (now European Union) law the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, adopted in Brussels on 27 September 1968 (OJ L 299, 31.12.1972, p. 32). For the purposes of this report, the main contribution of the Brussels I Regulation was to make it mandatory for the national courts of the EU Member States to accept jurisdiction in civil liability cases filed against defendants domiciled in the forum State, whichever the nationality of the defendant or of the plaintiff and, in cases of extra-contractual liability, wherever the damage was inflicted. This rule is stipulated in article 2 § 1 of Regulation n° 44/2001, which provides that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". As regards the use of this basis for jurisdiction in transnational human rights litigation, see esp. G. Betlem, 'Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts', in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000), at 283; A.A.H. Van Hoek, "Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of their Suppliers", in Y. Konijn, F. Pennings and A. Veldman (eds), *Social Responsibility in Labour Relations: European and Comparative Perspectives*, Kluwer Law International, 2008, p. 147.

¹¹⁷ Green Paper on the Review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final of 21.4.2009.

¹¹⁸ OJ L 7 of 10.1.2009. This Regulation covers cross-border maintenance applications arising from family relationships. It establishes common rules for the entire European Union aiming to ensure recovery of maintenance claims even where the debtor or creditor is in another country.

¹¹⁹ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the regulation and enforcement of judgments in civil and commercial matters, COM(2010) 748 final of 14.12.2010.

First, Article 25 in the proposal provides that "Where no court of a Member State has jurisdiction in accordance with [the other provisions of the Regulation, as listed in] Articles 2 to 24, jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located, provided that (a) the value of the property is not disproportionate to the value of the claim; and (b) the dispute has a sufficient connection with the Member State of the court seized." In other terms, the proposal provides that a non-EU defendant can be sued at the place where moveable assets belonging to him are located provided their value is not disproportionate to the value of the claim and that the dispute has a sufficient connection with the Member State of the court seized. This rule is seen as compensating for the absence of the defendant in the Union. It is justified by the European Commission on the grounds that "Such a rule currently exists in a sizeable group of Member States and has the advantage of ensuring that a judgment can be enforced in the State where it was issued".¹²⁰

Second, the Commission proposed a new Article 26 in the Recast 'Brussels I' Regulation, providing that: "Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seized under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seized".

Such a "forum necessitatis" provision would have allowed the courts of a Member State to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned.

Both these rules would therefore have extended the jurisdiction of the national courts of the EU Member States to defendants which are not domiciled in the forum State, under a condition of subsidiarity (the national courts of one State should only have jurisdiction where no other court is competent within the EU (Art. 25) or even outside the EU (Art. 26)), and provided there exist certain connections with the forum State. According to the European Commission, this was intended to ensure "that citizens and companies have equal access to a court in the Union and that there is a level playing field for companies in the internal market in this respect. The harmonised rules compensate the removal of the existing national rules. ... the forum of necessity guarantees the right to a fair trial of EU claimants, which is of particular relevance for EU companies investing in countries with immature legal systems".¹²¹

In its extended impact assessment of its proposals for the revision of the 'Brussels I' Regulation, the European Commission considered that "The envisaged creation of a forum of necessity and a "mildly exorbitant" rule of jurisdiction, e.g. based on the location of assets having a link with the dispute in the territory, is hardly objectionable on a diplomatic level. On the contrary, impact on third countries would be positive as Member States would not be entitled to maintain more generous conditions for access to justice in their national law".¹²² Nevertheless, the Recast 'Brussels I' Regulation (Reg. No. 1215/2012) that was finally adopted — which entered into force on 1 January 2015 — did not contain rules corresponding to Articles 25 and 26 in the initial proposal.¹²³

¹²⁰ Id., p. 8.

¹²¹ Id., p. 8.

¹²² SEC(2010) 1548 final of 14.12.2010, para. 2.2.4.

¹²³ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20.12.2012, p. 1.

