MANDATORY CORPORATE HUMAN RIGHTS DUE DILIGENCE MODELS: SHOOTING BLANKS?

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The major stakeholders, including states (at least, in the global North) and transnational corporations (TNCs), have radically changed their attitude to the idea of mandatory human rights due diligence in the last decade. By asking what is behind these good intentions, and whether the mandatory corporate human rights due diligence models enforced so far are effective or represent an exercise in shooting blanks, and by combining a legal positivistic perspective with studies on governance and the production of knowledge, this article contributes to the legal and socio-legal assessment of these changes Assessing the effectiveness of mandatory corporate human rights due diligence, this article discusses the inherent or implied features of this regulatory tool which restrict its ability to serve as an instrument to protect human rights. A special focus is made on two main restrictions that are specific for human rights due diligence: the regulatory boundary revealed in the auxiliary character of due diligence and its limed ability to serve as a standard of conduct, and the epistemic boundary, deriving from the conflicting role of companies as the architects and executives of knowledge production. To a certain extent, the legislative process can counterbalance some of these restrictions by setting up the substantive, precise obligations of companies, and by creating mechanisms of control and remediation. However, the analysis of nine different instruments reveals that neither states, nor the EU have used the potential of the regulatory force.

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Table of Contents

Introduction

The use of due diligence concept was one of the key elements of the success of the U.N. "Protect, Respect and Remedy" Framework of 2008. This was subsequently elaborated in the 2011 Guiding Principles on Business and Human Rights, which were endorsed by the U.N. Human Rights Council.[1] Together with the soft-law nature of this document, the concept of corporate human rights due diligence seems to

[1] Rep. of John Ruggie (Special Representative): on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/8/5, 7 April 2008; on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/17/31, 21 March 2011.

have suited both large companies, enabling them to demonstrate their adherence to human rights protection to their consumers, and states, who showcased their willingness to deal with the problem caused by the legal gap in the liability of corporations for human rights abuses. Voluntary human rights due diligence gave companies thresholds and a reference point that were, on the one hand, determinate and authoritative enough to be "sold" to customers, and that were, on the other, weak, ambiguous, and ranged from "ticking the boxes" to quasi-state level human rights protection. However, as empirical studies have proven, human rights due diligence policies were voluntarily implemented by less than half of large companies.[2] Among them, the overwhelming majority, at best, confined their endeavours to declarations of adherence or the endorsement of the U.N. Framework or other soft-law instruments, the inclusion of the relevant formulations of ethical codes, and the placement of declarations on their web sites.[3]

Academic scholarship,[4] human rights and environmental activists, NGOs and international organisations concurred that self-regulation and voluntary measures to foster corporate respect for human rights, although a progressive step, have proven to be insufficient.[5] One of the main failures was the lack of legally binding obligations to conduct human rights due diligence and the lack of judicial remedies to hold legal persons liable for damages occurring in their supply chains.[6] Thus, it was the concept of mandatory due diligence that – among all possible alternatives – was glorified as sufficient and able to provide a response to corporate human rights abuses.[7] There are currently nine binding instruments, adopted either at the state

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[2] The European Parliament in the Resolution of 10 March 2021 stated that "only 37% of business respondents currently conduct environmantal and human rights due diligence" (Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 10 March 2021 (hereinafter – the EU Draft Directive on Corporate Due Diligence and Corporate Accountability)), preamble, (X); *see* also British Institute of International and Comparative Law, Study on Due Diligence Requirements Through the Supply Chain (2020), at 48–50 (Oct. 5, 2021), available at https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[3] Rep. of Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/73/163, 16 July 2018, at 8–9.

[4] Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48(1) Tex. Int'l L.J. 33 (2012); Tim Bartley, *Transnational Governance and Re-Centered State: Sustainability or Legality?*, 8(1) Regul. Gov. 93 (2014); Gary Craig, *The UK's Modern Slavery Legislation: An Early Assessment of the Process*, 5(2) Soc. Incl. 16 (2017); etc.

[5] Resolution on Corporate Liability for Serious Human Rights Abuses in Third Countries, Eur. Parl. Doc. 2015/2315(INI), 25 October 2016, para. 28; Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 10 March 2021, para. 5.

[6] *See* Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 10 March 2021, para. 1.

[7] Bartley 2014, at 96–106.

level (in the U.S.,[8] the UK,[9] Australia,[10] the Netherlands[11] and France[12]) or in the EU (the Conflict Minerals Regulation[13] and the Non-Financial Reporting Directive[14]) which prescribe business entities to conduct human rights due diligence. The German and Swiss parliaments are currently discussing new legislation requiring corporate duty of care.[15] The EU is committed to introducing mandatory human rights due diligence with an unprecedentedly wide outreach in 2021.[16]

Just a few years ago it was primarily due to the comprehensive "smart mix" strategy[17] (consisting of a combination of binding rules imposed on states with non-binding norms addressed to businesses) that the U.N. Human Rights Council endorsed the voluntary "Protect, Respect and Remedy Framework" in 2008 and the Guiding Principles in 2011. This means, that states (at the least in the global North) and transnational corporations (TNCs) have radically changed their attitude to the idea of the mandatory human rights due diligence in the course of about a decade. By asking what is behind the good intentions, and whether the mandatory corporate

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8 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o) (hereniafter – the U.S. Dodd-Frank Act); California Transparency in Supply Chains Act of 2010, Civil Code, § 1714.43 (hereinafter – the California Transparency in Supply Chains Act).

9 Modern Slavery Act 2015, UK Public General Acts, 2015 c. 30 (herenafter – the UK Modern Slavery Act).

10 Modern Slavery Act 2018, C2018A00153 No. 153, 2018 (hereinafter – the Australian Modern Slavery Act); Modern Slavery Act 2018 No. 30 (hereinafter – the New South Wales Modern Slavery Act).

11 Wet de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen, 24.10.2019, Staatsblad van het Koninkrijk der Nederlanden, 13.11.2019 (hereinafter – the Dutch Child Labour Due Diligence Law).

12 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n° 0074 du 28 mars 2017 (hereinafter – the French Duty of Vigilance Law).

13 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 (Oct. 5, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821 (hereinafter – the Conflict Minerals Regulation).

14 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 (Oct. 5, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 (hereinafter – the Non-Financial Reporting Directive).

15 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten (hereinafter – the Draft Law on the Business Due Diligence in Supply Chains).

16 On 10 March 2021 the European Parliament requested the Commission to submit a legislative proposal on mandatory human rights due diligence and conveyed to it a draft proposal of the directive (Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 10 March 2021, para. 5).

17 European Parliament, Directorate-General for External Policies, Policy Department, Implementation of the UN Guiding Principles on Business and Human Rights (2017), at 12 (Oct. 5, 2021), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf.

human rights due diligence models enforced so far had been effective or represented an exercise in shooting blanks, and by combining a legal positivistic perspective with studies on governance and the production of knowledge, this article contributes to both the legal and socio-legal assessment of these changes.[18]

For this purpose, the article is divided into three sections. The first tracks the chronology of changes in the attitudes of stakeholders to the mandatory human rights due diligence of corporations. The second section conceptualises the distinctive features of this due diligence which serve as the *implied* restrictions of this process. The third section distils the *imposed* restrictions of different mandatory corporate human rights due diligence models: using the material and personal scopes of application, the length of the supply or value chains covered, the type of obligations (risk assessment, disclosure, reporting, labelling of goods, the creation of grievance or remedial mechanisms, etc.), and the existence and strength of state monitoring or control. The conclusion summarizes the arguments made in this research and shows the lack of effectiveness of this regulatory tool.

1. Changing Minds or "States Are Back"

As early as 2003, the U.N. Commission on Human Rights failed to adopt the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights" drafted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, primarily because of its choice of a mandatory scheme of corporate due diligence.[19] The strategy chosen by Professor

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[18] A significant amount of scholarship on corporate human rights due diligence is underpinned by the positivistic legal methodology: Chiara Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation* in *Legal Sources in Business and Human Rights* 218 (Martina Buscemi et al. eds., 2020); Olga Martin-Ortega, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, 32(1) Neth. Q. Hum. Rts. 44 (2014); Robert McCorquodale & Lise Smit, *Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty* in *Building a Treaty on Business and Human Rights: Context and Contours* 216 (Surya Deva & David Bilchitz eds., 2017); Mark B. Taylor, *Human Rights Due Diligence in Theory and Practice* in *Research Handbook on Human Rights and Business* 88, 103–104 (Surya Deva & David Birchall eds., 2020); Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69(4) Int'l Comp. L.Q. 789 (2020); Doug Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1(2) Bus. Hum. Rts. J. 179 (2016); or an analysis of law from a regulatory perspective: Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20(1) Melb. J. Int'l L. 221 (2019). In the other corner is the sociologically framed literature on due diligence: Bill Maurer, *Due Diligence and "Reasonable Man," Offshore*, 20(4) Cur. Ant. 474 (2005); Tony Porter, *Making Serious Measures: Numerical Indices, Peer Review, and Transnational Actor-Networks*, 15(4) J. Int'l Relat. Dev. 532 (2012); Stelios Zyglidopoulos & Peter Fleming, *Corporate Accountability and the Politics of Visibility in "Late Modernity,"* 18(5) Org. 691 (2011); whereas the transdisciplinary studies is quite rare: Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22(1) Hum. Rts. Rev. 109, 116 (2020); Emmanuelle Cheyns et al., *Missing the Forest for the Data? Conflicting Valuations of the Forest and Cultivable Lands*, 96 Land Use Pol'y 1 (2020).

[19] Karin Buhmann, *Navigating from 'Train Wreck' to Being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework* in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 29 (Surya Deva & David Bilchitz eds., 2013).

John Ruggie, who was appointed Special Representative of the Secretary-General in 2005, with the purpose to break the stalemate, was successful because of several key factors, one of which was overarching. The new approach shifted, or to be more precise, reversed the perspective from the victims of human rights abuses to companies. This influenced the language, the content, the scope, and the legal nature of the human rights commitments. Such a "principled pragmatism" matured in numerous consultations with large corporations and guaranteed the triumph of the 2008 U.N. "Protect, Respect and Remedy Framework" and the 2011 U.N. "Guiding Principles on Business and Human Rights."[20] The price paid for this was that corporate human rights obligations were formulated in an amorphous way: which specific rules were applicable was not identified; the pertinent issues of responsibility for subsidiaries' compliance with human rights were not covered, and non-judicial grievance mechanisms could not provide any semblance of redress.[21]

Let us firstly track the legislative changes that signified the rise of the idea of mandatory corporate human rights due diligence. The first such step was made in the US. The U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 introduced sectoral due diligence with respect to "conflict minerals" – columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives – with an origin limited to the DRC and neighboring countries.[22] Although aiming to break the link between mineral extraction and the financing of armed conflict in the DRC, the U.S. initiative proved to be inefficient and is applied in a reduced scope after it was challenged in the U.S. courts.[23]

Nonetheless, in 2017, three years after the U.S. Dodd-Frank Act came into force, the EU Commission introduced the Conflict Minerals Regulation, which came into effect on 1 January 2021. The Commission did not conceal that the adoption of this regulation was a clear result of the Dodd-Frank Act: according to the Commission, there were 40 dual-listed EU/U.S. companies subject to the U.S. Dodd-Frank Act, and 150,000–200,000 EU companies were estimated to be indirectly affected by the U.S. Act as being in the supply chain of U.S.-listed companies.[24]

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[20] Surya Deva & David Bilchitz, *The Human Rights Obligations of Business: A Critical Framework for the Future* in *Human Rights Obligations of Business*, *supra* note 19, at 1, 9.

