
Human Rights Due Diligence As Part Of Corporate Risk Management: Insights From The EU Policy Debate*

Submitted 27/08/20, 1st revision 16/09/20, 2nd revision 10/10/20, accepted 30/11/20

Izabela Jędrzejowska-Schiffauer¹, Peter Schiffauer²

Abstract:

Purpose: This paper investigates possible modalities of new EU-wide mandatory human rights due diligence (mHRDD) measures and their implications for the practice of corporate risk management.

Design/Methodology/Approach: The contribution originates in a desk-based review and analysis of the EU policy debate and other relevant scholarly and stakeholder contributions. The applied research methodology includes a combination of theoretical and analytical methods.

Findings: Businesses' input pointing out the specificities of branches and suggesting best practices for implementing HRDD obligations is highly relevant for framing upcoming legislation. Proper fulfillment of HRDD obligations will, however, be definitively ascertained in court only. Compliance-oriented risk management accounting solely for the risks to the company may thus prove insufficient regarding HRDD and eventually lead to liability.

Practical Implications: Given expectations of high corporate due diligence standards by investors, consumers and civil society on the one hand, and the prospective new EU HRDD measures on the other, it appears desirable for companies to take appropriate steps so as to adapt their business structures and operations for the endorsement of such new HRDD standards.

Originality/Value: The contribution provides insights into mHRDD as a prospective new legal standard of care for companies operating on the EU Internal Market.

Keywords: EU law and policy, due diligence, risk management, human rights, corporate and supply chain governance.

JEL codes: K33, K13, F15

Paper type: Research article.

¹Corresponding author, Wrocław School of Banking, Faculty of Finance and Management, izabela.schiffauer@wsb.wroclaw.pl;

²Fernuniversität in Hagen, Faculty of Law, peter.schiffauer@fernuni-hagen.de

*Paper presented in ICABE 2020.

1. Introduction

Developments have intensified across Europe to introduce mandatory human rights due diligence (mHRDD) obligations for companies in relation to their operations and supply chains. Numerous civil society groups are calling for such mHRDD obligations (Smit *et al.*, 2020) in order to address serious labour exploitation and other adverse impacts on people by corporate activity. According to a quantitative research into enterprises of all sizes and representing all sectors commissioned by the European Commission (EC) DG Justice and Consumers (Smit *et al.*, 2020a), even businesses themselves consider that mHRDD may provide legal certainty, a level playing field, and an increased leverage in their business relations through the supply chain by way of a non-negotiable standard. Not surprisingly, since the current situation clearly disadvantages companies that already fulfill HRDD through their supply chains in so far as it deprives them of equal opportunities for competition (Korn, 2020). The 2017 Dutch Child Labour Due Diligence Act and the 2017 French Corporate Duty of Vigilance Law are examples of national HRDD laws already in force. In Switzerland and Norway HRDD legislative proposals are at advanced stage. The Finish and German governments announced such laws. The European Commission (EC) envisages proposing in 2021 EU-wide mHRDD legislation. It would aim at obliging businesses to act with due diligence in relation to the potential human rights and environmental impacts of their operations and supply chains. The announced measures are likely to be cross-sectoral and provide for sanctions in the event of non-compliance.³ This EC initiative fits into the global trend to embed corporate respect for human rights into different types of legal requirements (Cossart *et al.*, 2017: 318). A question arises how this development came about?

By its resolution no 17/4 of 16 June 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights (UNGPs). The endorsement of the UNGPs spurred the global multi-stakeholder dialogue on business-related adverse impacts on people. The UN inspired negotiation process involves amongst others representatives of governments, businesses and civil society; policy contributions have also been formulated by the OECD (i.a. 2011, 2018)⁴, Council of Europe (2016)⁵ and EU institutions (i.a. 2011, 2013, 2018)⁶.

³<https://www.nortonrosefulbright.com/en/knowledge/publications/1a58997f/proposal-for-an-eu-wide-mandatory-human-rights-due-diligence-law> (21.07.2020). See also Krajewski & Faracik 2020.