Although the idea of the *forum necessitatis* was finally rejected in the course of the preparation of what became the Recast "Brussels I" Regulation, it is a rule that may be found in some EU member States. In the Netherlands for instance, Article 9(b) and (c) of the Code of Civil Procedure provides a basis for the exercise of international civil jurisdiction over claims that would normally not fall within one of the other bases for jurisdiction if effective opportunities to bring those claims in foreign fora are absent. This has not often been applied in The Netherlands – and in any case not (yet) against a corporate defendant – but a well-known case was the assumption of jurisdiction over civil claims brought by Iraqi pilots who asserted that they could not receive a fair trial if forced to bring their claims before the courts in Kuwait.¹²⁴ The *forum necessitatis* rule will only be applied in exceptional cases such as the absence of a foreign court due to natural disasters or war or where plaintiffs cannot expect to receive a fair trial due to discriminatory legal rules. The provision is closely connected to the requirements of Article 6 of the European Convention on Human Rights.

In March 2012, this rule provided a basis for the assumption of jurisdiction by the Hague civil court over a civil claim brought by a foreign plaintiff in relation to his unlawful imprisonment and torture in Libya. In this *Palestinian doctor* case,¹²⁵ the only connection to the Netherlands was the plaintiff's presence in the Netherlands. This case concerned a claim for damages brought before The Hague District Court by a Palestinian doctor who claimed to have suffered damages following unlawful imprisonment for eight years in Libya for allegedly infecting children with HIV/AIDS. The place of residence of the defendants was unknown. In this case, the court relied on the *forum necessitatis* rule that allows Dutch courts to exercise jurisdiction over civil claims that would not normally fall under the ordinary bases for jurisdiction but where bringing those claims outside the Netherlands is simply impossible, either legally or practically.

States have a duty to impose human rights due diligence on corporations domiciled within their jurisdiction (incorporated under their laws or having located their central place of business within the national territory), and they should be encouraged, in addition, to provide that the domestic courts can receive claims filed against corporations having a reasonable link to the State, for instance as a result of substantial business activities being conducted within that State. The case is particularly strong in favour of such a broad understanding of the duties of the State where victims otherwise would not have access to remedy.

5.2. Due diligence and proximity in transnational activities

In the discussions concerning the adoption of a regulatory framework to impose the duty to practice human rights due diligence, a second question that occasionally arises is whether the scope of the duty, both as regards the human rights (including workers' rights) it extends to and as regards the degree of scrutiny applied, should be made to depend on the proximity of the link between the company concerned and the situation in which it is alleged to share responsibility.

"Proximity" is the concept at the heart of the British jurisprudence discussed above, which leads courts in the United Kingdom to impose a duty of care on the parent company only where that company exercises a degree of control on the subsidiary company's activities that is considered to be close enough. The question is also relevant, however, in the relationships between buyer and supplier in global supply chains. This is illustrated for instance by the approach adopted by the International Finance Corporation's Sustainability Framework.

¹²⁴ *Saloum/Kuwait Airways Corp.*, Amsterdam Subdistrict Court, April 27, 2000, 2000 Nederlands Internationaal Privaatrecht 315, at 472 [Kuwait Airways case II]; *Abood/Kuwait Airways Corp.*, Amsterdam Subdistrict Court, January 5, 1996, 1996 Nederlands Internationaal Privaatrecht 145, at 222 [Kuwait Airways case I].

¹²⁵ *El-Hojouj/Unnamed Libyan Officials*, The Hague District Court, 21 March 2012, LJN: BV9748.

Under this Framework, the IFC client — the corporation which the IFC lends support to — is expected to monitor workers' rights. The IFC Standards however (specifically, Performance Standard 2 (Labour and Working Conditions)) distinguish between three categories of workers, depending on the nature of their relationship to the company concerned. *Direct workers*, which are 'workers directly engaged by the client' enjoy the full set of guarantees, to be ensured by the firm of which they are the employees: there is little added value to using the concept of due diligence vis-à-vis this category of workers, except insofar as the notion strengthens the normally applicable 'duty of care' towards such workers. In contrast, due diligence provides a useful guide to define the scope of the company's duties towards two other categories of workers, referred to respectively as *contracted workers* and as *supply chain workers*.