[21] *Id.* at 9–17.

[22] U.S. Dodd-Frank Act, § 1502.

[23] *Nat'l Ass'n of Mfrs., et al. v. SEC*, No. 13-CF-000635 (D.D.C. Apr. 3, 2017); Statement of Acting Chairman Piwowar on the Court of Appeals Decision on the Conflict Minerals Rule, Acting Chairman Michael S. Piwowar, U.S. Securities and Exchange Commission, 7 April 2017 (Oct. 5, 2021), available at https://www.sec.gov/news/public-statement/piwowar-statement-court-decision-conflict-minerals-rule.

[24] Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, SWD(2018) 186 final, 17 May 2018, para. 13 (Oct. 5, 2021), available at https://eur-lex.europa.eu/resource.html?uri=cellar:c5049833-59b7-11e8-ab41-01aa75ed71a1.0001.02/DOC_2&format=PDF.

The start of another round of passing mandatory human rights due diligence laws once again took place in the U.S. The California Transparency in Supply Chains Act, which focused on the fight against slavery and human trafficking, was adopted in 2010 and entered into force in 2012, served as a role model for adoption of the similar legislation in the UK and Australia. The Modern Slavery Act was adopted in 2015 in the UK, and two acts – The Australian and The New South Wales Modern Slavery Acts – were passed in 2018. Another targeted mandatory due diligence law, focusing on child labor was adopted in 2019 in the Netherlands.

Among this national legislation, the 2017 French Duty of Vigilance Law stands alone as the only national law with a general material and personal scope of application, for it covers all human rights and is not sector-specific. This law, even after some of its provisions were found unconstitutional,[25] represents the most comprehensive domestic approach, so that the U.N. Working Group on Business and Human Rights, in its report to the U.N. General Assembly, designated it as "a development that other Governments should learn from,"[26] and eight states called for the EU to replicate the France model.[27]

Germany and Switzerland are introducing new legislative bills providing for the corporate duty of care. On 3 March 2021, the draft law "On Corporate Due Diligence in Supply Chains" was adopted by the German government and then submitted to the Bundestag.[28] After a far-reaching proposal on mandatory human rights due diligence failed to get a "double majority" in a referendum in Switzerland in 2020, a new modest version in the form of a counter-proposal is currently under parliamentary consideration.[29]

The EU has imposed on large companies the duty to disclose their human rights due diligence activities in the Non-Financial Reporting Directive of 2014. However, neither this directive, nor the EU Conflict Minerals Regulation, due to their ambiguous and toothless character, were able to provide a comprehensive and strong legal basis guaranteeing human rights compliance. On 28 April 2020, the European

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25 Conseil constitutionnel, Décision n° 2017-750 DC du 23 mars 2017, JORF n° 0074 (28 mars 2017) texte n° 2, paras. 9–14.

26 Rep. of Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/73/163, 16 July 2018.

27 Members of 8 European Parliaments Support Duty of Care Legislation for EU Corporations, European Coalition for Corporate Justice, 31 May 2016 (Oct. 5, 2021), available at https://corporatejustice.org/news/members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations/.

28 Draft Law on the Business Due Diligence in Supply Chains (2021) (Oct. 5, 2021), available at https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2.

29 Roman Obrist, *Gescheiterte Konzernverantwortungsinitiative: Rechtsfolgen des indirekten Gegenvorschlags*, Zürcher Handelskammer, 29 January 2021 (Oct. 5, 2021), available at https://www.zhk.ch/de/wirtschaft-und-politik/abstimmungen/gescheiterte-konzernverantwortungsinitiative-rechtsfolgen-des-indirekten-gegenvorschlags.html.

Commissioner for Justice, Didier Reynders, announced the Commission's plans to introduce a legislative proposal on mandatory human rights due diligence by 2021.[30] Finally, on 10 March 2021, the European Parliament requested the Commission to submit such a legislative proposal and convey a draft proposal of the directive.[31]

Negotiations of the Open-ended Intergovernmental Working Group led to the elaboration on 6 August 2020, of the second revised version of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.[32] This is not the first initiative to draft a treaty requiring states to ensure that companies abide by human rights, as the first one was undertaken under the auspices of the International Conference of the Great Lakes Region when its members signed the 2006 Protocol Against the Illegal Exploitation of Natural Resources.[33]

Mandatory human rights due diligence is gaining momentum. Alongside the rise of political support,[34] what has changed significantly in the course of the proliferation of mandatory due diligence is the attitude of big business. Corporations and business associations were strictly against the mere idea of a mandatory model, as was clear from the reaction to the draft norms composed by the U.N. Sub-Commission on the Promotion and Protection of Human Rights[35] and from the opposition to the introduction of the "conflict minerals" due diligence in the U.S.[36] However, in a few years,

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30 European Commission Promises Mandatory Due Diligence Legislation in 2021, Webinar Report, Responsible Business Conduct, 30 April 2020 (Oct. 5, 2021), available at https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/.

31 Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 10 March 2021.

32 OEIGWG, The Second Revised Version of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (2020) (Oct. 5, 2021), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

33 International Conference on the Great Lakes Region, Protocol Against the Illegal Exploitation of Natural Resources, 30 November 2006 (Oct. 5, 2021), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourcess.pdf.

34 U.N. High Commissioner for Human Rights, Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, U.N. Doc. A/HRC/38/20/Add.2, 1 June 2018; Rep. of Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/73/163, 16 July 2018; Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states (2016); OECD Council at Ministerial Level, On the Implementation of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High Risk Areas, C/MIN(2011)12/FINAL, 25 May 2011.

35 Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3(1) J. Hum. Rts. Env't 5, 11 (2012).

36 The National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable filed a lawsuit challenging due diligence provisions of the U.S. Dodd-Frank Act in 2013 (*see Nat'l Ass'n of Mfgrs v. SEC*, 748 F.3d 359 (D.C. Cir. 2014)).

business giants had changed their minds and started to endorse, in different forms, initiatives calling for states and the EU to introduce mandatory due diligence.[37]

Two cases are highly illustrative in this respect. The Dodd-Frank act initially met strong resistance from the business circles – the National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable filed a lawsuit challenging this law in 2013.[38] However, when the plans of President Trump to suspend this Act were leaked in 2017,[39] the TNCs, and among them Apple and Intel, claimed to support the existing law.[40] The second example is related to the EU. Although the need for a new enhanced approach has long been debated in the EU, plans to introduce mandatory cross-sector human rights due diligence were announced almost immediately after a group of 101 international investors with US$4.2 trillion in assets under management, issued a statement calling on "all governments to develop, implement and enforce mandatory human rights due diligence requirements for companies."[41] In addition, on 2 September 2020, 26 companies and business associations representing holdings with a combined annual turnover of almost 350 billion EUR (among them Adidas, Unilever, Inditex, and Mars), jointly called on the EU to introduce a new comprehensive model of environmental and human rights due diligence.[42]

It seems that the slow introduction of mandatory due diligence dispelled doubts that it will endanger company welfare, profits or both. In the following sections, we scrutinize what in the model of mandatory human rights due diligence could have provided businesses with the grounds to draw such conclusions and reverse their attitude to this regulatory tool.

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37 European Coalition for Corporate Justice, Evidence for Mandatory HRDD Legislation, Background Note (2019), at 4 (Oct. 5, 2021), available at https://corporatejusticecoalition.org/wp-content/uploads/2018/01/Policy-evidence-mHRDD-May-2019-FINAL.pdf; Our Responsibility in a Globalised World: A Call for Mandatory Human Rights and Environmental Due Diligence Legislation, Business & Human Rights Resource Centre (Oct. 5, 2021), available at https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/gesetz/.

38 *Nat'l Ass'n of Mfgrs v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

39 Sarah N. Lynch & Emily Stephenson, *White House Plans Directive Targeting 'Conflict Minerals' Rule: Sources*, Reuters, 8 February 2017 (Oct. 5, 2021), available at https://www.reuters.com/article/us-usa-trump-conflictminerals-idUSKBN15N06N.

40 Kramer Michael, *Why Care About Conflict Minerals? Customers and Investors Do*, GreenBiz, 26 February 2015 (Oct. 5, 2021), available at https://www.greenbiz.com/article/why-care-about-conflict-minerals-customers-and-investors-do.

41 Investor Alliance for Human Rights, The Investor Case for Mandatory Human Rights Due Diligence (Oct. 5, 2021), available at https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_0.pdf.

42 26 Companies, Business Associations, and Initiatives Make Joint Call for EU Mandatory Human Rights & Environmental Due Diligence, Business & Human Rights Resource Centre, 2 September 2020 (Oct. 5, 2021), available at https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence/.

2. Implied Restrictions of the Concept of Corporate Human Rights Due Diligence

The concept of corporate human rights due diligence, whether voluntary or mandatory, has some features which restrict its scope, content, and, consequently, its capacity to meet the goal of protecting human rights. These distinctive properties are either predetermined by the character of due diligence as a compliance procedure (general restrictions) or by the designation of this concept to serve the protection of human rights (human-rights specific restrictions).

Corporate human rights due diligence as an element of corporate social responsibility is one type of corporate due diligence carried out with respect to social, environmental, and governance risks and impacts. It represents "the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems."[43] This suggests a number of general restrictions that human rights due diligence shares with other types of due diligence, which are thoroughly reflected elsewhere.[44] First, being of a procedural nature, it is by nature an "obligation of conduct." Secondly, the results of due diligence depend on the corporation's capacities (which explains why most models of mandatory corporate human rights due diligence restrict their scope of application to the largest companies). Thirdly, due diligence as a concept is underpinned by neoliberal doctrines of good governance, accountability, and transparency[45] and is not conceived as serving as a legal remedy. Fourthly, although the core procedural elements of human rights due diligence include the identification of actual or potential impacts, the prevention and mitigation of such impacts, accountability, and responses to these impacts,[46] this tool is more oriented to fulfil the *ex-ante* preventive function and is, therefore, conceptualized to catch the patterns, but not to address individual abuses of human rights.

There are at least two human rights-specific restrictions that are implied in corporate human rights due diligence: the regulatory and the epistemic. The latter gets only scarce attention in the literature and needs to be analysed more thoroughly.

2.1. Regulatory Boundary: The Auxiliary Character of Due Diligence

The regulatory restriction follows from the limited ability of corporate human rights due diligence to be used as a "standard of conduct." Corporate human rights

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43 OECD Guidelines for Multinational Enterprises (as amended on 25 May 2011), at 23, para. 14 (Oct. 5, 2021), available at https://www.oecd.org/daf/inv/mne/48004323.pdf.