⁴*OECD Guidelines for Multinational Enterprises, 2011 Edition; OECD Due Diligence Guidance for Responsible Business Conduct, 2018.*

⁵*Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business of 2 March 2016; the Council of Europe Parliamentary Assembly's Resolution 2311 (2019) and Recommendation 2166 (2019).*

⁶*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility COM(2011) 681 final; Commission*

Under the UNGPs, business enterprises are expected to exercise human rights due diligence (HRDD). As explained by Prof. J. Ruggie, the main architect of the UNGPs, HRDD aims at “enabling the enterprise to discover whether and how it may become involved in human rights risks (forward looking) or is already involved in an adverse impact (present). Human rights due diligence includes using the information so gained to craft an appropriate response.” (Ruggie and Sherman 2017: 927). Still, as a soft-law document, UNGPs are not enforceable. Given strong resistance of international business lobby groups against the establishment of corporate accountability for adverse human impact⁷ (see e.g. Joint Statement on Business & Human Rights to the UN Human Rights Council by IOE, ICC and BIAC of 2011), the efforts to elaborate a legally binding instrument of international law may be of no avail. Or, even if adopted (second draft of the treaty was released in August 2020), it might take decades to get it ratified and implemented. While in recent years a proliferation of private Corporate Social Responsibility (CSR) standards and international soft-law instruments may be observed, to date, there is no binding international framework in place that addresses the conduct of companies in global supply chains (de Jonge, 2011). To some extent the OECD regime may be considered as such a framework, but applying only to its members and other states that voluntarily declare to be bound by the OECD Guidelines for Multinational Enterprises and later OECD Due Diligence Guidance. Thus both documents are government-backed recommendations providing non-binding principles and standards for responsible business conduct in a global context.

While first examples of mHRDD legislation were set by the Dutch⁸ and French⁹ due diligence laws or EU timber regulation¹⁰, some legislative measures sought to improve corporate human rights due diligence by means of transparency legislation (e.g. the UK 2015 Modern Slavery Act (MSA) and the EU 2014 Non-Financial

Sector Guides on Implementing the UNGPs, 2013, https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-hum-0_en (12.07.2020); European Parliament resolution of 4 October 2018 on the EU's input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights (2018/2763(RSP)).

⁷ *Joint Statement on Business & Human Rights to the UN Human Rights Council by the International Organisation of Employers (IOE), International Chamber of Commerce (ICC) and Business and Industry Advisory Committee (BIAC) to the OECD, <https://iccwbo.org/content/uploads/sites/3/2011/05/Joint-Statement-on-Business-Human-Rights-to-the-United-Nations-Human-Rights-Council.pdf> (12.08.2020).*

⁸ *The Dutch Child Labour Due Diligence Act, Kamerstukken I, 2016/17, 34 506, A.*

⁹ *The French Corporate Duty of Vigilance Law, Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*

¹⁰ *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, European Union Official Journal L 295, 12.11.2010, p. 23–34.*

Reporting Directive (NFRD)¹¹). Literature points to various shortcomings of this legislative strategy (Le Baron and Rühmkorf 2017, 2019, indirectly in that sense also Broad & Turnbull 2019), deficiencies in the quality and usefulness of reporting (Smit *et al.*, 2020; Mares, 2018, 21-22; Carrier and Bardwell, 2017, see also below) and failure to yield the expected effects in terms of influencing corporate behaviour (Mantouvalou, 2018; Le Baron and Rühmkorf, 2017; 2019). That is why in recent months there have been intensified developments across Europe to move from transparency legislation towards mHRDD legislation, including the announced plans by the European Commission to develop a respective legislative proposal by 2021.

Against that backdrop, this paper attempts to provide some insights into mHRDD as a prospective new legal standard of care for companies operating on the EU Internal Market. Based on a desk-based review and analysis of the EU policy debate and other relevant scholarly and stakeholder contributions, the paper discusses possible options for mHRDD measures as well as their implications for the practice of corporate risk management. To that end, the paper first taps into examples of EU legislation in force that require due diligence of companies in relation to aspects other than human rights. A hypothesis is made that the modalities of enforcement of such legislation may usefully inform how the prospective HRDD obligations are best to be operationalized at the company level to ensure compliance. Subsequently modalities of mHRDD already in force at national and EU level are analysed and confronted with the EU policy debate and the consultation of stakeholders on HRDD. On that basis, options for EU-wide mHRDD measures are considered, as well as their possible consequences for corporate and supply chain governance.

