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**How Voluntary and Mandatory Due Diligence
Requirements Affect Corporate Compliance.
Insights from Motivational Crowding Theory**

Eva van der Zee

European University Institute

Academy of European Law

European Society of International Law

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Abstract

The concept of mandatory due diligence legislation is gaining momentum worldwide. As such, businesses are now not only confronted with voluntary but also mandatory requirements. These voluntary and mandatory requirements have different underlying regulatory structures in the field of human rights and environmental due diligence. This paper aims to get a better understanding of how due diligence requirements in the field of human rights and environmental risks set by multi-stakeholder initiatives (MSIs) and governments affect corporate compliance. To achieve this aim, this paper builds upon motivational crowding theory. Motivational crowding theory is based on experimental findings that show that, depending on the circumstances, intrinsic and extrinsic motivation can be crowded in or crowded out in response to external intervention. It was found that requirements set by MSIs and governments may have different effects on intrinsic and extrinsic motivation of businesses. Governments are advised to incorporate intrinsically motivated businesses in regulatory design, use sanctions that are severe enough to crowd in extrinsic motivation, use rewards and praise for those companies that do their due diligence well, as well as explicitly position mandatory due diligence as a tool designed for laggards. MSIs can, then, promote, in cooperation with governments and international organizations as important stakeholders, a learning environment for pioneers whereby new and better practices can be put in place.

Keywords

Global governance, due diligence, corporate social responsibility, multi-stakeholder initiatives, mandatory due diligence legislation

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Table of contents

1. Introduction	1
2. Motivational Crowding Theory	3
3. Motivational Crowding Effect of Different Types of External Intervention	3
3.1. Impaired Self-Determination	4
3.2. Framing Good or Bad Behaviour	6
3.3. Normative Signal.....	7
4. Applying Motivational Crowding Theory to Business	8
5. Conclusion	9

1. Introduction

The complex nature of sustainable development and the risks associated with such problems pose a fundamental challenge to policymakers worldwide. Part of this challenge consists in the difficulty of regulating businesses that operate in different legal systems throughout their supply chain. An important part of the quest for such an effective regulatory framework can be found in the internationally recognized UN Guiding Principles on Business and Human Rights (Guiding Principles) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). These principles prescribe the need to conduct corporate due diligence. Corporate due diligence is undertaken by companies to know and show that they respect human rights and/or the environment.

For long, companies have become members of multi-stakeholder initiatives (MSIs) to show that they respect human rights and/or the environment. These MSIs often set social and/or environmental standards with which businesses may *voluntarily* comply. If businesses do not comply with the standards they can only be expelled from membership and/or from using certification labels on their consumer products.¹ Typical of MSIs is that they govern social and/or environmental standards that have participants from both business and social interest groups as members. Furthermore, the governance structures, ideally, allow for an equal possibility of input among the different partners in steering the initiative.² The scale of MSIs is significant: a study in 2017 compared 45 MSI and found that these MSIs alone regulate over 9000 companies in more than 170 countries on six continents.³

Besides the voluntary standards set by MSIs, the concept of mandatory due diligence legislation is gaining momentum worldwide. Mandatory due diligence legislation generally *mandates* that companies conduct adequate due diligence concerning human rights and/or environmental risk, which usually encompasses risk analysis in one or more tiers of the supply chain.⁴ If businesses do not comply with mandatory due diligence legislation, they risk

¹ Frank G. A. de Bakker, Andreas Rasche and Stefano Ponte, 'Multi-Stakeholder Initiatives on Sustainability: A Cross-Disciplinary Review and Research Agenda for Business Ethics' (2019) 29 *Business Ethics Quarterly* 343, 346.

² Luc Fransen, 'Multi-stakeholder governance and voluntary programme interactions: legitimation politics in the institutional design of Corporate Social Responsibility' (2011) 10 *Socio-Economic Review* 163, 166.

³ MSI Integrity 2017.