44 Landau 2019, at 232–289.

45 Ben Radley & Christoph Vogel, *Fighting Windmills in Eastern Congo? The Ambiguous Impact of the 'Conflict Minerals' Movement*, 2(3) Extr. Ind. Soc. 4 (2015).

46 Olivier De Schutter et al., *Human Rights Due Diligence: The Role of States* (2012), at 55 (Oct. 5, 2021), available at https://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf.

due diligence is procedural, and it is not a "free-standing obligation,""but ... a modality and a standard of behaviour, it can therefore be only a "component part" of other rules."[47] Therefore, its application presupposes that a substantive legal rule, able to serve as a reference point, exists elsewhere. National or supranational instruments that introduce corporate human rights due diligence provide the legal basis for the imposition of obligations for companies arising from human rights, and thereby they extend the circle of addressees of human rights obligations. However, this bridging of the gap is not enough, as the question remains as to which rights and freedoms should be respected by companies and to what extent.

However, there are no binding international instruments that directly impose human rights obligations on companies. International human rights treaties are underpinned by the structural division between state (all bodies, entities, and individuals whose behaviour can be attributed to the state)[48] as an addressee of the obligations, and individuals or groups of individuals (including NGOs or even sometimes companies), as non-state bearers of such obligations.[49] Human rights provisions are thought of as vertical relations and presuppose that the addressee of these obligations possesses public power, a monopoly to use force, as well as legislative, executive and judicial competencies. Hence, many human rights formulations are underpinned by the balancing of human rights and the legitimate pursuits of states, or the balancing of different rights; some presuppose a wide margin of interpretation. The language, internal structure, and nature of these constructions cannot, without any changes, be applied with respect to companies. The transposition of these types of obligations onto companies, if not accompanied by relevant details, will either remain a dead letter or will lead to distortions in human rights protection.[50]

Only a few human rights obligations of a negative nature are clear-cut and tailored for transposition onto corporations and for application in horizontal relations without provoking legal uncertainty. The majority of these obligations are either underpinned by *jus cogens* norms of International Human Rights Law, like the prohibition of torture or forced labour, or detailed by the International Labour Organization, like the prohibition of the worst forms of child labour. The

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47 Heike Krieger & Anne Peters, *Due Diligence and Structural Change in the International Legal Order* in *Due Diligence in the International Legal Order* 351, 374–375 (Heike Krieger et al. eds., 2020).

48 Article 2(1) of the ICCPR adresses the obligations to "respect and ensure" the rights recognized in this treaty to "State Parties" and the same approach is reflected in eight other human rights treaties adopted under the auspicies of the U.N.; Article 1 of the ECHR requires from "the High Contracting Parties" to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"; Article 1(1) of the American Convention of Human Rights also identifies "the States Parties" as those responsible to "undertake to respect the rights and freedoms' enshrined in this treaty."

49 *Slovenia v. Croatia*, App. No. 54155/16, 16 December 2020, paras. 60–69 (Oct. 5, 2021), available at http://hudoc.echr.coe.int/eng?i=001-206897; *Ljubljanska Banka D.D. v. Croatia*, App. No. 29003/07, 4 June 2015, paras. 49–56 (Oct. 5, 2021), available at http://hudoc.echr.coe.int/eng?i=001-154983.

50 *See* also Jay Butler, *The Corporate Keepers of International Law*, 114(2) Am. J. Int'l L. 189, 216–218 (2020).

provisions of both International Humanitarian Law and International Criminal Law are of limited importance. Even if International Humanitarian Law is mentioned in a national instrument introducing human rights due diligence, their norms are thought to primarily oblige the parties to the conflict, and only a close affiliation of the company with one of them may open the possibility of the application of this set of norms to corporate actors as individuals or groups of individuals. International Criminal Law, which is also usually not referred to in national legislation on human rights due diligence, may be relevant for the determination of particular norms of International Human Rights Law as having reached the level of *jus cogens*, although this indirect impact is also restricted by the high thresholds set for "international crimes" in comparison with International Human Rights Law.

The dispute on whether corporations are directly bound to comply with International Human Rights Law and, in particular, whether two judgments that gave an affirmative answer to this question – the *Urbaser v. Argentina* Arbitral Award[51] and the *Nevsun Resources Ltd. v. Araya*,[52] decided by the Supreme Court of Canada – are premature[53] or not,[54] is not relevant to this issue, as it does not change the content of the human rights rules.

Therefore, a national (or international) instrument introducing corporate human rights due diligence should not only be an act of transposing states' obligations onto companies but also provide them with a standard of conduct. Only a few models fulfil this requirement, and all of them represent a targeted approach to the protection of human rights, being focused on a particular human right: prohibitions of child labour in Dutch law or of modern slavery in the laws of the UK and Australia.

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[51] *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Arbitral Award, 8 December 2016, paras. 1195–1199.

[52] *Nevsun Resources Ltd. v. Araya*, Supreme Court of Canada, Case No. 37919, Judgment, 28 February 2020.

[53] Markus Krajewski, *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application*, 5(1) Bus. Hum. Rts. J. 125, 128 (2020); Kevin Crow & Lina Lorenzoni Escobar, *International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?*, 36(1) B.U. Int'l L.J. 87, 117–118 (2018); Edward Guntrip, *Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL:Talk!, 10 February 2017 (Oct. 5, 2021), available at https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/; Edward Guntrip, *Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of Urbaser v. Argentina*, 1(1) Brill Open L. 37, 48 (2018); Patrick Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration*, 1(1) Brill Open L. 61, 82 (2018); Peter Muchlinski, *Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: Nevsun Resources Limited v. Araya*, 1(3) Amicus Curiae 505, 523–524, 528 (2020).

[54] Barnali Choudhury, *Investor Obligations for Human Rights*, ICSID Review 11 (forthcoming 2021); Tomer Broude & Caroline Henckels, *Not All Rights Are Created Equal: A Loss–Gain Frame of Investor Rights and Human Rights*, 34(1) Leiden J. Int'l L. 93, 104 (2021); Upendra Baxi, *Nevsun: A Ray of Hope in a Darkening Landscape?*, 5(2) Bus. Hum. Rts. J. 241, 247 (2020); Mark B. Taylor, *Litigating Sustainability – Towards a Taxonomy of Counter Corporate Litigation*, University of Oslo Faculty of Law Research Paper No. 2020-08 (2020), at 22–23 (Oct. 5, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3627580.

Although a targeted approach *per se* is not a guarantee that the standard of conduct will be clearly defined, both sector-specific national and supranational instruments and instruments with a general scope of application *ratione materiae* and *ratione personae* often make use of a blank clause with respect to human rights. The U.S. Dodd-Frank Act envisages a general formula, requiring an indication of minerals that "directly or indirectly finance armed groups or result in labour or human rights violations."[55] The EU Conflict Minerals regulation does not disclose which particular rights should be respected and which obligations should be fulfilled by companies and only makes a reference to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and its Annexes in the preamble. The OECD Guidance contains a list of *jus cogens* prohibitions (torture, forced or compulsory labor), including the worst forms of child labor, and then mentions "other gross human rights violations and abuses such as widespread sexual violence"[56] and "war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide."[57]

Without exception, all corporate human rights due diligence instruments with a general scope of application, including The French Duty of Vigilance Law, the EU Non-Financial Reporting Directive, which are already in force, as well as the new EU proposal on universal human rights due diligence,[58] and the German and Swiss legislative drafts do not specify the content of the human rights obligations of companies. It is not surprising that the imprecise character of the reference to "human rights" and "fundamental freedoms" in the Duty of Vigilance Law has been criticised by the French Constitutional Council and served as one of the grounds for declaring the sanctions part of this legislative act to be unconstitutional.[59] Soft law acts providing corporate human rights due diligence, which are sometimes referred to by the instruments imposing mandatory models, follow exactly the same path.

The combination of the obligations of companies set up at the national or supranational level with an absent or ambiguous standard of behaviour makes corporate human rights due diligence a half-measure, nebulous, and open to interpretation. The more or less serious attempts to bring companies to liability will likely encounter challenges to the legality of the relevant provisions. Only provided that the legal instrument is explicit with respect to the content of human rights and freedoms, can a national model of corporate human rights due diligence be regarded as a complete package and not an underwritten rule.

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55 U.S. Dodd-Frank Act, § 1501(c)(1)(B)(ii).

56 OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016), paras. 20–21 (Oct. 5, 2021), available at https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf.

57 *Id.*

58 EU Draft Directive on Corporate Due Diligence and Corporate Accountability.

59 Décision n° 2017-750 DC du 23 mars 2017, supra note 25, paras. 9–14.

2.2. Epistemic Boundary: Companies as Architects and Executives of Knowledge Production

The second implied restriction of corporate human rights due diligence is of an epistemic nature. Due diligence, regardless of its subjects and objects, can be represented as a "disclosure device" of "qualitative knowledge production."[60] This is a tool for the transformation of information concerning companies' respect of human rights into knowledge, i.e. the transformation of data, organized in some way, into "organized data that has an effect."[61] Like in any knowledge production, what comes out depends on who is participating in this process and how the process is conducted, so that the roles of the "knowledge producer" and the "knowledge modes" used are of crucial importance.[62]

It is the epistemic layer that significantly distinguishes corporate human rights due diligence as it has been crystallized in international soft law and national hard law instruments from the models of commercial due diligence, aimed at vetting contractual partners, or from two other forms of internationally driven types of corporate due diligence: anti-corruption and anti-money laundering. Corporate human rights due diligence is impacted by a combination of four factors. First, the company itself is the producer of knowledge; secondly, the content of the company's self-interest; thirdly, the possibility of the widest interpretation for companies in the process and the content of due diligence; and, fourthly, the misalignment between the modes of knowledge inherent in this regulatory tool and the experiential knowledge held by the local population, in general, and the victims of human rights abuses, in particular.[63]

Corporate human rights due diligence as part and parcel of the neoliberal concept of transparency[64] is conceptualized through the practice of "naming and shaming." This may be efficient when the subject and the object of shaming do not coincide, whereas this regulatory tool of corporate human rights due diligence is underpinned by self-evaluation and, consequently, self-incrimination. Almost all instruments introducing corporate human rights due diligence rely on the internal organization of this process by the company itself.[65] The requirement for an external audit is not a necessary element, and, anyway, such audits are organized and financed by the company itself, which opens the doors for complicity or the non-disclosure of results which might be regarded as potentially dangerous for the reputation of the company.

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60 Hans K. Hansen & Mikkel Flyverbom, *The Politics of Transparency and the Calibration of Knowledge in the Digital Age*, 22(6) Org. 872, 873 (2015).

61 James Leach, *'Step Inside: Knowledge Freely Available': The Politics of (Making) Knowledge-Objects* in *The Politics of Knowledge* 79, 84 (Patrick Baert & Fernando D. Rubio eds., 2012).