Contracted workers are 'workers engaged through third parties to perform work related to core business processes of the project for a substantial duration'.¹²⁶ IFC's client company is expected to 'take commercially reasonable efforts to ascertain that the third parties who engage these workers are reputable and legitimate enterprises and have an appropriate [Environmental and Social Management System (ESMS)] that will allow them to operate in a manner consistent with the requirements of this Performance Standard'¹²⁷; to this effect, it shall 'establish policies and procedures for managing and monitoring the performance of such third party employers in relation to the requirements of this Performance Standard. In addition, the client will use commercially reasonable efforts to incorporate these requirements in contractual agreements with such third party employers'.¹²⁸

Supply chain workers are workers 'engaged by the client's primary suppliers [suppliers who, on an ongoing basis, provide goods or materials essential for the core business processes of the project]'.¹²⁹ As regards this category of workers, paragraphs 27 to 29 of Performance Standard 2 provide that:

27. Where there is a high risk of child labour or forced labour in the primary supply chain [as such risks may be identified through the establishment of an Environmental and Social Management System (ESMS) to mitigate risks, as described in IFC Performance Standard 1], the client will identify those risks consistent with [the definitions of child labour and forced labour in paragraphs 21 and 22 of Performance Standard 2]. If child labour or forced labour cases are identified, the client will take appropriate steps to remedy them. The client will monitor its primary supply chain on an ongoing basis in order to identify any significant changes in its supply chain and if new risks or incidents of child and/or forced labour are identified, the client will take appropriate steps to remedy them.

28. Additionally, where there is a high risk of significant safety issues related to supply chain workers, the client will introduce procedures and mitigation measures to ensure that primary suppliers within the supply chain are taking steps to prevent or to correct life-threatening situations.

29. The ability of the client to fully address these risks will depend upon the client's level of management control or influence over its primary suppliers. Where remedy is not possible, the client will shift the project's primary supply chain over time to suppliers that can demonstrate that they are complying with this Performance Standard.

The IFC Standards therefore provide that the lead company in global supply chains (i) is only required to focus its due diligence efforts on the avoidance of risks associated with certain of the most serious human rights violations, related to child labour, forced labour, or (as regards

¹²⁶ IFC Performance Standard 2, para. 4.

¹²⁷ IFC Performance Standard 2, para. 24.

¹²⁸ IFC Performance Standard 2, para. 25.

¹²⁹ IFC Performance Standard 2, para. 4.

health and safety at work) 'life-threatening situations'; and that (ii) the scope of the due diligence obligation shall depend on the strength of the relationship between the lead company, on the one hand (the IFC client), and the primary supplier, on the other hand: such obligation shall be defined on the basis of the lead company's 'level of management control or influence over its primary suppliers'.

This approach raises two questions. First, it cannot be excluded that what the IFC Performance Standards refer to as "contracted workers" should in fact be treated as workers with a direct employment relationship with the lead company (the IFC client), even though these workers are hired through a third party. It is recalled that the existence of an employment relationship, according to the Employment Relationship Recommendation (No. 198) adopted by the International Labour Organisation's General Conference in 2006, "should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties".¹³⁰ Should certain indicators¹³¹ point to the existence of such an employment relationship directly with the lead company, the duties of such company should go beyond using "commercially reasonable efforts" to ensure the third party recruiting the worker complies with certain requirements; it should treat such workers as its own, and accept full responsibility for compliance with their employment rights.

Secondly, the restrictive approach to the duties a company has vis-à-vis workers employed in the supply chain is inconsistent with the emerging framework of international human rights law. The Guiding Principles on Business and Human Rights provide that human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Thus, the Guiding Principles express the expectation that, as part of their responsibility to respect human rights, business enterprises shall act with due diligence, without restricting such due diligence to certain 'core' rights (the requirement is explicitly intended to apply to all human rights, including labour rights, without distinction), and without making the duty conditional upon the enterprise concerned being in a position to exercise decisive influence on its business partners, with whom it had developed a 'business relationship'. The only recognized limitation has to do with conditions of practicability:

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers'

¹³⁰ Employment Relationship Recommendation (No. 198), 15 June 2006, para. 9.

