Study on due diligence requirements through the supply chain

PART III: COUNTRY REPORTS

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PART III COUNTRY REPORTS

BELGIUM COUNTRY REPORT

Geert Van Calster;[1] Siel Demeyere[2]

I. OVERVIEW

Belgium implements European law in matters concerning supply chain due diligence ('SCDD'), with secondary law on financial reporting being the most obvious sector, with this implemented by Belgium without gold plating, It supports the use of international (voluntary) standards and by including SCDD in its overall corporate social responsibility agenda (*responsabilité sociétale de l'entreprise, maatschappelijk verantwoord ondernemen*).

General laws, both substantive and procedural, are considered to be flexible enough to accommodate SCDD, however not a single Act or Government Decree at any level of the Belgian institutional structure is aimed directly at SCDD. In summary therefore it may be said that Belgian law does not obstruct SCDD, however does little to encourage its use.

It would be easy to blame a perceived lack of action on Belgium's complex layer of heads of power, with its sometimes opaque division of competencies between the federal level, the Regions and the Communities. However, in reality SCDD has simply not moved up the political agenda, influenced also by the firm conviction among Belgian policymakers that human rights initiatives in the supply chain overall ought to remain voluntary.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

a. Corporations law (including director's liability)

(i) 2009 Belgian Code on Corporate Governance[3]
(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)[4]
(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; *Code des sociétés et des associations*); including re veil piercing

b. Health, safety and regulatory law

(iv) General tort law: Article 1382 Code Civil 1804

c. Employment law

(v) Article 1384 Civil Code: vicarious liability for employees

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[2] KU Leuven; Université de Lille.
[3] English version available at https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/corporategovukcode2009.pdf, or https://bit.ly/2vbpoc4 last accessed 18 April 2019.
[4] NL and FR version available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013022819&table_name=wet or https://bit.ly/1Mg8z1g last accessed 18 April 2019.

d. Private international law and public international law

Mostly subject to EU law. But see re veil piercing, sub 1. a (iii) above
Additionally:
(vi) 2004 Belgian Act on private international law

2. Scope

a. Rationale given by the State for the regulation (or lack of regulation)

(i) 2009 Belgian Code on Corporate Governance
This Code is essentially an implementation of EU Directive 2006/46[5] in the Belgian legal order.

The Corporate Governance Code received statutory recognition in the Act of 6 April 2010 for the reinforcement of corporate governance. This Act amended article 96 of the Company Code (*Code des sociétés; Wetboek van vennootschappen*) and introduced the obligation for listed companies to assign the 2009 Corporate Governance Code as their code of reference.[6]

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique) – Unfair Trading Practices Act.
The provisions of this Code, as far as SCDD and human rights are concerned, essentially discipline false claims made by companies about their SCDD and human rights policies The Code qualifies as unfair trading practice, those company initiatives which purport to act in accordance with human rights and SCDD without reflecting real company practice. The Act transposes the 2005 Unfair Commercial Practices Directive.[7]

(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations);[8] including re veil piercing.

Having entered into force on 1 May 2019 only, the Code replaces the 1999 Company Code and the 1921 Associations Code. The Act is meant to modernize Belgian company law, making it more transparent, as well as attractive to foreign investors. It is also a general tidying-up exercise following many years of piecemeal transposition of EU secondary law.

SCDD did not feature as a reason behind the new Act. As noted, one of the key elements of human rights and SCDD in Belgium is that it is based on the voluntary engagement of enterprises. No obligations singularly aimed at human rights or SCDD have been introduced in company law. Nevertheless, some of the more generic provisions in company law may help further SCDD, *particularly those with a view to ensuring transparency*.

(iv) General tort law: Article 1382 Code Civil 1804
Belgium's overall principle of non-contractual liability.

(v) Article 1384 Civil Code: vicarious liability for employees
The mother company will, however, generally not be liable for any fault committed by its subsidiary as the latter is not regarded as the appointee of the mother company.

(vi) 2004 Belgian Act on private international law

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[5] Directive 2006/46, OJ [2006] L224/1.
[6] Art. 96, §2, 1° Company Code 1999.
[7] Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market.
[8] Official State Gazette 4 April 2019, available at http://www.ejustice.just.fgov.be/cgi/article.pl?language=nl&caller=summary&pub_date=2019-04-04&numac=2019040586 or https://bit.ly/2VRqF3J, last accessed 18 April 2019.

Applies only in the rare case that the Brussels Ia Regulation does not determine jurisdiction.

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

(i) 2009 Belgian Code on Corporate Governance

Covers listed companies only as far as the statutory obligation to implement is concerned. All other companies may follow the code voluntarily.

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)

Covers all corporations.

(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations); including re veil piercing

Covers all types of corporations small and large. As noted, no specific SCDD requirements are included for either small or large corporations.

(iv) General tort law: Article 1382 Code Civil 1804

General scope of application

(v) Article 1384 Civil Code: vicarious liability for employees

(vi) 2004 Belgian Act on private international law

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights

(i) 2009 Belgian Code on Corporate Governance

None of the principles of the 2009 Corporate Governance Code, specifically relate to human rights let alone SCDD.
Human rights terminology is used only in a wide sense and only in Guideline 1.2, which invites the board to *"pay attention to corporate social responsibility, gender diversity and diversity in general"* when *"translating values and strategies into key policies".*

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)

None of the principles of the Code, specifically relate to human rights let alone SCDD.

(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations); including re veil piercing

None of the principles of the 2019 Company Code, specifically relate to human rights let alone SCDD. The 794 pages of the Government Bill introducing the Act[9] mention human rights twice only, with respect to reporting requirements: see for further detail 3 a iii below.

(iv) General tort law: Article 1382 Code Civil 1804

No specific mention of human rights or SCDD

(v) Article 1384 Civil Code: vicarious liability for employees

[9] Available (bilingual text) at http://www.dekamer.be/FLWB/PDF/54/3119/54K3119001.pdf or https://bit.ly/2KOMFLD, last accessed 18 April 2019.

No specific mention of human rights or SCDD

(vi) 2004 Belgian Act on private international law

No specific mention of human rights or SCDD

d. Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation

(i) 2009 Belgian Code on Corporate Governance

Subsidiaries are mentioned only in relation to transparency of executives' pay.

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)

No specific mention of subsidiaries or business relations.

(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations); including re veil piercing

Given the lack of any specific SCDD provisions, reference to subsidiaries on this issue is not included.

(iv) General tort law: Article 1382 Code Civil 1804

No specific mention of human rights or SCDD

(v) Article 1384 Civil Code: vicarious liability for employees

No specific mention of human rights or SCDD

(vi) 2004 Belgian Act on private international law

No specific mention of human rights or SCDD

3. Content of Regulation

a. Overview and description of the required measures for business (such as requirement to adopt human rights due diligence or a vigilance plan)

(i) 2009 Belgian Code on Corporate Governance

See above. Human rights terminology is used only in a wide sense and only in Guideline 1.2, which invites the board to *"pay attention to corporate social responsibility, gender diversity and diversity in general"* when *"translating values and strategies into key policies".*

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)

Unfair commercial practices are targeted by a 'black list' of practices, which are per se unfair, as well as two more general standards. The black list in particular is interesting for plaintiffs to rely on, as Article VI.100 of the Belgian Code of Economic Law states, *inter alia*, that the following practices are misleading and therefore unfair:

1. Claiming to have signed a code of conduct, while this is not the case;
2. Applying a label of trust, quality or the like without the required permission;
3. Claiming that a code of conduct has been recognised by a public or other authority, while this is not the case;
4. Claiming that a company, including its commercial practices, or a product has been recommended, recognised, approved or allowed by a public or private authority, while this is not the case.

Article VI.98, 2° is a first more general requirement and specifically targets the breach of a code of conduct, as already provided for in Article 6 (2) of the Directive. Under Article VI.98, The breach will be considered as an unfair commercial practice under the following conditions:

a) the code of conduct must not be a mere letter of intent, but a verifiable (*verifiable, verifieerbaar*) obligation, and

b) the company has indicated in the context of a commercial practice that it is bound by the code of conduct.

The breach of the code of conduct will then be considered to be an unfair commercial practice when it has induced or could have induced the average consumer to engage in a transaction, which he/she would otherwise not have engaged in.

Article VI.97 includes the most general standard and may also be relevant in a human rights and SCDD context: providing incorrect information is disciplined, as is providing factually correct information which nevertheless misleads the average consumer. Of particular relevance here is the reference (sub ,3°) to 'the nature of the sales process' and, sub 6°, the qualities of the corporation, including any prizes or labels received. It is suggested that whether the standard of misleading is met, is judged against the general requirements of professional diligence in the sector. The latter can be made more concrete by taking into account codes of conduct that are applied in the relevant sector.[10]

Here, too, misrepresentation is only considered to be an unfair commercial practice when it has induced or could have induced the average consumer to engage in a transaction, which he/she would otherwise not have engaged in. While the protection against unfair commercial practices is aimed at consumers, a company can also rely on these provisions and act against unfair commercial practices of another company when the professional interests of the claiming company are at stake (art. VI.104).

When a court finds that a commercial practice of a certain company is unfair, a prohibitory injunction will follow. Additionally, once a commercial practice is found to be unfair, that counts as sufficient proof of a fault in the sense of Article 1382 Civil Code: this enables a claim in tort (see below **Error! Reference source not found.**) which can e brought be both competitors and consumers (commensurate with any damage they may have suffered.

(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations); including re veil piercing

Human rights terminology is only included in **reporting requirements.** This is the one area which one could optimistically stretch to include SCDD and it has not changed in the 2019 version of the Act as compared to the version of 1999. Directors of every company are obliged to publish their annual accounts and the requirements for those accounts depend on the size of the company.[11] Much of the report, attached to the annual accounts, is purely financial. One of the elements however in the report that is imposed on most companies, relates to human rights, but it will not always be included. *Only when it is necessary for a good understanding of the development, the results or the position of the company*, must the analysis of the company not only mention financial elements, but also non-financial essential performance indicators, including 'in particular information concerning environmental and staff issues'. Human rights issues are absent verbatim however the use of the wording 'in particular' is clearly non-exhaustive.

It is clear that recalcitrant corporations may quite easily circumvent this reporting requirement.

Listed companies are also obliged to report on the application of the aforementioned Good Governance Code.

[10] Caucheteux and Roegiers (2015), 660.

[11] See art. 94 Belgian Company Code 1999; Article 3:6:§1 in fine, 2019 Code.

Certain listed companies, credit institutions and insurance undertakings with over 500 employees are subject to **more stringent transparency requirements** because of Directive 2014/95, transposed without gold plating (the Belgian Government requiring exactly the obligations of the Directive and nothing more) by an Act of 18 December 2015. Pension funds and collective investment funds had already been subject to transparency requirements, as to the question whether they take into account social, ethical and environmental aspects in their investments strategies.[12] Information may be given in a declaration and report, yet it need not be included in the annual account and report.

b. Veil piercing

In this context veil piercing refers to situations in which a subsidiary or daughter company is liable, for whatever reason, and the creditors of the daughter company also (try to) engage the liability of the mother company – attributability might be the better term.[13] Veil piercing is in the first place aimed at insolvency situations and only few might be relevant in a SCDD context.[14] This can be shown in a brief overview of relevant veil piercing grounds in Belgian law. Of note is that veil piercing or attributability discussed here, targets the mother company, not its directors: the latter issue is discussed below, under 'directors liability'.

Abuse of right (*abus de droit, rechtsmisbruik*) is a popular veil piercing ground in Belgian law. The privilege of limited liability is a right that may be abused.[15] Claimant first has to prove that the subsidiary is liable, no matter what the basis for its liability is. Then, a claim against the mother company for abuse of the privilege of limited liability may be filed. Proof that the mother company does not earn the privilege of limited liability because it did not respect the rules concerning the autonomy of the subsidiary, will pierce the veil.[16] However, the threshold for abuse is high as only when the right was exercised in a way that *obviously* goes beyond the way it would be exercised by a reasonably forward-looking and careful person, there is an abuse.[17]

Concealment (*simulation, veinzing*), fraud (*fraude, bedrog*) and the creation of false appearances (*apparence, rechtmatig vertrouwen*) are three other grounds available for veil piercing in Belgian law,[18] but they are less popular. There is concealment when parties to a contract intentionally differentiate between their expressed and actual intentions.[19] According to article 1321 Belgian Civil Code, third parties can choose to rely on the consequences of the expressed intentions or on the consequences of the actual intentions.[20] Concealment can be a tool in a company group to organize the insolvency of a certain company in order to escape from its creditors. A company that was founded with merely this goal is considered a fictitious company (*société fictive*). [21] The indications of concealment match to a large extent the indications of abuse of right, such as the absence of decent bookkeeping, the malfunction of organs, and the lack of decision-making power of organs.[22] Multinational enterprises will, however, rarely have

[12] Art. 42-47 of the Act of 28 April 2003 concerning supplementary pensions (*Loi relative aux pensions complémentaires*); art. 58, §1 and art. 88, §1 Act of 3 August 2012 concerning institutions of collective investments (*Loi relative aux organismes de placement collectif*); Aydogdu (2016b), 894; Enneking et al. (2015), 162.
[13] See also Van Calster (2019), forthcoming.
[14] For a more elaborate CSR-oriented analysis, see Demeyere (2015b), 397-399.
[15] Such abuse was historically based on articles 544 and 1382 of the Civil Code but is now by some said to be a general principle of law. See De Boeck (2011), 6 and 8-10; Van Ommeslaghe (2013a), 65, no. 22 and 73, no. 25.
[16] Brüls (2004), 312; Cornelis (1989), 181; Geens, Denef, Tas, Hellemans and Vananroye (2000), 342; Geens and Wyckaert (2011), 340; Ronse, Nelissen-Grade, van Hulle, Lievens and Laga (1986), 939 and 948-949; Ronse and Lievens (1986), 137 and 170; Vandekerckhove (2007), 32. A shareholder might have set up a subsidiary to prevent its creditors from reaching its assets.
[17] Cass. be. 10 March 1983, *Arr. Cass.* 1982-1983, p 847; De Boeck (2011), 12; Geens and Wyckaert (2011), 343; Ronse, Nelissen-Grade, van Hulle, Lievens and Laga (1986), 949.
[18] See e.g. Court of Appeal Antwerp 12 December 1995, *TRV* 1996, p 62; Cass. be. 6 December 1996, C.950260.N, www.cass.be.
[19] Wéry (2011), 877.
[20] Geens and Wyckaert (2011), 326; Van Gerven and Van Oevelen (2015), 227.
[21] See e.g., Court of Appeal Bastia 19 October 2011, no. 10/00457, www.legifrance.gouv.fr. This case is based on French law, but is a good example for Belgian law as well since the rules on concealment are nearly identical.
[22] Schoonbrood-Wessels (1993), 474.

such a poor administration, but if they have, this can be deployed to the benefit of the victims of the subsidiary's practices.

Fraud is another legal basis that exists in Belgian law to establish the liability of a mother company.[23] The maxim *fraus omnia corrumpit* means that no one may invoke his own fraud in order to justify the application of legal rules to his benefit. The maxim is recognised as a general principle of law,[24] and the judiciary will rely on the principle to hold a mother company liable if the mother company itself does not respect the legal autonomy of its subsidiary but invokes it *vis-à-vis* third parties. Fraud will lead to the impossibility to invoke a certain act (*inopposabilité*).[25] The existence of the separate legal personality can then not be invoked against the victims.

The judge-made theory of creation of false appearances is a last possibility to establish the liability of the mother company.[26] In Belgian law, the legitimate confidence of a third party in a certain situation can be honoured by forcing the person that created the appearance to live up to it.[27] It is rather unlikely that this theory will be relevant when a subsidiary has caused damage in tort. The damage then just happens to the victim and the victim did not think about the constellation of the company or group so he/she cannot have had legitimate confidence in the unity of the group. Even for contractual creditors, a claim on the basis of creation of false appearances is only accepted in rare situations. Fraud or concealment would overall seem more attractive to plaintiffs, as the latter require no proof of the legitimate confidence in the created situation.

A final way to hold a mother company liable for the debt of its subsidiary occurs when the mother company can be designated as a director of the subsidiary. The mother company might then be liable on legal grounds specific to company law or based on general tort law. Both are discussed below.

c. Directors' liability

Company law is also concerned with the liability of the director(s) of a company. Directors may be liable based on company law, or based on common tort law (see below). While several provisions have been inserted regarding director's liability, only one category of them seems relevant for the purposes of current study, namely the liability towards the company and towards third parties for a breach of the provisions of the Belgian Company Code or a breach of the articles of incorporation.[28] We have, however, just shown that only few provisions in the Belgian Company Code have a clear SCDD impact. This is mainly a breach of the eventual obligation to publish non-financial indicators in the annual report.

An extra hurdle for liability will be the required causality between the breach and the damage. Especially when the breach consists in a lack of action, such as an omission in the annual report, is it hard to prove causality.[29] Article 128 *jo.* 96 Belgian Company Code 1999 makes it a crime to breach the obligation to give a true image of the company in the annual report. In case such a crime is committed, the wrongful act of the director(s) will be certain, but this still leaves the victim with the proof of causality.

We will deal with tort law below, but a *caveat* should already be added on the potential tortious liability of a director towards a contracting party of the company. In Belgian law, so-called 'executory agents' (*agent d'exécution, uitvoeringsagent*) can only be liable in tort towards the contracting party of their principal under the same conditions as the principal could be liable in tort towards his contracting party. Conditions are strict.

[23] See Lenaerts (2013-14), 362. For the French language version of this text, see Lenaerts (2014), 98–115.
[24] Lenaerts (2013-14), 362; Wéry (2011), 248.
[25] Van Gerven and Van Oevelen (2015), 82.
[26] Wéry (2011), 876.
[27] Cauffman (16 February 2005), 15–18.
[28] Artt. 263 and 528 Belgian Company Code 1999. See extensively Vandenbogaerde (2009), 82-121.
However, it is not always clear whether a provision of the articles of incorporation really has statutory value and is thus able to engage the liability of the director(s). See Vandenbogaerde (2009), 85-87.
[29] Vandenbogaerde (2009), 93, no. 108.

Other provisions concerning the liability of the directors are mainly directed towards insolvency situations,[30] or can only be invoked by the company, but not by third parties.[31] They seem of no relevance to the current study.

(iv) General tort law: Article 1382 Code Civil 1804

Article 1382 Civil Code reads '[any] act whatever of man, which causes damage to another, obliges him by whose fault it occurred, to compensate it.'[32] Article 1383 Civil Code provides the same for negligence causing damage. In Belgian law, a person incurs liability under article 1382 or article 1383 when three elements are present: a fault, damage, and a causal link between the fault and the damage. Legal persons are subject to these provisions, just as natural persons. When a representative of the legal person commits a fault, it will be imputed to the legal person.[33] A new draft of the Belgian Civil Code did not make its way through parliament as a result of the Government becoming a caretaker Government at the end of 2018 – however the contents of the new Article replacing Article 1382, were not materially changed. However, the proposed articles 5.146 *ff* still apply the same three elements.[34] The liability of a legal person for its representatives will, however, be characterised as vicarious liability.[35]

The first condition, *fault*, can be a wrongful act or a wrongful omission and consists in the violation of a statutory rule or the violation of a duty of care, whether intentional or not.[36] When a person does not act as a reasonably forward-looking and careful person, as a *bonus pater familias*, he/she has infringed the general duty of care. Overall, a fault is easily accepted and a *culpa levissima* suffices to engage the liability of the person committing the fault.[37] It will be interesting to see in future Belgian case law whether that demanding duty of care is equally upheld for companies in a human rights and SCDD context, particularly in the absence hitherto of a general SCDD requirement. In this respect, developments of French case-law on its devoir de vigilance will be of particular interest, as Belgian case-law tends to employ French authority – albeit in the case at issue this may well be varied given that Belgium does not have plans for statutory intervention as is the case for the devoir de vigilance.

Another relevant element is the ease with which a contractual breach is equated with a fault in case the contractual breach causes damage to a third party. While according to Belgian scholarship and the Belgian Court Supreme Court, a fault must be separately proven, case-law of lower courts shows that no separate proof of a fault is required when a contractual breach has been proven.[38] When a company in this way has accepted certain (enforceable) human rights or SCDD obligations in a contract, a breach of such a contract can serve as a basis for a third party to prove a fault of the company. In such a case, a third party would not need a contractual provision in favour of a third party in order to be able to rely on the contract.