2. Industry-specific Perspectives on EU Corporate Due Diligence Standard

In the EU law due diligence is a well-established standard of conduct expected from business enterprises operating within the EU Internal Market. What requirements such a standard must involve with respect to particular situations, industries and/ or operational contexts is laid down in many fields of EU legislation and further concretized in the jurisprudence of the Court of Justice of the European Union (CJEU). Hence, a corporate due diligence standard of conduct may not be put into any “universalized” formula. By way of example, under Article 13 of Directive 2005/60/EC¹² financial institutions are obliged to exercise *customer due diligence* which involves continuous vigilance over account activity of their customers in relation to the risks of money-laundering and financing terrorism. Article 2 (h) of the

¹¹Directive 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. 1–9.

¹²Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, [2005] OJ L 309/15.

Unfair Commercial Practices Directive¹³ defines the concept of *professional diligence* as “the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”. CJEU specified that, within the meaning of the Directive, commercial *practice* can involve an isolated act of a professional which affected only one single consumer. Otherwise the onus of proving that other individuals have also been harmed by that same professional would rest on the consumer, who would very likely be incapable of providing such evidence.¹⁴ Furthermore, according to the settled CJEU case law it remains within the importer’s sphere of responsibility to make the necessary arrangements in his contractual relations to guard against the risks of an action for post-clearance recovery of import duties relating to the importation of goods from third countries into the EU territory.¹⁵ Pursuant to Article 220(2)(b) of the Community Customs Code¹⁶ the importer may effectively object to a post-clearance incurring of liability for import duties provided he can demonstrate that, during the period of the trading operations concerned, he has taken *due care* to ensure that all the conditions for the preferential status of the imported goods (i.e. either no or a reduced rate of import duties is levied on them) have been fulfilled. As part of their duty of care, importers are notably required to seek to obtain from the other contracting party all the necessary evidence confirming that the certificate of origin of the imported goods was correctly issued.¹⁷ For this duty it is immaterial that the importer is dependent on a chain of supply.¹⁸

It follows from the foregoing that, as an expected standard of conduct for companies operating within the EU Internal Market, due diligence (or, depending on legislative rendition, due care, etc.) may and should be tailored to sector-specific and operational contexts. At the same time, it shares certain cross-sectorial features, such as the discharging of a legally imposed duty (compliance) and an exculpatory function in respect of companies which can demonstrate a requisite standard of care.

3. The Experience of Mandatory Due Diligence Laws in Force

¹³Directive 2005/29/EC 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 and Regulation (EC) No 2006/2004 (“Unfair Commercial Practices Directive”) [2005] OJ L 149/22.

¹⁴Case *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft.*, (C-388/13) EU:C:2015:225, at 42 and 46.

¹⁵ See e.g. Case *Lagura Vermögensverwaltung* (C-438/11) EU:C:2012:703, at [30] or Order in *CPL Imperial 2 and Unifriigo v Commission* (C-299/98 P) [1999] ECR I-8683, at 38.

¹⁶Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L 302/1, as amended by Regulation (EC) No 2700/2000 of 16 November 2000 [2000] OJ L 311/17.

¹⁷ *Lagura Vermögensverwaltung*, at 31.

¹⁸ Case *Aqua Pro* (C-407/16) EU:C:2017:817.