⁴ See e.g. Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 *Global Policy* 15.

monetary fines, and sometimes criminal liability⁵ or exclusion from public sector contracts.⁶ France introduced mandatory due diligence legislation in 2017,⁷ Germany and Norway introduced mandatory due diligence legislation in 2021,⁸ in The Netherlands the draft legislation is expected to come into force in 2022,⁹ and in February 2022 the European Commission proposed a Directive on Corporate Sustainability Due Diligence as a response to the European Parliament resolution of March 2021.¹⁰ Moreover, international efforts to draft the Treaty on Business and Human Rights envisage imposing obligations on states to put effective and proportionate sanctions in place when businesses have caused or contributed to human rights abuses.¹¹ As a consequence, businesses are confronted with multiple standards with different underlying regulatory structures in the field of human rights and environmental due diligence. So far, there is no research studying whether these multiple standards with different underlying regulatory structures may have interaction effects. Ideally, mandatory due diligence legislation would help to ensure a baseline of corporate due diligence, leaving a role for MSIs to promote a learning environment whereby new and better practices can be put in place. However, a worst-case scenario would be that the existence of these different mechanisms would reduce the overall social effect to levels below what any of the individual mechanisms could have achieved in isolation.

This paper aims to get a better understanding of how due diligence requirements in the field of human rights and environmental risks set by MSIs and governments affect corporate compliance. To achieve this aim, this paper builds upon motivational crowding theory. Motivational crowding theory is based on experimental findings that show that, depending on the circumstances, intrinsic and extrinsic motivation can be crowded in (i.e. increased) or crowded out (i.e. reduced) in response to external intervention.¹² Empirical research shows that especially intrinsic motivation plays an important role in fostering corporate environmental and social sustainability performance.¹³ Intrinsically motivated actions are actions that have no

⁵ See e.g. the Dutch Child Labour Due Diligence Act, due to come into effect in mid-2022 and the proposal on 11 March 2021 for a Responsible Sustainable International Business Conduct Act.

⁶ Article 22 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021).

⁷ Loi de Vigilance, Loi No. 2017-399 du 27 Marz 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Law 2017-399 of Mar. 27. 2017), Journal Officiel de la République Française [J.O].

⁸ Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021); Act on Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, 2959. Official English translation at <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf> [last accessed 20 October 2021]; Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99. Unofficial English translation at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20dec> ent [last accessed 25 October 2021].

⁹ Tweede Kamer der Staten Generaal, Voorstel van wet van de leden Voordewind, Alkaya, Van den Hul en Van den Nieuwenhuijzen houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Vergaderjaar 2020-2021, nummer 35 761, (last accessed 1 October 2021).

¹⁰ European Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 2022/0051 (COD); European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

¹¹ Third Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises (published August 2021).

¹² Christopher P. Reinders Folmer, 'Crowding-Out Effects of Laws, Policies and Incentives on Compliant Behaviour' in Benjamin van Rooij and D. Daniel Sokol (eds), *The Cambridge Handbook of Compliance* (Cambridge Law Handbooks, Cambridge University Press 2021).

¹³ Johan Graafland and Lans Bovenberg, 'Government regulation, business leaders' motivations and environmental performance of SMEs' (2020) 63 *Journal of Environmental Planning and Management* 1335; Antony Paulraj, 'Environmental motivations: a classification scheme and its impact on environmental strategies and practices' (2009) 18 *Business Strategy and the Environment* 453; Graafland and Bovenberg (2020).

direct reward but the behaviour itself.¹⁴ As such, the type of regulatory tools used may affect the extent to which businesses incorporate due diligence. Furthermore, empirical research shows that the type of external intervention also matters with regard to the extent it manages to crowd in extrinsic motivation.¹⁵ As such, when businesses lack sufficient intrinsic motivation, regulatory instruments may have different effects to sufficiently strengthening extrinsic motivation needed to ensure compliance.

This paper is structured as follows: Section 2 provides a brief explanation of motivational crowding theory. Section 3 discusses empirical insights on the motivational crowding effect of different types of external intervention. In Section 4, it is described how motivational crowding theory could be applied to businesses. Section 5 provides a preliminary conclusion.