If the damage is caused by a subsidiary, it will not be easy to prove that the mother company has committed a fault as well.[39] If a mother company has made a human rights or SCDD statements, however, the mother company set the standard for the duty of care higher for itself. In that case, it arguably will be accepted more easily that the mother company be liable for its subsidiary's acts or negligence.[40] Apart from this

[30] See artt. 265 and 530 Belgian Company Code.
[31] See e.g. artt. 262 and 527 Belgian Company Code.
[32] "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*"
[33] Simonart (1995), 451.
[34] See also Commissie tot hervorming van het aansprakelijkheidsrecht (2018), 39 *ff.* The proposal and the explanatory memorandum are available online in a French and Dutch version: https://justitie.belgium.be/nl/bwcc (last accessed 1 May 2019).
[35] See article 5.158 of the bill.
[36] Van Gerven and Van Oevelen (2015), 368; Van Ommeslaghe (2013b), 1219-1220, no. 830.
[37] Van Ommeslaghe (2013b), 1225, no. 834.
[38] Demeyere (2015a), 35, no. 79.
[39] See also Demeyere (2015b), 393.
[40] Compare Queinnec and Caillet (2010), 654.

hypothesis, it can be argued that the mother's omission to intervene is a fault. When the mother company knew about the unacceptable acts of its subsidiary and looked the other way, a judge might decide the mother company be liable because it did not use its ability to control to end the unacceptable practices.[41] One might even go further and argue that even if the mother company did not know about the unacceptable acts, it is liable for omission because it did not follow its subsidiary up closely enough. The latter two applications of the fault in a company group context come down to liability as *de facto* director (*dirigeant de fait*).[42] The mother company might have assumed the management of its subsidiary and will be liable for faults it commits in its management.[43] When the judge decides whether something amounted to a fault or not, he must however take into account the policy margin a director has.[44]

The *damage* is the loss of a pecuniary or other benefit and can be material or immaterial.[45] Proving that this condition is fulfilled will, in most cases, be the easiest part of proving liability under article 1382 or 1383 Civil Code.[46]

The claimant also has to prove the *causal link* between the fault and the damage before it can recover damages. Belgian law clearly adheres to the 'equivalence doctrine'.[47] This means that there is a causal link whenever the fault has contributed to the existence of the damage. This view on the causal link as valid in current Belgian law is very permissive. With regard to the causal link, the defendant can escape or reduce liability by proving that he/she was not the only factor contributing to the creation of the damage. *Force majeure*, acts by a third party and a fault of the victim itself can all break the causal link and lead to a division of liability.[48] However, this will not really disadvantage the claimants as whenever the company is partly liable, it is liable *in solidum* to pay the whole amount of damages it owes to the claimants.[49] Only later, it can (try to) claim the determined amount back from the other persons that are liable.

(v) Article 1384 Civil Code: vicarious liability for employees

In Belgian law, a person is not only liable for his/her own acts or omissions but also for the acts and omissions by his/her appointee(s) (*préposé, aangestelde*). Article 1384, third limb Civil Code states that 'masters and employers [are liable] for the damage caused by their servants and employees in the functions for which they have been employed'.[50] An employer or any other 'appointer' is thus liable for a fault committed by his employees, or 'appointees',[51] while employees themselves will only rarely be liable.[52] Article 1384 was enacted to ensure that a victim can claim damages from a solvent person. The 'master' plays a guaranteeing role.[53] This *ratio* is definitely valid for liability in group law and it can be analysed whether a company would not only be liable for its own employees, but might incur any vicarious liability for a daughter company as well.

A mother company will, however, generally not be liable for any fault committed by its subsidiary as the latter is not regarded as the appointee of the mother company, although some authors argue so.[54] However, a director of the subsidiary can, at the same time, be an employee of the mother company, in which case the mother company

[41] See also Aydogdu (2016a), 698, no. 56; Thomas (2013), no. 13.
[42] Gallez (2013), 163.
[43] Cornelis (1989), 166.
[44] Vandenbogaerde (2009), 131.
[45] Van Gerven and Van Oevelen (2015), 453 and 459.
[46] Queinnec and Caillet (2010), 654.
[47] Van Gerven and Van Oevelen (2015), 423.
[48] Van Gerven and Van Oevelen (2015), 437 *ff*.
[49] Cass. be. 10 July 1952, *Pas.* 1952, I, 738, *Arr.Cass.* 1952, 650; *ibid*. 563.
[50] *"Les maîtres et les commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés."* This article may in the future be replaced by article 5.157 with a similar scope.
[51] The concept of 'appointee' is broader than that of 'employee', but liability for other appointees than employees is irrelevant in this context.
[52] See art. 18 Belgian Employment Contracts Act (act of 3 July 1978): the employee will only be liable for fraud, his *culpa lata*, and his not accidental *culpa levis*.
[53] See Malinvaud, Fenouillet and Mekki (2014), 473–474.
[54] See e.g. Queinnec and Caillet (2010), 652–653.

can be vicariously liable for its employee. It can also be argued that the director is appointed by the mother company even if he/she is not an employee in the strict sense. In this case, it is not imaginary that a fault of the director will engage the liability of the mother company on the basis of article 1384 Civil Code.[55]

To engage the liability of the employer, three conditions have to be fulfilled.

- First, there has to be a bond of subordination or appointment. The employee is not only socially or economically dependent on the employer or 'appointer', but the employer has the right to give orders and instructions, although he need not exercise this right.[56] It might be so that the employee is granted considerable freedom to act and it is not even required that the employee acted in accordance with the instructions of the employer.[57] The first condition is even fulfilled when the defendant has, in the eyes of a reasonable third party, created the appearance that he/she has the right to give orders and instructions.[58] A labour contract is not required, nor need there be any wage for the employee.[59]
- Second, the employee has to have committed a fault as defined in articles 1382 and 1383 Civil Code, although the liability of the employee himself must not be established.[60]
- Third, is that the employee has caused the damage while exercising his/her function.[61] A mother company will probably argue that the person that caused the damage only exercised his function in the subsidiary and not the function he/she has for the mother company. However, the last condition is interpreted particularly broad and it is enough that the damage would not be present in such a way if the subordinate had never been employed.[62] Once these three conditions are fulfilled, the employer has no defence as this provision enacts a non-rebuttable presumption of liability.[63]

(vi) 2004 Belgian Act on private international law

In the rare cases where the Brussels Ia Regulation is not applicable, the 2004 Belgian Act on private international law (hereafter 'PIL Act') applies. In a commercial or civil matter specifically, the PIL Act will apply when the defendant is not domiciled within the EU and there is no other basis for its applicability (such as exclusive matters of jurisdiction).[64] The Act also applies when the matter of the issue is not addressed by the Brussels I Recast or another EU Regulation, such as the Insolvency Regulation.[65] Given the unlikely applicability of the PIL Act, we will only briefly describe the main jurisdiction rules that can be found in it.

The general jurisdiction clause can be found in article 5 and provides that the Belgian courts have jurisdiction when the defendant has his domicile (*domicile, verblijfplaats*) or usual place of residence (*residence habituelle, voornaamste verblijfplaats*) in Belgium.[66] In case of a legal person, the usual place of residence is understood as the principal establishment (*établissement principal, voornaamste vestiging*) (art. 4, §2, 2°). Article 5, §2 is also relevant as it states that a Belgian judge also has jurisdiction when a claim concerns the exploitation of a secondary establishment (*établissement secondaire*, *nevenvestiging*) in Belgium, in case the legal person does not have a domicile or

[55] De Moor III.6-37 and III.6-44.
[56] Cass. be. 27 February 1970, *Pas*. 1970, I, 565; Ronse and Lievens (1986), 162.
[57] Cass. be. 3 January 2002, no. C.99.0035.N, *AJT* 2001-02, 768, note I. BOONE.
[58] Van Gerven and Van Oevelen (2015), 395.
[59] Ronse and Lievens (1986), 163.
[60] Van Gerven and Van Oevelen (2015), 397.
[61] Van Gerven and Van Oevelen (2015), 398.
[62] See, for instance, Cass. be. 7 February 1969, *RW* 1968–1969, 1545. An employer is, for instance, even liable when his employee causes a traffic accident while driving a company car without a driver's licence after his working hours. See Cass. be. 2 October 1984, *Arr.Cass.* 1984–1985, 181.
[63] Van Gerven and Van Oevelen (2015), 394.
[64] Art. 6 (1) Brussels I Recast; Van Calster (2014), 129.
[65] Art. 2 Belgian PIL Code; Erauw (2009), 147, no. 74.
[66] Article 4 determines what the domicile or usual place of residence of a person is. See also Erauw (2009), 150, no. 79 *ff*.

principal establishment in Belgium.[67] Article 6 confirms the legitimacy of a *forum* clause in favour of Belgian courts, but contains an application of *forum non conveniens* for instances where the case has 'no meaningful link' to Belgium (art. 6, §2). The latter is, however, applied restrictively.[68] Article 11 contains a *forum necessitatis* clause and allows jurisdiction of the Belgian courts when no other provision contradicts this and the case has narrow ties with Belgium, while a procedure abroad appears impossible or while it would be unreasonable to demand that the claim is introduced abroad. The PIL Act also contains a clause on connected claims, similar to the Article 8 anchor mechanism of the Brussels I Recast.

Article 96 PIL Act provides extra possibilities for jurisdiction concerning contractual and tortious obligations. For contractual obligations, Belgian judges will also have jurisdiction when the obligation has arisen in Belgium, or is or should be performed in Belgium. For liability in tort, the Belgian judges will have jurisdiction when the tort has occurred (or threatens to occur) completely or partly in Belgium or if and in so far as the damage has occurred (or threatens to occur) in Belgium. Employment and consumer contracts are again subject to a special regulation. Article 97, §2 adds to article 96 that the employment is performed in Belgium when the employee usually performs his work in Belgium at the moment the dispute arises. A *forum* clause will only be valid when it has been agreed upon after the dispute concerning the employment of consumer contract has arisen (art. 97, §3).

In summary, the PIL Act does not therefore offer claimant unexpected interesting possibilities to bring a claim in a Belgian court. Except for articles 6 and 11, the Code does not create other possibilities than the Brussels I Recast.

With an Act of 1993, however, Belgium had allowed for universal jurisdiction for international crimes. The **1993 Belgian Genocide Law**[69] allowed prosecution for war crimes, even when committed in an internal conflict, against both a natural person and a legal person, even *in absentia*. The latter meant that the person involved did not need to be present on Belgian territory to prosecute that person.[70] The amendments of 1999[71] broadened the scope of the Belgian Genocide Law and also included the prosecution of genocide and crimes against humanity. Article 5, §3 moreover stated that no immunity connected to an official capacity could prevent prosecution.[72] Especially since 1999, victims discovered the Act and several complaints were launched, also against heads of state in function.[73] Only very serious international crimes could be prosecuted under the Belgian Genocide Law, but in a human rights or SCDD context, such crimes are not unimaginable. A complaint for instance was made against TotalFinaElf for its alleged complicity in the military junta in Burma.[74]

Under international pressure,[75] the Belgian Genocide Act was repealed and some provisions of the Act, none granting universal jurisdiction, were introduced in the Belgian Criminal Code and the Code on Criminal Procedure.[76]

The only relevant human rights procedure that was started in Belgium is the TotalFinalElf case under the Belgian Genocide Act. In April 2002, four refugees from Myanmar filed a complaint against the company for its alleged involvement in human rights violation in the course of construction and exploitation of gas pipelines.[77] The procedure was

[67] See Erauw (2009), 152, no. 81.
[68] Erauw (2009), 153, no. 82.
[69] Act of 16 June 1993 concerning the punishment of serious violations of the Geneva Conventions of 12 August 1949 and on the additional protocols of 8 June 1977, *BS* 5 August 1993, 17751.
[70] Wouters (2003-04), 10.
[71] Act of 10 February 1999 concerning serious violations of international humanitarian law, *BS* 23 March 1999.
[72] See Wouters (2003-04), 11.
[73] For a brief overview, see Wouters (2003-04), 12.
[74] Wouters (2003-04), 12.
[75] The USA had, for instance, threatened to block the expansion of the NATO headquarters in Brussels. See Wouters (2003-04), 17.
[76] Act of 5 August 2003, *BS* 7 August 2003, 40506.
[77] See Enneking et al. (2015), 163.

however overtaken by the legislative changes and the repeal of the Belgian Genocide Act in 2003. The Belgian Supreme Court decided in 2005 that the proceedings could not be continued, and that the complaint was inadmissible since there was no more legal basis for jurisdiction of the Belgian courts.[78] The case was eventually terminated in 2008 after a couple more appeals to the Constitutional Court and the Supreme Court.[79]

e. Key legal elements of the obligation

(i) 2009 Belgian Code on Corporate Governance

Vague guideline of intent only.

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)

Infringement of stated intent.

(iii) 2019 Company Code (Wetboek van Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations); including re veil piercing

Breach of transparency obligations.

(iv) General tort law: Article 1382 Code Civil 1804

Breach of statutory duty (not relevant for human rights of SCDD) or of general duty of care (more promising).

(v) Article 1384 Civil Code: vicarious liability for employees

Little to no calling in the human rights and SCDD context.

(vi) 2004 Belgian Act on private international law

Scope of application limited due to Brussels Ia's wide reach.

4. Monitoring, sanction and enforcement

All of the relevant Belgian anchor points for human rights due diligence discussed above are, if at all, in the main monitored by private individuals and NGOs. It is their enforcement action which will lead to disciplining by the courts in ordinary. The Belgian ministry of economics has wide-ranging inspection and enforcement means with a view to upholding economic law as a whole, typically following competitors and /or consumers complaints, including for commercial practice relevant to SCDD. However to our knowledge there has not been a single enforcement action directly linked to such SCDD.

5. Procedural Framework

(i) 2009 Belgian Code on Corporate Governance

Not relevant – No such due diligence required.

(ii) 2013 Wetboek van Economisch Recht (WER) (Code de droit économique)

When a commercial practice is found to be unfair, a prohibitory injunction (*action en cessation, vordering tot staking*) can be claimed in court by any person with an interest (art. XVII.7). It is unlikely that a consumer will make the effort and incur expenses to start court proceedings.[80] However, consumer organisations, the relevant minister and other companies can also file a claim. The professional interest of other companies will, for instance, be at stake when they compete with the company alleged to apply an unfair commercial practice or when it is a company granting trust labels.[81]

6. Available Remedies

[78] Cass. 29 June 2005, no. P.040482.F, www.juridat.be.
[79] For a more complete overview of the case, see Enneking et al. (2015), 164.
[80] Caucheteux and Roegiers (2015), 660.
[81] Caucheteux and Roegiers (2015), 661.

Belgium's National Contact Point under the OECD Guidelines has hitherto not dealt with human rights due diligence relevant claims.[82]

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

Not quite relevant given the absence of SCDD content. In general, it is impossible to estimate due to lack of transparency in same.

8. Impact of the Regulation

2009 Belgian Code on Corporate Governance
Clearly not much of an impact at all.

III. COMPARATIVE ANALYSIS

An area which is not included in the template provided, is **general contract law**. Provisions concerning human rights and SCDD obligations may be inserted into business contracts. They may be based on codes of conduct, whether international and general, particular to a certain sector or even particular to an enterprise. Status, and especially the enforceability, of such provisions is unclear.

Contracting parties can include a wide range of obligations, such as a declaration (for instance the self-declaration regarding ISO 26000, see above **Error! Reference source ot found.**), the application of the Corporate Governance Code, reporting on the human rights policy of the company, and respecting certain norms in their supply chain. When the enforceability of such an obligation is certain, whether because it is clearly determined by the parties, or whether because a judge has later confirmed its enforceability, the question arises whether a particular obligation which is alleged to have been breached, actually constitutes a 'best efforts obligation' (*obligation de moyens*, *inspanningsverbintenis*) or an obligation to achieve a certain result (*obligation de résultat*, *resultaatsverbintenis*).[83] The distinction is of major importance to the burden of proof. In case a claimant asserts that an obligation to achieve a result has been breached, the only proof necessary is that the obligation is actually breached. It is then up to the debtor / defendant to prove that the breach was due to *force majeure* and that it must not be held accountable for it. In case a 'best efforts obligation' would be breached, however, it is up to the claimant to prove that the debtor has not taken all reasonable efforts to perform the obligation. It is usually up to the judge to determine whether a particular obligation was one of best efforts or one to achieve a result. Examples allow for a clarification of the concept. The promise to insert a certain provision in a subsequent contract with another party, such as a supply chain enterprise, will normally be an obligation to achieve a result. The promise to assure by own investigations that no subcontractors allow child labour in their foreign factories, will on the other hand be a 'best efforts obligation'.

If contracting parties want to ensure the enforceability of the obligations they insert, a variety of options are available, and most clauses can be combined all at once.

- A first interesting clause is a damages clause.[84] This clause allows parties contractually to determine beforehand the damages to be paid in case of a breach of a certain contractual provision. The real damages then do not have to be proven[85] and it does not matter whether they would approach the damages foreseen in the

[82] Huyse and Verbrugge 2018.
[83] See Stijns (2005), 142, no. 196; Van Gerven and Van Oevelen (2015), 169; Van Ommeslaghe (2013a), 50, no. 15.
[84] Stijns (2005), 181, no. 253; Van Gerven and Van Oevelen (2015), 188.
[85] Cass. be. 3 February 1995, no. C.928358.N, *Arr.Cass.* 1995, 130, *RW* 1995-96, 226.

contractual provision. The predetermined amount must be paid, while the damage that actually occurred may be significantly more or less. Only when the predetermined damages are unreasonably high, can a judge mitigate them.[86] When the predetermined damages would be unreasonably low, the provision must be recharacterised as a disclaimer.[87]

- Secondly, contracting parties can grant to one (or both) of them the possibility to dissolve the contract, without having to go to court,[88] contrary to article 1184 Belgian Civil Code (see below). Notice upon the debtor is not required if this is explicitly provided in the contract. The debtor can still go to court and uphold that the dissolution was unjust, which will then be assessed by the judge.
- Thirdly, the circle of claimants can be broadened by inserting provisions in favour of a third party.[89] A third party, such as employees of the debtor, can be given the right to enforce a contractual provision concerning their labour conditions. This is a way to overcome privity of contract (art. 1165 Civil Code) and to grant rights to third parties. Very concrete elements could enhance the enforceability of such provisions, such as advertising the rights and obligations of the employees in plain language within the factory buildings.[90] Hitherto no SCDD relevant case-law on this issue exists.
- Fourthly, in case there is a chain of contracts not all involving the first creditor who wishes to impose human rights or SCDD obligations, there is a possibility to insert a 'chain clause' (*kettingbeding*).[91] Such a clause obliges the contracting party to insert a certain obligation in a subsequent contract, coupled with the obligation to let any subsequent contracting party insert it as well. Such a provision could for instance oblige the whole chain of suppliers to ensure respect for human rights and to uphold humane labour conditions. The enforceability of this clause can be strengthened by adding a provision in favour of a third party, namely the first creditor, and a damages clause. The first creditor can then enforce the obligation against any sub supplier who has accepted this provision. The latter, however, shows the weakness of this provision. The sub supplier will only be liable when the provision was actually inserted into his contract. When this did not happen, no action can normally be undertaken against him based on that specific clause.[92]
- Fifthly, the performance of human rights and SCDD obligations could be inserted as a suspensive condition (*condition suspensive, opschortende voorwaarde*) or as a condition of avoidance (*condition résolutoire, ontbindende voorwaarde*).[93] This goes further than the provisions we just discussed, because the creation or (further) existence of the contract depends on the fulfillment of the condition. Moreover, once a condition is fulfilled, the contract will automatically be created or dissolved and there will be no moment for negotiations, considerations or whatsoever.

General contract law therefore provides for a variety of options which will be useful in a human rights and SCDD context. However, that is only so when the parties are clear on

[86] Art. 1231, §3 Belgian Civil Code.
[87] A disclaimer will in Belgian law be invalid when (i) it is contrary to mandatory law, (ii) it concerns an essential obligation of the contract, or (iii) it would exonerate the debtor for his own fraud. See Stijns (2005), 163, no. 231; Van Gerven and Van Oevelen (2015), 179.
In the other cases, the recharacterised damages clause will be a valid disclaimer and must be upheld.
[88] Van Gerven and Van Oevelen (2015), 202.
[89] Art. 1121 Belgian Civil Code; Stijns (2005), 241, no. 336; Van Gerven and Van Oevelen (2015), 235; Van Ommeslaghe (2013a), 685, no. 442.
See also van der Heijden (2011), 6.
[90] van der Heijden (2011), 8.
[91] Sagaert (2014), 29, no. 28; Stijns (2005), 239, no. 333; Van Gerven and Van Oevelen (2015), 233.
See also van der Heijden (2011), 6.
[92] For more details on the functioning of a chain clause, its strengths and weaknesses, see Demeyere (2017a), no. 46 *ff*.
[93] Artt. 1181-1183 Belgian Civil Code; Stijns (2009), 3, no. 2; Van Gerven and Van Oevelen (2015), 537; Wéry (2016), 333, no. 339.

the enforceability of the obligations they agreed upon, or when a judge has decided in favour of their enforceability.