The development of mHRDD legislation, both at EU and state level, is likely to draw on the experience of the CSR legislation already in force. Notably the 2017 French Corporate Duty of Vigilance Law may be very influential due to its broad scope (it embraces human rights, health and safety of persons and the environment), as well as cross-sectorial character. The law establishes an obligation of vigilance for parent companies and companies having the power to instruct with regard to their subsidiaries, subcontractors and suppliers. Since the law was inspired by the UNGPs and OECD Guidelines¹⁹, the obligations relating to preparing and implementing a vigilance plan by companies are modeled on the HRDD process provided under the UNGPs (cf. Savourey, 2020: 56). When properly implemented, both the vigilance measures and HRDD process are thought to allow for identifying the risks and preventing severe impacts on human rights. Unlike HRDD under UNGPs, the French law extends the corporate duty of vigilance to possible environmental impact of its activity (Article L225-102-4 of the amended French Commercial Code, cf. also Brabant, Michon and Savourey 2017). The law initially provided for sanctions conceived as „civil fines” of up to 30 million Euro for non-compliance. However, the French constitutional Council found them unconstitutional on grounds of their being de facto of punitive character, while lacking sufficiently precise specification and previously enacted legal bases.²⁰ This does not change the fact that, subject to a penalty, companies can still be ordered to comply with the duty to establish, publish and implement a vigilance plan. In addition, pursuant to Articles 1240 and 1241 of the amended French Civil Code, companies bear civil liability in cases where the non-compliance with the duty of vigilance has caused harm to the third party. In effect, for the establishment of company’s civil liability a direct causal link between that breach and the incurred losses needs to be demonstrated by the claimant.

Clearly more restricted in scope, the 2017 Dutch Child Labour Due Diligence Act imposes on every company that supplies goods or services to Dutch end-users an obligation to conduct due diligence throughout the supply chain to find out whether the production of those goods and services to be supplied has involved child labour as well as to issue a declaration to that effect (Art. 4-5 of the Act). The fulfillment of the obligations is safeguarded by administrative and criminal (repeated non-compliance) sanctions. Unlike the French Law which is not fully explicit as to whether the risk assessment under vigilance obligation refers only to the last tier (direct contractual partner) or to additional tiers down along the supply chain, the obligations imposed by the Dutch law cover the entire supply chain. Interestingly, though, the companies may discharge their due diligence obligations by purchasing the goods or services they intend to supply to Dutch end-users from companies that have issued a declaration with respect to those goods or services. The rationale behind this solution is the expectation that it will incentivize the last tier companies to deal only with lower tier companies that also live up to the obligations laid down

¹⁹See the explanatory memorandum [*exposé des motifs*] of the draft law, <http://www.assemblee-nationale.fr/14/propositions/pion2578.asp>, (accessed 26 July 2020).

²⁰ Decision of 23 March 2017, ECLI:FR:CC:2017:2017.750.DC.

in the Act, which will in practice have the effect of ‘pushing’ the Act’s obligations ‘down’ the supply chain (Enneking, 2020: 176).

Regarding the EU CSR legislation, the EU Conflict Minerals Regulation²¹ lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. Article 16(3) thereof, which shall apply from 1 January 2021, stipulates that in the case of infringements on due diligence obligations laid down in the Regulation, Member State competent authorities shall issue a notice of remedial action to be taken by the EU importer. The scope of the said Regulation is, however, limited to a very specific sector of global supply chains. The same applies to the EU Timber Regulation (EUTR) aimed at countering trade in illegally harvested timber and timber products. Adopted prior to the endorsement of the UNGPs, it establishes an obligation to exercise due diligence for operators who place timber or timber products on the EU Internal Market. The due diligence under EUTR involves three elements: i) access to information concerning the operator’s supply of timber or timber products placed on the market, notably tree species and quantity, country of harvest, details of the supplier and information on compliance with national legislation; ii) risk assessment procedures enabling the operator to analyse and evaluate the risk of illegally harvested timber in his supply chain; iii) risk mitigation procedures involving requiring additional information and verification from the supplier where the risk assessment points at possible risk of illegal timber logging. Pursuant to Art. 10(5) of the Regulation, if shortcomings are detected in an operator’s compliance to his due diligence obligations, the competent authorities may issue a notice of remedial actions to be taken by that operator. Additionally, depending on the nature of the shortcomings detected, Member States may take immediate interim measures, including inter alia: i) seizure of timber and timber products; ii) prohibition of marketing of timber and timber products as well as impose other penalties, including fines (Art. 19).

4. Options for mHRDD Measures and their Operationalization

In the light of increasing demand for fairly produced goods in Western countries, amidst lax enforcement of labour and environmental standards by governments of many export oriented economies (Fransen and Burgoon 2012), calls for broader (cross-sectorial and covering all human rights²² action have been intensified by civil society organizations, trade unions and even businesses. As pointed out by the aforementioned study on due diligence through the supply chain for the EC DG Justice and Consumers, 2020, legal certainty and the level playing field for all were amongst the most important considerations for business interviewees. The consulted stakeholders expressed an overall preference for a general cross-sectorial regulation,

²¹ Regulation (EU) 2017/821 of 17 May 2017, [2017] OJ L 130/1.