2. Motivational Crowding Theory

Motivational crowding effects may occur when intervention to promote good (or reduce bad) behaviour is externally imposed. Externally imposed interventions that may pose crowding out and crowding in effects have been linked to monetary incentives (payments, rewards, fines) as well as a broad range of laws and policies (rules, affirmative duties, torts, criminal sanctions).¹⁶ If well-designed, such instruments may provide extrinsic motivation to comply (i.e. motivation driven by consequences associated with performing the activity¹⁷), which may crowd out people's intrinsic motivation for doing so. Externally imposed intervention may, however also crowd in people's intrinsic motivation for pro-social behaviour since externally imposed interventions proscribe which behaviours are (not) permissible and express social norms.¹⁸ Under these circumstances, such instruments may produce crowding-in effects and strengthen people's intrinsic motivation to comply.¹⁹ For example, legal sanctions may create a focal point around which individuals coordinate.²⁰

3. Motivational Crowding Effect of Different Types of External Intervention

To ensure that corporate due diligence regulation is effective it needs to avoid crowding out effects and stimulate crowding in effects to the extent that social and environmental responsibility is increased. Since mandatory legislation may not necessarily increase compliance or may have the opposite effect, voluntary regulation may fill in the gaps where mandatory legislation cannot be sufficiently effective. Such a combination of regulatory tools is also known as "smart mixes" of regulation or "smart regulation". Smart regulation is not limited to state-based law, but also includes self- and co-regulation and a wide variety of other

¹⁴ Thomas H. Allison and others, 'Crowdfunding in a Prosocial Microlending Environment: Examining the Role of Intrinsic versus Extrinsic Cues' (2015) 39 *Entrepreneurship Theory and Practice* 53.

¹⁵ See e.g. Yuval Feldman and Oren Perez, 'How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement' (2009) 36 *Journal of Law and Society* 501.

¹⁶ e.g., K. Underhill, 'When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out' (2016) 33 *Yale Journal on Regulation* 5; Bruno S. Frey and Reto Jegen, 'Motivation Crowding Theory' (2001) 15 *Journal of Economic Surveys* 589; Yuval Feldman, 'The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights From the Behavioral Analysis of Law' (2011) 35 *Washington University Journal of Law and Policy* 11.

¹⁷ Allison and others (2015).

¹⁸ Known as the "expressive effect". See e.g., Richard H. McAdams, 'A Focal Point Theory of Expressive Law' (2000) 86 *Virginia Law Review* 1649; Robert Cooter, 'Expressive Law And Economics' (1998) 27 *The Journal of Legal Studies* 585.

¹⁹ Samuel Bowles and Sandra Polanía-Reyes, 'Economic Incentives and Social Preferences: Substitutes or Complements?' (2012) 50 *Journal of Economic Literature* 368; Bruno Frey, *Not Just for the Money* (Edward Elgar Publishing 1997); Richard H. McAdams and Janice Nadler, 'Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game' (2005) 2 *Journal of Empirical Legal Studies* 87.

²⁰ McAdams and Nadler (2005).

forms of social control exercised by businesses and NGOs.²¹ Essential to smart regulation is that the idea of a combination of regulatory instruments and actors is often more effective than a single instrument and that instruments can be complementary.²² The idea is that each regulatory tool has its strengths and weaknesses and that a smart mix could take advantage of their strengths while compensating for their weaknesses.²³ To find an optimal combination of mandatory due diligence legislation and standards set by MSIs, it is, thus, needed to obtain a better understanding of the crowding effects of each instrument. As such, motivational crowding theory could provide important insights into the effect of different regulatory tools on intrinsic and extrinsic motivation of businesses to engage in corporate social and environmental responsibility. Most notably, external intervention, such as standards set by MSIs and mandatory due diligence legislation, may have different effects on the level of perceived self-determination, the perceived frame of good or bad behaviour, as well the perceived normative signal of the regulatory instrument.