IV. REGULATORY FRAMEWORK

This is covered in the Overview to the Report above.

In addition, there is a proposed amendment to the 2009 Belgian Code on Corporate Governance. The Code was meant to have been amended in 2019, however this is now likely to be extended to 2020. Neither human rights nor SCDD are at the forefront of the suggestions for review however there is no particular reason why they could not or should not be.

There is also pressure from some NGOs to include mandatory due diligence in Belgium law to apply to Belgium companies, without hitherto any detail being given on how such a law should be construed[94]

[94] See https://bit.ly/2YgzpkX, last accessed 7 May 2019.

DENMARK COUNTRY REPORT

Lia Heasman[95]

I. OVERVIEW

There are no mandatory legal requirements to conduct human rights due diligence, but there is currently a proposal related to mandatory human rights due diligence. According the National Action Plan, the Danish Government is committed to continuously improving and promoting guidance provided to companies on corporate social responsibility (CSR) and human rights in particular. The Financial Statements Act, which implemented the EU Accounting Directive 2013/34, requires human rights reporting. Denmark was the first country in the EU to implement the requirement for human rights. Denmark has chosen to include a larger group of companies than the directive prescribes under its scope.

In January 2019 three parliamentary members Rasmus Nordqvist (ALT), Eva Flyvholm (EL) and Lisbeth Bech Poulsen (SF) proposed a proposal for a parliamentary resolution to make it compulsory for companies to exercise the necessary care in the field of human rights and on the introduction of effective remedies.[96] These Danish Parliament members asks the Government to present a bill that makes it compulsory for large Danish companies and small and medium-sized enterprises, which operate in particularly risky sectors or who have trade relations with high risk areas such as conflict zones, to exercise due diligence in the human rights field.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

A. Corporations law

- **The Danish Financial Statements Act** Section 992:

Large undertakings must supplement the Management's Review with a corporate social responsibility (CSR) report, cf. (2)-(9). Corporate social responsibility entails that undertakings incorporate considerations for, inter alia, human rights, social conditions, environmental and climate issues, as well as anti-corruption measures, in their business strategy and business activities. (2) As a minimum, the CSR report must include the following, cf. (3), (6) and (7), however:
1) A brief description of the undertaking's business model.
2) A description of the CSR policies pursued by the undertaking, including any standards, guidelines or CSR principles applied by the undertaking. As a minimum, environmental policies, including measures to reduce the climate impacts of the undertaking's activities, must be disclosed, as well as social conditions and employee conditions, ***respect for human rights****, and measures to fight bribery and corruption. For each policy area it must be stated whether the undertaking has a policy for the area in question, and the nature of the policy.*
3) For each policy area, cf. 2), it must be stated how the undertaking puts its CSR policy into practice, and any systems or procedures in this respect must be described. Details must also be given of the ***due diligence*** *processes applied, if the undertaking uses such processes.*

[95] Lia Heasman LLD.
[96] Fremsat den 24. januar 2019 af Rasmus Nordqvist (ALT), Eva Flyvholm (EL) og Lisbeth Bech Poulsen (SF) Forslag til folketingsbeslutning om at gøre det lovpligtigt for virksomheder at udøve nødvendig omhu på menneskerettighedsområdet og om indførelse af effektive retsmidler, Beslutningsforslag nr. B 82 (January 24, 2019)

4) Details must be given of the principal risks related to the undertaking's business activities, including, where relevant and proportionate, in relation to its business relationships, products or services which are likely to entail a particular risk of adverse impacts in the areas stated in 2). This must include details of how the undertaking manages the risks in question. Information must be provided for each policy area.
5) Details must be given of the undertaking's use of any non-financial key performance indicators relevant to the specific business activities.
6) Details must be given of the undertaking's assessment of the results it has achieved as a result of its CSR initiatives during the financial year, and any future expectations of these initiatives. Information must be provided for each policy area, cf. 2). (3) Where the undertaking does not pursue CSR policies in the areas stated in (2) 2), this must be disclosed in the Management's Review, including the grounds, for each of the areas stated. (4) The report must be presented as part of the Management's Review.
Instead, however, the undertaking may present the report 1) in a supplementary report to the Annual Report, cf. Section 14, to which reference is made in the Management's Review, in accordance with regulations issued pursuant to (8), first sentence; or 2) on the undertaking's website, to which reference is made in the Management's Review, in accordance with regulations issued pursuant to (8), second sentence.
(5) For undertakings that present consolidated financial statements it is sufficient to provide the information stated in (1)-(3) for the overall Group.
(6) A subsidiary that is part of a Group may omit this information from its Management's Review if a parent undertaking fulfils the disclosure requirements in accordance with (1)-(3).
(7) An undertaking may refrain from preparing a CSR report in accordance with (2) if the undertaking discloses its CSR policies in accordance with international guidelines or standards that include the information stated in (2). Subsection 3 will apply in the same way if the information does not cover the policy areas stated in (2).
(8) The Danish Business Authority lays down more detailed regulations concerning the publication of the CSR report in a supplementary report to the Annual Report, as well as the obligations of auditors with regard to the information published therein, cf. (4), 1). The Danish Business Authority lays down more detailed regulations concerning the publication of the CSR report on an undertaking's website, including regulations concerning the undertaking's updating of the information on the website, and the obligations of auditors with regard to the information published on the website, cf. (4), 2).
(9) The Danish Business Authority lays down more detailed regulations for the terms on which an undertaking can report on CSR according to international guidelines or standards.

- **Financial Statements Act** Section 107 b

An entity that has securities admitted to trading on a regulated market in an EU / EEA country must include a corporate governance statement that includes the following: 1) Indication of whether the entity is covered by a corporate governance code, citing the code that the company may be subject to.
2) Indication of where the code referred to in paragraph 1 is publicly available.
3) Indication of which parts of the code referred to in paragraph 1 the company deviates from, and the reasons for doing so, if the company has decided to depart from parts of the code.
4) Indication of the reasons why the company does not apply the code referred to in paragraph 1 if it has decided not to apply the Code.
5) Reference to any other corporate governance codes which the company has decided to use in addition to or in place of the code referred to in paragraph 1, or to which the company applies voluntarily, stating similar information to those in paragraphs 2 and 3 stated.
6) Description of the main elements of the company's internal control and risk management systems in connection with the financial reporting process.

7) Description of the composition of the company's management bodies and their committees and their function.

PCS. 2. An enterprise covered by subsection (1). 1, and which alone has securities other than shares admitted to trading on a regulated market in an EU / EEA country, may refrain from giving the securities referred to in subsection (1). 1, items 1-5 and 7, unless the company in question has shares admitted to trading in a multilateral trading facility in an EU / EEA country. Item 1 does not apply to state-owned limited liability companies.
PCS. 3. The statement according to subsection (1). 1 must be given in connection with the information mentioned in section 107a in the management's review, cf. 4th
PCS. 4. The Danish Business Authority may decide that the statement in accordance with subsection (1). 1 must not be included in the management's review if the management's review contains a reference to the company's website, where the statement has been published. The Danish Business Authority sets detailed rules on this, including on the company's updating

- **The Danish Companies Act** Section 115

In limited liability companies that have a board of directors, the board must, in addition to performing overall management duties and strategic management duties and ensuring proper organisation of the company's business, ensure
1. the bookkeeping and financial reporting procedures are satisfactory, having regard to the circumstances of the limited liability company;
2. adequate risk management and internal control procedures have been established;
3. the board of directors receives ongoing information as necessary about the limited liability company's financial position;
4. the executive board performs its duties properly and as directed by the board of directors; and that
5. the financial resources of the limited liability company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they fall due. The limited liability company is therefore required to continuously assess its financial position and ensure that the existing capital resources are adequate.

- **The Danish Companies Act** Section 116

In limited liability companies that have a supervisory board, the board must ensure that
6. 1. the bookkeeping and financial reporting procedures are satisfactory, having regard to the circumstances of the
7. limited liability company;
8. 2. adequate risk management and internal control procedures have been established;
9. 3. the supervisory board receives ongoing information as necessary about the limited liability company's financial position;
10. 4. the executive board performs its duties properly; and
11. 5. the financial resources of the limited liability company are adequate at all times, and that the company has sufficient
12. liquidity to meet its current and future liabilities as they fall due. The limited liability company is therefore required
13. to continuously assess its financial position and ensure that the existing capital resources are adequate

- **Committee on Corporate Governance Recommendations for corporate governance of 2017** Section 2 and 5 (annex)

B. Health, safety and regulatory law

- **Working Environment Act** Section 15

It shall be the duty of the employer to ensure safe and healthy working conditions. Special reference is made to:

1.Part 5 on the performance of the work,

2.Part 6 on the design and fitting out of the work site,

3.Part 7 on technical equipment, etc.,

4.Part 8 on substances and materials.

C. Administrative law.

- **Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct** (annex)

2. Scope

a. Rationale given by the State for the regulation (or lack of regulation)

There are no mandatory legal requirements to conduct human rights due diligence, but there is currently a proposal related to mandatory human rights due diligence. The Financial Statements Act, which implemented the EU Accounting Directive 2013/34, requires human rights reporting. Denmark was the first country in the EU to implement this requirement. Denmark has chosen to include a larger group of companies than the directive prescribes under its scope. According to the National Action Plan, the purpose is to further strengthen Danish companies' activities in relation to human rights and climate change which will be beneficial to society overall, but also to the individual company.[97]

According the National Action Plan, the Danish Government is committed to continuously improving and promoting guidance provided to companies on human rights and on CSR. [98] Human rights are integrated into Danish law and there exists a general expectation that companies are expected to comply with the law without undergoing a specific licensing process in advance. It is apparent the Danish government has been proactive in offering information related to human rights. The Government offers the portal "Responsible Purchaser", which is a portal with guidance on CSR for public purchasers. The Government provides non-binding guidance for companies and has, for example, provided the CSR Compass, gives guidance on ways to solve company conflicts by actively engaging in a dialogue with the company's stakeholders, and the Global Compact Self-Assessment, which works as a self-guidance for companies.[99] The self-assessment has integrated the Guiding Principles and includes a questionnaire covering aspects of human rights, worker's rights, environment and anti-corruption. When the Action Plan for Corporate Social Responsibility 2012-2015 ended in 2015 and there is no information whether the Danish Government will evaluate the plan, or develop a new one.

The Danish Business Authority under the Ministry of Business and Growth is responsible for coordinating the Danish efforts for business and human rights. This includes, among other things, the overall responsibility for the Government's Action Plan for Corporate Social Responsibility 2012-2015. [100] The Dialogue Forum for Corporate Social Responsibility and Growth (Dialogforum for Samfundsansvar og Vækst), which was

[97] Danish National Action Plan – implementation if the UN Guiding Principles on Business and Human Rights (March 2014)14 at https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf

[98] Danish National Action Plan – implementation if the UN Guiding Principles on Business and Human Rights (March 2014) 9 at https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.

[99] Ibid 13-14.

[100] Danish Institute of Human Rights, Erhverv og menneskerettigheder i en dansk kontekst (2016) 12

founded in 2016, supports Danish companies in CSR matters.[101] The new Dialogue Forum also helps social-economic companies create growth. Much like the former Council for Social Responsibility, the new Dialogue Forum is composed of 14 members across sectors. The Danish government set up the former Council for Corporate Social Responsibility in 2016, which advised the government on social responsibility, including the two action plans and the establishment of the Mediation and Complaints Institution for Responsible Business Behavior.[102]

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

The Danish reporting requirements on human rights are explicit and apply to all a number of companies in Denmark, which includes all publicly listed companies, state-owned limited liability companies and institutional investors who must report on human rights in their annual reports. The Financial Statements Act requirements apply to listed businesses in accounting classes C and D with some companies exempt, because they are subsidiaries to a parent that report the information for the group.[103] Companies in D class compose of listed and state owned companies. Companies in class C with two of the three size limits in the last two consequent years; balance sum of 156 million kr; revenustae of 313 million kr, and an average number of 250 employees, fall within the scope. The same reporting requirement applies to institutional investors, mutual funds and other listed financial enterprises, such as banks and insurance issued by an Executive Order issued by the Danish Financial Supervisory Authority who are not covered by the Financial Statements Act.

The jurisdictional scope of the Danish Working Environment Act is limited to work being performed in Denmark and thus the Act does not apply to employees abroad even if the employee is a Danish citizen working for a Danish employer.

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights (see above)

The Financial Statements Act specifically uses human rights terminology.[104] Similarly the wording of due diligence is noted in the section.

3. Content of Regulation

a. Overview and description of the required measures for business (such as requirement to adopt human rights due diligence or a vigilance plan)

Danish regulation does not explicitly include human rights due diligence requirements. Sustainability related efforts focus mainly on reporting, but reporting related to due diligence processes applied is mandatory in accordance with the Financial Statements Act.[105]

b. Key legal elements of the obligation

Certain duty of care expectations exists in the Danish Working Environment Act, which notes a duty of care related to employers to provide their employees with a safe and healthy working environment.[106]

[101] Danish Institute of Human Rights, Erhverv og menneskerettigheder i en dansk kontekst (2016) 14
[102] Ibid 13.
[103] Financial Statements Act (LBK nr 1580 af 10/12/2015) Section 99a.
[104] The Financial Statements Act (LBK nr 1580 af 10/12/2015) 99a.
[105] The Financial Statements Act (LBK nr 1580 af 10/12/2015) 99a.
[106] Working Environment Act (LBK nr 1072 af 7/9/2010) Chapter 4 Section 15.

Even though the section 115 and 116 of the Danish Companies Act does not automatically articulate a duty of care,[107] but it does imply a duty of care by the board of directors and the supervisory board. The Recommendations by the Committee for Corporate Governance clearly stipulate the obligation to act diligently. [108] These recommendations are best practice guidelines for the management of companies that trade on a regulated market and not mandatory. The updated Recommendations for Corporate Governance of 23 November 2017 entered into force for the financial years starting January 1, 2018 or later. The recommendations on corporate governance are a supplement for current Danish company law and stock exchange regulation as well as the requirements for financial reporting. Companies must in accordance with the Financial Statement Act report on governance.

Danish companies must expressively state in their reports what measures they are taking to respect human rights and to reduce their impact on the climate from 2013 onwards. The Financial Statement Act requires that the description of a company's policies must include a description of "due diligence processes implemented" and the section 99a specifically uses the term "due diligence".[109] The current Section 99a does not describe directly what the due diligence concept entails. However the Danish Business Authority and the Mediation and Complaints-Handling Institution for Responsible Business Conduct official website note that the concept of due diligence exists in the international guidelines such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.[110]

Companies must also report on their standards and policies if the company has a CSR policy, CSR standards, guidelines or principles and the nature of that policy. [111] This includes disclosing social conditions and employee conditions and respect for human rights. Companies must report how these policies materialize into action, which includes the systems or procedures used. Thirdly, the company must evaluate their achievements related to the CSR initiatives during the financial year.[112] Importantly companies must also report if the company does not have any social responsibility policies. In order to fulfil their requirements companies need to be able to know and show how they respect human rights.

Listed companies that are covered by section 107b of the Danish Financial Statements Act must also publish the statement related to governance in the company's management's report or make reference in the management's report to the company's website, where the statement has been published.[113] The Danish Financial Statements Act notes that companies that have securities admitted to trading on a regulated market in an EU / EEA country must include a statement on corporate governance. The Board of Directors of listed companies are responsible for preparing the report. As noted earlier the Corporate Governance Recommendations for corporate governance should be included in this reporting, which also includes the recommendation related to duty of acting diligently, corporate social responsibility and whistleblowing channels.[114]

c. Risk assessment requirements and risk mitigation measures

[107] Companies Act (LBK nr 1089 af 14/09/2015) 115-116.
[108] The Committee on Corporate Governance Recommendations for corporate governance of 2017 (November 2017) 10 at https://corporategovernance.dk/sites/default/files/181211_clean_recommendations_version071218_002.pdf
[109] Financial Statements Act (LBK nr 1580 af 10/12/2015) 99a.
[110] The Mediation and Complaints-Handling Institution for Responsible Business Conduct official website, what companies can do (visited on April 29, 2019) at https://businessconduct.dk/due-diligence; Danish Business Authority, Implementation in Denmark of EU Directive 2014/95/EU on the disclosure of non-financial information, 9 at http://csrgov.dk/file/557863/implementation-of-eu-directive.pdf
[111] Financial Statements Act (LBK nr 1580 af 10/12/2015) 99a.
[112] Ibid.
[113] Financial Statements Act (LBK nr 1580 af 10/12/2015) 107b.
[114] The Committee on Corporate Governance Recommendations for corporate governance of 2017 (November 2017) 25-27 at https://corporategovernance.dk/sites/default/files/181211_clean_recommendations_version071218_002.pdf

The statement related to the Danish Financial Statements Act must also state the most significant risks in relation to the company's business activities.[115] This does not however denote an obligation to conduct risk assessments.

d. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers (if any)

Legal obligations for corporate action outside of Denmark does not exist.

e. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

The Danish Financial Statements Act operates with a "follow-or-explain" principle. The principle means that the board of directors of the listed company itself decides whether to follow recommendations. The listed company must explain why and how it has chosen to do so when a recommendation is not followed. If the company does not conduct CSR and human rights activities, it merely has to state this in relation to its reporting requirements in the Financial Statements Act.[116] An auditor must review corporate social responsibility statement and give an opinion on whether the information in the management's review is in accordance with annual accounts and consolidated financial statements.

f. Transparency and disclosure requirements

A mandatory legal requirement for reporting on human rights, environmental matters, corruption and bribery, and social aspects is in section 99a of the Danish Financial Statements Act. The statement must contain a description of relevant policies and processes, including due diligence as described above. The statement must also state the most significant risks in relation to the company's business activities as noted above.

g. Implementation of internal processes by business, including operational-level grievance mechanisms

Danish law does not set requirements for grievance mechanisms related to human rights due diligence.

4. Monitoring, sanction and enforcement

a. Monitoring body

Danish law does not indicate a monitoring body related to human rights or sustainability. Danish courts handle violations of Danish legislation. In relation to the Financial Statements Act requirements, the reports related to human rights form part of the management review businesses prepare and submit to the Danish Commerce and Companies Agency each year together with their annual financial statements.

b. Form of sanction(s), if any (In particular, whether monetary or other sanctions)

A liability, penalty and corporate criminal liability exists in the area of environmental pollution in accordance with the Environment Protect Act specifically when the actions governed by the law.[117]

[115] Financial Statements Act (LBK nr 1580 af 10/12/2015) 99a.
[116] Danish Business Authority official website (visited April 28) at http://csrgov.dk/faq

[117] Environmental Protection Act (LBK nr 241 af 13/03/2019) Chapter 13 Section 1-4

c. Incentives or implications, such as link to procurement, licensing or export credit

The Public Procurement Act governs public procurement in Denmark. Social and Environmental factors can be taken into account in public procurement, but it is not mandatory to do so. [118]. All public institutions that are subject to the EU Procurement Directives or the Offer Act can subscribe to the Government and Local Government Purchasing Service (SKI) and thereby make use of SKI's framework agreements.[119] The framework agreements also include requirements to the suppliers to exhibit due diligence in relation to child labour, forced labour freedom of association, gender discrimination, migrant labour and other areas across different sectors and categories. In respect to this requirement suppliers are obligated to investigate human rights risks in connection to their business activities in relation to themselves and other companies they might influence, such as major subcontractors. Simultaneously suppliers are obligated to take measures to prevent the risks. The purpose of the provisions is for instance to ensure decent work and environmental conditions in relation to the production of the products, which are purchased by the public institutions. The agreements include requirements to the suppliers to demonstrate social responsibility by adhering to a set of requirements that are based on internationally recognized principles and international initiatives, such as UN Global Compact, UN Guiding Principles on Business and Human Rights, and OECD Guidelines for Multinational Enterprises. Denmark has ratified ILO convention94, which requires authorities to insert labor clauses in all public contract, but applies only to government contracts, whereas it is voluntary for municipalities and regions.

The Investment Fund for Development and the Danish Export Credit Agency both have highlighted human rights. [120] Danish Export Credit Agency (EKF) has a number of policies that refer to human rights, such as a CSR policy, Environmental and social sustainability policy, Business and ethics policy, and a procurement policy. The CSR policy explicitly focuses on human rights and social responsibility and references the UN Guidelines, the OECD Guidelines for Multinational Enterprises, and the OECD's specific guidelines for the export and credit institutions' social and environmental standards. The EKF screens all transactions for human rights impacts and acts upon findings. Where considered relevant, the EKF performs due diligence of transactions. The Investment Fund for Developing Countries (IFU) has a process for screening and monitoring the investments, which is based on the UN Guidelines, and a handbook, which guides companies to ensure respect for human rights.[121]

d. Enforcement methods

The Danish Financial Statements Act operates with a "follow-or-explain" principle. The principle means that the board of directors of the listed company itself decides whether to follow recommendations. The listed company must explain why and how it has chosen to do so when a recommendation is not followed.