²² I.e. human rights as defined by international human rights treaties and accepted instruments such as ILO core standards.

as long as it provides for the specificities of the sector, and the size of the business enterprise in its application to specific cases. Stakeholders seemed also to agree that any regulatory mechanism should build upon the influence and strength of the UNGPs due diligence concept instead of any more “vague” solution. Not surprisingly, since the deficiencies in quality reporting under e.g. the 2015 UK Modern Slavery Act (Le Baron and Rühmkorf, 2017, 2019) and NFRD clearly suggest that the ultimate goal of such transparency legislation, i.e. the actual improvement of corporate human rights due diligence, has not been achieved. As a response to that state of affairs, the EU policy debate on CSR legislation evolves towards two basic trajectories: the intention to strengthen the provisions of the NFRD and developing a proposal for EU-legislation on mHRDD.

The EC’s public consultation regarding a possible revision of the provisions of NFRD²³ reveals that the lack of an obligation to disclose a minimum set of data (a common standard for reporting) in non-financial reporting under NFRD leads to incomparability of data between companies, or within the same company over the course of time and, in end effect, to limited usefulness of such information for investors, consumers and other potentially interested parties. Hence, it may be expected that the intended strengthening of the NFRD provisions will involve the introduction of such a common standard for reporting.

As has been discussed under Section 3, transparency requirements are also typically incorporated into due diligence processes. Still, as a matter of principle, the obligations under the above discussed due diligence legislation regarding receiving access to, verifying and disclosing of relevant information are precisely specified, notably in view of non-compliance being subject to sanctions under those laws (cf. e.g. Art. 4, 7 and 16(1)(3) of the EU Conflict Minerals Directive). For reasons of legal certainty, firstly, any future EU-wide substantive HRDD obligations for business enterprises need to clearly define the required elements of the standard of corporate conduct, including that of disclosure obligations.

Secondly, a question arises whether EU mHRDD measures should apply to all or only selected business enterprises. Due diligence legislation currently in force takes different approaches, which include as a point of reference: a specified annual import volume of the minerals or metals (EU Conflict Mineral Directive); a minimum number of employees for a specific period of time (the French law)²⁴; the size of the company (measured according to a minimum turnover threshold (the UK Modern Slavery Act) and/ or annual balance sheet threshold), which additionally need to be cumulatively fulfilled with two additional premises: a particular legal form of the business entity, i.e. a public-interest company and minimum threshold of

²³<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation> (accessed 30 July 2020).

²⁴ The law sets the thresholds at min. 5000 employees for two consecutive financial years, including company’s direct and indirect subsidiaries.

employees more than 500 employees (NFRD). These approaches share, however, a certain common denominator whereby it is correct to say that the laws apply to „big enterprises”. Yet, „size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity [and likelihood] of its actual and potential human rights impact will be the more significant factor” (OHCHR, 2012: 20). Such factors determine an enterprise’s risk profile proportionate to which it needs to implement policies and processes for ensuring that it is not involved in such impacts (e.g. extractive sector in conflict areas, *ibid.*). These arguments speak in favour of the new EU mHRDD legislation applying to all business enterprises operating on the EU Internal Market, while the duties to discharge of mHRDD obligations could be differentiated in accordance with the enterprise’s risk factor, the complexity of its business structure, operational context relations and supply chains.

Thirdly, the thrust of due diligence in existing corporate liability regimes, including in the EU context, is its exculpating function with respect to the defendant who can demonstrate a requisite standard of care²⁵ (cf. e.g. B. Fasterling and G. Demuijnck, 2013: 806-7; J. Bonnitcha and R. McCorquodale, 2017: 900). A similar approach is likely to be taken up by the expected EU mHRDD measures. In the European legal tradition a well-established principle of tort law allows for ascribing blameworthiness and thus also liability to a defendant who infringed on his obligation of the legal standard of care (due diligence). This approach is also adopted in the analysed due diligence laws under Section 3.