3.1. Impaired Self-Determination

While external intervention mainly serves to motivate those who are not (sufficiently) motivated to engage in pro-social behaviour, it may also undermine intrinsic motivation. The reasons for this undermining effect are many. One reason is that such regulation may be experienced as controlling.²⁴ People may experience external intervention as attempts to control or manipulate their behaviour, reducing their intrinsic motivation to comply.²⁵ For example, Schulze and Frank (2003) found that monitoring on corruption had both a deterrent effect on high-level corruption while simultaneously reducing intrinsic motivation for honesty or low levels of corruption, ultimately leading to an overall increase in corruptibility.²⁶ Research indicates that the reason for this is that if external intervention is considered controlling, it often compromises individuals' sense of self-determination, degrading their intrinsic motivation to engage in pro-social behaviour.²⁷ For example, in the absence of rewards kids less than two years old have been found to avidly help an adult retrieve an out of reach object, but after being rewarded with a toy for their helping behaviour the helping rate fell by forty per cent.²⁸ However, when the external intervention is perceived to be supportive, in the sense that it acknowledges one's competence, intrinsic motivation is strengthened.²⁹ This can be achieved by, amongst others, including recipients in the design of external intervention.³⁰ Research suggests that this makes individuals more compelled to comply with fair policies and more willing to relinquish their autonomy to them.³¹ Furthermore, it has been found that policies that give individuals space in

²¹ Neil Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21 *Journal of Environmental Law* 179; Neil Gunningham and Darren Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (1999) 21 *Law & Policy* 49; Judith van Erp and others, 'Introduction: The Concept of Smart Mixes for Transboundary Environmental Harm' in André Nollkaemper and others (eds), *Smart Mixes for Transboundary Environmental Harm* (Cambridge Studies on Environment, Energy and Natural Resources Governance, Cambridge University Press 2019), at 7.

²² van Erp and others (2019), at 7.

²³ Gunningham and Sinclair (1999).

²⁴ E. L. Deci, R. Koestner and R. M. Ryan, 'A meta-analytic review of experiments examining the effects of extrinsic rewards on intrinsic motivation' (1999) 125 *Psychol Bull* 627; Frey (1997).

²⁵ Folmer (2021), at 328.

²⁶ Günther G. Schulze and Björn Frank, 'Deterrence versus intrinsic motivation: Experimental evidence on the determinants of corruptibility' (2003) 4 *Economics of Governance* 143.

²⁷ Bowles and Polanía-Reyes (2012).

²⁸ Felix Warneken and Michael Tomasello, 'Extrinsic rewards undermine altruistic tendencies in 20-month-olds' (2008) 44 *Developmental Psychology* 1785.

²⁹ Bruno S. Frey & Alois Stutzer, 'Environmental Morale and Motivation', in Alan Lewis (ed.), *Cambridge Handbook of Psychology and Economic Behavior* (Cambridge University Press), pp 406-428, at 412.

³⁰ Underhill (2016).

³¹ Bruno S. Frey, 'A Constitution for Knaves Crowds out Civic Virtues' (1997) 107 *The Economic Journal* 1043.

terms of *how* they comply (i.e., outcome control rather than process control) may invoke less resistance.³²

How could these crowding-out effects impede companies from undertaking human rights or environmental due diligence? Companies may be more likely to stiffen their resistance to due diligence norms, to which they would otherwise agree when the external intervention is considered controlling. Especially when external regulation leaves little discretion regarding the human rights and environmental policies of companies, it shifts the locus of control from the company to the external intervener. This may reduce the business' intrinsic motivation to engage in human rights and environmental actions. For example, it has been found that external pressures by NGOs and the media increased financial benefits from social and environmental responsibility, which crowded *in* intrinsic motivation in SMEs to improve social and environmental performance.³³ The reason for this may be that environmentally desirable behaviour can increase perceived self-determination in a business context as it rewards the (often costly) investments in social and environmental responsibility reframing it as a business opportunity triggering intrinsic motivation. On the other hand, government regulation of environmental performance has been found to crowd *out* intrinsic and extrinsic motivation of small and medium enterprises (SMEs) to voluntarily improve their environmental performance, leading to a reduction in environmental performance overall.³⁴ They found that only if SMEs had no intrinsic motivation to improve environmental performance did government regulation improve their environmental performance.³⁵ This may be because government regulation interferes more directly in the operations of the company, limiting the company's self-determination as well as shifting the locus of control from the company to the government.³⁶ MSI standards may be less likely to suffer from this crowding-out effect since, by their very nature, they require input from within their community, i.e. the multiple stakeholders that take part in the initiative. Furthermore, MSIs often aim to support businesses in achieving the set standards and they often provide business opportunities to engage in social and environmental responsible behaviour. Moreover, non-compliance often leads initially to increased guidance and support by the MSI in collaboration with the business where the business is offered the opportunity to address the specific violation.³⁷ Some mandatory due diligence legislation, most notably the proposed Dutch Responsible Sustainable International Business Conduct Act,³⁸ also involves guidance by a regulatory body as well as an opportunity to correct noncompliance. However, such measures are often not included in mandatory due diligence legislation.