5. Procedural Framework

a. Competent Court or other body

In Denmark, there are several mechanisms, including Danish courts, the National Board of Industrial Injuries, the Equal Treatment Board, and The Mediation and Complaints-

[118] Public Procurement Act (LBK nr 1564 15/12/2015) Section 137.
[119] Danish Institute of Human Rights, Erhverv og menneskerettigheder i en dansk kontekst (2016) 25 at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/erhverv_og_menneskerettigheder_i_en_dansk_kontekts.pdf.
[120] Ibid.
[121] Ibid.

Handling Institution for Responsible Business Conduct. Danish national courts are competent bodies in relation to Danish law.

b. *Jurisdictional restrictions (including forum non conveniens, place of business incorporation)*

Danish courts may adjudicate disputes in all legal areas such as civil, labour, administrative, and constitutional law and criminal justice. According to the Criminal Code, acts committed outside the Danish territory are subject to Danish criminal jurisdiction in certain specified cases. Criminal liability presupposes that the Danish penal provision that also applies to acts committed abroad that cause extraterritorial applicability with certain requirements. Danish law does not generally regulate it whether penalties have extraterritorial applicability. Instead, the question depends on interpretation in each case of the particular penal provision.

6. Available Remedies

a. Civil, criminal and administrative remedies

Danish authorities can only prosecute criminal offenses, which are committed in other countries, if the act is committed by a person with Danish citizenship, residence or permanent residence in Denmark, and only if the act is also punishable by law at the crime scene.

b. Existence and use of judicial and non-judicial grievance mechanisms

Other non-judicial institutions, which contribute to remedy for victims of business-related human rights abuses, include Employment Tribunals, national Ombudsman, and Consumer tribunal. Denmark offers a number of various tribunals whose decisions can be tested in courts. The Investment Fund for Developing Countries (IFU) has recently established a complaint mechanism, in which people can complain about negative influences related to IFU's investments.[122] The mechanism called Danida Feedback in relation to the Danish development assistance (Danida) makes it possible for local people to make complaints about Danish development programs and activities.[123] Danida also has a whistleblower function against corruption in Danida-supported projects.[124]

The Danish Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct established the Danish Mediation and Complaint Handling Institution. The Danish OECD National Contact Point model differs from many others due to the legitimacy it receives by its founding and structure stipulated by law. Anyone can file a complaint, but the complaint must concern non-compliance with the OECD Guideline for Multinational Enterprises.[125] The incident must not have taken place more than five years ago. The Institute can handle complaints not only related to multinationals but all Danish public and private companies and the company's business associates; governmental authorities such municipalities and their business associates; and Danish private or public organisations and their business associates.[126] The Institution works in accordance with the criteria for national contact points as stated in the OECD Guidelines for Multinational Enterprises. The older Danish NCP had discussed very few cases before the enactment of the Danish Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct.

[122] Investment Fund for Developing Countries IFU official website (visited on April 29, 2019) at http://www.ifu.dk/dk/vardier/baredygtige-investeringer/grievancemechanism
[123] Danida official website, Feedback (visited on April 29, 2019) at http://um.dk/en/danida-en/about-danida/danida-transparency/feedback-to-danida/about-feedback/
[124] Danida official website, anti-corruption (visited on April 29, 2019) at http://um.dk/en/danida-en/results/anti-corruption/
[125] The Mediation and Complaints-Handling Institution for Responsible Business Conduct official website, Complaints handling (Visited April 29, 2019) at https://businessconduct.dk/complaints_handling
[126] Ibid.

The Danish Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct has the main aim is to allow mediation to solve complaints both on company level and if that is not possible, assisted by the mediation. If mediation is not possible, the institution can initiate an investigation of the matter and based on the result, make a public statement. When a complaint is approved for further consideration, the Mediation and Grievance Mechanism for Responsible Business Conduct encourages the parties to resolve the matter between the parties with dialogue. Matters resolved between the parties are not subject to any form of publication by the Institution. The Institution cannot order sanctions as such as it is not a judicial court, but it can publish public statements.

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

This is not applicable.

8. Impact of the Regulation

a. Impact of the national regulation on behaviour/ policy of businesses (both direct and indirect)

The CSR reporting requirement is a statutory requirement, which impacts around 1,100 largest Danish companies. In 2013, nearly 50% of the companies reported on CSR for the first time in the first three years of the new reporting requirement.[127]

b. Impact of the national regulation on victims and potential victims (both direct and indirect)

In 2015, the OECD carried out a review of the Mediation and Complaints-Handling Institution for Responsible Business Conduct, which concluded that it has a legal mandate and enjoys great legitimacy among stakeholders.[128] The assessment concluded that the Mediation and Complaints-Handling Institution for Responsible Business Conduct can become even more active and targeted in its efforts to inform about itself.[129]

c. Public responses of stakeholders to regulation

The Danish Institute for Human Rights noted in 2016 that the Danish response to implementing the UN Guiding Principles on Business and Human Rights has been systematic, but Denmark is far from achieving the implementation of the UN Guidelines.[130] The previous Council for Social Responsibility had been a driving force and secured broad participation and support and there had been clear results in terms of both legislation and public initiatives. With the expiry of the CSR action plan in 2015 and the creation of the new Dialogue Forum, DIHR raised fears that the process could end.[131]

Current discussion related to possible regulation is considered below.

d. Degree of overcoming of obstacles for victims to bring claims in Member State

[127] Danish Business Authority Corporate Social Responsibility and Reporting in Denmark: Impact of the third year subject to the legal requirements for reporting on CSR in the Danish Financial Statements Act (2013) https://samfundsansvar.dk/sites/default/files/csr_rapport_2013_eng.pdf
[128] Denmark National Contact Point Peer Review Report (2015) 8 at http://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf.
[129] Ibid 3.
[130] Danish Institute of Human Rights, Erhverv og menneskerettigheder i en dansk kontekst (2016) 14
[131] Ibid 15

Danish courts can handle all cases related to violations of national laws, which include human rights stands implemented to national regulation. Denmark offers remedies in the forms of courts and courts can adjudge all legal areas such as civil, labour, administrative, and constitutional law and criminal justice. However, this may not be sufficient for victims, because many abuses occur abroad and national law does not articulate human rights obligations for companies. Obstacles related to remedies are the extraterritorial application requirements and the lack of judicial organs related to human rights matters.

e. Change in industry standards, codes of conduct and other business sector activity

The Danish government has publicly promoted and published number of codes and standards that further describe the expectations and obligations related to corporate social responsibility. The key codes are noted above.

The Danish government has multi-stakeholder initiatives with business associations and enterprises such as the new Partnership for Responsible Garments Production in Bangladesh in which they have agreed on a number of detailed commitments to improve conditions within their sphere of influence.[132] The partnership, which was agreed within the framework of the Danish Ethical Trading Initiative (DIEH), will has been implemented in close co-ordination with international partners as well and stakeholders in Bangladesh.

The Danish government provides the Danish development assistance (Danida), which generally contributes to promotion of human rights and sustainable growth. [133] Companies involved in Danida Business Partnerships must integrate human rights and demonstrate due diligence. [134] The Danida Business Finance instrument requires due diligence analysis and requirements to comply with fundamental principles of ILO when providing interest-free loans to public infrastructure projects in developing countries.[135] In co-operation with the Danish Business Authority, the Ministry of Foreign Affairs offers annual CSR workshops for Danish companies and their local partners at Danish embassies.[136]

III. COMPARATIVE ANALYSIS

9. Comparisons between different regulations within the Member State

a. Corporate and directors' liability regime in case of violations or damage caused by operators in the EU parent company's supply chain, including relevant jurisprudence, even in the absence of legislation on due diligence

According to the Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct, the Institution can handle complaints related to business associates.[137] Business associates in this case means business partners, entities in the supply chain, and other non-public or public entities that can be related directly to the business activities, products or services of the company, authority organisation.

[132] Dansk Initiativ for Etisk Handel official website, Spotlight on Responsible Garment and Textile Production in Bangladesh (visited on April 29 2019) at https://www.dieh.dk/publikationer/cases/case-spotlight-on-responsible-garment-and-textile-production-in-bangladesh/
[133] Ministry of Foreign Affairs Denmark official website (visited April 29, 2019) at http://um.dk/en/danida-en/
[134] National Action Plan 12.
[135] Ibid.
[136] The Mediation and Complaints-Handling Institution for Responsible Business Conduct official website, Complaints handling (Visited April 29, 2019) at https://businessconduct.dk/complaints_handling
[137]The Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct (nr 546 of 18/06/2012) Section 3.

b. The level of "duty of care"/"due diligence" required of the business or its administrative organs, in order to fulfil their obligations, and the key elements of this legal "duty of care"

Even though the section 115 and 116 of the Danish Companies Act does not automatically articulate a duty of care, but it does imply a duty of care by the board of directors.[138] The Recommendations by the Committee for Corporate Governance clearly stipulate the obligation of management to act diligently.[139]

c. How directors' responsibility can be engaged

The Danish Companies Act states that if members of the board of directors or the executive board of a company cause damage to the company, deliberately or through negligence, they are liable to the company for damages.[140] If management causes damage to the company's shareholders, creditors or a third party, deliberately or through negligence, management is liable for damages.[141]

d. How parent companies can be held liable in the Member States for the impacts of their subsidiaries, including non-EU based subsidiaries (including in comparative areas of corporate governance such as anti-bribery and corruption, anti-money laundering, taxation, competition, health and safety)

According to the Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct Section 3 the Institution, can handle complaints related to business associates.[142] Business associates in this case means business partners, entities in the supply chain, and other non-public or public entities that can be related directly to the business activities, products or services of the company, authority organisation.

e. How companies in Member State can be held liable for the impacts of their supply chain, including non-EU based suppliers, and including suppliers beyond the first tier of the supply chain[143]

According to the Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct Section 3 the Institution, can handle complaints related to business associates[144]. Business associates in this case means business partners, entities in the supply chain, and other non-public or public entities that can be related directly to the business activities, products or services of the company, authority organisation.

IV. REGULATORY FRAMEWORK

10. Overall Review of Regulatory framework

a. To what extent the regulations are effective in terms of a) providing individuals whose rights are affected access remedy and b) adherence by Member States to their fundamental human rights obligations

[138] Companies Act (LBK nr 1089 af 14/09/2015)Section 115-117.
[139] The Committee on Corporate Governance Recommendations for corporate governance of 2017 (November 2017) 10 at https://corporategovernance.dk/sites/default/files/181211_clean_recommendations_version071218_002.pdf
[140] Companies Act (LBK nr 1089 af 14/09/2015) Section 361.
[141] Ibid.
[142] The Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct (nr 546 of 18/06/2012) Section 3
[143] First tier suppliers are understood as those suppliers with which the company does not have a direct contractual relationship.
[144] The Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct (nr 546 of 18/06/2012) Section 3

The possibility to hold companies accountable for violations in the supply-chain are extremely restricted. Denmark offers, through its court system, the possibility for judicial remedies for victims, which does not extend extraterritorial reach for most Danish national laws. No law is in force that requires companies to conduct due diligence, assess their impacts or risks or be held liable for violations in the company's supply-chain. Currently the Danish model does not offer adequate judicial remedies for victims outside of Denmark in relation to human rights.

Victims can contact the Danish Mediation and Complaint Handling Institution, but this does not serve as a judicial remedy for victims. It does offer a more valid and legitimate process compared to other NCPs due to the legal formation of the Institute.

b. Under which conditions and how victims can hold the Member State parent companies or their subsidiaries liable in case of human rights violations or other relevant damage caused within the supply chains

The possibilities to hold companies accountable for violations in the supply-chain are extremely restricted. The only possibility for judicial remedies is in the court system, which does not extend extraterritorial reach for most Danish national laws. No law is in force that requires companies to conduct due diligence, assess their impacts or risks or be held liable for violations in the company's supply-chain.

c. What are the main obstacles and difficulties

The main obstacle is the lack of human rights due diligence requirements. Even though Danish law does recognize due diligence requirements, none of them can be widely extended to human rights due diligence.

d. Which regulatory model is most effective in achieving corporate implementation of adequate due diligence

The main obstacle is the lack of human rights due diligence requirements. Even though Danish law does recognize due diligence requirements, none of them can be widely extended to human rights due diligence. It is apparent that even the existing due diligence requirements can be difficult to translate into practical steps and measures required. Denmark has introduced new initiatives and rules to ensure companies' respect for human rights, environment, climate and principles for responsible tax. These include action plans for corporate social responsibility, a mediation and complaint institution, and an action plan for the incorporation of the UNGPs. According to the below mentioned legal proposal, current rules in the Danish Financial Statements Act are not sufficient, because these only relate to reporting and do not contain any possibility that victims can raise claims against companies that are involved in serious violations of human rights. Similarly, reporting requirements do not apply to small and medium-sized enterprises, which may operate risky sectors, such as textile, shipping and food industries.

An important aspect to note is the Danish Mediation and Complaint Handling Institution, which notes the competence of the Institute to consider cases concerning non-compliance with the OECD's Guidelines for Multinational Enterprises based on a complaint or at its own instigation, brings due diligence requirements of the OECD Guidelines into a judicial context. Even though the OECD Guidelines are not legally mandatory per se, the Act the Institution was with the legal mandate. The Institute acts as the OECD NCP in Denmark.

The NCP has given a final statement in relation to the due diligence process of the Danish Ministry of Defence in relation to the contracting and building of the inspection

vessel Lauge Koch.[145] The inspection vessel was built at the Polish shipyard, Crist S. A., which is alleged to have deployed forced labour of North Korean nationality. The NCP observed that the project carried out in 2013 the Ministry of Defence was required to act in accordance of the revised OECD Guidelines from 2011. The Ministry of Defence had not documented or otherwise made probable that due diligence has been secured in other ways. The NCP has made rejected complaints and general statements.[146]

e. Which regulatory model is most effective in providing victims with access to remedy

Currently the regulatory model does not offer effective remedies for victims. Victims may bring forth claims in Danish courts against Danish companies for violations of national laws, which include human rights standards.
The Danish Mediation and Complaint Handling Institution offers a non-judicial remedy for victims. The Danish NCP does however offer a more valid and legitimate process due to the legal formation of the Institute. At least in theory at least this should provide a more beneficial remedy possibility for victims, but this has not materialized in practice to a considerable rise in cases.[147]

f. An overall assessment of the main strengths and weaknesses (risks and opportunities) of the examined legislative regimes, providing a detailed comparative analysis, including whether they are effective to address the most important potential harms and negative impact of companies in their operation and in their supply chain

Denmark has introduced new initiatives and rules to ensure companies' respect for human rights. The government has taken initiative by enforcing reporting requirements for a wider scope of companies than other countries and it has formed the NCP of Denmark with a law. Denmark has clearly taken active steps to enforce proactively certain obligations on companies. The Danish government has, however, not been effective in developing mandatory due diligence requirements and has largely focused on further developing reporting requirements and providing information to companies until recently.
Danish companies have actively adopted the Danish reporting requirements. The requirements are clear for companies to follow. The reporting requirement has been extended to include all listed Danish companies and the scope of the requirement is much wider than Finland and Sweden. Denmark has also chosen to include requirements to describe specifically due diligence process if it is used. This allows companies to further consider the actual content and process of their human rights risk and due diligence. However, this requirement could be extended to require companies to report if they do not use due diligence and to explain their decision.

One key finding is that requirements related due diligence are not foreign in the Danish legal tradition. Therefore, companies should not have difficulty in complying its general concept. These concepts do not automatically support the concept human rights due diligence. It is also apparent that it is difficult to explain in a practical, distinct and clear manner what due diligence specifically requires.

As noted earlier, the Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct brings the due diligence requirements of the OECD Guidelines into a judicial context. Even though the OECD Guidelines are not legally

[145] Danish National Contact Point for the OECD, Specific instance on the Danish NCP's own instigation: The due diligence process of the Danish Ministry of Defence in regard to the contracting and building of the inspection vessel Lauge Koch statement (September 6, 2018)
https://businessconduct.dk/file/664546/final_statement_6_september_2018.pdf
[146] The Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct official website (visited April 29, 2019) at https://businessconduct.dk/concluded-cases
[147] Ibid.

mandatory *per se*, but through the Act they act in the judicial realm through the legal mandate of the Institute. This indicates that Denmark has already accepted the concept of human rights due diligence in a legal context based on the adaptation of the Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct and the reporting requirement on due diligence. Obviously, this does not include an actual obligation to conduct due diligence, but it has enforced due diligence into mainstream corporate language and conversations surrounding compliance. Therefore the jump to enforcing and requiring human rights due diligence might not be such a far stretch.

11. Review of Proposals for Regulation

a. How would new or planned legislative regimes have changed/would change this situation

At a national level, the Danish Government has put together an inter-ministerial working group, which discusses the need for and feasibility of legislation with extraterritorial effect in areas of particular relevance.[148] The group considers the national laws and actions of other countries. The group will examine the need for judicial prosecution of severe human rights impacts as recommended by the Danish Council for CSR. The working group was discontinued in 2015.[149]

In January 2019 three parliamentary members Rasmus Nordqvist (ALT), Eva Flyvholm (EL) og Lisbeth Bech Poulsen (SF) proposed a proposal for a parliamentary resolution to make it compulsory for companies to exercise the necessary care in the field of human rights and on the introduction of effective remedies.[150] These Danish Parliament members asks the Government to present a bill that makes it compulsory for large Danish companies and small and medium-sized enterprises, which operate in particularly risky sectors or who have trade relations with high risk areas such as conflict zones, to exercise due diligence in the human rights field.[151] Due diligence means in this case that companies must identify, prevent and mitigate potential and current negative impacts on human rights and report on the efforts and results of it.[152] The proposal should also ensure access to effective remedies for victims of serious human rights violations involving businesses.

The law would adhere to recognized international standards, such as the UN Guidelines on Human Rights and Business and the OECD Guidelines for Multinational Enterprises with accompanying guidance.[153]

b. What proposals have been created and what the critiques of them have been

In January 2019, three parliamentary members Rasmus Nordqvist (ALT), Eva Flyvholm (EL) og Lisbeth Bech Poulsen (SF) proposed a proposal for a parliamentary resolution.[154] The proposal wishes to make the exercise of due diligence in the human rights field mandatory. At this point, the proposal does not include any distinct requirements or even an outline of the requirements related to due diligence.[155] As the proposal references the UN Guidelines and the OECD Guidelines, we can draw a conclusion that due diligence requirements would mirror the guidance of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines.

[148] Danish Institute of Human Rights, Erhverv og menneskerettigheder i en dansk kontekst (2016) 21.
[149] Ibid 21.
[150] Fremsat den 24. januar 2019 af Rasmus Nordqvist (ALT), Eva Flyvholm (EL) og Lisbeth Bech Poulsen (SF) Forslag til folketingsbeslutning om at gøre det lovpligtigt for virksomheder at udøve nødvendig omhu på menneskerettighedsområdet og om indførelse af effektive retsmidler, Beslutningsforslag nr. B 82 (January 24, 2019)
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Fremsat den 24. januar 2019 af Rasmus Nordqvist (ALT), Eva Flyvholm (EL) og Lisbeth Bech Poulsen (SF) Forslag til folketingsbeslutning om at gøre det lovpligtigt for virksomheder at udøve nødvendig omhu på menneskerettighedsområdet og om indførelse af effektive retsmidler, Beslutningsforslag nr. B 82 (January 24, 2019)
[155] Ibid.

The proposal is still in the very early stages of a legislative process and it has not gathered much criticism or conversation around it.

FINLAND COUNTRY REPORT

Lia Heasman[156]

I. OVERVIEW

Finland is committed to promoting the UN Guiding Principles on Business and Human Rights and the National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights was released in 2014. Separate mandatory legal human rights due diligence or environmental due diligence requirements for corporations are not currently in force. There are some other due diligence and duty of care obligations but they have not been made specifically with human rights, environmental matters or other corporate responsibility matters in mind. National law already dictates the respect for human rights in appropriate legal texts whilst a duty of care for company management is stipulated in corporate law. The non-financial information requirement requires disclosure of human rights, environmental, social and employee-related matters, anti-corruption and bribery matters in accordance with the Accounting Act. This requirement applies to public-interest companies with over 500 employees and thus privately owned companies are not in its scope. Certain requirements exist for considering social and environmental in public procurement. It is important to note that the Act on Public Procurement and Concession Contracts does not demand that social factors should be included.

The current campaign Ykkösketju by Finnish NGOs, companies and other stakeholders, lobbying for mandatory human rights due diligence began in the autumn 2018. The campaign has over 100 companies, NGOs and other members publicly supporting it and advocating for it.