¹³¹ These are indicators such as the fact that the work "is carried out according to the instructions and under the control of" the lead company; that the work "involves the integration of the worker in the organization of" that company; that it "is performed solely or mainly for the benefit of" that company, or that it "is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work"; or that the remuneration of the worker for the project "constitutes the worker's sole or principal source of income"(see Employment Relationship Recommendation (No. 198), 15 June 2006, para. 13).

or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.¹³²

In practice, in order to discharge their human rights due diligence obligations, companies shall put in place mechanisms to ensure appropriate supervision of compliance with human rights within their business relationships: this extends both to parent companies owning a stake within subsidiary entities, whatever the degree of control of the parent on the subsidiary, and to lead companies in global supply chains, which should, to that effect, insert a provision regarding human rights compliance in their contractual agreement with the supplier, and ideally put in place third-party monitoring scheme to ensure compliance.

Indeed, it would be counter-productive to make due diligence obligations conditional upon the parent company being effectively involved in the subsidiary's day-to-day operations or exercising a sufficient degree of control on the subsidiary (for instance because it has a majority stake within the subsidiary or can appoint a certain number of representatives on the board of directors), or to make it conditional on the lead company in global supply chains being able to exercise decisive influence on the sub-contractor (for instance because it is the main or the only buyer). Such approach would constitute a powerful incentive for the parent company or the lead company to remain at arm's length from the operation of the subsidiary or from the practice of the supplier, in order to reduce the scope of the due diligence obligation. This should be avoided.

All companies should be imposed to practice human rights due diligence by ensuring, to the fullest extent possible, that the other entities to which they are connected by an investment nexus (whatever the degree of ownership) or by a contractual nexus (whatever the actual leverage they may exercise) comply with human rights. The workers of these entities should therefore be protected from abuse, and they should be able to seek remedies against the parent company or the buyer, where that parent or buyer have failed to take measures that might have prevented the violation from occurring. This should also extend to the workers employed by the sub-contractors of these entities. The only restriction to the scope of the liability of the company should be based not on a formal criterion based on the "degree of proximity", as this could lead to abuse — organising the corporate structure or segmenting the supply chain into a larger number of sub-contractors in order to limit liability —, but on considerations of practicability: liability might stop where it would be unreasonable to expect the company against which a liability claim is filed to adopt a broader range of measures to prevent the violation from occurring.

5.3. Compliance with due diligence requirements and legal liability

As a growing number of States shall be establishing a regulatory framework to impose on companies the duty to practice human rights due diligence, a key question shall be whether, if a business enterprise has fully discharged its due diligence obligations, it thereby shall be considered immune from legal liability claims for whatever human rights abuse occurs within the group (in multinational enterprises) or in the supply chain. It is tempting to consider that companies that have robust due diligence mechanisms in place should be rewarded by allowing them be shielded from legal claims alleging liability: if, despite having deployed its best efforts, a company fails to prevent an abuse committed by the subsidiary or by a business partner, should it not be allowed to claim as a defence that it could not have prevented the abuse from occurring? Has it not been taken by surprise?

The main argument in favour of this approach is that it provides a powerful incentive for companies to put in place due diligence systems that are robust at least on their face, as this

¹³² Guiding Principles on Business and Human Rights, Commentary to Principle 17.

shall be a means to avoid liability for acts adopted by the subsidiary or the business partner. The counter-argument however is that, thus conceived, due diligence may become a box-ticking exercise, in which appearance counts more than effectiveness: why should the company move beyond the minimum effort that can be expected (based, for instance, on the standard practice in the sector in which it operates), since that minimum shall suffice to ensure immunity from liability?

The UN Guiding Principles on Business and Human Rights clearly suggest that the duty of care a company owes to those who may be affected by its activities, including indirectly (through the acts of its subsidiaries or business partners), is not absorbed by a company discharging its due diligence obligations. In other terms, due diligence and duty of care should be treated as two separate and complementary duties of the company. The Commentary to Principle 17 of the Guiding Principles state that:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

The same conclusion follows from reading the IFC's Performance Standards. The overview of the Performance Standards on Environmental and Social Sustainability notes that

In addition to meeting the requirements under the Performance Standards, clients must comply with applicable national law, including those laws implementing host country obligations under international law.¹³³

In other terms, the company receiving IFC support cannot claim that, since it complies fully with the Performance Standards the IFC imposes on its clients, it should escape legal liability.