³² Jody L. Crosno and James R. Brown, 'A meta-analytic review of the effects of organizational control in marketing exchange relationships' (2015) 43 *Journal of the Academy of Marketing Science* 297.

³³ Johan Graafland and Frank G. A. de Bakker, 'Crowding in or crowding out? How non-governmental organizations and media influence intrinsic motivations toward corporate social and environmental responsibility' (2021) *Journal of Environmental Planning and Management* 1.

³⁴ Graafland and Bovenberg (2020).

³⁵ *Ibid.*, at 1349.

³⁶ *Ibid.*, at 2401.

³⁷ See Rainforest Alliances, Guidance Document L. Assess and Address. Version 1.1. <https://www.rainforest-alliance.org/wp-content/uploads/2020/08/Guidance-L-Assess-and-Address.pdf> (last accessed 5 August 2021); Bonsucro Code of Conduct, <https://www.bonsucro.com/wp-content/uploads/2017/01/Code-of-Conduct-December-2011.pdf> (last accessed 5 August 2021).

³⁸ Article 3.1. Tweede Kamer der Staten Generaal, Voorstel van wet van de leden Voordewind, Alkaya, Van den Hul en Van den Nieuwenhuijzen houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Vergaderjaar 2020-2021, nummer 35 761, <https://www.tweedekamer.nl/downloads/document?id=69db3a5e-b040-41b3-86fc-0e114c1eebbc&title=Voorstel%20van%20wet.pdf> (last accessed 1 October 2021).

3.2. Framing Good or Bad Behaviour

External intervention may also change the frame people use to understand good or bad behaviour. Fines or rewards could, for example, reframe an issue from a moral question into one of economic exchange where a market ethic is appropriate.³⁹ Field studies show that the introduction of a fine increased and stabilized the rate of misbehaviour well above pre-fine levels.⁴⁰ A possible explanation is that fines may change the social meaning of norm violations, i.e. actors may feel justified in violating a social obligation because they paid a monetary sum – as is illustrated by Gneezy and Rustichini's (2000) study that the introduction of a monetary fine for parents that pick up their children too late increased the number of late-coming parents significantly even after the fine was removed.⁴¹ In addition, while prohibitions and high sanctions may have an expressive effect, i.e. signalling what behaviour is appropriate,⁴² people have been found to have stronger adverse moral and emotional reactions to non-compliance under the regime of self-regulation where rules were enacted through a participatory process.⁴³ It may well be that sanctions, both in the form of fines and imprisonment, may be seen as a de facto payment by the firm for non-compliance, legitimizing the behaviour.⁴⁴ Furthermore, external intervention could reframe initial pro-social behaviour into self-interested behaviour. For those complying with a pro-social norm for intrinsic reasons, this may be considered highly objectionable and irreconcilable with their self-image.⁴⁵ For example, people have been found to not only donate to privately provided public goods to gain utility from increasing their total supply, but also to gain utility from the act of giving.⁴⁶