Last but not least, it is believed that the new EU or state level CSR legislation would benefit from explicit provision that a company’s due diligence not only covers immediate (first-tier) contractual partners, but also extends to its potential influence over additional tiers of the supply chain (‘n-tier’ suppliers) (Krajewski & Faracik 2020: 11). Given that instances in the CJEU’s case law²⁶ may be found where the Court extends a business operator’s risk liability beyond its immediate contractual partner, it may be assumed that mHRDD requiring risk assessment n-tier down the supply chain would be consistent with the current EU Internal Market principles.

5. Implications for the Corporate Risk Management Practice

²⁵*This is not the function ascribed to due diligence by UNGPs, which link a company’s responsibility to its involvement with an adverse human rights impact. Thus the company’s responsibility and the obligation to remedy resulting from it arise whenever it causes, contributes to or is linked to negative human rights impact through its business activity or relationships. Establishing responsibility is linked to a harm suffered by an individual, whereas due diligence relates to the sphere of a business operator by which he can “know and show” that he respects human right. For discussion of this corporate accountability option, see Jędrzejowska-Schiffauer (2021, European Law Review, forthcoming).*

²⁶ *Aqua Pro (C-407/16) EU:C:2017:817.*

The above discussed options of new mHRDD obligations for business enterprises, if implemented, would have direct implications for the corporate risk management practice. The operationalization of such HRDD obligations at the company level would first of all require extending corporate risk management to monitoring possible negative human rights impact. „Human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the corporation itself, to include risks to rights-holders” (UNGPs, Commentary to GP 17). This effect could be safeguarded provided appropriate consultation with stakeholders, representative trade unions and workers’ representatives is conducted by the company prior to and during any major business activity (cf. ECCJ, 2020).

Human rights risk assessment and management constitutes the core of substantive HRDD obligations and standards. By way of example, the new EU Conflict Minerals Regulation defines *supply chain due diligence* as the obligation of the EU importers „in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to 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”. As pointed out above, it may be useful for businesses to employ tools they already use within other processes such as risk assessments or environmental and social impact assessments for the purpose of assessing possible or actual human rights impacts. On condition, however, that all internationally recognised human rights will be involved as a point of reference ((UNGPs, Commentary to GP 18). To be accurate, human rights impact assessment (HRIA) is to be carried out „at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship” (ibid). As argued above, HRIA must account for legitimate concerns of potentially affected right-holders, preferably by direct consultation with them or, in case of barriers to their effective involvement, by consulting independent experts from civil society engaged in human rights protection.

Evidence may also be provided to the effect that the achievement of sustainable development goals requires that a business enterprise takes on shared responsibility for the whole (n-tier) supply chain, with business relationships constituting an important factor affecting the company’s ability to create and manage a sustainable supply chain (Rudnicka 2018). For instance, pursuant to Art. 5(1)(b) of the EU CMR, enterprises are obliged to respond to the identified risks by adopting risk management measures, including exerting pressure on suppliers who can most effectively prevent or mitigate the identified risk. The leverage may involve: i) continuing trade while simultaneously implementing measurable risk mitigation efforts, ii) suspending trade temporarily while pursuing ongoing measurable risk mitigation efforts, or iii) disengaging with a supplier after failed attempts at risk

mitigation. In this context, compliance with the due diligence standard also involves access to and keeping record of adequate documentation, notably maintaining a written record of all due diligence actions and their results (cf. e.g. ECCJ, 2020).

Feasibility of shared responsibility within the supply chain depends on economic characteristics of a company's position in the production chain. It may also be difficult where enterprises have large numbers of entities in their supply chains. Identifying high-profile risk areas and conducting HRDD across them could be potentially a way forward (cf. UNGPs, Com. GP 17). As exemplified by the EU CMR, the 'supply chain due diligence scheme' may easily be adapted and applied for that purpose as it builds upon a combination of voluntary supply chain due diligence procedures, tools and mechanisms, including independent third-party audits. It means that business enterprises will and should have enough room to prioritise their primary incentives for undertaking HRDD, such as: i) reputational risks; ii) investors requiring a high corporate due diligence standard; iii) consumers requiring a high standard (Smit et al. 2020, cf. also Fransen and Burgoon 2012); iv) sanctions for non-compliance or v) risk of litigation in court. The risk that a court holds a company liable for damages on the grounds of not having fulfilled HRDD obligations despite its reasonable efforts to comply with them, could possibly be covered by voluntary insurance schemes.