In June 2019, the new Finnish Government has pledged to adopt mandatory human rights due diligence legislation in the Government's programme. Firstly, the government will conduct a study with the goal of adopting a HRDD law related to national and international corporate activity and secondly the new government will explore the possibility of an EU-wide HRDD law, which would take into account the variety of company sizes and global value chains.[157]

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

A. Corporations law

- **Limited Liability Companies Act,** Chapter 1 Section 8

The management of the company shall act with due care and promote the interests of the company.

- **Limited Liability Companies Act,** Chapter 6 Section 1

Chapter 1, section 7, contains a prohibition of decisions contrary to the principle of equal treatment, chapter 1, section 8, on the duty of care, and chapter 22 on liability in damages.

- **Limited Liability Companies Act**, Chapter 22 Section 1

[156] Lia Heasman LLD.
[157] Finnish Government, Agreement on the Government Programme, Osallistava ja Osaava Suomi - sosiaalisesti, taloudellisesti ja ekologisesti kestävä yhteiskunta (June 3, 2019) p. 62, 71 and 108.

A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall be liable in damages for the loss that he or she, in violation of the duty of care referred to in chapter 1, section 8, has in office deliberately or negligently caused to the company.

B. Health, safety and regulatory law

- **Consumer Safety Act** Section 5

Duty of care

The operator must ensure that the consumer product or consumer service does not endanger the health or property of any person, as required by the care and professionalism required by the circumstances. The operator must have sufficient and correct information on consumer goods and consumer services and must assess the risks involved.

- **Food Act** Section 16 – General requirements concerning the responsibility of a food business operator

(1) Food business operators must take sufficient care in all their operations so as to ensure that food, food premises, places of primary production and conditions for storing, transporting and handling food meet the requirements under this Act. Provisions on the responsibility of food business operators concerning food safety and withdrawing from the market any food that is not in compliance with the food regulations and ensuring the recall of food supplied to consumers are laid down in Articles 17(1) and 19 of the General Food Regulation.

-**Food Act** Section 19 – Own-checks and the keeping of records concerning own-checks of primary production

(*1) Food business operators must possess sufficient and accurate information about the food they produce, process and distribute. Food business operators must be aware of the health hazards concerning food and the handling of food, and of the critical points in their operations in terms of food safety and other requirements under Chapter 2 of this Act.*

(2) At the place of primary production, records must be kept of the implementation of own checks referred to in this section. Provisions on the keeping of records on own-checks by other food business operators are laid down in section 20.

(3) Further provisions on the keeping of records on own-checks by places of primary production are issued by Decree of the Ministry of Agriculture and Forestry.

- **Food Act** Section 20 – Own-check plan

(1) Food business operators must prepare a written plan on own-checks (own-check plan) and comply with it, as well as keep a record of its implementation. The critical points referred to in section 19 and the related risk management must be described in the own-check plan. Places of primary production are not, however, required to prepare an own-check plan.

(2) Where necessary, a sampling and testing plan and information on the laboratories where samples taken in own-check are to be tested must be attached to the own-check plan.

(3) Food business operators must keep the own-check plan up to date.

(4) Further provisions on the own-check plans of food business operators and the related keeping of records are issued by Decree of the Ministry of Agriculture and Forestry.

- **Sea Act** Section 26

The carrier is not liable if he proves that the damage is due to: (1) an error or omission committed by the master, a crew member, a pilot or any other person working on behalf of the ship during navigation or handling; or

2) a fire which has not been caused by his own fault or neglect.

However, the carrier is liable for any damage caused by the fact that he or someone acting under his responsibility has failed to exercise due diligence to ensure that the ship is seaworthy prior to the commencement of the voyage. The carrier has to show that such diligence has been respected in order to free himself from liability.

- **Sea Act** Section 14

Obligation of the carrier to control the interests of the cargo owner

The carrier must carry out the carriage with due diligence and promptness, take care of the goods and otherwise control the interests of the cargo owner upon receipt of the goods until delivery.

The carrier shall ensure that the vessel used for the carriage is seaworthy and shall also ensure that the ship is properly manned and equipped and that the cargo compartments, refrigeration and freezing rooms and other spaces of the vessel to which the goods are loaded are in good condition for receiving, transporting the goods and for preservation.

- **Work Safety Act** Section 8

The employer must take the necessary measures to ensure the safety and health of workers at work. For this purpose, the employer must take into account the issues related to work, working conditions and other working environment as well as the personal conditions of the employee.

The factors limiting the scope of the duty of care are the unusual and unforeseeable circumstances beyond the control of the employer and the extraordinary events the consequences of which could not have been avoided despite all appropriate precautions.

The employer must design, select, dimension and take the necessary measures to improve working conditions. In this case, the following principles should be observed as far as possible:

(1) prevent the occurrence of hazards and nuisances;

(2) the hazard and nuisance factors are removed or, if this is not possible, replaced by less dangerous or less harmful;

3) generally effective occupational health and safety measures are taken before the individual; and

(4) take into account the development of technology and other available means.

The employer must constantly monitor the working environment, the working environment and the safety of the working methods. The employer must also monitor the impact of the measures taken on work safety and health.

The employer must ensure that safety and health measures are taken into account in the work of all parts of the employer's organization.

C. Environmental law (including on climate change)

- **Act on Compensation for Environmental Damage**, Section 7

Persons liable for compensation- Even when the loss has not been caused deliberately or negligently, liability for compensation shall lie with a person

1) whose activity has caused the environmental damage;

2) who is comparable to the person carrying out the activity, as referred to in subparagraph 1; and

3) to whom the activity which caused the environmental damage has been assigned, if the assignee knew or should have known, at the time of the assignment, about the loss or the nuisance referred to in section 1 or the threat of the same.

In the assessment of the comparability referred to in paragraph 1, subparagraph 2, due consideration shall be given to the competence of the person concerned, his financial relationship with the person carrying out the activity and the profit he seeks from the activity.

- **Environmental Protection Act**, Section 6

Knowledge requirement

Operators shall have knowledge of the environmental impacts and risks of their operations, and of the management of these impacts and risks and ways to reduce adverse impacts (knowledge requirement).

- **Environmental Protection Act**, Section 7

Obligation to prevent and limit environmental pollution

Operators shall organise their operations in such a way that environmental pollution can be prevented in advance. Where pollution cannot be fully prevented, it shall be limited to the lowest level possible. Operators shall limit the emissions from their operations into the environment and into the sewerage system to the lowest level possible.

Activities that pose a risk of environmental pollution shall comply with the general obligations and principles laid down in chapter 2 of the Waste Act (646/2011), and with the general principles regarding the safe use of chemicals and the obligations to prevent environmental pollution and the risk of it, as provided in the Chemicals Act (599/2013) and European Union chemicals legislation.

- **Environmental Protection Act**, Section 20

General principles for activities that pose a risk of environmental pollution. The principles for activities that pose a risk of environmental pollution are:

1) proper care and caution shall be taken to prevent environmental pollution as entailed by the nature of the activity, and the probability of pollution, risk of accident and opportunities to prevent accidents and limit their impacts shall be taken into account (principle of caution and care) ;

2) a combination of various measures shall be used in providing appropriate and cost-effective means to prevent pollution (principle of best environmental practice) .

D. Administrative law

- **Public Procurement Act** (29.12.2016/1397) Chapter 1 Section 2

2) Contracting entities shall endeavour to arrange their procurement operations so that procurements can be implemented with optimal economy, quality and orderliness, taking advantage of existing competitive conditions and allowing for environmental and social aspects. To reduce the administrative functions involved in procurement, contracting entities may use framework agreements and make joint procurements or benefit from other opportunities for co-operation in competitive tendering for public procurement.

- **Public Procurement Act** (29.12.2016/1397) Section 81

The contracting entity may decide to exclude from competitive tendering a candidate or tenderer:

5) that has infringed the environmental, social and labour law obligations Finnish or European Union legislation, collective agreements, or the international treaties listed in Annex C, where the contracting entity can prove the infringement

- **Public Procurement Act** (29.12.2016/1397) Section 93

The contracting entity may impose price-quality ratio comparison criteria related to qualitative, societal, environmental or social considerations or innovative characteristics. Qualitative criteria may include technical merits, aesthetic and functional characteristics, accessibility, a design that meets the requirements of all users, operating costs, cost-

effectiveness, after-sales service and technical support, servicing and delivery date, or delivery or implementation period and other terms and conditions of delivery. The contracting entity may also consider the qualifications and experience of staff assigned to implement the procurement agreement and the organisation of staff if the quality of assigned staff may significantly affect implementation of the procurement agreement.

E. Stock exchange listing and related regulations

- **Accounting Act** Chapter 3a Section 1

Scope of application

A public-interest entity referred to in section 9 of chapter 1 that is a large undertaking whose average number of employees during the financial year has exceeded 500, has to include in its management report a statement of non-financial information.

- **Accounting Act** Chapter 3a Section 2

The statement shall include, as a minimum, information regarding how the reporting entity handles:

1) environmental matters

2) social and employee-related matters

3) respect for human rights,

4) anti-corruption and bribery matters.

The information shall be disclosed to the extent necessary to understand the implications of the reporting entity's activities.

The statement shall include:

1) a brief description of the reporting entity's business model;

2) a description of the policies pursued by the reporting entity in relation to the matters referred to in subsection 1, including due diligence processes implemented;

3) the outcome of policies referred to in paragraph 2 of this subsection;

4) a description of the principal risks related to the matters referred to in subsection 1, taking into consideration the reporting entity's business relationships, products or services and otherwise the nature and extent of its activities, the realization of which is likely to cause adverse impacts on its activities, and an explanation of how the reporting entity manages those risks;

5) non-financial key performance indicators relevant to the reporting entity's business.

Where the reporting entity does not comply with the policies referred to section 3 paragraph 2 in relation to one or more of those matters, the statement shall provide a clear and reasoned explanation for not doing so.

Where necessary, the statement shall include references to, or additional explanations of, amounts reported in the financial statements.

When preparing the statement, the reporting entity may rely on national, Union-based or international frameworks. If it does so, it shall specify which frameworks it has relied upon.

- **Accounting Act** Chapter 3 Section 3

Information relating to negotiations or developments or matters in the course of negotiations may be omitted where, in the duly justified opinion of the reporting entity, the disclosure of such information would be seriously prejudicial to the commercial position of the reporting entity. It is, however, required that such omission does not prevent a fair and balanced understanding of the impact of the reporting entity's development, performance and financial position.

F. Tort law

- **Criminal Code of Finland** Chapter 9 Section 2

Prerequisites for liability (61/2003) (1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation.

- **Tort Liability Act** Chapter 5 Section 6

Right to Compensation for Damage of Injury whose personal integrity has been seriously infringed intentionally or through gross negligence; deliberately or through gross negligence, been seriously violated in a manner comparable to other offenses referred to in paragraphs 1 to 3.

2. Scope

a. Rationale given by the State for the regulation (or lack of regulation)

The general judicial principle in Finland is that all Finnish legislation ensures human rights and fundamental rights. In Finland, the Constitution provides protection for the realisation of human rights, but it does not stipulate any obligations for companies.[158] Finland is committed to promoting the UN Guiding Principles on Business and Human Rights and the National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights was released in 2014.[159] The current campaign Ykkösketju by Finnish NGOs, companies and other stakeholders, lobbying for mandatory human rights due diligence began in the autumn 2018.

Separate mandatory legal human rights due diligence or environmental due diligence requirements for corporate are not currently in force. There is however growing interest and support for a mandatory corporate responsibility law regulating human rights due diligence. However according to the National Action Plan on the implementation of the UN Guiding Principles on Business and Human Rights from 2014, the administrative burden of companies will not be increased and in order to ensure a balanced result, all further actions are prepared in extensive cooperation with various stakeholders[160]. The working group behind the Action Plan emphasized the need to identify best practices and the concept of more functional international specifications. Similarly the Action Plan noted that it is difficult to consider that human rights due diligence would be made into a legal obligation.[161] This outlook was commonly the general opinion of various governmental and non-governmental parties before the start of the current lobbying campaign. According to the Action Plan, the problem with a legal obligation would be to attempt to define the actual obligation of due diligence.[162] National law in this sense already dictates the respect for human rights in appropriate legal texts whilst a duty of care for companies' management is stipulated in corporate law. However, according to the Action Plan, extending national legislation to apply to international operations is even more challenging and current existing regulation does not extend to international actions.[163]

Certain requirements exist for considering social and environmental in public procurement. The Act on Public Procurement and Concession Contracts allows the

[158] The Constitution of Finland 11 June 1999 (731/1999), Chapter 1 Section 1
[159] National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights (Publications of the Ministry of Employment and the Economy 46/2014) https://tem.fi/documents/1410877/3084000/National+action+plan+for+the+implementation+of+the+UN+guiding+pronciples+on+business+and+human+rights/1bc35feb-d35a-438f-af56-aec16adfcbae/National+action+plan+for+the+implementation+of+the+UN+guiding+pronciples+on+business+and+human+rights.pdf
[160] National Action Plan, Government covering note on the UN Guiding Principles on Business and Human Rights National Action Plan.
[161] National Action Plan, 25.
[162] Ibid.
[163] Ibis.

inclusion of social factors in procurement practices. [164] In the Resolution on Corporate Social Responsibility[165], which is not binding, the Finnish Government encourages public procurers to consider social aspects in procurement and the Ministry of Employment and Economy has published a Guide to Socially Responsible Procurement and has a CSR-compass website.[166] The guide mentions that the inclusion of social factors in public procurement is one way for the government to execute the UN Guiding Principles.

It is important to note that the Act on Public Procurement and Concession Contracts does not demand that social factors should be included. The Act on Public Contracts is a procurement law, which does not enforce which factors decide the procurement, but sets the outlines for the process to be transparent, non-discriminatory and equal. Social factors can be included and must be in accordance with the general principles of transparency, relative, equality, reciprocity, non-discrimination and EU legal principles. Human rights or environmental matters therefore do not have to be a deciding factor in public procurement. Procurement divisions should have a strategy in place on how to social factors are considered in procurement, which includes the inclusion of human rights risk assessments for certain procurements. [167] Risk assessments should be included in the planning stage to consider which type of social matters may arise.[168] Procurement contracts, according to the guide, should determine that employment standards must follow Finnish law, but can contain standards in relation to ILO core conventions and UN Convention on the Rights of the Child[169]. Similarly monitoring can be done by for example third party auditors.[170] These audits could be BSCI audits or SA 8000 certified audits.[171]

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

The Limited Liabilities Company Act applies to registered companies, which can be private (private company) or public (public company). The non-financial information regulation of the Accounting Act applies to publicly listed companies with more than 500 employees.[172]

The Act on Public Procurement and Concession Contracts applies to public procurement when the financial value of the procurement exceeds certain threshold sizes in accordance with the Act.[173] Separate procedural obligations are set depending whether the financial value exceeds an EU threshold in which case all procedural rules are or whether the financial value exceeds a national threshold in which case only certain procedural rules are followed.[174] The Act does not apply if the value does not exceed either thresholds, but the procurement must occur in accordance the principles of transparency and non-discrimination.

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights

[164] The Act on Public Procurement and Concession Contracts (29.12.2016/1397) Chapter 1 Section 2.
[165] Valtioneuvoston periaatepäätös yhteiskunta- ja yritysvastuusta (2012) 6 at https://valtioneuvosto.fi/documents/10184/1210166/yhteiskuntajayritysvastuu140411.pdf/f963e159-3ef5-4e0f-a7ad-e93de1f954ce/yhteiskuntajayritysvastuu140411.pdf.pdf
[166] Guide to socially responsible public procurement (December 2017) at http://urn.fi/URN:ISBN:978-952-327-285-9
[167] Ibid, 9.
[168] ibid, 15.
[169] Ibis, 35.
[170] Ibid 32.
[171] Ibid, 43.
[172] Accounting Act (1336/1997) Chapter 3a Section 1.
[173] The Act on Public Procurement and Concession Contracts Chapter 4 Section 25-31.
[174] Public Procurement official website, threshold (visited on April 29, 2019) at https://www.hankinnat.fi/mika-julkinen-hankinta/kynnysarvot

Effective regulation does not currently specifically mention human rights, environmental, climate change or sustainability matters in relation to human rights. The duty of care in the Limited Liabilities Act does specifically concern governance matters.

Certain soft law guidance by the government, such as the Human rights impacts of own operations: Insights for due diligence [175] and the Guide to Socially Responsible Procurement, detail examples of specific human rights, but these are given as examples. The Guide to Socially Responsible Procurement notes as examples of contractual terms rights such as freedom of organisation and right to collective bargaining, non-discrimination and equality, and abolition of child labour and forced labour. [176] For example, the Guide illustrates the requirements set by all tenderers seeking contracts to supply goods for the company by Hansel Ltd..[177] Similarly, the Guide gives an example of how Alko has incorporated a section on ethics in its procurement contract term.[178] The Guide also has an example how the Finnish Defence Forces has set out requirements for tenderers in its textile supply contracts exceeding the European Union threshold value[179]. The Insights for due diligence references The Universal Declaration on Human Rights the International Covenant on Civil and Political Right, and the International Covenant on Economic, Social and Cultural Rights.[180] The Insight offers guidance in mitigating risks related to occupational health and safety, discrimination, forced labour, adequate wage, excessive work hours, land rights and freedom of association.[181]

d. Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation

Legal obligations for corporate action outside of Finland does not exist.

e. Civil, criminal and administrative scope

Companies can have criminal liability in accordance the Criminal Code of Finland. A legal person whose activities are subject to a criminal offense can be convicted of a criminal offense, if it is a criminal offense under the Criminal Code.[182] A legal person is convicted of a corporate fine if its statutory body, executive, or a person exercising effective decision-making power in a legal person, has been involved in a crime, allowed a crime to occur, or if the conduct in question has not been exercised with duty of care and caution to prevent crime.[183]

3. Content of Regulation

a. Overview and description of the required measures for business (such as requirement to adopt human rights due diligence or a vigilance plan)

Companies are required to ensure that the products they sell are safe for consumers and users. This includes an obligation to conduct duty of care on whether the products can cause danger to health or property of the consumer and in an extent that is reasonable in relation to the circumstances and professional ability.[184] Due diligence in the broad sense includes that the operator must provide adequate information to consumers in their marketing so that consumers can evaluate the associated hazards of consumer

[175] Publications of the Ministry of Economic Affairs and Employment, Human rights impacts of own operations: Insights for due diligence (2018) at http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160573/TEMrap_4_2018_Human_rights.pdf?sequence=1&isAllowed=y
[176] Guide to Socially Responsible Procurement (December 2017) 40 at http://urn.fi/URN:ISBN:978-952-327-285-9.
[177] Guide to Socially Responsible Procurement (December 2017) 36 at http://urn.fi/URN:ISBN:978-952-327-285-9.
[178] Ibid 37.
[179] Ibid 38.
[180] Human rights impacts of own operations: Insights for due diligence, 11.
[181] Ibid, 17-35.
[182] Criminal Code (19.12.1889/39) Chapter 9 Section 1.
[183] Ibid Chapter 9 Section 2.
[184] Consumer Safety Act (2011/920) Section 5.

goods and consumer services. The Supervisory Authority, Finnish Safety and Chemicals Agency, can require operators to give consumers information in a suitable way on the prevention or prevention of the risks associated with the use or operating instructions necessary.

Companies operating in the food industry are mainly responsible for the safety of their products in accordance with the Food Act. Companies must act with an adequate level of duty of care.[185] This specifically applies to ensuring that food products comply with applicable laws and regulation. This also requires companies to have a level of sufficient and truthful information of all products and production.[186] Each company must have an own check plan, which describes the risks associated with its operations and the process to manage those risks.[187] This includes risks related to hygiene, safety, environment and work safety. Government officials verify the own check plan with site visits.

The knowledge requirement of the Environmental Protection Act requires knowledge of environmental impacts and environmental risks of each company's operations and all the possibilities to reduce such impacts according to government proposal on the Act.[188] The knowledge requirements is part of the overall principle of caution and care in relation to environmental matters. In legal praxis in Supreme Court ruling KKO 2016:58, this requirement was connected to the Act's Chapter 4 environmental permit requirement. However, the knowledge requirement is in this case attached solely to the information required for environmental permits and thus does not go further than information detailed to attain a permit and the information required to be monitored during the possession of such a permit.[189]

The Finnish Ministry of Employment and the Economy organized with the Ministry of Foreign Affairs the Grocery trade's round table, which discussed the respect of human rights in purchasing. It released a common view by specific Finnish grocery retailers, NGOs and authorities, which sets out the common understanding on how to implement the UN Guiding Principles on Business and Human Rights across the purchasing chains of the grocery trade and specifically in relation to human rights due diligence.[190] The common view is not mandatory, but both major Finnish grocery retailers Kesko and SOK publicly advocate it.[191] The due diligence process takes into account some special characteristics of the grocery retailers, but in general it details the process of human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights. It does note specific cases and examples of human rights related problems. The Ministry of Economic Affairs and Employment organized a similar round table for other companies from various sectors, but the participants did not reach or release a common view.

b. Risk assessment requirements and risk mitigation measures

The Consumer Safety Act specifically requires operators to assess risks related to their products and their use. Any actual assessment related to this is not specifically required, but companies are required to assess risk in a manner that is reasonable in relation to the circumstances of each case. [192]Therefore products that maybe more dangerous for consumers or their health require that risks are detailed more in detail.