Empirical research with individuals suggests that crowding-out effects of framing may be reduced by relying on non-financial rewards, such as in-kind rewards or praise. These may be less likely to recast compliance as an economic transaction and more likely to conserve intrinsic motivation.⁴⁷ Furthermore, if financial incentives are used (such as fines or rewards) they should be proportional to the requested behaviour and not too small.⁴⁸ When financial incentives are too small they may undermine intrinsic motivation while not sufficiently compensating with compliance based on extrinsic motivation. Furthermore, financial incentives must be continued once applied, since they may fundamentally alter people's reasons for complying (i.e. from intrinsic to extrinsic).⁴⁹

How could these crowding-out effects impede companies from undertaking human rights or environmental due diligence? MSI standards often rely on non-financial rewards such as membership rights and certification privileges. This may be more effective in framing due diligence as a moral question and not one of economic exchange. On the other hand, mandatory due diligence legislation is predominantly based on fines for non-compliance. Such fines may potentially recast corporate due diligence norm as a social licence to operate to a mere economic transaction. This becomes especially problematic if the fines are not sufficiently high to compensate for the loss of intrinsic motivation. As such, companies may disregard obligations to report their due diligence measures (procedural obligations) or to

³⁹ Uri Gneezy and Aldo Rustichini (2000); J. Heyman and D. Ariely, 'Effort for payment. A tale of two markets' (2004) 15 *Psychol Sci* 787.

⁴⁰ Uri Gneezy and Aldo Rustichini (2000).

⁴¹ Heyman and Ariely (2004); Uri Gneezy and Aldo Rustichini (2000).

⁴² Patricia Funk, 'Is There An Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines' (2007) 9 *American Law and Economics Review* 135; Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021.

⁴³ Feldman and Perez (2009).

⁴⁴ *Ibid* at 526.

⁴⁵ Bowles and Polanía-Reyes (2012); Frey (1997).

⁴⁶ James Andreoni, 'Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving' (1990) 100 *The Economic Journal* 464 at 473.

⁴⁷ Underhill (2016); See e.g. Bruno S. Frey, 'Morality and Rationality in Environmental Policy' (1999) 22 *Journal of Consumer Policy* 395.

⁴⁸ Underhill (2016).

⁴⁹ Funk (2007).

remedy human rights violations or environmental harm (substantive obligations) if the price of noncompliance is a low fine.

The fines imposed by current (draft) mandatory due diligence legislation are arguably too small. The French *Loi de Vigilance* (LDV) does not include fines for noncompliance.⁵⁰ The fines in the Dutch proposal for a Responsible Sustainable International Business Conduct Act are low: fines for noncompliance regarding the due diligence policy, action plan, and annual reporting can amount to up to €21750.⁵¹ A failure to terminate activities that cause or contribute to adverse human rights impacts or a failure to provide remedy can be up to €87000.⁵² The German Due Diligence legislation proposal, due to come into effect in 2023, includes fines for noncompliance of up to two per cent of the business average worldwide turnover, and possible exclusion from public sector contracts.⁵³ The European Parliament Resolution on Corporate Due Diligence and Corporate Accountability seems a bit more ambitious. It is proposed that administrative fines are provided for that are in magnitude to fines currently provided for in competition law and data protection law.⁵⁴ The European Parliament Resolution and the European Commission Proposal for a Directive on Corporate Sustainability Due Diligence generally emphasize that sanctions for non-compliance should be effective, proportionate and dissuasive.⁵⁵

The Dutch proposal for a Responsible Sustainable International Business Conduct Act does not only include fines, but imprisonment as a possible sanction for noncompliance. Failure to terminate activities with adverse impacts or failing to provide a remedy for the third time within five years is considered a criminal offence under the Dutch Economic Offences Act, punishable by up to six years' imprisonment or community service.⁵⁶ Further research is needed on whether criminal sanctions have a stronger framing effect than other types of sanctions, as well as whether imprisonment has a different framing effect than monetary fines.⁵⁷

3.3. Normative Signal

People may interpret external intervention as a signal that provides information on what behaviour is appropriate (normative signals), on what others do, and how the authority perceives them.⁵⁸ Such external intervention may, then, have a strong expressive function⁵⁹ and may crowd in people's intrinsic motivation to act pro-socially.⁶⁰ However, if the external intervention incorporates fines or rewards that are too low, people may interpret that pro-social

⁵⁰ However, any third party is allowed to sue companies for any damage caused in relation to the activity of a subsidiary, a subcontractor or a supplier, if it can be proven that the proper implementation of that company's vigilance plan could have prevented the damage suffered by the relevant third party. Recently, a claim was filed against Casino, seeking damages of €3 million in relation to Casino's alleged involvement in the deforestation of the Amazon rainforest.