62 *Id.*

63 *See* Almut Schilling-Vacaflor, *Who Controls the Territory and the Resources? Free, Prior and Informed Consent (FPIC) as a Contested Human Rights Practice in Bolivia*, 38(5) Third World Q. 1058 (2017).

64 Radley & Vogel 2015, at 409.

65 Taylor 2020, at 103–104.

Commercial legal entities, being by definition profit driven, conceive due diligence tools, both voluntary and mandatory, as tools "to mitigate financial, reputational, legal or other risks *for itself*."[66] If we consider the self-interest of the company, the methodological tool for measuring it will be permeated by one of four general approaches to assess the companies' effectiveness: the goals, the system resource, internal process, or strategic constituencies.[67] Whereas the system resource exaggerates the impact of the obtained resources, and the internal process overestimates the role of the organization's internal climate, the goals and the strategic constituencies allow the effectiveness of companies to be measured and discussed via internal and external factors. The goals approach presupposes that the company has clear and identifiable goals. Respect for and the promotion of human rights in different configurations may be either postulated by the company itself or imposed by the application of human rights due diligence tools. However, the problem with putting goals at the centre of this analysis is hindered by the inevitable disruptor between the formal (publicly declared) and actual goals. The main (and actual) goals shared by all commercial organizations include market share, profitability, market value, and customer satisfaction.[68] Human rights protection in the light of a goals-based assessment can be sought by companies only as an element of these actual goals. The application of the strategic constituencies approach leads to a comparable result. Under this approach, the organization fulfils the demands of those constituencies from whom it needs support for its survival – shareholders, investors, and customers.[69]

Many instruments introducing corporate human rights due diligence are silent on their aims, like the French Duty of Vigilance Law or the EU Non-Financial Reporting Directive. Even a purpose of human rights protection is rarely mentioned in the hard law sources. Only the draft Directive, prepared by the EU parliament, highlights its purpose to ensure that the companies fulfil their duty to respect human rights, not to cause or contribute to potential or actual adverse impacts on human rights, and to prevent and mitigate those adverse impacts.[70] This approach echoes the OECD Guidelines for Multinational Enterprises, which aim to make companies "respect the

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66 Björnstjern Baade, *Due Diligence and the Duty to Protect Human Rights* in *Due Diligence in the International Legal Order* 92, 95 (Heike Krieger et al. eds., 2020).

67 Kim Cameron, *Critical Questions in Assessing Organizational Effectiveness*, 9(2) Org. Dyn. 66, 67–68 (1980); Peter E.D. Love & Martin Skitmore, *Approaches to Organisational Effectiveness and Their Application to Construction Organisations* in *Proceedings of the 12th Annual Conference and Annual General Meeting, The Association of Researchers in Construction Management* 3 (A. Thorpe et al. eds., 1996).

68 Peter Doyle, *Setting Business Objectives and Measuring Performance*, 12(2) Eur. Manag. J. 123, 123–127 (1994); Kenny Crossan & Thomas Lange, *Business as Usual? Ambitions of Profit Maximization and the Theory of the Firm*, 17(3) J. Interdiscip. Econ. 313, 324 (2006).

69 Cameron 1980, at 67; Joe R. Matthews, *Assessing Organizational Effectiveness: The Role of Performance Measures*, 81(1) Libr. Q. 83, 85 (2011).

70 EU Draft Directive on Corporate Due Diligence and Corporate Accountability, Art. 1(1).

internationally recognized human rights of those affected by their activities."[71] Against this background, it is striking that some legal instruments do not even conceal the purpose of the satisfaction of investors and (or) customers, stipulating it as the sole impetus. The preamble of the EU Non-Financial Reporting Directive speaks of the identification of sustainability risks and increase of investor and consumer trust[72] and the Dutch Child Labor Law was exemplary explicit by providing that companies shall "prevent their products and services from being produced using child labour, so that *consumers* can buy them with peace of mind"[73] [emphasis added] without indicating at any other aims.[74] The same holds true for the California Transparency in Supply Chains Act that seeks to 'educate customers' and "thereby, to improve the lives of victims of slavery and human trafficking."[75]

Companies are reporting about human rights compliance for their profit, but this is not an oxymoron, for the due diligence – either voluntary or prescribed by law – as a form of self-regulation[76] makes these companies themselves the architects of the system of knowledge production. None of the enforced legal instruments providing for mandatory corporate human rights due diligence, although this type of due diligence is an "obligation of process," are explicit about the procedural details of this process. In the best-case scenario, these instruments refer companies to soft law sources, while most of them barely indicate which general measures should be undertaken. The Dodd-Frank Law, the French Duty of Vigilance Law and the Dutch Child Labour Law, for instance, confine themselves with the list of measures without answering the how-question, thus, leaving the widest room for corporate policies. This freedom of implementation is multiplied by the ambiguity of the scope of corporate human rights obligations related to the lack of the standard of behaviour discussed above.[77]

Corporate human rights due diligence as a regulatory tool allows the exploitation of the epistemic disruption between reality, including the experiential knowledge held by the local population, in general, and the victims of human rights abuses, in particular, on the one hand, and the knowledge produced by companies in the

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71 OECD Guidelines for Multinational Enterprises, § II(A)(1).

72 EU Non-Financial Reporting Directive, Rec. 3 (preamble); *see* also European Parliament resolution on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, Eur. Parl. Doc. 2012/2098(INI), 6 February 2013, para. 36; European Parliament resolution on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery, Eur. Parl. Doc. 2012/2097(INI), 6 February 2013, paras. 18, 26, 69.

73 Dutch Child Labour Due Diligence Law, Preamble.

74 *Id.*

75 California Transparency in Supply Chains Act, § 2(j).

76 John Ruggie, *Just Business: Multinational Corporations and Human Rights* 125 (2013).

77 *See* subpara. 3.1.

course of the human rights compliance procedures, on the other.[78] First, it manifests itself in the differences between the "modes of knowledge"[79] – the representation of structured information. Reports, surveys, and other tools of risk assessment are based on the search for, collection, filtering, and analysis of information conducted by companies, and this mode of knowledge may significantly differ from the real picture *in situ*. Secondly, the process of knowledge production is not necessarily shaped by standards strictly based on the law, for International Human Rights Law's ability to serve as a "standard of conduct" is very limited, and the soft law documents cannot fill in this gap. Thus, the applied standard of conduct can be based on the local understanding of human rights obligations with all their biases, distortions, and blind spots.

As a result, disclosure about carrying out human rights due diligence does not truly put companies in a trade-off position between their profit and their respect of human rights; it merely places the burden on them to organize their corporate human rights compliance procedures and adjust them for their purposes. The coincidence of positions of the architect of the system of knowledge production, the author of the particular results – both intermediate and final – and their publisher in conjunction with the purpose to attract its investors and customers, is *per se* programmed to bring cosmetic results.[80] This implied feature of corporate human rights due diligence can explain the disconnections between the commitments and processes, on the one hand, and the actual impact of these endeavours for the level of human rights protection, on the other. This problem is described by NGOs as a paradox when the highest scoring companies with robust commitments and human rights risk management systems are alleged of severe human rights abuses.[81] This may be well a result of the abovementioned epistemic boundaries of the human rights due diligence, which allow "mimicking of effective compliance system."[82]

3. Imposed Restrictions of Mandatory Corporate Human Rights Due Diligence Models

This section considers the peculiarities of the national mandatory regimes of corporate human rights due diligence, discussing which restrictions on the ability

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78 Compare with Michael Power, *Organized Uncertainty: Designing a World of Risk Management* 41–42 (2007).

79 Hansen & Flyverbom 2015, at 874.

80 Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81(2) Wash. U. L. Q. 487 (2003).

81 World Benchmarking Alliance, Corporate Human Rights Benchmark – Across Sectors: Agricultural Products, Apparel, Automotive Manufacturing, Extractives & ICT Manufacturing (2020) (Oct. 5, 2021), available at https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf.

82 Krawiec 2003, at 492.

of this tool to meet the aim of human rights protection were imposed by the states, who fulfil a meta-regulatory function. In contrast to the extensive commentaries overviewing these acts, this analysis is critically framed and will not to be limited to black letter laws, exploring how these acts were implemented in practice and how they have been already legally challenged. The scope of the legal instruments under scrutiny is mostly limited to legislative acts. Among them, seven acts have entered into force: The U.S. Dodd-Frank Act, the EU Conflict Minerals Regulation, the California Transparency in Supply Chain Act, the French Duty of Vigilance Law, the UK and Australian Modern Slavery Acts, the EU Non-Financial Reporting Directive and The Dutch Child Labour Due Diligence Act which is pending entry into force. The analysis of legal initiatives is limited to the Draft EU Directive, which is an instrument with an unprecedently wide scope of application.

These legislative instruments reflect several models of mandatory corporate human rights due diligence, which can be divided into those which are sector-specific or focused on particular human rights and those which are universal. The latter represents either a weak or an enhanced model, depending on whether and to what extent it is accompanied by enforcement and liability mechanisms. The U.S. Dodd-Frank Act and the EU Conflict Minerals Regulation comprise a sector-specific model. A specific human rights-focused model is reflected in four acts analysed in this article: the California Transparency in Supply Chains Act, the UK and Australian Modern Slavery Acts, and the Dutch Child Labor Due Diligence Act. The EU Non-Financial Reporting Directive can be designated as a "weak" universal model, and the French Duty of Vigilance Law and the Draft EU Directive can be characterised as "enhanced" ones.

3.1. Sector-Specific Model

3.1.1. The U.S. Dodd-Frank Act

The first step in adopting mandatory human rights due diligence for corporations was taken in the U.S. The 2010 U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 introduced sectoral due diligence with respect to "conflict minerals" – columbite-tantalite (coltan), cassiterite, wolframite, gold,[83] or their derivatives – originating in the DRC and the neighbouring countries.[84] The U.S. initiative was aimed to break the link between mineral extraction and the financing of armed conflict in the DRC. End product companies are obliged to file an annual report called a Form Specialized Disclosure with the Securities and Exchange Commission (SEC) and, if it identified the use of 3TG, originating in the DRC, they must exercise due diligence on the source and chain of custody, and describe the process in the

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[83] Conflict Minerals are defined in § 1502(e)(4) of the Dodd-Frank Act as columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); wolframite (the metal ore from which tungsten is extracted) and gold, which are cumulativelly called "3TG."

[84] U.S. Dodd-Frank Act, § 1502.