There is a risk however that, in the adoption of a regulatory framework imposing human rights due diligence obligations on business enterprises, this distinction shall be lost of sight. Indeed, robust due diligence obligations should ideally go hand in hand with monitoring mechanisms, to ensure that the systems such enterprises put in place are credible and are not a form of greenwashing. The French Law of 27 March 2017 on due diligence and the Dutch Child Labour Due Diligence Law (*Wet Zorgplicht Kinderarbeid - WZK*) of 24 October 2019, both discussed above, provide examples. The French legislation specifies the five components of the "due diligence plan" that the companies concerned should adopt, and it allows for a judicial injunction to be addressed to companies that do not comply. Under the Dutch WZK, companies selling goods or services in The Netherlands should file a declaration that they have practiced due diligence with a view to preventing child labour in the supply chain, filed with a Supervisory Body, and where it has been assessed that there is a risk that child labour occurs in the supply chain, an action plan shall be adopted, that in some cases the Government (the Minister of Foreign Trade and Development Cooperation) may be called to approve. Thus, under these regulatory frameworks, compliance with the

¹³³ Id., para. 5. With regard specifically to Environmental, Health and Safety Guidelines (EHS Guidelines) that define the performance standards in these areas that are normally acceptable to IFC, the Guidance note to Performance Standard 1 confirms that: 'When host country regulations differ from the levels and measures presented in the EHS Guidelines, projects are expected to achieve whichever is more stringent' (para. 7).

due diligence obligation is subject to some form of monitoring, with a combination of administrative and judicial mechanisms.

It is important that human rights due diligence be subject to such form of monitoring. The establishment of monitoring systems is the best way to ensure that the measures adopted by companies in order to discharge their due diligence obligations shall be effective in preventing violations from occurring, and shall not simply be cosmetic or formalistic. However, the more effective such a monitoring, and the more robust the system a company puts in place in order to discharge its human rights due diligence obligations, the more it may seem natural to "reward" such company with a guarantee of immunity from legal claims alleging its liability for violations occurring in the supply chain or as a result of actions taken by subsidiaries from the same multinational group. This, it may indeed be argued, would be a means to encourage companies to adopt robust monitoring systems, since that shall allow them to "buy" immunity from liability claims.

The temptation must be resisted. First, provided the obligation to put in place a satisfactory due diligence mechanism is adequately monitored (for instance, as in the French legislation, by courts, or by a national human rights institution), there is no need, in order to further incentivize the company to comply with such obligation, to "reward" it with legal immunity. The monitoring itself should be sufficient, especially if, as would be desirable, sanctions are attached to a failure to comply with the due diligence obligations stipulated in legislation. Secondly, if a company may escape legal liability by invoking as a defence that it has put in place an adequate due diligence mechanism (allowing thus the company to argue that it has been "taken by surprise", when faced with a violation of human rights caused by a subsidiary or a business partner), it will be tempted to practice due diligence *a minima*: sufficiently perhaps to comply with the requirement to put in place a human rights due diligence mechanism, and thus to "buy" a legal defence if faced with a legal claim alleging liability, but not going beyond that minimum. This risks human rights due diligence becoming a sophisticated "box-ticking" exercise: the incentive, in other terms, would be for the company to do the minimum required, but not to be proactive beyond that minimum. Thirdly, therefore, this would not be consistent with the idea that human rights due diligence is an ongoing practice, to be permanently updated and improved, based on experience learned: the Guiding Principles on Business and Human Rights specify in this regard that human rights due diligence "should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve" (Principle 17, c)).