⁵¹ Article 23(4) Tweede Kamer der Staten Generaal, Voorstel van wet van de leden Voordewind, Alkaya, Van den Hul en Van den Nieuwenhuijzen houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen), Vergaderjaar 2020-2021, nummer 35 761, <https://www.tweedekamer.nl/downloads/document?id=69db3a5e-b040-41b3-86fc-0e114c1e8bbc&title=Voorstel%20van%20wet.pdf> (last accessed 1 October 2021).

⁵² Article 23(4) *Ibid.*

⁵³ Article 22 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021).

⁵⁴ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), at 50.

⁵⁵ *Ibid.*, Article 18; Article 20 European Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 2022/0051 (COD).

⁵⁶ Article 6.1(1) Dutch Economic Offences Act.

⁵⁷ Some research has been done by Feldman and Perez but they also call for further study (Feldman and Perez (2009), footnote 82).

⁵⁸ Folmer (2021).

⁵⁹ Funk (2007); Sunstein (1996).

⁶⁰ Bowles and Polanía-Reyes (2012); Frey (1997); McAdams and Nadler (2005).

behaviour is not highly valued by the authority.⁶¹ Furthermore, external intervention could signal that the proscribed behaviour is widespread. This is problematic since empirical studies show that actors who behave pro-socially may abandon their pro-social behaviour when external intervention cues them to believe that other actors are defectors.⁶² As such, external intervention may reduce rather than increase the willingness to comply by signalling that non-compliance is the norm.⁶³ In other words, a legal regime designed for knaves may produce knaves.⁶⁴ In addition, people may also interpret external intervention as a signal that the authority does not trust them to engage in pro-social behaviour voluntarily.⁶⁵ This may be perceived as demeaning, undermining their intrinsic motivation to behave pro-socially.⁶⁶ How could these crowding-out effects impede companies from undertaking human rights or environmental due diligence? If fines or rewards are included in the regulatory design and these are too low, companies may interpret that corporate due diligence is not highly valued by the government, potentially reducing their efforts to go beyond mandatory due diligence requirements. Furthermore, if companies believe that their previous due diligence efforts are not widespread, they may reduce their willingness to go beyond the mandatory due diligence requirements and possibly even try to circumvent the mandatory requirements. Positioning the mandatory due diligence legislation as a tool specifically designed for laggards may circumvent this problem.

4. Applying Motivational Crowding Theory to Business

Most motivational crowding effects are studied in individuals or households. Only very few studies have examined motivational crowding effects of externally imposed intervention on businesses.⁶⁷ These studies suggest that different types of external intervention can have different types of motivational crowding effects on SMEs behaviour, as compared to households and individuals, with regard to corporate social and environmental responsibility. Further research is needed on whether and to what extent motivational crowding effects apply to larger businesses as well and how the results deviate from studies with households and individuals. However, since external intervention is meant to change behaviour, this paper aims to provide a theoretical alternative to the current rationalist model of behaviour that is frequently applied in (inter)national legal discourse.⁶⁸ Following this rationalist model, people are assumed to always behave fully rational, self-interested, and utility-maximizing.⁶⁹ However, this rationalist model can also not give a full account of how larger companies would behave since also rational choice theory takes the individual as the unit of analysis. Furthermore, studies show that companies, including multinationals, behave, just like people, not always fully rational.⁷⁰ As such, motivational crowding theory can provide important insights that may enable more effective external intervention than solely relying on rational choice theory as the predominant model of behaviour.