Conflict Minerals Report.[85] Although the model used in the Dodd-Frank Act was only a self-reporting procedure, the SEC was empowered to examine the fulfilment of the requirements by the companies. This, alongside the coverage of the supply chain, meant the model had a significant impact on the market and on the companies even before its entry into force. The study carried out by Elayan et al. showed that there was not only a significantly negative stock market reaction to the introduction of mandatory human rights due diligence, but also that "companies with poor records of conflict mineral sourcing"[86] were economically forced "to improve their practices for the purpose of avoiding the high costs that will arise if they are forced to disclose human rights abuses related to conflict mineral use."[87]

The counter-reaction was multifaceted and was not long in coming. First, there was criticism of this due diligence model at the political level, which was underpinned by the idea that the unintended humanitarian consequences were extremely high. Avoiding the negative risk of trading in conflict minerals, U.S. (and EU) companies preferred to leave the region, which directly impacted the livelihood of millions of the ordinary Congolese employed in the mining sector, while the level of security and human rights protection remained relatively unchanged.[88]

Secondly, this due diligence model was challenged legally. A lawsuit was filed in 2013 by the National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable. The plaintiffs claimed, *inter alia*, that by requiring a company to describe its products as not DRC conflict-free even when it was unable to trace its supply chains to determine the minerals' origins, the company falsely associated itself with groups involved in human rights violations. On 14 April 2014, the U.S. Court of Appeals for the District of Columbia found the conflict minerals disclosure requirements requiring a description of certain products as "not found to be 'DRC conflict free'"[89] to be unconstitutional as it violated the First Amendment in part as it constituted compelled commercial speech.[90] As the court stated, "the label 'conflict free' is a metaphor that conveys moral responsibility for the Congo war. (...) By compelling an issuer to confess blood on his hands, the statute interferes with the exercise of the freedom of speech under the First Amendment."[91] This ruling was taken into account by

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85 Securities Exchange Act, Public Act No. 291 (6 June 1934), 15 U.S.C.A., Rule 13 p-1.

86 Fayez A. Elayan et al., *The Market Response to Mandatory Conflict Mineral Disclosures*, 169(1) J. Bus. Ethics 13 (2021).

87 *Id.*

88 The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision, House Hearing, 113 Congress, 21 May 2013 (Oct. 5, 2021), available at https://www.govinfo.gov/content/pkg/CHRG-113hhrg81758/html/CHRG-113hhrg81758.htm.

89 *Nat'l Ass'n of Mfgrs v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

90 *Id.*

91 *Id.* para. 371.

the SEC in its guidance of 2014.[92] On 3 April 2017, the U.S. District Court for the District of Columbia issued a final judgment upholding the general tenet and concretising it in that both Section 1502 of the Dodd-Frank Act and SEC Rule 13p-1 and Form SD, Conflict Minerals were in violation of the First Amendment.[93]

Thirdly, the challenges happened at the enforcement level. Relying on the uncertainties that arose after the final judgment in the litigation regarding the conflict minerals due diligence, on 7 April 2017, the SEC declared that "unless these issues are resolved," it would suspend its enforcement functions.[94] As a result, although Section 1502 of the Dodd-Frank Act and SEC Rule 13p-1 remained in force and companies shall continue to make disclosures,[95] this due diligence model has been significantly relaxed.

3.1.2. The EU Conflict Minerals Regulation

When the Dodd-Frank Act was adopted, the EU immediately asked the Commission and the Council for a legislative initiative "along these lines."[96] It took, however, quite a long period to meet this aim. The EU Conflict Minerals Regulation was adopted in 2017 and became effective from 1 January 2021. The Commission did not conceal that the adoption of this regulation was a chain effect of the Dodd-Frank Act: according to the Commission, 40 dual-listed EU/U.S. companies subject to the U.S. Dodd-Frank Act, and 150,000–200,000 EU companies were estimated to be indirectly affected by the U.S. Act as being in the supply chain of U.S.-listed companies.[97]

The EU Regulation imposes on 3TG importers obligations to introduce system and risk management, conduct third-party audits, and to disclose audit reports to EU Member-state authorities and the information gained and maintained pursuant to their supply chain due diligence to their immediate downstream purchasers on an annual basis, and to publicly report on their supply chain due diligence policies and

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92 On 29 April 2014, the SEC issued guidance on what covered companies must file with respect to the disclosures required by the conflict minerals rule (Oct. 5, 2021), available at http://www.sec.gov/News?publicStmt/Detail/PublicStmt/1370541681994.

93 *Nat'l Ass'n of Mfrs., et al. v. SEC*, No. 13-CF-000635 (D.D.C. Apr. 3, 2017).

94 Statement of Acting Chairman Piwowar, *supra* note 23.

95 It should be also noted that California, Maryland and Oregon have adopted similar regulations.

96 European Parliament resolution of 7 October 2010 on failures in protection of human rights and justice in the Democratic Republic of Congo, para. 14 (Oct. 5, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010IP0350.

97 Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas, SWD(2014) 53 final, 5 March 2014, para. 13 (Oct. 5, 2021), available at https://eur-lex.europa.eu/resource.html?uri=cellar:b05a9c8f-a54d-11e3-8438-01aa75ed71a1.0001.01/DOC_1&format=PDF.

practices.[98] The substance of the EU Regulation largely repeats the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[99] In general, the EU Regulation follows the course paved by the Dodd-Frank Act, albeit with some crucial differences. First, the scope of the EU law is not limited to the DRC but includes "areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law,"[100] including human rights abuses. The second difference is that the EU Regulation applies only to importers and, thus, is restricted to upstream companies which extract and refine 3TG minerals, whereas the US act is also applicable to end product companies.

Alongside the restricted circle of the companies falling under the scope of the EU Regulation, the model cannot boast of an effective enforcement system. The system provides for the possibility of issuing a notice to an importer acting in infringement. Competence for EU member states to conduct ex-post checks, on a risk-based approach or the possession of the relevant information, taking into account the Commission estimates that the Regulation will apply to between 600 and 1,000 importers and will cover all continents, gives grounds to doubt the ability of the competent authorities to undertake a proper examination of facts or to cover many companies. The "on-the-spot inspections" envisaged in this act, especially those carried out "at the premises of the importer," look barely enforceable. The Resolution shifts the burden to lay down the rules applicable to its infringements to the member states;[101] however, this invitation may remain unused. For these reasons, this Regulation has been widely characterised as "toothless"[102] or "modest."[103]

3.2. Modern Slavery, Human Trafficking, and Child Labour Focused Model

3.2.1. The California Transparency in Supply Chains Act

The California Transparency in Supply Chains Act was passed in 2010 and entered into force in 2012.[104] Being confined to the disclosure obligations of covered companies, it serves as an example of a purely "reflective" model of corporate

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98 Conflict Minerals Regulation, Arts. 4–7.

99 OECD Due Diligence Guidance, *supra* note 56, paras. 20–21.

100 Conflict Minerals Regulation, Art. 2(f).

101 *Id.* Art. 16.

102 The Battle for Stronger EU Conflict Minerals Legislation, Global Mining Review, 4 February 2020 (Oct. 5, 2021), available at https://www.globalminingreview.com/finance-business/04022020/the-battle-for-stronger-eu-conflict-minerals-legislation/.

103 Nowrot Karsten, *The 2017 EU Conflict Minerals Regulation: An Effective European Instrument to Globally Promote Good Raw Materials Governance?* (2018).

104 Kamala D. Harris, *The California Transparency in Supply Chains Act: A Resource Guide* (2015), at 3 (Oct. 5, 2021), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

human rights due diligence,[105] which is not supported by any sanctions. This Act foreshadowed the UK and Australian legislative initiatives, which are also focused on the fight against modern slavery and human trafficking, and have similar control mechanisms. The approach used in the California Transparency in Supply Chains Act is not futile *per se* and its ultimate goal is the correction of business behaviour, but three fundamental restrictions obstruct the effective operation of this model: an extremely narrow scope of application, the content of disclosure requirements, and underdeveloped enforcement mechanisms.

For a company to fall under the scope of the California Transparency in Supply Chains Act, three cumulative criteria must be met, namely, it shall (1) be a retailer or manufacturer, (2) do business in California, (3) and have annual gross receipts exceeding US$100 million.[106] The Act establishes a relatively high threshold of personal application, exceeding those in the UK and the Australian acts and omitting in its coverage small and medium-sized businesses, whose impact on human rights can still be significant.[107] Moreover, the Act has a clear sectoral incline, as it applies to actors in retail sales and manufacturing, while service providers may have a comparable impact on human rights.[108]

The disclosure obligations in the California Transparency in Supply Chains Act embrace companies' activities on verification, audit, certification, internal accountability, and training.[109] This information should be published on companies' websites.[110] According to a survey by Birkey et al., of 105 retail companies, the majority of actors complied with the required disclosure,[111] albeit the quality of such disclosure was low:[112] the responses tended to be "more symbolic than substantive,"[113] with only 13% of complying companies providing extensive disclosure on some of the issues[114]

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[105] Benjamin T. Greer & Jeffrey G. Purvis, *Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour*, 20(1) Int'l J. Hum. Rts. 55, 71 (2015); *see* also Jolyon Ford & Justine Nolan, *Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy Between Human Rights Due Diligence and the Social Audit*, 26(1) Aust. J. Hum. Rts. 27, 30 (2020).

[106] California Transparency in Supply Chains Act, § 1714.43, sub. (a).

[107] Alexandra Prokopets, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37(2) Hastings Int'l & Comp. L. Rev. 351, 358 (2014).

[108] The Global Slavery Index 2018 (2018), at 104 (Oct. 5, 2021), available at https://downloads.globalslaveryindex.org/ephemeral/GSI-2018_FNL_190828_CO_DIGITAL_P-1617688524.pdf.

[109] California Transparency in Supply Chains Act, § 1714.43, sub. (c)(1–5).

[110] *Id.* sub. (b).

[111] Rachel N. Birkey et al., *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, 152(3) J. Bus. Ethics 827, 828 (2018).

[112] *Id.* at 837.

[113] *Id.* at 835.

[114] Calculated from provided data in Table 2, at 835.

and 50.6% had a link to the due diligence related information on their website.[115] In the light of this, out of 3,336 complying companies as of 2017, almost half of them could provide only superficial compliance.[116]

The California Transparency in Supply Chains Act does not provide for a strong liability mechanism: the Attorney General can only bring action for injunctive relief.[117] The instrument's general idea of compliance motivation is consumer awareness: conscientious consumers would prefer to purchase from complying companies, hence indirectly urging companies to adjust their behaviour.[118]

3.2.2. The UK Modern Slavery Act

At the moment of its adoption, the 2015 UK Modern Slavery Act was hailed as a "world-leading instrument"[119] and a "game-changer."[120] The Act is, for the most part, dedicated to the criminalisation of slavery and human trafficking, and only in one section does it envisage mandatory corporate human rights due diligence in the form of disclosure.[121] This law requires commercial organizations to prepare a slavery and human trafficking statement for each financial year.

The threshold of the personal scope of application is not precisely set up in the UK Modern Slavery Act and is determined by the regulation of Secretary of State for the Home Department of the UK as a total turnover of at least £36 million.[122] Section 54(12) of the Act defines the term 'commercial organisation' as a corporate body or partnership "which carries on a business, or part of a business, in any part of the United Kingdom".[123] The Statutory guidance for the section's implementation does not

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115 Calculated from provided data in Table 2, at 835.

116 Chris Bayer & Jesse Hudson, *Corporate Compliance with the California Transparency in Supply Chains Act: Anti-Slavery Performance in 2016*, Development International (March 2017), at 6 (Oct. 5, 2021), available at https://static1.squarespace.com/static/5862e332414fb56e15dd20b9/t/58bf06e346c3c478cf76d619/1488914152831/CA-TISCA.v.24_secured.pdf.