For all these reasons, the requirement to practice human rights due diligence and the requirement to compensate for any harm resulting from human rights violations should be treated as *separate* and *complementary* obligations. There is a duty to prevent the risk of human rights violations occurring within the corporate group or in the supply chain: this is the human rights due diligence obligation. There is also a duty to remedy any violation where the preventative measures adopted, if any, appear to have failed: this is the duty to compensate the damage caused where the duty of care was not properly discharged, and it should be role of courts, when faced with legal claims, to assess on a case by case basis whether the company could have been expected to do more to prevent the violation from occurring.

Although the two obligations are in principle separate, courts relying on general civil liability provisions might be tempted to interpret the notion of "fault" in assessing claims filed by victims seeking compensation from companies which, allegedly, should have taken measures to prevent such violations from occurring, by taking into consideration whether human rights due diligence obligations were effectively complied with. Courts may naturally conclude that, when such obligations were not complied with, this is a "fault" that could result in legal liability, where compliance might have prevented the violation from occurring. (Indeed, the French Law of 27 March 2017 explicitly directs courts to take this position.)

Conversely however, courts may conclude that where human rights due diligence obligations have been complied with (and especially where this has been confirmed following some administrative or judicial procedure), there could be no finding of civil liability: since it has been found through such a procedure that the company concerned has put in place an adequate human rights due diligence system to prevent violations in the corporate group or in the supply chain, it might seem difficult to justify a finding that the company has committed a fault engaging its liability.

Such an interpretation of civil liability provisions would weaken the protection of victims. It is indeed perfectly possible that the harm that occurred brings to light the fact that, however impeccable the due diligence system might have appeared in principle (or "on paper"), it included a blind spot, or a lacuna, that the company concerned should have addressed. In other terms, although a due diligence system has been put in place and even if it has met with some form of official approval, it still could appear that the company could have done more, and should have done more, to avoid a violation from occurring. This is the logic of the two obligations being separate: (i) to practice human rights due diligence and (ii) to accept responsibility for any violations that occurred despite the preventive measures taken, where it appears that other reasonable measures could have been taken that might have prevented the violation. And it is the only way to create a strong incentive on companies to go beyond the minimal measures expected from them to comply with their human rights due diligence obligations, and to take all reasonable measures that could prevent the violation, with a view to continuous improvement.

In the legislation implementing the duty to practice human rights due diligence, a specific provision could be inserted to avoid general civil liability provisions being interpreted so as to ensure a form of immunity from legal claims to companies which practiced human rights due diligence. Such a clause could read (following the specifications on the content of the human rights due diligence obligation and the monitoring of compliance with such obligation):

The fact that a business enterprise has complied with the human rights due diligence requirements as specified [in the sections above] is without prejudice of its civil liability, under [the provisions in the civil code or any other relevant source] that define the regime of liability for non-contractual liability.

This clause, in essence, replicates the Commentary to Principle 17 of the Guiding Principles on Business and Human Rights, cited above. Its chief aim would be to direct courts not to treat the adoption by a company of a human rights due diligence policy as a license to operate with a legal immunity, even where such due diligence policy has been subject to some form of official endorsement or monitoring, and considered on adequate on its face. At the very least, a victim should still be able to demonstrate that the human rights due diligence system put in place could have been more robust: the violation, in that sense, brought to light the gap in the system — the blind spot that the company had missed, whether wilfully or not.

Indeed, there is no reason to impose on the victim that s/he shoulder the full burden of proving that the company has been committing a "fault", by failing to adopt certain measures that might have had a reasonable chance of preventing the occurrence of the harm. Since the relevant information typically shall be in the hands of the company rather than in those of the victim (a disadvantage that is only partly compensated for, in certain countries, by a "discovery" procedure, allowing the claimant to obtain from courts an injunction ordering the disclosure of information in the hands of the defendant), it would be more appropriate — and certainly more dissuasive — to impose on the company that it proves that it could not have done more to avoid the causation of harm, once the victim has proven the damage inflicted and the connection to the business activities of the company, whether the damage was caused directly by the operations of the company or whether it has its immediate source in

the conduct of a subsidiary or of a business relationship. To that effect, the legislation implementing the human rights due diligence obligation could provide explicitly that "when persons who consider themselves wronged because the defendant has not discharged its duty of care establish, before a court or other competent authority, facts from which it may be presumed that the duty of care [i.e., the duty to take all reasonable measures that could have had a chance of preventing the harm] has not been complied with, it shall be for the respondent to prove that there has been no breach of that duty."¹³⁴