The Common View of grocery retailers (referred to above) details that specifically adequate risk assessments, monitoring assessments and reacting to risk is central.[193] According to the Common View active actions can ensure that grocery retailers can

[185] Food Act (2006/23) Chapter 3 Section 16.
[186] Food Act, Chapter 3 Section 17.
[187] Food Act, Chapter 3 Section 20.
[188] Environmental Protection Act (2014/572) Chapter 2 Section 6; HE 214/2013
[189] Supreme Court of Finland (KKO 2016:58)
[190] A Shared Vision for Respecting the UN Guiding Principles on Business and Human Rights in Grocery Trade Supply Chains (20 August 2015, Update 4 April 2017) at https://tem.fi/documents/1410877/3084000/UNGP+grocery+trade_en/54a9d248-7467-4903-8f2a-99a975445b27/UNGP+grocery+trade_en.pdf
[191] Ibid, 15.
[192] Consumer Safety Act (2011/920) Section 5.
[193] A Shared Vision for Respecting the UN Guiding Principles on Business and Human Rights in Grocery Trade Supply Chains 11.

eliminate their participation in contributing to negative impacts. The Common View also notes third-party audits in accordance with international standards such as ISO 17065 as important factors in human rights due diligence.[194]

According to the National Action Plan Finland will support the strengthening of human rights assessments in third countries during EU trade or investment agreement negotiations and when monitoring their implementation.[195] Finland shall make use of the human rights impact assessments in forming its own opinions related to trade policy positions.

c. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers

Finnish law does not specifically discuss supply-chain matters. However from the Food Act and Consumer Safety Act due diligence requirements can be extended to the supply-chain.

The non-mandatory Common View of grocery detailers only applies to supply-chains abroad and does not focus on human rights impacts in Finland.[196]

d. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

No such requirement is in force.

e. Transparency and disclosure requirements

The non-financial information requirement requires disclosure of human rights, environmental, social and employee-related matters, anti-corruption and bribery matters in accordance with the Accounting Act.[197] The requirement applies to public-interest companies with over 500 employees and thus privately owned companies are not in its scope.[198]

Non-financial information statements are part of auditing and the auditor's accountability in accordance with the Accounting Act.[199] Therefore, the information must be true and fair in accordance with the Accounting Act. If the report is presented as a separate report from the annual report, the auditor shall state in its audit report if the information in the financial statements and the separate report is not consistent.

f. Implementation of internal processes by business, including operational-level grievance mechanisms

Finnish law does not set requirements for grievance mechanisms related to human rights.

The Common View does not set out any expectation for offering remedies or grievance mechanisms, but encourages companies, NGOs, unions and governmental authorities to develop new grievance mechanisms that specific factories and clients could better use them.[200]

4. Monitoring, sanction and enforcement

[194] Ibid 5-17.
[195] National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights (Publications of the Ministry of Employment and the Economy 46/2014) 18.
[196] A Shared Vision for Respecting the UN Guiding Principles on Business and Human Rights in Grocery Trade Supply Chains 6.
[197] The Accounting Act Chapter 3a Section 2.
[198] Ibid Chapter 3a Section 1.
[199] Ibid Chapter 3a Section 6.
[200] A Shared Vision for Respecting the UN Guiding Principles on Business and Human Rights in Grocery Trade Supply Chains 15.

a. Monitoring body

Specific monitoring bodies exist in relation to due diligence requirements set in specific national laws, but not for human rights due diligence.

Parliamentary Ombudsman has the task of ensuring that all government departments and officials follow the law and can handle complaints in relation to public authority or an official has not observed the law or fulfilled a duty, or if fundamental and human rights have not been appropriately implemented. [201] The Ombudsman can investigate complaints if it gives ground for the suspicion that an authority or official has acted unlawful.

b. Form of sanction(s), if any (In particular, whether monetary or other sanctions)

Liability for violations by the management of duty of care is noted in the Limited Liability Companies Act, but this liability exists solely towards the company itself.[202] When this liability is towards others than the company in question, the management has also had to violate another section of law or the company's articles of association.[203]

The Consumer Safety Act is a general law and it does not apply when there exists separate laws related to product safety elsewhere. Liability for violations of Consumer Product Safety is in the Criminal Code of Finland, which requires that liability may arise from gross negligence or deliberately.[204] Those liable for damages may include the manufacturer or importer of the product and the person who has marketed the product. It is a condition of liability that the product in question has not been as safe as it was supposed to be. In this case, the safety of the product has been inadequate and consequently damage has been caused. Damage by the product and specifically defective product safety as well as the causal relationship between the products must be demonstrated to obtain compensation.

In the Act on Compensation for Environmental Damage, the strict liability ensures that companies can always be liable of environmental damage regardless of negligence or deliberation. The liability is towards people who are outside of the company or with whom the company does not have a contractual obligation. This is because the liability is linked to existence and cause of environmental damage. It is possible to connect this liability to the sections of Limited Liabilities Act on the duty of care and liability of management if the management has not acted with duty of care.[205] As long as the cause and effect are likely, liability can arise.[206]

c. Incentives or implications, such as link to procurement, licensing or export credit

Public procurement is described above.

Finland's official export guarantee company, Finnvera, updated its policy in 2016 for evaluating the environmental and social impacts of projects. Finnvera takes into account the principle of sustainable development and environmental and social impacts as part of the project's overall risk assessment when Finnvera grants export credit guarantees and conforming export credit guarantee conditions. [207] Finnvera adheres to the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence adopted by the Organisation for Economic Co-operation and Development (OECD), which are also grounded the UN Guiding Principles on Business and Human Rights; the ILO Declaration on Fundamental

[201] Parliamentary Ombudsman of Finland official website (April 29, 2019) at https://www.oikeusasiamies.fi/en/eoa
[202] Limited Liabilities Act (624/2006) Chapter 22 Section 1.
[203] Ibid.
[204] Criminal Code (19.12.1889/39) Chapter 44 Section 1.
[205] Supreme Court of Finland (KKO 2016:58)
[206] Act on Compensation for Environmental Damage (737/1994) Section 3.
[207] Finnvera official website (visited on April 28, 2019) at https://www.finnvera.fi/eng/export/export-credit-guarantee-operations/export-credit-guarantee-operations

Principles and Rights at Work; the UN Framework Convention on Climate Change; and the OECD Guidelines for Multinational Enterprises.[208]

Finnvera uses screening, classification and review of projects. Social and environmental impacts are identified during the screening and classification of projects. The purpose of the screening is to identify the applications covered by Finnvera's project evaluation. The screening and classification of projects indicates the level of potential negative environmental and social impacts that will determine the appropriate scope of impact evaluation. The classification classifies projects into three categories based on the significance of plausible adverse environmental and/or social impacts. Screening is made by information provided on application forms. For applications where Finnvera's risk exceeds 10 million euros and applications, irrespective of the size of the risk, where the associated project is located in a sensitive area or can have an adverse impact on a sensitive area or involves the likelihood of severe project-related human rights impacts, the application and other information are used to determine whether the application is associated with a project that requires classification. Finnvera's project review encompasses the whole project even when export financing is granted only for a part of the project or for an individual delivery of equipment that is associated with a project. The project category given by Finnvera determines the level of the background studies required by the project. These stage may include environmental and social impact assessments. The owner of the project company and/or the main supplier for the project and/or the project sponsor and/or the exporter is responsible for ensuring that the background studies required by the project category are made or commissioned. The applicant for export financing is responsible for supplying the information to Finnvera.

Finnvera website notes that social impacts may be associated with factors such as: labour rights and working conditions; community health and safety and security; land acquisition and involuntary resettlement; the rights of indigenous peoples; cultural heritage; and project-specific human rights factors, such as forced labour, child labour and occupational health and safety situations posing a threat to human life. Finnvera employs a human rights analyst and trains its personnel to identify environmental and social aspects and to assess the related risks.

d. Enforcement methods

No enforcement methods related to human rights or environmental matters in place.

5. Procedural Framework

Finnish courts can process claims in accordance with Finnish law.

6. Available Remedies

a. Civil, criminal and administrative remedies

Finnish courts offer legal remedies in relation to violations of Finnish law, which includes Companies Act and other laws detailing duty of care obligations. The General Courts are District Courts, Court of Appeal and Supreme Court. District courts deal with litigation and criminal matters. Administrative courts are administrative courts and the Supreme Administrative Court with administrative courts generally deal with complaints made of decisions by government authorities.

The Ministry of Employment and Economy together with the Committee on Corporate Social Responsibility act as the National Contact for the OECD.

b. Existence and use of judicial and non-judicial grievance mechanisms

[208] Ibid.

The Ministry of Employment and Economy together with the Committee on Corporate Social Responsibility act as the National Contact for the OECD. The Finnish NCP has handled two different instances.[209] According to the Government Decree (591/2008) at the request of the Ministry, the Committee can express its view on whether enterprises have acted in accordance with the Guidelines. The first instance was regarding Pöyry Plc and the Xayabury hydropower project. Pöyry had claimed not to have complied with the OECD Guidelines' recommendation on sustainable development and several other environmental recommendations and demonstrated a lack of due diligence as referred to in the chapters on environmental impacts and human rights impacts in the guidelines. In the final statement, the NCP concluded that Pöyry had not violated the OECD guidelines, but it was justified to expect Pöyry to more aware of its overall role in relation to the project.[210] The second instance has been related to the closure process of Stora Enso's Corbehem factory. The NCP viewed that Stora Enso had notified in advance and good time workers and authorities required by French legislation. The complainant did not respond to repeated requests by the Finnish and French NCPs and thus the NCP did not consider it appropriate to continue with a detailed assessment of the case, because the complainant had not exercised its opportunity to respond to Stora Enso Oyj.[211]

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

This is not applicable as no human rights due diligence requirements or environmental due diligence requirements exist.

8. Impact of the Regulation

Finland reports the UN Committee on the Rights of the Child on the Implementation of the recommendation by the Committee on Business.[212]

III. COMPARATIVE ANALYSIS

9. Comparisons between different regulations within the Member State

a. Corporate and directors' liability regime in case of violations or damage caused by operators in the EU parent company's supply chain, including relevant jurisprudence, even in the absence of legislation on due diligence

The duty of care according to the Limited Liability Companies Act requires the company's management to act with duty of care and to make decisions based on efficient information.[213] The Act does not define the actual content of duty of care, but a general business judgment rule is applied when its limits are considered. The duty of care requires that management base their decisions on adequate information, make logical decisions and their actions are not influenced by conflicts of interests. Legal praxis has

[209] Ministry of Economic Affairs and Employment official website, Handling Specific Instances of the OECD Guidelines for Multinational Enterprises (visited on April 28, 2019), at https://tem.fi/en/handling-specific-instances-of-the-oecd-guidelines-for-multinational-enterprises

[210] Ministry of Employment and the Economy, Pöyry Plc and the Xayaburi hydropower project in the Lao PDR; OECD's guidelines for multinational enterprises; Statement of the national contact point, Unofficial translation (June 10, 2013) 12 at: https://tem.fi/documents/1410877/3104828/P%C3%B6yry+NCP+Final+Statement+EN.pdf/974194d1-3fbd-440d-8c8a-e08e440941e7/P%C3%B6yry+NCP+Final+Statement+EN.pdf.pdf

[211] The Ministry of Economic Affairs and Employment Finland, OECD National Contact Point's Final Statement regarding following OECD Guidelines in the closure process of Stora Enso's Corbehem factory in France, Statement (March 29, 2017) at https://tem.fi/documents/1410877/3104828/OECD+Final+Statement+regarding+Stora+Enso.pdf/b0390e4b-c953-412e-90dd-623032aba4ec/OECD+Final+Statement+regarding+Stora+Enso.pdf.pdf

[212] Ombudsman for Children Finland, Report to the UN Committee on the Rights of the Child (2011) at http://lapsiasia.fi/wp-content/uploads/2015/04/report_to_UN_committee.pdf

[213] Limited Liability Companies Act (624/2006) Chapter 1 Section 8

concluded that the duty of care can be extended to include of human rights and environmental matters.[214] However it is important to note the duty of care is solely towards the company and its shareholders and thus not towards other stakeholder groups. The duty of care in the requirement specifically requires management to act in the best interest of the company in question and thus liability only applies in the scope of the company in question.

In the Supreme Court Decision KKO 2016:58 the liability of the members of the management of a limited liability company for the environmental damage was in question.[215] The case does hold precedence as there has been very few such court cases in Finland. At the center of the case was whether corporate management could be held liable and guilty of environmental degradation by neglecting their obligations as members of the board of directors.[216] The Supreme Court held that the negligence of two members of a three member Board of Directors was gross considering that they had not familiarized themselves with the content of the environmental permit. Similarly the court ruled that they had deliberately neglected their duty to arrange and supervise matters related to the permit.

b. The level of "duty of care"/"due diligence" required of the business or its administrative organs, in order to fulfil their obligations, and the key elements of this legal "duty of care"

Duty of care according to the Limited Liability Companies Act requires the company's management to act with duty of care and to make decisions based on efficient information.[217] A certain level of risk and risk approach is always attached to corporate decisions and thus the level of risk appetite must be appropriately attached to the level of adequate information and knowledge that the decision is based on. The provisions on liability of management are not intended to prevent business risks being taken as long as the decision-making process is consistent and based among other things on up-to-date and reasonably available information. The more significant the action of society and the company is, the more they should act with care.

c. How directors' responsibility can be engaged

The Limited Liabilities Act provides that companies may have a Board of Directors, a Managing Director and a Supervisory Board.[218] The Board of Directors shall see to the administration of the company and the appropriate organisation of its operation whilst the Managing Director shall see to the executive management of the company in accordance with the instructions and orders given by the Board of Directors.[219] Therefore, operational daily activities belong to the activities of Managing Director. However, the Managing Director may undertake measures that are unusual or extensive in view of the scope and nature of the activities of the company only if so authorised by the Board of Directors. It is not defined whether matters related to human rights due diligence or environmental due diligence are under the supervision of the Managing Director or Board of Directors. Based on the Act, however, the Board of Directors can transfer and delegate certain aspects to the Managing Director. It may be difficult to determine which of the two - the management or the CEO - is responsible for the act that caused the damage. The premise is that the more significant the action is, the more likely it belongs to the board's competence. In the discussed case (KKO 2016: 58) the CEO had not informed the Board of the company's environmental activities.[220] The Board

[214] Supreme Court of Finland (KKO 2016:58)
[215] Ibid.
[216] Ibid.
[217] Limited Liability Companies Act (624/2006) Chapter 1 Section 8
[218] Limited Liability Companies Act (624/2006) Chapter 6 Section 1
[219] Ibid Chapter 6 Section 2.
[220] Supreme Court of Finland (KKO 2016:58)

had confidence that the CEO was responsible for the appropriateness of the environmental actions, because of the agreed upon work division that was established in practice. It is important that the Board of Directors should on its own initiative consider the appropriateness of environmental activities. The Supreme Court held that the negligence of two members of a three member Board of Directors was gross considering that they had not familiarized themselves with the content of the environmental permit. Similarly the court ruled that they had deliberately neglected their duty to arrange and supervise matters related to the permit.

Chapter 22 Section 1 of the Limited Liability Companies Act provides for the liability of a senior manager of the company.[221] A senior executive is a member of the Board of Directors, the Board of Directors and the CEO. According to the section, the company's manager must compensate the company for any damage that he or she has deliberately or negligently caused to the company in violation of the duty of care.

Environmental obligations are primarily binding on the company[222], but due to the other responsibilities of the management, management should ensure that environmental legislative provisions are properly implemented. According to the provisions of the Limited Liabilities Act, the management of the company is responsible for decision-making concerning the company, proper organization of operations and supervision of the implementation of operations.[223] The pursuit of the company's interests could involve environmental obligations of the company, as well as the implementation of environmental responsibility that is independently implemented. Management should ensure that the company complies with all legal obligations related to environmental matters and management does have a duty of care towards these decisions.

Management may avoid liability towards their companies if they acted with a duty of care.[224] It is possible for management to avoid its obligation to pay compensation by the fact that the decision was made on appropriate information[225]. As management's diligence is always assessed afterwards, management should pay attention to the fact that sufficient documentation has been made for all their actions. However, the strict liability of environmental damages requires companies outside of their company to be liable regardless of due diligence.[226] For management this requires a level of cause for the damage. According to the presumption of negligence, a member of the Board of Directors is deemed to have caused the damage by negligence, unless he or she proves to have acted diligently.[227] The circumstances of the case determine what kind of diligence the management should exercise at any given time.

d. How companies in Member State can be held liable for the impacts of their supply chain, including non-EU based suppliers, and including suppliers beyond the first tier of the supply chain[228]

Liability in contractual relationship are in various national laws, such as the Sale of Goods Act. The general provisions on non-contractual liability are in the Damages Act. According to it, persons who deliberately or negligently cause damage to another are liable to compensate the damage.[229] In Finland, parties are only liable for their own actions. An exception is that employers have a responsibility for damage caused to a third party by negligence on the part of his employee.[230]

[221] Limited Liability Companies Act (624/2006) Chapter 22 Section 1
[222] In relation Environmental Protection Act (2014/572) and the Act on Compensation for Environmental Damage (737/1994)
[223] Limited Liability Companies Act (624/2006) Chapter 6 Section 2
[224] Limited Liability Companies Act (624/2006) Chapter 22 Section 1
[225] Compared to Limited Liability Companies Act (624/2006) Chapter 1 Section 8
[226] Act on Compensation for Environmental Damage (737/1994) Section 7
[227] Supreme Court of Finland (KKO 2016:58)
[228] First tier suppliers are understood as those suppliers with which the company does not have a direct contractual relationship.
[229] Damages Act (412/1974) Chapter 2 Section 1.
[230] Damages Act (412/1974) Chapter 3 Section 1.

e. The burden of proof to hold a business or its board/director liable for human rights or other impacts, including which regulations are the most efficient for victims in this respect

As a rule, the burden of proof lies with the person claiming to be entitled to damages. Thus, if a manager is alleged to have acted, for example, negligently in the performance of his duties and the resulting damage, then he must be able to prove that he was negligent and the associated damage.

If a person of management who is claimed to have violated the Limited Liabilities Act or the Articles of Association, which results in damage, the manager must prove themselves to have acted careful to avoid.[231] The reversed burden of proof also applies if the damage is caused by a legal action in favor of a related party.

IV. REGULATORY FRAMEWORK

10. Overall Review of Regulatory Framework

According to the National Action Plan Finland offers sufficient judicial remedies through its court system. The possibilities to hold companies accountable for violations in the supply-chain are extremely restricted. The only possibility for judicial remedies is in the court system, which does not extend extraterritorial reach for Finnish national laws.

No law is in force that requires companies to conduct due diligence, assess their impacts or risks, or be held liable for violations in the company's supply-chain.
The current duty of care obligations of the Limited Liabilities Act set a balance between obligation for a level of care and the practical realities of corporate operations. With an extremely high-level of legal obligations, it may be impossible to get people to join as executives in companies.

The Limited Liabilities Companies Act does not specifically detail human rights or environmental matters. Even though legal praxis has extended the duty of care to include knowledge of environmental impacts. However as no human rights due diligence requirements exist it is difficult to extend duty of care to include human rights. Therefore, at least some level of human rights due diligence requirements would allow the possible extension of the duty of care also to human rights matters.

Finland offers through its court system the possibility for judicial remedies for victims in Finland. Currently the Finnish model does not offer adequate judicial remedies for victims outside of Finland. Victims can contact OECD national contact point of Finland, but this does not serve as a judicial remedy for victims.

It is clear that Finland does not require companies to conduct human rights due diligence. There are some other due diligence and duty of care obligations, but they have not been made specifically with human rights, environmental matters or other corporate responsibility matters in mind. Non-financial information requirements focus on naming risks and the manners in which such risk is monitored. The inclusion of NFI to auditing requirements does give the statements credibility, but it is important to remember that only roughly 150 companies are in its scope.

Currently the Finnish law does not specifically attach environmental or human rights due diligence as an obligation for companies. The duty of care has been to some extent applied to an expectation to make business decisions based on proper environmental

[231] Limited Liability Companies Act (624/2006) Chapter 22 Section 1

information in legal praxis and to have a level of duty of care towards environmental risks. This application has not been common, but certain legal praxis (KKO 2016:58) does exist.