117 California Civil Code, § 1714.43, subd. (d).

118 Greer & Purvis 2015, at 71; *see* also Miguel Gonzalez Marcos, *Are You Sure That Your Shirt Is Slavery-Free?: The California Transparency in Supply Chains Act of 2010*, University of Minnesota, Human Rights Center (2011), at 1, 4 (Oct. 5, 2021), available at http://hrlibrary.umn.edu/links/CaliforniaTrafficking2011.pdf.

119 Theresa May, *My Government Will Lead the Way in Defeating Modern Slavery*, The Telegraph, 30 July 2016 (Oct. 5, 2021), available at https://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/.

120 Hult International Business School & Ethical Trading Initiative, Corporate Leadership on Modern Slavery: How have companies responded to the UK Modern Slavery Act one year on? (2016) (Oct. 5, 2021), available at https://www.ethicaltrade.org/sites/default/files/shared_resources/corporate_leadership_on_modern_slavery_full_report_2016.pdf.

121 UK Modern Slavery Act, § 54.

122 Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations, SI 2015/1833, 28 October 2015.

123 *Id.* § 12.

bring more clarity,[124] and in this vein, the Independent Anti-Slavery Commissioner in his review indicated that the phrase "carrying on a business" is vague and imprecise, obstructing NGOs and consumers from identifying which companies the Act is to be applied to.[125] It is, in addition, not clear how far down its supply chain a company should be responsible for human rights protection disclosure.[126]

The content of the due diligence obligations is set up in the Act as a mixture of some mandatory steps with wide discretion given to the companies with respect to the content of the disclosure. The company shall make a statement on due diligence and indicate the steps taken to ensure that none of the abuses covered take place in the company's business and supply chains or state that the company has taken no such steps.[127] The Act also gives full discretion to companies, providing that such a statement 'may include information' about six different areas, namely, organisation's structure, business and supply chains, policies, due diligence processes, existing risks and taken steps to preempt them, staff training, and the company's general practice on human rights protection.[128] Alongside the recommendatory nature, this list omits issues concerning remediation, the disclosure of instances of modern slavery, whistleblowing mechanisms or collaboration with external partners.[129]

Finally, there is no oversight mechanism, and a company that falls under the scope of the Act only has to place its due diligence statement on its website.[130] Only in March 2021 did the UK launch a governmental registry of due diligence statements;[131] previously, its collection was exclusively a non-governmental initiative. The monitoring of the reporting revealed that out of the 16,000 statements made by more than 18,000 companies, only 30% met the mandatory minimum requirements.[132] Although under

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[124] Publish an Annual Modern Slavery Statement, Official Guidance, UK Government, 12 March 2019 (Oct. 5, 2021), available at https://www.gov.uk/guidance/publish-an-annual-modern-slavery-statement.

[125] Secretary of State for the Home Department, Independent Review of the Modern Slavery Act 2015: Final Report (2019), at 40 (Oct. 5, 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf.

[126] Shuangge Wen, *The Cogs and Wheels of Reflexive Law – Business Disclosure Under the Modern Slavery Act*, 43(3) J. L. Soc. 327, 352–353 (2016).

[127] UK Modern Slavery Act, § 54(4).

[128] *Id.* at 5.

[129] Home Office, Transparency in Supply Chains Consultation: Government Response, 22 September 2020, at 6 (Oct. 5, 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf.

[130] *Id.* at 6–7.

[131] Government Launches Modern Slavery Statement Registry, UK Government, 11 March 2021 (Oct. 5, 2021), available at https://www.gov.uk/government/news/government-launches-modern-slavery-statement-registry.

[132] Modern Slavery Statements: A Database, Business & Human Rights Resource Centre (Oct. 5, 2021), available at https://www.business-humanrights.org/en/from-us/modern-slavery-statements/.

Section 54 (11) of the Act due diligence duties are enforceable via bringing civil proceedings for an injunction or specific performance by the Secretary of State, this option has never been used.[133]

The model of human rights due diligence introduced by the UK Modern Slavery Act can be called mandatory at a stretch as it is underpinned by the voluntary transparency and the lack of enforcement by the state. It has a long way to go to be able to tackle the problem of slavery and human trafficking.[134]

3.2.3. The Australian Modern Slavery Act

The 2018 Australian Modern Slavery Act resembles the UK's the anti-slavery law. The Australian Act similarly requires companies to disclose attempts (if any) to combat modern slavery in their own business and supply chains. The Australian version goes further than the UK version,[135] however the Australian Modern Slavery Act entered into force in 2020[136] during the COVID-19 pandemic and therefore evidential data on the application of this law is scarce. The provisions of this Act allow us to highlight a number of problems in the instrument's scope of application, the content of obligations and the accountability mechanisms.

With regard to the scope of application, in comparison to the UK act, the Australian legislators have chosen a different approach to its *ratione personae* threshold: the Act applies to every company (as well as trusts and partnerships) with a minimum annual consolidated revenue of AU$100 million (appr. £55 million), which is either incorporated or doing business in Australia.[137] This high threshold was set up, despite strong criticism,[138] and the majority of Australian firms were left uncovered.[139]

The disclosure requirement of the Australian Act, however, is crafted more elaborately than the UK one: it provides for more robust mandatory requirements for the form and content of the due diligence statement.[140] Australian companies are required to report, *inter alia*, on their structure, operations and supply chains,

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133 Independent Review of the Modern Slavery Act 2015, *supra* note 125.

134 Virginia Mantouvalou, *The UK Modern Slavery Act 2015 Three Years On*, 81(6) Mod. L. Rev 1017, 1045 (2018).

135 Matt Kelly, *What Is the Australian Modern Slavery Act & How Does It Differ from UK's*, JD Supra, 3 January 2020 (Oct. 5, 2021), available at https://www.jdsupra.com/legalnews/what-is-the-australian-modern-slavery-26073/.

136 *Id*.

137 Australian Modern Slavery Act, § 5. In 2018 New South Wales has also passed its Modern Slavery Act with a lower threshold of annual revenue for the reporting companies. *See* more details about this act in Paul Redmond, *Regulating Through Reporting: An Anticipatory Assessment of the Australian Modern Slavery Acts*, 26(1) Aust. J. Hum. Rts. 5 (2020).

138 Jamie Fellows & Mark D. Chong, *Australia's Modern Slavery Act: Challenges for a Post-COVID World?*, 45(3) Altern. L.J. 209, 211 (2020).

139 *Id.* at 212.

140 Australian Modern Slavery Act, § 16.

the risks of modern slavery in those operations and supply chains and those of the entities that the reporting entity owns or controls, and actions taken to assess and address those risks, including due diligence and remediation processes, and how the reporting entity assesses the effectiveness of those actions.[141]

An approach to accountability in the Australian act is weaker than that reflected in the UK: the Act provides that once the Minister determines the company's failure to comply with the mandatory disclosure requirements, he or she has the option to file a request to such a company for either an explanation of the failure to report and can subsequently publish information about such failure,[142] or the Minister simply may "name and shame" an entity for failing to report.[143] Accordingly, the instrument contains no provision regarding penalties in the form of fines or other sanctions. Legislators willingly abstained from introducing penalties, explaining their intent by the anti-collaborative impact of penalties on business-government relations.[144] This rationale automatically raises the suspicion of legislative hypocrisy: despite loud voices for the use of penalties, the final draft was introduced without such provision, leaving only individual businesses optimistically saying that

> companies are essentially ethical in their nature, and if they find slavery in their supply chain … they will report it and do something about it.[145]

In the 2019 survey, 100% of the respondents (companies, civil society organizations, government representatives, and consultants) indicated legal penalties as "the most likely factor" to influence a company's decisions.[146] Moreover, as the UK example demonstrates, abstaining from the imposition of penalties is not beneficial for the Act's regulatory efficiency. Accordingly, scholars have joined the critical chorus, saying the absence of penalties is a significant issue.[147]

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141 Australian Modern Slavery Act, § 16(1)(b)–(e).

142 *Id*. § 16A.

143 Redmond 2020, at 15.

144 Modern Slavery Bill 2018, Bills Digest No. 12, 2018–19 (Oct. 5, 2021), available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bd012#_ftn113.

145 Luke Michael, *Businesses Urged to Show Leadership on Stamping Out Modern Slavery*, Pro Bono Australia, 4 December 2018 (Oct. 5, 2021), available at https://probonoaustralia.com.au/news/2018/12/businesses-urged-show-leadership-stamping-modern-slavery/.

146 Justine Nolan et al., *Regulating Transparency and Disclosures on Modern Slavery in Global Supply Chains A "Conversation Starter" Or A "Tick-Box Exercise"?*, A Research Project Supported by a Grant under CPA Australia's Global Research Perspectives Program (March 2019), at 14 (Oct. 5, 2021), available at https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/professional-resources/esg/modern-slavery-global-supply-chains.pdf.

147 Ford & Nolan 2020, at 40; Ramona Vijeyarasa, *The Modern Slavery Act: Did Australia Get It Right?*, Australian Institute of International Affairs, 10 December 2018 (Oct. 5, 2021), available at https://www.internationalaffairs.org.au/australianoutlook/modern-slavery-act-did-australia-get-it-right/; Fellows & Chong 2020, at 212.

The Australian Modern Slavery Act 2018, albeit being slightly more progressive in some respects than its UK counterpart, retains certain common drawbacks. The high income threshold, the lack of mechanism to verify the reported information, and the absence of penalties degrade the Act's regulatory potential. A review of the Australian Modern Slavery Act after three years of operation will consider the need for additional compliance incentives, such as civil penalties.[148] Thus, it is only to be hoped that this Act will be subsequently amended and clarified where necessary.

3.2.4. Dutch Child Labor Due Diligence Law

The Dutch Child Labour Due Diligence Law is one of the most recent human rights due diligence instruments: having been promulgated in October 2019, it is still pending entry into force.[149] This act requires companies, selling goods or services to Dutch end-users, regardless of the registration of these companies, to assess whether there exists a "reasonable suspicion" that the goods and services have been produced in the violation of the 1999 Worst Forms of Child Labour Convention and, in addition, of the 1973 Minimum Age Convention, provided that such work takes place in a state that is a party to the latter.[150] Having the widest scope of personal application and accompanying the reporting obligations with enforceable penalties, both administrative and criminal, as well as establishing a governmental supervisory mechanism,[151] this national instrument could have been regarded as a thorough and comprehensive model, if not for the drawbacks that are already discernible at this stage.

With regard to the due diligence, the companies' obligation under the Dutch Child Labor Law is twofold: firstly, business actors shall investigate whether the goods and services have been produced using the child labor, and if the suspicion is "reasonable," the company falls under a duty to draw up and implement a "plan of action";[152] and, secondly, the declaration on due diligence should be prepared and sent to the state superintendent, who shall publish this information on its website.[153] The reporting obligation, however, according to this act is not meant to be repetitive, progressive, or annual, as in other instruments: the companies that are already registered are required to send their reports within six months after the entry of the act into force and new companies shall send their declarations immediately.