6. Conclusions

Upcoming mHRDD legislation may reasonably be expected to appropriately define the effects to be achieved by HRDD measures that any enterprise involved in transnational supply chains would need to implement. The modalities of implementation may, however, be differentiated in accordance with the enterprises' risk profiles. Corporate risk management would therefore be well advised, on the one hand, to adapt its existing tools to the task of assessing the risk of adverse human rights impact caused by the activities of the enterprise.

On the other hand, it is in the enterprise's own interest to provide constructive input into the upcoming legislative procedures, so as to point out the specificities of the business branches and to suggest best practices for implementing HRDD. While aiming at legal certainty the upcoming legislation will inevitably leave „grey areas” (Grabosch 2015) where - in case of dispute - the proper fulfillment of the HRDD obligations may only be determined in court. Compliance-oriented risk management accounting solely for the risks to the company may thus prove insufficient regarding HRDD and eventually lead to liability.

The arguments advanced and distinctions proposed in this paper could usefully be deepened by theoretical and empirical research, including qualitative and quantitative analysis of companies operating on the EU Internal Market and sourcing products from developing countries.

References:

- Bonnitcha J., McCorquodale R, 2017. The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights. *The European Journal of International Law*, 28(3), 899-919.
- De Jonge, A. 2011. *Transnational Corporations and International Law: Accountability in the Global Business Environment*. Cheltenham: Edward Elgar Publishing.
- Enneking, L. 2020. The Netherlands country report, in: Study on due diligence. Part III Country Reports. Publications Office of the European Union, 170-196.
- European Coalition for Corporate Justice, ECCJ Position Paper, Key Features of Mandatory Human Rights Due Diligence Legislation, 2018.
- Fasterling, B., Demuijnck, G. 2013. Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights. *Journal of Business Ethics*, 116, 799-814.
- Fransen, L., Burgoon, B. 2012. A Market for Worker rights: Explaining Business Support for International Private Labour Regulation. *Review of International Political Economy*, 19(2), 236-266.
- Grabosch, R. 2015. Options for Elaborating Corporate Human Rights Due Diligence Obligations in German Law. In: Robert Grabosch and Christian Scheper, *Corporate Obligation with Regard to Human Rights Due Diligence. Policy and Legal Approaches*, Friedrich Ebert Stiftung, December.
- Korn, F. 2020. How Germany plans to uphold human rights in supply chains. *International Politics and Society*.
- Krajewski, M., Faracik, B. 2020. Substantive elements of potential legislation on human rights due diligence.” Briefing No 1, European Parliament, Policy Department for External Relations Directorate General for External Policies of the Union PE 603.504-June.
- LeBaron, G., Rühmkorf, A., 2017. Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance. *Global Policy*, 8(S3) Special Issue: Public and Private Labor Standards Policy in the Global Economy, 15-28.
- LeBaron, G., Rühmkorf, A. 2019. The domestic politics of corporate accountability legislation: struggles over the 2015. UK Modern Slavery Act. *Socio-Economic Review*, 17(3), 709-743.
- Mares, R. 2018. Corporate transparency laws: a hollow victory? Unpublished version, forthcoming in *Netherlands Quarterly of Human Rights*, 21-22.
- Ruggie, J. Sherman, J. 2017. The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale, *The European Journal of International Law*, 28(3), 921-928.
- Savory, E. 2020. France Country Report. In: Study on due diligence. Part III Country Reports, Publications Office of the European Union, 56-94.
- Smit, L., Bright, C., Pietropaoli, I., Hughes-Jennett, J., Hood, P. 2020. Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies. *Business and Human Rights Journal*, 1-9, DOI: <https://doi.org/10.1017/bhj.2020.10>.
- Smit, L. *et al.* 2020a. Study on due diligence requirements through the supply chain. European Commission. Directorate-General for Justice and Consumers.
- United Nations Office of the High Commissioner for Human Rights (OHCHR). 2012. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, Geneva.