The current duty of care of company management could be more widely interpreted to include environmental and human rights matters. This has however not been the case. The legal praxis of Finland has considered environmental matters at least in some extent to be included in the duty of care of management. This however does not extend this requirement to all environmental impacts or environmental matters. Even with this limitation, it does require management to have a level of understanding towards their company's environmental impacts. Something similar might be required for human rights, which would require clear and defined requirements for companies in relation to human rights. If human rights matters or environmental actions can be considered significant both for the company and for society, the involvement it could be expected that the board would pay particular attention to the appropriateness of actions related to these matters.

The problem with even the current duty of care and due diligence requirements is their unclear content. The due diligence requirement in the Consumer Safety Act already existed in the previous Product Safety Act, but the due diligence requirements had been considered by operators to be unclear. The government had released guidance on the issue but operators had still struggled to define the required level of risk due diligence.

11.Proposals for Regulation

In September 2018 a Finnish #Ykkösketjuun-campaign was published, which attempts to promote and lobby for a mandatory law regulating human rights due diligence.[232] The aim is to lobby for the new law during the parliamentary election in the spring of 2019 and to have the new Finnish government to write a clear and distinct objective for the law in the new government's government programme.

The campaign has over 100 companies, NGOs and other members publicly supporting it and advocating for it. Central NGOs such as Finnwatch, Amnesty International, Plan International, Save the Children, UNICEF Finland and World Vision are part of the campaign. Similarly employee unions such as Central Organisation of Finnish Trade Unions, the Trade Union Solidarity Centre of Finland SASK, Industrial Union at the Confederation of Unions for Professional and Managerial Staff in Finland. Major Finnish companies, such as SOK, Kesko, Paulig and Fazer publicly advocate and support the campaign.[233] There not members to the campaign, but have endorsed it. These include Finnish retailers such as Stockmann and Tokmanni.[234]

From the beginning the campaign has not detailed any plan or details for the law, but only had a general mutual objective of promoting a legal obligation for human rights due diligence. Even after the election on April 14th 2019, the campaign does not publicly support any detailed view or text. This allowed for large corporations and for example Finnwatch to support the same campaign. However, it has given the possibility for every member of the campaign to lobby their own view and for the conversation around the campaign maybe take a turn that not all parties any more support.

As the campaign has never specified detailed plans for the regulation, there exists a number of differing views on the subject even within the campaign. One of the key organizers, Finnwatch, has promoted a more an all-inclusive human rights due diligence law based on the UN Guiding Principles on Business and Human Rights, which would specifically require the actions of human rights due diligence.[235] The Finnish law would thus differ from other national laws by not requiring reporting, but actually attempting to

[232] Ykkösketjuun official website https://ykkosketjuun.fi/en/
[233] Ykkösketjuun official website, tietoa meistä (visited on April 29) at https://ykkosketjuun.fi/tietoa-meista/
[234] Ibid.
[235] Ykkösketjuun official website, tietoa meistä (visited on April 29) at https://ykkosketjuun.fi/tietoa-meista/

define specific and actual due diligence requirements for companies across all sectors. This regulation would apply to all companies operating in Finland regardless of their revenue, size or financial structure. They have publicly advocated that certain sectors, such as textile, must be included even if certain thresholds may exist regardless of size. Similarly, Finnwatch has specified they wish to have the law have sanctions and a remedy body in the form of the Finnish court system or a separate judicial committee to consider claims in a remedy role. A number of parliamentary candidates has supported this view.

Not all companies support the details of this view. The possibility of court remedies or a specific judicial committee has similarly been widely criticized by a number of Finnish companies. Finnish companies that did not join the campaign have expressed of its possible content and limitations.

It is important to note that the parties that will form the government will not only dictate whether such a law will come into force, but also its details and scope.

FRANCE COUNTRY REPORT

Elsa Savourey[236]

I. OVERVIEW[237]

1. Overview of the main features of the French Law of the Corporate Duty of Vigilance

France has been at the forefront of legislative approaches incorporating into domestic hard law human rights and environmental due diligence. This results from the enactment of the Law No 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies (the "Vigilance Law") [*Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*].

Companies that enter into the scope of the Vigilance Law have to prepare a vigilance plan. The plan must contain reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment. These measures must cover the activities of these aforementioned companies and of the companies they control as well as certain entities with whom they have business relationships.

As will be discussed in this report, the Vigilance Law only applies to a limited number of companies (between 150 and 300 according to various estimates). Nevertheless, the number of companies that fall into the ambit of a company's vigilance plan (and are therefore concerned by the reasonable vigilance measures) is larger.

The obligations set out in the Vigilance Law (the "Vigilance Obligations") are three-fold. They go beyond simple reporting and require companies to: 1) establish a vigilance plan; 2) effectively implement it; and 3) make the plan and the report on its effective implementation public as well as include both of them in the company's annual management report. As this report will explain, the vigilance plan is the cornerstone of the Vigilance Law.

In the event of a breach of the Vigilance Obligations, three sanctions are provided in the Vigilance Law: 1) an injunction (with a possible periodic penalty payment); 2) civil liability; and 3) the potential publication of the court decision on civil liability.

There are several features that set the Vigilance Law apart from legislation such as the United Kingdom Modern Slavery Act and the Australia Modern Slavery Act. These include the breadth of topics covered by the Vigilance Law (human rights, health and safety of persons and the environment), the requirement of effective implementation of the vigilance plan, and the Vigilance Law's sanction regime.

The Vigilance Obligations share commonalities with the human rights due diligence process provided by the United Nations Guiding Principles on Business and Human Rights (the "UNGPs") and associated standards. Yet, these Vigilance Obligations also

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[237] Translations of French legislation and French articles are provided by the author of this report. Translations of international sources are, where possible, based on official translations from international organisations (UN, OECD, EU).There is no official English translation of the French law on the corporate duty of vigilance available at this time. This country report relies on a translation prepared by the author of this report. For the other laws mentioned in this report, translations are also provided by the author. As requested by the British Institute of International and Comparative Law, this country report mainly focuses on the French law on the corporate duty of vigilance. It only touches upon a limited number of other legislation relevant to due diligence without going into as much detail.

have significant singularities. It is for this reason that this report privileges the term "vigilance" over "due diligence" in its overview of the Vigilance Law.

Similarly, the term "vigilance" is also preferred to "duty of care". Earlier translations of the Vigilance Law have used the term "duty of care". However, there is now a relative consensus in France among stakeholders on the use of the term "vigilance". This choice also avoids possible semantic confusions across jurisdictions of different legal traditions. Actually, the notion of "duty of care" is well known among lawyers in common law jurisdictions. Using this same term in association with the Vigilance Law may lead to the misconception that the Vigilance Law is merely an application of the common law "duty of care" in France. France is a civil law jurisdiction, and the notion of "duty of care" does not exist as such.

2. Overview of other due diligence/vigilance provisions applicable in France

The Vigilance Law sets out what could be considered as a relatively general regime of vigilance in relation to human rights, the health and safety of persons and the environment. There are other laws, which are sector-specific or are only directed to certain stakeholders, and require due diligence measures more or less directly related to human rights and the environment. Although the focus of this country report is mainly on the Vigilance Law, some of these other laws will be briefly discussed. Some of them result from the transposition into French law of European directives.

For a more detailed list of these norms and their brief analysis, please refer to a report dated December 2016 and led by Sherpa (only available in French) entitled "Societal Vigilance Under French Law" [*La vigilance sociétale en droit français*].[238] This report lists and analyses a specific set of provisions from selected legislation and regulations in order to identify obligations that could be considered as due diligence/vigilance obligations. The report details these obligations according to stakeholders and sectors. It aims to identify a definition of the "*devoir de vigilance sociétale*" in a context where most of these legislations and regulations do not provide for such a definition. As the report indicates, there was no general obligation requiring businesses to prevent social and environmental risks related to their activities in 2016. The obligations to prevent those risks that were then in existence were spread across various texts, involved different scopes of application, persons and sectors, and were limited to specific issues. This 2016 report and most of the obligations identified are still relevant today even with the Vigilance Law in place. Therefore, for more information on the legislation adopted prior to 2017 and discussed below, please refer to the 2016 report.

For an additional source presenting the national legislative framework relating to corporate social responsibility, and in particular human rights and human rights due diligence, see the French National Action Plan.[239]

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

This is a non-exhaustive list of relevant existing legislation.

- Labour Code [*Code du travail*]: several provisions impose on employers, instructing parties and project owners [*donneurs d'ordre et maîtres d'ouvrage*] relevant obligations. They include, for instance, actions in relation to the fight

[238] Sherpa, Communauté des sites de ressources documentaires pour une démocratie mondiale (Coredem) & Ritimo, La vigilance sociétale en droit français, Collection Passerelle, Dec. 2016, available at https://www.coredem.info/IMG/pdf/pass_16_web.pdf%20.

[239] French Ministry of Foreign Affairs and International Development, Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises, April 2017, sections 9-10, available at https://www.diplomatie.gouv.fr/IMG/pdf/3_-_pnadh_fr_version_finale_bandeau_cle0be656.pdf.

against conditions of collective accommodation incompatible with human dignity, payment of wages, violation of fundamental rights of workers, physical and mental health of workers, etc.

- EU Regulation No 995/2010 of 20 October 2010 lays down the obligations of operators who place timber and timber products on the market. Member States are responsible for laying down effective, proportionate and dissuasive penalties and for enforcing the Regulation. In France, article 76 of the Law No 2014-1170 of 13 October 2014 for the future of agriculture, food, and the forest [*Loi No 2014-1170 du 13 octobre 2014 d'avenir pour l'agriculture, l'alimentation et la forêt*] provides a national sanction regime for breaches of the obligations provided in the aforementioned EU Regulation. These sanctions include imprisonment and fines.
- Law No 2014-773 of 7 July 2014 on the orientation and the programming related to the policy on development and international solidarity [*Loi No 2014-773 du 7 juillet 2014 d'orientation et de programmation relative à la politique de development et de solidarité internationale*]. This law defines the objectives of State action. Article 8 of the law provides that "the policy on development and international solidarity takes into account the requirement [*l'exigence*] for societal responsibility of public and private actors […] In the context of this requirement for societal responsibility, companies implement risk management procedures aimed at identifying, preventing or mitigating social, sanitary and environmental harms as well as impacts on human rights which may result from their activities in partner countries". Further, article 8 provides that France "encourages" companies headquartered in France and operating abroad to implement the OECD Guidelines for Multinational Enterprises as well as the UNGPs.
- Consumer Code [*Code de la consommation*] (as amended by order No 2016-301 of 14 March 2016). It includes measures related to health and safety and human rights in supply chains (see e.g. article L. 113-1 of the Consumer Code).
- Law No 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies (the "Vigilance Law") [*Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*].
- Directive 2014/95/EU of 22 October 2014 amending directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Texts transposing the directive into French law are:
    - Order No 2017-1180 of 19 July 2017 on the publication of non-financial information by certain large undertakings and groups of companies [*Ordonnance No 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises*]; and
    - Decree No 2017-1265 of 9 August 2017 for the application of Order No 2017-1180 of 19 July 2017 on the publication of non-financial information by certain large undertakings and groups of companies [*Décret No 2017-1265 du 9 août 2017 pris pour l'application de l'ordonnance No 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises*].

Other selected legislation that may be relevant for comparison purpose but that does not provide for human rights and environmental due diligence

- Law No 2016-1691 of 9 December 2016 on Transparency, Anti-corruption and Modernisation of Economic Life ("Sapin II Law") [*Loi No 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la*

modernisation de la vie économique]. The Sapin II Law was debated in Parliament at about the same time as the Vigilance Law. In several respects, article 17 of the Sapin II Law and the Vigilance Law have a similar structure. However, the processes to be implemented such as "risk mapping" or "alert mechanisms" are not the same. These two laws *do not have the same objectives; they do not address the same risks* (the risks to the company itself for the Sapin II Law, and the risks to rights-holders for the Vigilance Law). In addition, other differences relate to the sanction regime and the scope of both laws.

- Law related to the growth and transformation of businesses [*Loi relative à la croissance et la transformation des entreprises* also known as "*Loi PACTE*"]. This law was initially introduced as a draft law by the Government. Article 169 of this Law (initially introduced as article 61) is worth mentioning. This highly debated article amends the Civil Code [*Code civil*] and the Commercial Code [*Code de commerce*] and provides that a company is managed in its corporate interest while **taking into consideration the social and environmental stakes of its activities** ["*[…] en prenant en considération les enjeux sociaux et environnement aux de son activité.*"](emphasis added).[240]

Note: The remaining parts of Section II will only focus on the Vigilance Law.[241]

2. Scope

a. Rationale given by the State for the regulation (or lack of regulation)

The draft law on the corporate duty of vigilance for parent and instructing companies was introduced by members of Parliament. Specifically, it was introduced by deputies [*deputés*] at the National Assembly. It is thus called a "*proposition de loi*" (as opposed to a "*projet de loi*" which designates a draft law introduced by the Government). Dominique Potier was one of the leading deputies that introduced this draft law. In March 2015, he was nominated "*Rapporteur*" for this draft law by the Commission on Legal Affairs [*Commission des lois*] of the National Assembly. He remained in this role during the entire adoption process.[242]

Although the draft law was introduced by deputies, Michel Sapin, then Minister of Economy and Finances, expressed its support during the later phase of the adoption process.[243] For instance, on 29 November 2016, he explained that the objective of the draft law was "fully shared by the Government". He noted that the adoption of the draft law will make France a model and will prove the Government's commitment to the moralisation and the transparency of economic life undertaken since 2012. Sapin further indicated that the law "will be a significant and ambitious breakthrough for France toward reinforcing the social responsibility of companies, and more generally the respect of human rights and fundamental freedoms". He continued by noting that "[t]his text may also serve as useful support for the progression of such cause within

[240] LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038496102&dateTexte=&categorieLien=id%20) (last accessed 24 October 2019).
[241] Some of the following Sections rely on articles containing in-depth analyses of the Vigilance Law in English and French, including some co-authored by the author of this Report.
[242] For a summary description of the French legislative process in English and the role of Rapporteur, see the English website of the French National Assembly, page on the role and powers of the National Assembly, available at http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly" \l "node_9511 (last accessed 17 March 2019).
[243] For an account of the legislative process from the civil society organisations' standpoint, their involvement in this process and the support of the Government in the later phase of the process, see Amnesty International France, Il était une loi, 20 Sept. 2017, available at https://www.amnesty.fr/responsabilite-des-entreprises/actualites/entreprises-il-etait-une-fois-une-loi (last accessed 30 April 2019). Regarding the position of one of the main business association in France (MEDEF), it had initially expressed opposition to the draft bill and then to the Vigilance Law (one of the arguments expressed by the MEDEF was that a legislative initiative had to be coordinated at the international level), see e.g. MEDEF, Devoir de vigilance: une loi inefficace qui menace notre économie, Dec. 2018, available at https://www.medef.com/fr/communique-de-presse/article/devoir-de-vigilance-une-loi-inefficace-qui-menace-notre-economie (last accessed 6 May 2019).

the discussions held at the European and international levels".[244] Another example of the Government's support can be found in the Government's letter of observations about the law. This letter was written at the time the law was referred to the French Constitutional Court [*Conseil constitutionnel*].[245]

The explanatory memorandum of the draft law [*exposé des motifs*] expands on the prevention and remediation objectives of the draft law. In particular, it indicates that the draft law's aim was to "establish a vigilance obligation for parent companies and instructing companies vis à vis their subsidiaries, subcontractors and suppliers". A clear reference was made to the fact this objective was in line with the UNGPs and the OECD Guidelines for Multinational Enterprises. The overall idea was to "encourage multinational companies to act responsibly with the aim of preventing tragic events" in France or abroad that would violate human rights and harm the environment, and to "obtain remediation for the victims" where damage is sustained.[246] The explanatory memorandum further details the context in which the proposal was made, e.g. the collapse of the Rana Plaza, the legal concept of the corporate veil, the difficult access to remedy in the event of adverse human rights impacts or environmental damage, the international normative context with the UNGPs, the OECD Guidelines, ISO 26000, the EU directive on non-financial reporting, the French case law in relation to the Erika oil spill,[247] the existing and potential legislation in countries such as the United Kingdom, Switzerland, Italy, Spain, Canada, and the United States.

Several arguments were put forward to reinforce the responsibility of multinational companies. They included "valuing good practices already implemented by a number of companies, improving the integration of risk within our economy, and contributing to the non-price competitiveness of [France]".[248]

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

It is important to differentiate between:

- The companies entering into the scope of the Vigilance Law and which are therefore subject to the Vigilance Obligations; and
- The companies entering into the ambit *rationae personae* (sometime also called the "perimeter") of the vigilance plan to be prepared by companies that enter into the scope of the Vigilance Law.

Companies entering into the scope of the Vigilance Law

"Any company that employs, by the end of two consecutive financial years [*deux exercices consécutifs*], at least five thousand employees [*salariés*] itself and in its

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[244] Michel Sapin, Declaration of the Minister of Economy and Finances on the duty of vigilance of large companies at the National Assembly, 29 Nov. 2016, available at http://discours.vie-publique.fr/notices/163003497.html (last accessed 17 March 2019) ("*Ce sera une avancée significative et ambitieuse pour la France sur le chemin d'un renforcement de la responsabilité sociale des entreprises et plus largement du respect des droits de l'Homme et des libertés fondamentales. Ce texte pourra également être un appui utile pour faire progresser cette cause dans les discussions européennes et internationales*.").

[245] See Observations of the Government on the law on the duty of vigilance of parent companies and instructing companies, published on 28 March 2017, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290672&categorieLien=id

[246] National Assembly, draft law No 2578, 11 Feb. 2015, available at http://www.assemblee-nationale.fr/14/propositions/pion2578.asp ("*Conformément aux principes directeurs des Nations unies relatifs aux entreprises et aux droits de l'homme adoptés à l'unanimité par le Conseil des droits de l'homme des Nations unies en juin 2011, et conformément aux principes directeurs de l'OCDE, l'objectif de cette proposition de loi est d'instaurer une obligation de vigilance des sociétés mères et des entreprises donneuses d'ordre à l'égard de leurs filiales, sous-traitants et fournisseurs. Il s'agit de responsabiliser ainsi les sociétés transnationales afin d'empêcher la survenance de drames en France et à l'étranger et d'obtenir des réparations pour les victimes en cas de dommages portant atteinte aux droits humains et à l'environnement.*").

[247] Cour de cassation, Chambre criminelle, arrêt No 3439, 25 Sept. 2012, pourvoi No 10-82.938.

[248] National Assembly, draft law No 2578, 11 Feb. 2015, available at http://www.assemblee-nationale.fr/14/propositions/pion2578.asp ("*Loin d'être un frein économique, cette proposition de loi aura donc comme effet de valoriser les bonnes pratiques mises en œuvre par de nombreuses entreprises, d'améliorer la prise en compte du risque dans notre économie, et de contribuer à la compétitivité hors coût de notre pays*.").

direct or indirect subsidiaries whose registered office [*siège social*] is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad, shall establish and effectively implement a vigilance plan." (Commercial Code, article L. 225-102-4.-I. as introduced by the Vigilance Law)

This article, which defines the companies that enter into the scope of the Vigilance Law, has been the subject of several discussions. In particular, these discussions have focused on the corporate forms of these companies and the location of their registered office.[249] These questions have been discussed and also clarified notably by the French Constitutional Court [*Conseil constitutionnel*] in its decision of 23 March 2017.

To enter into the scope of the Vigilance Law, a company has to fulfil three criteria:

- Have its registered office [*siège social*] in France;
- Be registered under a certain corporate form (i.e. SA [*Sociétés Anonyme*], SCA [*Société en Commandite par Actions*], SE [*Société Européenne*]. The question of whether SAS [*Société par Actions Simplifiées*] is a corporate form included in the scope of the Vigilance Law is subject to several interpretations. Most commentators consider such a corporate form to be included); and
- Employ, at the end of two consecutive years, at least five thousand employees [*salariés*] itself and in its direct or indirect subsidiaries whose registered office is located within French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad.

Thus, the scope of the Vigilance Law is not determined based on a turnover threshold.

The Vigilance Law also introduced an exemption mechanism. Accordingly, "[s]ubsidiaries or controlled companies that exceed the thresholds referred to in the first paragraph shall be deemed to satisfy the obligations provided in this article, if the company that controls them, within the meaning of article L. 233-3 [of the French Commercial Code], establishes and implements a vigilance plan covering the activities of the company and of all the subsidiaries or companies it controls."[250]

Other discussions not covered in this report have touched upon the calculation of the number of employees, the identification of direct and indirect subsidiaries, and the question of the inclusion of the SAS [*Sociétés par Actions Simplifiées*] into the scope of the Vigilance Law.[251]

Companies entering into the ambit rationae personae of the vigilance plans to be prepared by companies that enter into the scope of the Vigilance Law

"The plan shall contain reasonable vigilance measures [*mesures de vigilance raisonnable*] adequate to identify risks and to prevent severe impacts [*atteintes graves*] on human rights and fundamental freedoms, on the health and safety of

[249] For an account of these discussions and relevant references to existing literature, see Stéphane Brabant & Elsa Savourey, Scope of the Corporate Duty of Vigilance Law: Companies Subject to the Vigilance Obligations, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017. Original version published in French, translation into English available at https://www.business-humanrights.org/sites/default/files/documents/Scope%20of%20the%20Corporate%20Duty%20of%20Vigilance%20Law%20-%20Companies%20Subject%20to%20the%20Vigilance%20Obligations%20-%20Int%27l%20Rev.Compl_.%20%26%20Bus.%20Ethics.pdf.