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148 Australian Modern Slavery Act, § 24(1)(a, b).

149 It is estimated that the Dutch Child Labour Due Diligence Law will not enter into forth before the mid-2022, *see* Juliane Kippenberg, *Netherlands Takes Big Step Toward Tackling Child Labor: New Bill Holds Companies Accountable for Every Step of the Supply Chain*, Human Rights Watch, 4 June 2019 (Oct. 5, 2021), available at https://www.hrw.org/news/2019/06/04/netherlands-takes-big-step-toward-tackling-child-labor.

150 Dutch Child Labour Due Diligence Law, Arts. 2, 4, 5.

151 *Id*. Art. 3–5, 7–9.

152 *Id*. Art. 5.

153 *Id*. Art. 4.

Another drawback relates to the complete omission of a remediation mechanism. While the instrument includes a provision on administrative and criminal penalties, allowing heavy fines to be imposed on companies that fail to comply (up to 10% of their worldwide annual turnover),[154] it does not provide justice for victims or persons otherwise affected by the company's actions. A company "may quickly get rid of child laborers if discovered without taking responsibility for remediation of impacts that have already occurred"[155] and successfully report about its due diligence examination.[156] This is scarcely the result legislators wanted, but it is the most likely they will get given the minimum requirements for company compliance.

3.3. A Weak Universal Model

The drawbacks of the EU Non-Financial Reporting Directive of 2014 became common knowledge long ago, and it is a matter of time before the European Commission starts the instrument's revision.[157] Hence, this instrument's analysis allows us to learn by the experience of a once-promising endeavour. The Directive's origin can be traced back to when the previously adopted instrument was meant to be transformed into member states' national legislation, bringing with it an obligation for large companies to issue non-financial statements, which contain information on human rights, anti-corruption, the environment and other essential aspects of companies' business. However, the instrument demonstrated its operational futility due to structural imperfections, namely, the narrow scope of application and the imprecise and voluntary content disclosure requirements.

This instrument's disclosure obligation applies only to businesses with more than 500 employees, whose balance sheet total exceeds €20 million or with a net turnover over €40 million.[158] Thus, according to the European Commission, the Directive covers approximately 6,000 large EU companies[159] or only 0.02% out of all EU enterprises.[160]

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154 Dutch Child Labour Due Diligence Law. Art. 7.

155 Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law, MVO Platform, 3 June 2019 (Oct. 5, 2021), available at https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/.

156 *Id*.

157 The European Green Deal, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2019/640 final, para. 2.2.1 (Oct. 5, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640.

158 EU Non-Financial Reporting Directive, Art. 19a(1).

159 Non-Financial Reporting, European Commission (Oct. 5, 2021), available at https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en.

160 Rate is determined on the basis of the EU enterprises' overall number, *see* Business demography statistics, European Commission (Oct. 5, 2021), available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics.

Some EU states implementing this Directive have lowered the threshold to 250 employees,[161] however many companies were left uncovered, albeit some sectors of their business (for example, retail or textile) possess high human rights risks,[162] and the companies' impact on society and the environment does not depend on their size or legal status.[163] According to different approaches to the Directive's reform, the coverage may be increased by up to 0.3%.[164]

According to the Directive, companies shall include their non-financial statement in their managing report.[165] Although the provision determines the required statement's scope, it does so in very general terms, like a "description" and "policy outcomes" or an indication of "principal risks"[166] without detail. Moreover, the Directive leaves questions of reporting standards with respect to human rights due diligence, which is essential for sustainability reporting,[167] almost unanswered. The European Commission tried to remedy the regulatory deficiency by means of issuing non-binding guidelines,[168] but such practice proved to be ineffective: despite an overall increase of non-financial statements,[169] the Alliance for Corporate Transparency's report indicated the negative rate of such statements' quality with only 20% of them containing specific information on risks, policy outcomes and targets, while the majority of statements (80–90%) presented general policies and commitments, expressly mentioned in the Directive itself.[170] Such a quantity-quality discrepancy may also be explained by the fact that

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161 For example, Denmark. *See* CSR Europe and GRI, Member State Implementation of Directive 2014/95/EU: A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information (2017), at 17 (Oct. 5, 2021), available at https://www.accountancyeurope.eu/wp-content/uploads/1711-NFRpublication-GRI-CSR-Europe.pdf.

162 Franziska Humbert, *Sustainability Reporting: A Critical Assessment of the E.U. CSR Directive and Its German Implementation from a Human Rights Perspective*, 71(2) Schmalenbach Bus. Rev. 279, 281 (2019).

163 Joint Statement on the Revision of the Non-Financial Reporting Directive in the Context of Covid-19, Accountancy Europe, 23 June 2020 (Oct. 5, 2021), available at https://www.accountancyeurope.eu/good-governance-sustainability/joint-statement-on-the-revision-of-the-non-financial-reporting-directive-in-the-context-of-covid-19/.

164 Frank Bold, Countdown for the Reform that Will Overhaul Companies' Sustainability Reporting Obligations in Europe, Alliance for Corporate Transparency, 29 January 2021 (Oct. 5, 2021), available at https://www.allianceforcorporatetransparency.org/news/countdown-reform.html.

165 EU Non-Financial Reporting Directive, Art. 19a(1).

166 *Id*. Art. 19a(1).

167 Global Reporting Initiative, Sustainability Reporting Guidelines (2011) (Oct. 5, 2021), available at http://www.interlycees.lu/site/wp-content/uploads/2010/01/GRI-G31-Guidelines-2011.pdf.

168 Communication from the Commission – Guidelines on non-financial reporting (methodology for reporting non-financial information), C/2017/4234 (Oct. 5, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017XC0705%2801%29.

169 Chiara Mio et al., *The Predictive Ability of Legitimacy and Agency Theory After the Implementation of the EU Directive on Non-Financial Information*, 27(6) Corp. Soc. Responsib. Env't Mgmt. 2465, 2475 (2020).

170 Frank Bold, 2020 Research Report: An Analysis of the Climate-related Disclosures of 300 Companies from Central, Eastern and Southern Europe pursuant to the EU Non-Financial Reporting Directive

national legislators provided for sanctions only for the non-compliance with the disclosure obligations, not for the inaccuracy of any statements issued;[171] disclosure must be focused on human rights risks, not on potential exposure.[172]

The limited scope of application, the imprecise obligations and the sanctioning of non-reporting have predetermined the inefficiency of the EU Non-Financial Directive. The Directive's reform may correct this if existing provisions are amended with precise mandatory requirements aimed at, *inter alia*, human rights protection.

3.4. An Enhanced Universal Model

3.4.1. The French Duty of Vigilance Law

The French Duty of Vigilance Law of 2017 imposes on companies human rights due diligence obligations by using the concept of "vigilance measures," a concept familiar to the French legal system. The "vigilance measures" include the identification, assessment, mitigation, and prevention of human rights and environmental risks[173] and should result in the publication of a vigilance plan and its implementation report.[174] This law has the widest scope of application, being non-sector specific and covering "severe violations" of all human rights, health risks and environmental damage. The threshold of the personal scope of application – 5,000 employees within the company and its direct and indirect subsidiaries in France or 10,000 worldwide[175] – reduced the applicability of these obligations to the largest companies. The provision, according to which corporate due diligence should cover subsidiaries and companies that it controls, and subcontractors and suppliers with whom the company maintains an established commercial relationship, though not explicit as to which the part of the supply chain – upstream or downstream – it is applied, opens the door for a reserved interpretation as covering only businesses with whom the company has a stable, regular and ongoing relationship and not covering remote ties.[176]

(2020), at 48 (Oct. 5, 2021), available at http://www.allianceforcorporatetransparency.org/assets/Research_Report_EUKI_2020.pdf.

171 Karin Buhmann, *Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action*, 3(1) Bus. Hum. Rts. J. 23, 28 (2018).

172 European Network of National Human Rights Institutions, ENNHRI Submission for the public consultation on revision of the Non-Financial Reporting Directive 2014/95/EU, at 2 (Oct. 5, 2021), available at http://ennhri.org/wp-content/uploads/2020/06/ENNHRI-submission-to-EU-NFRD.pdf.

173 French Duty of Vigilance Law, Art. 1.

174 *Id*.

175 *Id*.

176 Anna Triponel & John Sherman, *Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law*, International Bar Association (2017), at 4 (Oct. 5, 2021), available at https://respect.international/wp-content/uploads/2018/08/Legislating-human-rights-due-diligence-opportunities-and-potential-pitfalls-to-the-French-duty-of-vigilance-law.pdf.

The French law has been widely regarded as a role model.[177] What differentiates this law from the other acts is the general scope of application and the inclusion of liability for breaches of the due vigilance obligations and tort liability for the "harm that due diligence would have permitted to avoid."[178] However, the implementation and enforcement of this approach has a number of drawbacks watering down this comparatively enhanced model of corporate human rights due diligence.

First, the law does not provide any system of state monitoring or enforcement. The companies should publish their vigilance plans and reports, and no state agency is designated to monitor this process, reflecting a lack of political will.[179] For instance, there is uncertainty as to which companies fall under the scope of the law, and a non-exhaustive list was produced by NGOs.[180] As follows from the monitoring of the "Duty of Vigilance Radar" project, far from all of the listed companies published their vigilance plans.[181]

Secondly, the law allows for any person with a legitimate interest to send a notice to the company with a request to comply with its duties and subsequently to apply to the court,[182] which may impose fines up to €10 million to make the company comply with its obligations under this Law.[183] However, the Constitutional Council, in its decision of 23 March 2017 – which preceded the entry of this law into force – found these provisions to be in violation of the principle of no punishment without law because the sanctions of a punitive nature were not defined with sufficient clarity and precision.[184] The constitutional examination revealed that the terms of reasonable oversight, "actions capable of mitigating risks or of preventing serious breaches" are of a general nature, the reference to "human rights" and "fundamental freedoms" are broad and indeterminate, and this alongside the scope of the companies, enterprises and operations that fall within the scope of oversight and the size of the fine served as grounds to declare provisions of the Duty of Vigilance Law, which provided that companies may be ordered to pay a fine of a maximum of €10 million, unconstitutional.[185]

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177 Members of 8 European Parliaments Support Duty of Care Legislation for EU Corporations, European Coalition for Corporate Justice, 31 May 2016 (Oct. 5, 2021), available at https://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations.

178 *Id*.

179 Schilling-Vacaflor 2020, at 116.

180 *See* Duty of Vigilance Radar (Oct. 5, 2021), available at https://vigilance-plan.org/search/.

181 *Id*.

182 French Duty of Vigilance Law, Art. 1.

183 *Id*.

184 Décision n° 2017-750 DC du 23 mars 2017, supra note 25, paras. 9–14.

185 The Constitutional Council declared unconstitutional the last subparagraph of Article 1, third subparagraph of Article 2 and Article 3 (Décision n° 2017-750 DC du 23 mars 2017, *supra* note 25, paras. 9–14).