Any legal regime that would "reward" a company having practiced due diligence with a form of immunity from civil liability claims would be counterproductive. Indeed, it would send the wrong signal to the company. In effect, the company would be encouraged to put in place a human rights due diligence system just sufficiently robust to comply with the legal requirement to put such a system in place, and, in a profit-maximizing logic, not so robust as to reduce the value to the shareholder of the subsidiary subject to control, or as to impose on the supplier costs that could raise the price of its services or products.

The requirement to practice human rights due diligence and the requirement to compensate for any harm resulting from human rights violations should be treated as *separate* and *complementary* obligations. The requirement to practice human rights due diligence is a duty to prevent the risk of human rights violations occurring within the corporate group or in the supply chain. Ideally, this duty should be subject to some form of monitoring, administrative and/or judicial, in order to ensure that human rights due diligence is not a mere box-ticking exercise of a purely cosmetic nature. However, even where such monitoring exists, the fact that a company has adequately discharged its human rights due diligence obligation should not lead to grant it immunity from civil liability claims by victims. In the legislation implementing human rights due diligence, a specific provision should be inserted to avoid courts interpreting general civil liability provisions as ensuring a form of immunity from legal claims to companies which practiced human rights due diligence.

Such legislation should also provide that the burden is on the company's shoulders to prove that it could not have done more to avoid the causation of harm, once the victim has proven the damage inflicted and the connection to the business activities of the company, whether the damage was caused directly by the operations of the company or whether it has its immediate source in the conduct of a subsidiary or of a business relationship. This would account for the fact that the relevant information concerning the operations of the company and the organisation of its relations with its subsidiaries or business partners resides with the company, and is generally not easily accessible to the victim.

4.4. The scope of human rights due diligence and categories of companies

The Guiding Principles on Business and Human Rights acknowledge that, in order to discharge their human rights responsibilities, "business enterprises should have in place policies and processes appropriate to their size and circumstances"¹³⁵; human rights due diligence in particular "will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations".¹³⁶ All companies, however, are expected to comply with the requirement; it is only the modalities of implementation that differ. This is made clear in Guiding Principle 14, which states that responsibility applies to all business enterprises, regardless of "structure". The UN Office of the High Commissioner for Human Rights interprets this to mean that "the corporate group

¹³⁴ This is the wording used in EU law, for instance in article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22.

¹³⁵ Principle 15.

¹³⁶ Principle 17, b).

structure does not make any difference to whether entities within the group have to respect human rights. It simply affects how they go about ensuring that rights are respected in practice, for instance through their contractual arrangements, internal management systems, governance or accountability structures. In the event that human rights abuses occur, it will be national law in the relevant jurisdictions that determines where the liability falls."¹³⁷

The OECD Due Diligence Guidance for Responsible Business Conduct adopts the same approach:

The nature and extent of due diligence can be affected by factors such as the size of the enterprise, the context of its operations, its business model, its position in supply chains, and the nature of its products or services. Large enterprises with expansive operations and many products or services may need more formalised and extensive systems than smaller enterprises with a limited range of products or services to effectively identify and manage risks.¹³⁸

A range of implementation measures adopted at domestic level, however, differentiate on the basis of the size of the corporation concerned. This is the case in particular for reporting requirements, which (as seen above) are one important component of the broader duty of human rights due diligence:

- In the United Kingdom, the Modern Slavery Act of 2015¹³⁹ requires corporate entities carrying on any part of their business in the UK that supply goods or services and have a minimum annual turnover, as defined by regulations of the Secretary of State (currently set at 36 million GBP),¹⁴⁰ to produce a 'slavery and human trafficking statement' each year, thus imposing on such businesses to ensure transparency in their supply chains with respect to slavery and human trafficking (see section 54 of the MSA);
- The California Transparency in Supply Chains Act 2010, which requires companies to disclose their efforts to keep supply chains free from slavery and human trafficking by reporting about risks and about how suppliers are expected to comply to ensure compliance, as well as about the auditing of suppliers and the training of personnel, applies to corporations doing business in California with annual receipts over 100 million US dollars (for further details, see Box 3).¹⁴¹
- In the European Union, the above-mentioned non-financial reporting directive (2014/95/EU)¹⁴² imposes certain reporting requirements (providing "a description of the policies pursued by the undertaking in relation to [environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters], including due diligence processes implemented" and "the outcome of those policies") on "large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year" (article 1);
- The French Law of 27 March 2017 on due diligence imposes the adoption of a due diligence plan on companies incorporated in France with at least 5,000 employees

¹³⁷ Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide*, HR/PUB/12/02 (2012), §3.6, p. 22.

¹³⁸ OECD Due Diligence Guidance for Responsible Business Conduct, p. 18.

¹³⁹ UK Public General Acts 2015, ch. 30.

¹⁴⁰ Modern Slavery Act, s 54(3); and The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 (adopted on 28 October 2015).

¹⁴¹ California Civil Code section 1714.43 (imposing the disclosure requirement on 'Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars').

¹⁴² 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, p. 1.

(including the employees of its subsidiaries), or companies with at least 10,000 employees whether or not they are incorporated in France ("Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger").

Reporting requirements, however, are of a special kind. They can impose a significant bureaucratic burden, particularly if they include having to request information from the full range of clients, suppliers or sub-contractors that they provide information. It is therefore understandable that the instruments referred to above only impose such duties on corporations of a certain size, or beyond a certain turnover.

Box 3. The 2010 California Transparency in Supply Chains Act

The California Transparency in Supply Chains Act requires a retailer doing business in California with worldwide sales in excess of \$100 million (reportedly covering some 3200 companies) to "conspicuously" disclose on its website the extent to which the company engages due diligence on its supply chains with respect to human trafficking.¹⁴³ A company covered by the California Supply Chain Transparency Act must disclose whether it:

- (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if a third party did not conduct the verification.*
- (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.*
- (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.*
- (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.*
- (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.*

In the event the Company does not have an Internet Web site, consumers shall be provided the written disclosure within 30 days of receiving a written request for the disclosure from a consumer.

Like the EU's non-financial reporting directive, this legislation only imposes a disclosure requirement. It adopts a "comply or explain" approach: companies are required to report about what measures they adopt, and to publish this on their website with a conspicuous link to the pertinent information. The statute provides that "The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief."

It does not follow, however, that the other components of the human rights due diligence obligation should not be imposed on all companies, whether large or small, and across all sectors. At a minimum, a general duty to "identify, prevent, mitigate and account for how

¹⁴³ California Transparency in Supply Chains Act, Civ. § 1714.43 (West 2012).

[corporations] address their impacts on human rights", both in their own operations and in their business relationships, could and should be imposed on all companies, irrespective of their size. In verifying whether the duty is complied with, size may matter, however (as implied by Principle 17 of the Guiding Principles on Business and Human Rights): for instance, while it cannot be requested from a micro-enterprise or from a small or middle-size enterprise that it provide a detailed account of how its suppliers are monitored for compliance with human rights, such enterprises could be expected to insert systematically in their contracts a clause stipulating that any plausible allegation that the supplier has been involved in violations of human rights (particularly labour rights) may be seen as a breach of contractual obligations and lead to the contract being rescinded, and they could be expected to explain this human rights policy vis-à-vis suppliers in public documents, for instance advertising this on their website. To the extent that the scope of human rights due diligence obligations may vary from company to company depending on size, interpretative documents may have to be adopted complementing the general requirements imposed in legislation.

Human rights due diligence is imposed on all companies, regardless of their size, structure, or (public or private) ownership. Whereas the specific situation of micro-enterprises, or of small and middle-size enterprises, can be taken into account particularly in order to alleviate the reporting burden for such companies, and while such enterprises could be supported to discharge their obligations (for instance by being provided training or guidance documents), the general duty to "identify, prevent, mitigate and account for how [corporations] address their impacts on human rights", applies also to such companies, both in their own operations and in their business relationships.