⁶¹ Folmer (2021); Roland Bénabou and Jean Tirole, 'Incentives and Prosocial Behavior' (2006) 96 *American Economic Review* 1652; Uri Gneezy and Aldo Rustichini (2000).

⁶² Ernst Fehr and Herbert Gintis, 'Human Motivation and Social Cooperation: Experimental and Analytical Foundations' (2007) 33 *Annual Review of Sociology* 43.

⁶³ Underhill (2016).

⁶⁴ Frey (1997).

⁶⁵ Bénabou and Tirole (2006); C. P. Cerasoli, J. M. Nicklin and M. T. Ford, 'Intrinsic motivation and extrinsic incentives jointly predict performance: a 40-year meta-analysis' (2014) 140 *Psychol Bull* 980; Frey (1997).

⁶⁶ Folmer (2021).

⁶⁷ Graafland and Bovenberg (2020); Graafland and de Bakker (2021).

⁶⁸ Anne van Aaken and Tomer Broude, 'The Psychology of International Law: An Introduction' (2020) 30 *European Journal of International Law* 1225.

⁶⁹ Richard Posner, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 *Stanford Law Review* 1551.

⁷⁰ See for an overview: Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (Oxford University Press 2018), Chapter 10.

5. Conclusion

This paper provides an overview of the role of different types of external intervention on intrinsic motivation for corporate environmental and social sustainability performance. It was found that external intervention could crowd-out such intrinsic motivation (1) when there is already intrinsic motivation, (2) when the external intervention compromises individuals' sense of self-determination, (3) when the regulated issue is reframed from a moral question into one of economic exchange, or (4) when the external intervention signals that the proscribed behaviour is widespread.

A worst-case scenario would be that mandatory due diligence legislation overtakes MSIs while undermining intrinsic motivation without being capable of sufficiently compensating with extrinsic motivation. While further studies are needed, current empirical research indicates that government regulators could take several issues into account to ensure that mandatory due diligence legislation improves corporate due diligence. First, it should be established to what extent companies are intrinsically motivated to engage in corporate due diligence. Importantly, mandatory due diligence legislation should ensure that the legislation does not crowd out the intrinsic motivation of those companies that are intrinsically motivated. To do so, governmental regulators could include intrinsically motivated companies in regulatory design increasing instead of reducing their intrinsic motivation to comply. Furthermore, besides fines, other incentives could be taken into account by governmental regulators, such as rewards or praise for those companies that do their due diligence well. This could, for example, be done through a ranking system where companies are ranked on how well they take due diligence into account. The latter could also be undertaken by international organizations, providing a global ranking for corporate due diligence.⁷¹ If indicators are perceived as fair and trustworthy,⁷² such intervention may be less likely to undermine existing intrinsic motivation. If sanctions are used, they should be severe enough to ensure that they sufficiently compensate with extrinsic motivation for the loss of intrinsic motivation. This is something where current due diligence legislation could be improved significantly given the consistent low sanctions underpinning most due diligence legislation. Finally, regulators must be careful that mandatory due diligence legislation does not signal that noncompliance is the norm. This could be done by positioning mandatory due diligence as a tool specifically designed to provide extrinsic motivation to those companies that lack intrinsic motivation to engage in corporate due diligence, and not as a single tool to regulate corporate due diligence more generally.

If mandatory due diligence legislation is designed with these insights into account, a clear role for MSIs emerges. MSIs can promote, in cooperation with governments and international organizations as important stakeholders, a learning environment for pioneers whereby new and better practices can be put in place. To further improve corporate due diligence a continuous interaction between mandatory due diligence legislation and MSIs is needed to ensure sufficient external intervention to motivate laggards, without undermining intrinsic motivation in pioneers.

⁷¹ See e.g. Doron Teichman and Eyal Zamir, 'Nudge Goes International' (2020) 30 *European Journal of International Law* 1263.

⁷² Referring to the critique to the World Bank's *Doing Business Report* of lacking scientific rigour, biased policy orientation, and data irregularities, ultimately leading to its discontinuation. See <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report> [last accessed October 18, 2021].