The remaining parts of the Duty of Vigilance Law still allow for the procedure of notifications, and in June 2019, a group of French city mayors and NGOs sent such notice to the gas company Total requesting it to take measures to identify the risks to human rights and the environment caused by its emissions of greenhouse gases, as well as adequate preventive measures against climate change.[186]

Thirdly, the provisions of the law, allowing for tort liability for the harm that due diligence would have avoided,[187] do not change the general rule by shifting the burden of proof to companies. This change was initially envisaged in the draft law[188] but did not stand parliamentary readings.[189] The burden of proof is one of the main legal obstacles faced by the victims of corporate wrongdoings.[190] Hence, despite its "enhanced" chracter, the French model of mandatory human rights due diligence is far from effective.

3.4.2. The Draft EU Directive

The EU human rights due diligence instruments setting forth disclosure requirements: the 2020 Conflict Minerals Regulation and 2014 Non-Financial Reporting Directive are far from a comprehensive and universally applicable regulatory framework, and the EU has been firmly committed to introducing mandatory human rights due diligence with the widest outreach. A pre-draft of the EU Directive on mandatory corporate due diligence and corporate accountability was first presented by the European Parliament's Committee on Legal Affairs on 11 September 2020.[191] In five months, the Committee submitted its final draft.[192] On 10 March 2021, the European Parliament adopted the text of the Committee's

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186 Sandra Cossart & Lucie Chatelain, *What Lessons Does France's Duty of Vigilance Law Have for Other National Initiatives?*, Business & Human Rights Resource Centre, 27 June 2019 (Oct. 5, 2021), available at https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives/.

187 French Duty of Vigilance Law, Art. 3.

188 Article 1 of the proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre was formulated as follows: "La responsabilité de l'entreprise, dans les conditions ci-dessus définies, est engagée à moins qu'elle ne prouve qu'elle n'a pu, en dépit de sa vigilance et de ses efforts, prévenir le dommage en faisant cesser son risque ou en empêchant sa réalisation compte tenu du pouvoir et des moyens dont elle disposait" (Oct. 5, 2021), available at https://www.assemblee-nationale.fr/14/propositions/pion1519.asp.

189 Schilling-Vacaflor 2020, 116.

190 *Id*.

191 Draft Rep. with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 11 September 2020 (Oct. 5, 2021), available at https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

192 Rep. with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), A9-0018/202, 11 February 2021 (Oct. 5, 2021), available at https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf.

draft with minor corrections as a Resolution with legislative recommendations to the Commission under Article 225 of the Treaty on the Functioning of the EU.[193] It is the most up-to-date EU corporate human rights due diligence concept, however, the current edition of the Directive's draft already raises some concerns about its potential functionality.

The material scope of the draft Directive embraces the protection of stakeholders from three different kinds of "potential or actual adverse impacts" that may affect human rights, the environment, or good governance.[194] However, the draft Directive neither specifies the term "adverse impact," a vital yardstick of corporate actions, nor provides for a specific list of human rights, leaving this issue for the forthcoming non-binding guidelines to be published by the Commission. Such an approach creates a double threat to the Directive's potential applicability: without a yardstick for corporate actions, businesses would be unaware of the legality of their activity, nor be able to foresee the liability for such behaviour.[195] Without its explicit indication in the Directive, this task falls on the shoulders of the member states and, as the EU Non-Financial Reporting Directive's critical overview demonstrates, this may create a significant obstacle to the instrument's effective implementation. Moreover, an extensively vague list of protected human rights obligations may also be used as grounds for the legal contestation of the validity of this act as not corresponding to the principle of legal certainty, similar to the French Duty of Vigilance Law.

Particular attention should be given to the personal scope of application: the EU draft covers all undertakings across all sectors of business, governed by the law of a member state or established in the territory of the EU, and undertakings of third states, selling goods or providing services in the EU, with an exception made for micro-undertakings only.[196] However, not all actors can perform the required due diligence equally; while large corporations almost certainly possess the resources necessary to implement due diligence strategies, SMEs would be confronted with difficulties of various degrees of economic severity.[197] Article 15 of the draft Directive imposes on member states a duty to provide SMEs with guidance and financial support in implementing due diligence via a specific web portal to be created for this purpose.[198] This provision, however, is vague, as it does not specify the measure, volume or legal

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193 Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, Eur. Parl. Doc. 2020/2129(INL), 10 March 2021.

194 EU Draft Directive on Corporate Due Diligence and Corporate Accountability, Art. 3.

195 EU Draft Due Diligence Directive: Three Critical Uncertainties for Business, AtelierAftab (Oct. 5, 2021), available at https://atelieraftab.com/insight/eu-draft-due-diligence-directive-three-critical-uncertainties-for-business.

196 EU Draft Directive on Corporate Due Diligence and Corporate Accountability, Art. 2(1–3).

197 Study on Due Diligence Requirements Through the Supply Chain, *supra* note 2, at 466.

198 EU Draft Directive on Corporate Due Diligence and Corporate Accountability, Art. 15.

basis of the support. Conceivably, the different approaches of states to SMEs in the implementation of due diligence may result not only in disproportional financial burdens but also in the reluctance of companies to comply with the requirements and, consequently, concealment and market disruption. The European Commissioner for Justice, Didier Reynders is aware of this problem and said that "the EU executive was still looking at ways to give small businesses financial and technical support so that they have the resources to be able to comply."[199] Until a solution is found, the application of the Directive to SMEs will remain highly problematic.

The draft Directive introduces the concept of corporate civil liability for the violation of the established human rights due diligence regime. Businesses shall be liable for the violation of due diligence requirements if they will fail to prove otherwise.[200] Accordingly, the Directive introduced not only civil liability for human rights abuses but also supplemented it with a reversed burden of proof, relieving claimants from the requirement to prove liability and causality in courts, an issue that for too long barred victims and affected persons from much-awaited justice.[201] It also includes a limitation period for bringing civil action but does it deficiently: according to the provision, member states shall ensure that such period is reasonable.[202] Hence, the provision endows member states with a great measure of discretion in the determination of reasonableness and its content. Currently, the average limitation period in the EU varies from one to three years,[203] which is a negligibly short period of time for such cases.[204] Moreover, the current draft does not indicate from which moment this period shall begin, which is a vital precondition for the requirement. This puts the Directive's remediation mechanism into existential abeyance, depending upon the member state. The Directive must include specific binding guidelines for states to properly determine the limitation period's reasonableness.

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199 Benjamin Fox & Kira Taylor, *New EU Reporting Requirements Will Force Firms to 'Get Serious,'* EURACTIV.com, 19 March 2021 (Oct. 5, 2021), available at https://www.euractiv.com/section/energy-environment/news/new-eu-reporting-requirements-will-force-firms-to-get-serious/.

200 EU Draft Directive on Corporate Due Diligence and Corporate Accountability, Art. 19.

201 European Union Agency for Fundamental Rights, Business and Human Rights – Access to Remedy, Report (2020) (Oct. 5, 2021), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf. *See* also Philipp Wesche & Miriam Saage-Maaß, *Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers Before German Civil Courts: Lessons from Jabir and Others v. KiK*, 16(2) Hum. Rts. L. Rev. 370 (2016).

202 EU Draft Directive on Corporate Due Diligence and Corporate Accountability, Art. 19(4).

203 Axel Marx et al., *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries: Study*, European Union, EP/EXPO/B/DROI/FWC/2013-08/Lot4/07 (February 2019), at 65 (Oct. 5, 2021), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf.

204 Claudia Müller-Hoff & Carolijn Terwindt, *"Anyone Can Make Claims" – Is the KiK Case Proof of Access to Remedy Against Corporate Human Rights Violations?*, Oxford Human Rights Hub, 26 February 2018 (Oct. 5, 2021), available at http://ohrh.law.ox.ac.uk/anyone-can-make-claims-is-the-kik-case-proof-of-access-to-remedy-against-corporate-human-rights-violations/.

The Directive as it currently stands is revolutionary in many aspects as it introduces a comprehensive human rights due diligence mechanism into EU-wide discourse. It inherits much of the French Duty of Vigilance Law's progressive ideas, merging it with an unrivalled scope of application. However, the provisions of the draft possess loopholes, obstructing the Directive's effectiveness.

Conclusion

A shift from voluntary to mandatory corporate human rights due diligence has had some positive effects. From the perspectives of victims and customers, it increases the application of human rights compliance policies by the business entities. From the companies' perspective, the introduction of the legislative acts brought a determination of the "rules of the game" and equalized the position of corporations falling under the scope of its application by smoothing the differences that may have arisen from the application or non-application of voluntary commitments. However, does the use of the mandatory model as a regulatory tool create just a "smokescreen" and is it able to provide any adequate responses to the volume and scope of corporate human rights abuses?

The assessment of the effectiveness should respect the inherent (implied) boundaries of human rights due diligence and reveal how national or supranational regulation uses normative tools to smooth them out. The inherent or implied features of these tools restrict their ability to serve as an instrument to protect human rights. Among the general features (non-human-rights specific) are the procedural nature of due diligence, the dependence on corporate capacities, the non-liability-oriented policy content (transparency, good governance, accountability), and a predominance of an *ex-ante* preventive function that follows from the risk-oriented character of this concept.

This article has discussed two main human rights-specific problems that are implicit in corporate due diligence. The first one emanates from the lack of clear and substantial legal rules on the content of the human rights obligations to which procedural provisions of due diligence can be attached. The auxiliary character of due diligence presupposes that it cannot be truly operational, and its ability to serve as a standard of conduct is, therefore, significantly limited. There are, at best, only a few prohibitions that are clear-cut obligations able to be applied by companies directly.

The second restriction follows from the epistemological rupture between the empirical knowledge on corporate human rights abuses and the production of knowledge in the due diligence process. Although this disruption is an immanent feature of any bureaucratic procedure framing reality, the specifics of corporate human rights due diligence consists of a merger of three roles: a knowledge architect, who sets the concrete scheme and content of the due diligence examination; a knowledge producer, who is collecting, filtering and structuring the information; and the knowledge discloser, who are the companies themselves publishing information about their due diligence endeavours.

To a certain extent, the legislative process can counterbalance some of the restrictions by setting up the precise substantive obligations of companies and by creating controlling and remedial mechanisms. However, the analysis of nine different instruments has revealed that states or the EU have not used the potential of regulatory force. All of them impose new restrictions on the ability of corporate human rights due diligence to make an effective, not nominal, contribution to human rights protection. A *per se* weak model based on self-regulation did not significantly gain force by being transferred from the domain of norms to the domain of rules. This confirms the hypothesis that the trend towards mandatory human rights due diligence, being supported by large corporations themselves, means that they are simply not afraid of the weak form of the mandatory human rights due diligence and the profit they gain by informing consumers about their adherence to the human rights standards overwhelms the bureaucratic costs. The human rights due diligence obligations of companies were initially at a "very low level,"[205] and the situation did not significantly change with the introduction of the mandatory models.

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[205] Deva & Bilchitz 2013, at 9.

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