[250] French version: Commercial Code, art. L. 225-102-4.-I. para. 2 ("*Les filiales ou sociétés contrôlées qui dépassent les seuils mentionnés au premier alinéa sont réputées satisfaire aux obligations prévues au présent article dès lors que la société qui les contrôle, au sens de l'article L. 233-3, établit et met en œuvre un plan de vigilance relatif à l'activité de la société et de l'ensemble des filiales ou sociétés qu'elle contrôle*."). On questions raised by the exemption mechanism, see Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017, p.7-8. Original version published in French, translation into English available at https://www.business-humanrights.org/sites/default/files/documents/Law%20on%20the%20Corporate%20Duty%20of%20Vigilance%20-%20Vigilance%20Plan%20-%20Intl%20Rev.Compl_.%20%26%20Bus.%20Ethics.pdf.

[251] On these topics, see Stéphane Brabant & Elsa Savourey, Scope of the Corporate Duty of Vigilance Law: Companies Subject to the Vigilance Obligations, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017.

persons and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers [*sous-traitants ou fournisseurs*] with whom there is an established commercial relationship, when these activities are related to this relationship." (Commercial Code, article L. 225-102-4.-I para. 3 as introduced by the Vigilance Law)

The vigilance plan must cover:

- The activities of the company entering into the scope of the Vigilance Law and thus responsible for the preparation of the vigilance plan;
- The activities of the companies that the company entering into the scope of the Vigilance Law controls within the meaning of article L. 233-16-II of the Commercial Code directly or indirectly; and
- The activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship.

Other discussions not covered in this report have touched upon how to interpret the concepts of "controlled companies", "subcontractors and suppliers", and "established commercial relationship".[252]

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights

"The plan shall contain reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment […]" (Commercial Code, article L. 225-102-4.-I para. 3 as introduced by the Vigilance Law)

The vigilance plan should cover risks and prevent severe impacts on three main themes. These themes constitute what can be considered as the ambit *rationae materia* of the vigilance plan:

- Human rights and fundamental freedoms;
- Health and safety of persons [in French, "*personne*s" – also understood in English as "individuals"]; and
- The environment.

Note that the Vigilance Law uses the expression "*droits humains*". This expression can be translated as "human rights". The expression used in earlier versions of the draft law was "*droits de l'homme*". The expression "*droits humains*" is considered more gender-neutral in French. However, both expressions are commonly used. By way of comparison, the official translation of the UNGPs in French uses "droits de l'homme".

The Vigilance Law covers "the health and safety of persons". The ambit *rationae materiae* of the vigilance plan therefore relates to a large pool of stakeholders, such as workers but also local communities.

The Vigilance Law does not provide a definition of any of the terms mentioned at article L. 225-102-4.-I para. 3 (such as "human rights and fundamental freedoms" and "environment"). It also does not specify any norms of reference that would assist in delineating these concepts. As a result of parliamentary debates, it was decided that there was no need for further clarification. The reason put forward was the "sufficiently precise and comprehensive" nature of the international commitments

[252] For more details on this ambit *rationae personae*, see II.3.4.; see also Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017.

undertaken by France.[253] The Government, in support of this position, emphasised that the vigilance plan "does not target a corpus of pre-established norms to be imposed on the companies in question [but rather] identifies the nature of the risks which will be included in the vigilance plan".[254]

d. Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation

It is important here again to differentiate between the companies entering into the scope of the Vigilance Law, and those entering within the ambit *rationae personae* of the vigilance plan.

Companies entering into the scope of the Vigilance Law

The companies subject to the Vigilance Obligations (and who must establish a vigilance plan) are French registered companies.

Note that French companies entering into the scope of the Vigilance Law can be subsidiaries of foreign companies. There has been a common misunderstanding that within corporate groups, only companies whose parent company have their registered office in France would enter into the scope of the Vigilance Law. This interpretation would have resulted in excluding from the scope of the Vigilance Law France-registered subsidiaries of a parent company having its registered office outside of France. This situation has been clarified following the analysis of parliamentary debates, the wording of the Vigilance Law, and reformulation by the French Constitutional Court [*Conseil constitutionnel*]. Thus, the Vigilance Law should be interpreted as covering any company which has its registered office in France (whether or not it is a subsidiary of a parent company with its registered office abroad), providing that it fulfils the criteria related to the corporate form and number of employees.

Companies entering into the ambit rationae personae of the vigilance plan

A company entering into the scope of the Vigilance Law is required to establish a vigilance plan covering its activities, the activities of "companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship."

The Vigilance Law does not specify the countries where these entities are registered or where their activity is taking place. Actually, and as with any other company, providing that they fulfil the criteria to enter into the ambit *rationae personae* of the vigilance plan of a given company, foreign companies will be included in such ambit.

e. Civil, criminal and administrative scope

The Vigilance Law provisions were inserted in two new articles of the French Commercial Code [*Code de commerce*] (article L. 225-102-4 and L. 225-102-5).

Note that article L. 225-102-5 of the Commercial Code provides for a civil liability action in the event of a breach of the Vigilance Obligations. Such action is subject to the general conditions for civil liability provided for in articles 1240 and 1241 of the Civil Code [*Code civil*] (see II.4.-II.6).[255]

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[253] See National Assembly, Report No 4242, 23 Nov. 2016, p.11, available at http://www.assemblee-nationale.fr/14/pdf/rapports/r4242.pdf.

[254] See Observations of the Government on the law on the duty of vigilance of parent companies and instructing companies, published on 28 March 2017.

[255] Commercial Code, art. L. 225-102-5 ("*Dans les conditions prévues aux articles 1240 et 1241 du code civil, le manquement aux obligations définies à l'article L. 225-102-4 du présent code engage la responsabilité de son auteur et l'oblige à réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter*.").

3. Content of Regulation

a. Overview and description of the required measures for business (such as requirement to adopt human rights due diligence or a vigilance plan)

The Vigilance Obligations

"Any company that employs, by the end of two consecutive financial years [*deux exercices consécutifs*], at least five thousand employees [*salariés*] itself and in its direct or indirect subsidiaries whose registered office [*siège social*] is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad, **shall establish and effectively implement a vigilance plan.** […] The vigilance plan and the report concerning its effective implementation shall be made public [*sont rendus publics*] and included in the report mentioned in article L. 225-102." (Commercial Code, article L. 225-102-4.-I as introduced by the Vigilance Law, emphasis added)

The duty of vigilance comprises three obligations (the "Vigilance Obligations"):

- Companies must establish a vigilance plan. The plan shall contain reasonable vigilance measures [*mesures de vigilance raisonnable*] adequate to identify risks and to prevent severe impacts [*atteintes graves*] on human rights and fundamental freedoms, on the health and safety of persons and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers [*sous-traitants ou fournisseurs*] with whom there is an established commercial relationship, when these activities are related to this relationship." (Commercial Code, article L. 225-102-4.-I as introduced by the Vigilance Law)
- Companies must effectively implement their vigilance plan; and
- Companies must make the plan and the report on its effective implementation public and include them in the company's annual management report (Commercial Code, article L. 225-102-4.-I). Note that according to the wording of the Vigilance Law, it is recommended to consider that the plan and report on its effective implementation should be made public (in the sense of being made accessible to the public) AND included in the company's annual management report.[256]

The content of the vigilance plan (i.e. ambit rationae materiae of the vigilance plan)

"**The plan shall contain reasonable vigilance measures [*mesures de vigilance raisonnable*] adequate to identify risks and to prevent severe impacts [*atteintes graves*] on human rights and fundamental freedoms, on the health and safety of persons and on the environment**, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers [*sous-traitants ou fournisseurs*] with whom there is an established commercial relationship, when these activities are related to this relationship.

The plan is meant **to be drawn up in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level.** It contains the following measures:

1° **A risk mapping** meant for their identification, analysis and prioritisation;

[256] In that sense, see also Sherpa, Vigilance Plans Reference Guidance, Feb. 2019, p.23, available at https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf.

2° **Regular evaluation processes** regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping;

3° **Adapted actions to mitigate risks or prevent severe impacts**;

4**° An alert and complaint mechanism** relating to the existence or realisation of risks, established in consultation with the representative trade union organisations within the company;

5° **A system monitoring implementation measures and evaluating their effectiveness**.

The vigilance plan and the report concerning its effective implementation shall be made public and included in the report mentioned in article L. 225-102.

A decree issued by the *Conseil d'Etat* may expand on the vigilance measures provided for in points 1 to 5 of this article. It may detail the methods for establishing and implementing the vigilance plan, where appropriate in the context of multi-stakeholder initiatives within sectors or at territorial level."

(Commercial Code, article L. 225-102-4.-I as introduced by the Vigilance Law, emphasis added)

Note that the vigilance plan's ambit *rationae materia* includes human rights and fundamental freedoms, the health and safety of persons and the environment. This is a wide ambit compared to Modern Slavery Acts adopted in the United Kingdom or Australia for example. The ambit *rationae materia* is then narrowed down to the ideas of "risks" and "severe impacts".

The decree that is mentioned in the Vigilance Law is optional. No such degree or any other legal text clarifying the Vigilance Law has been issued to date.

Notions that relate to the vigilance plan such as "reasonable vigilance measures" or "severe impacts" are not defined in the Vigilance Law. For this reason, they are also likely to be clarified by legal practice and by the courts in the event that a dispute arises under the Vigilance Law.

Regarding the interpretation of such notions, it is clear, reading the Vigilance Law and the mandated content of the vigilance plan that the UNGPs and OECD Guidelines for Multinational Enterprises were a source of inspiration. This inspiration is evidenced in the explanatory memorandum of the draft law and subsequent parliamentary debates.[257] The author, together with Stéphane Brabant, were among the first commentators of the Vigilance Law to have expressed the opinion that the UNGPs and OECD Guidelines for Multinational Enterprises should therefore serve as inspiration to interpret the Vigilance Law. This is a position that is shared by several experts.[258]

b. Key legal elements of the obligation

See answer to question II.3.a.

c. Risk assessment requirements and risk mitigation measures

Risk assessment and risk mitigation are central to the five measures contained in the vigilance plan. These measures are the following:

"1° A risk mapping meant for identification, analysis and prioritisation of risks;

[257] See e.g. National Assembly, No 3582, 16 March 2016, p.11, available at http://www.assemblee-nationale.fr/14/pdf/rapports/r3582.pdf ("*les principes directeurs de l'Organisation de coopération et de développement économiques (OCDE) et de l'Organisation des Nations unies (ONU) fournissent une base idéale et internationalement reconnue pour construire un plan de vigilance*").

[258] Among the first developments on this idea, see Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017, p.4.

2° Regular evaluation processes regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping;

3° Adapted actions to mitigate risks or prevent severe impacts;

4° An alert and complaint mechanism relating to the existence or realisation of risks, established in consultation with the representative trade union organisations within the company;

5° A system monitoring implementation measures and evaluating their effectiveness."

(Commercial Code, article L. 225-102-4.-I. as introduced by the Vigilance Law)

These five items operate in combination to contribute to risk assessment on the one hand and to risk mitigation on the other hand.

Note that risk mapping (item 1) should not only aim at identifying risks but also prioritising them with the view of preventing severe impacts. The Vigilance Law therefore acknowledges that companies can (and should) prioritise their responses. The appreciation of the "severity" of the impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment should also help prioritise risks.

Further, the risks mentioned in the Vigilance Law are risks for rights-holders and the environment and not for the business itself. This last aspect is not necessarily well understood by businesses. Actually several vigilance plans established by companies in 2018 were partly focused on the identification of risks not for rights-holders but for the companies themselves.

Adopting a *stricto sensu* reading of the Vigilance Law, it is also worth noting that the Vigilance plan "does not have to include remedies to be put into action once human rights abuses have already occurred".[259] Indeed, none of the items of the vigilance plan refer to actions to be implemented when the risks have materialised. Even item 4 which requires an "alert and complaint mechanism relating to the existence or realisation of risks" does not refer to remediation actions. However, the setting in place of such remedies could be accounted for in the report showing the effective implementation of the vigilance plan. In addition, regarding item 4 of the vigilance plan, Sherpa, a leading NGO, including on issues related to the Vigilance Law, argues that such item also includes remediation measures.[260]

d. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers (if any)

Subsidiaries and business relationships targeted by the Vigilance Law

The Vigilance Obligations only apply to the companies entering into the scope of the Vigilance Law. These companies can be parent companies or instructing companies. Note that, as explained in II.2.d., these companies can themselves be subsidiaries of companies registered in France or abroad.

These companies have to establish a vigilance plan: "The plan shall contain reasonable vigilance measures [*mesures de vigilance raisonnable*] adequate to identify risks and to prevent severe impacts [*atteintes graves*] on human rights and fundamental freedoms, on the health and safety of persons and on the environment, **resulting**

[259] Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, available at https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20-%20Penalties%20-%20Int%2527l%20Rev.Compl_.%20%26%20Bus.%20Ethics_.pdf.

[260] See also Sherpa, Vigilance Plans Reference Guidance, Feb. 2019, p.18 (considering that the mitigation and prevention measures include "preventive, mitigation and remediation measures").

from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers [*sous-traitants ou fournisseurs*] with whom there is an established commercial relationship, when these activities are related to this relationship." (Commercial Code, article L. 225-102-4.-I as introduced by the Vigilance Law, emphasis added)

As has already been discussed, the vigilance plan must cover the activities of the company entering into the scope of the Vigilance Law and of certain other entities. Such entities are therefore indirectly concerned by the Vigilance Obligations. These entities are:

- Companies directly or indirectly controlled within the meaning of II of article L. 233-16 [of the Commercial Code] by the company entering into the scope of the Vigilance Law. Article L. 233-16.-II uses a threefold definition of the concept of control (legal, de facto, or contractual). This concept is generally used by commercial companies for book-keeping purposes in the context of the preparation of consolidated accounts [*comptes consolidés*] and their group management report;[261] and
- "[T]he […] subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship." As a result of such conditions only a certain number of subcontractors and suppliers and only some of their activities are to be included into the ambit *rationae personae* of the vigilance plan.

Note that the Vigilance Law does not refer to the rank of subcontractors and suppliers within the supply chain. It is the established commercial relationship which is the criteria for determining the entities falling within the ambit *rationae personae* of the vigilance plan.[262]

The identification of such subcontractors and suppliers nevertheless poses a number of questions that are yet to be answered, including:

- Whether the "established commercial relationship" should be determined with regard to the companies entering into the scope of the Vigilance Law or also with regard to BOTH the companies entering into the scope of the Vigilance Law and the companies that the former controls? The answer to this question will determine whether the controlled companies' suppliers and subcontractors would be included in the ambit *rationae personae* of the vigilance plan.
- How should an "established commercial relationship" be defined? This concept refers to former article L. 442-6.-I of the Commercial Code.[263] It was considered sufficiently precise during parliamentary debates because it had already been subject to abundant case law. However, several commentators wonder whether this case law is relevant in the context of the Vigilance Law. This case law applies to the sudden/abrupt termination of established commercial relationships and the protection of suppliers and subcontractors. The Vigilance Law, however, has a different subject-matter and objective.[264] Courts are likely to provide clarity on this issue when the first actions are brought before them.

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[261] For more information, see, Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017, p.2.

[262] For further comments on this aspect and comparison with the UNGPs, see Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017, p.4.

263 Note that following Order No 2019-359 of 24 April 2019, the concept of "established commercial relationship" can now be found at art. L. 442-1.-II of the Commercial Code.

[264] See, Sherpa, Vigilance Plans Reference Guidance, Feb. 2019 p.32-33 (discussing how to define the extra-group scope of the Vigilance Law as addressing the question of the definition of an "established commercial relationship".); see also Charley Hannoun, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, Dalloz, Droit Social, 2017, p.806; Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of

Liability of parent/instructing companies for the adverse impacts caused by entities entering into the ambit rationae personae of the vigilance plan

The Law provides that companies failing to comply with the Vigilance Obligations will have to remedy the damage that "the execution of these obligations could have prevented".[265]

The Vigilance Law's civil liability regime is based on the parent or instructing company's own fault (i.e. a breach of the Vigilance Obligations). The Vigilance Law does not create a civil liability regime for the parent or instructing company based on the fault of other entities in their supply chains. This has been specifically noted by the French Constitutional Court [*Conseil constitutionnel*][266] and is also clear from the reading of the Vigilance Law. Indeed, the Vigilance Law explicitly refers to articles 1240 and 1241 of the Civil Code which set the conditions for civil liability under the general law of torts.[267]

It is important to understand that the vigilance plan serves to connect the subsidiaries, subcontractors and suppliers entering into the ambit *rationae personae* of the vigilance plan with their parent or instructing company that has to establish such a plan and effectively implement it. In the event of damage caused by these entities, any party with standing could try to prove that there was no vigilance plan or that the plan was not effectively implemented. As a result, such a party could try to bring a civil liability action against a company entering into the scope of the Vigilance Law and ask for remediation of the damage that "the execution of these obligations [i.e. the Vigilance Obligations] could have prevented".[268]

Test used to ascribe liability to parent companies for the adverse human rights impacts caused by their subsidiaries and suppliers

The three conditions for civil liability applicable under the general law of tort (articles 1240 and 1241 of the Civil Code [*Code civil*]) also apply. These conditions are the existence of:

- A damage;
- A breach of/failure to comply with an obligation (in the case of the Vigilance Law, a breach of one or several of the Vigilance Obligations); and
- A causal link between the damage and the breach.

As explained earlier, when assessing civil liability, the company entering into the scope of the Vigilance Law would not be exposed to liability as a result of the fault of the subsidiary, supplier or subcontractor which led to the damage. The company would be exposed to liability for its own fault in the sense that it did not comply with its Vigilance Obligations, and this non-compliance led to damage that "the execution of these obligations [i.e. the Vigilance Obligations] could have prevented".

The claimant bringing the civil liability action bears the burden of proof and has to prove that the case satisfies all three conditions that establish civil liability. This obligation applies regardless of whether the damage occurred at the level of the company entering into the scope of the Vigilance law (i.e. the parent or instructing company) or at the level of the subsidiaries, suppliers or subcontractors entering into the ambit of the vigilance plan.

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the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017 p.2 (on the concept of subcontrators and suppliers).

[265] Commercial Code, art. 225-102-5. ("*Dans les conditions prévues aux articles 1240 et 1241 du code civil, le manquement aux obligations définies à l'article L. 225-102-4 du présent code engage la responsabilité de son auteur et l'oblige à réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter*.")

[266] French Constitutional Court, Decision No 2017-750 DC, para. 27.

[267] Commercial Code, art. 225-102-5. Note that under the French law of tort, an individual is liable for his/her own fault [*responsabilité du fait personnel*] except in certain circumstances, where an individual can be liable for the acts of someone else [*responsabilité du fait d'autrui*] or of things [*responsabilité du fait des choses*].

[268] Commercial Code, art. 225-102-5, as introduced by the Vigilance Law.

For several reasons, breach and causal link are likely to be the most difficult elements for a claimant (who bears the burden of proof) to establish under the Vigilance Law.[269] The more remote in the supply chain the damage, the harder it may be for the claimant to prove that the damage has occurred as a result of a breach of the Vigilance Obligations and that there is causal link between such a breach and the resulting damage.

It is also to be expected that the claimant would have to prove that the Vigilance Law is applicable to her/his situation. This includes proving that the defendant enters into the scope of the Vigilance Law and that the damage occurred within the ambit *rationae personae* of the vigilance plan.

Note, moreover, that the obligation to effectively implement a vigilance plan was specifically introduced by the Vigilance Law as an obligation that companies take all steps in their power to reach a certain result [*obligation de moyens*] rather than to guarantee the actual attainment of that result [*obligation de résultat*]. As a result, a breach of that obligation cannot be inferred merely because there is damage.[270]

e. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

Several provisions of the Vigilance Law relate to external control. Such control can take place either prior or after the establishment of a vigilance plan. See also II.3.g. for more developments in relation to the Vigilance Law and operational-level grievance mechanism.

- Stakeholders consultations: the consultations of various stakeholders in the phase of establishment of the vigilance plan are opportunities for collaboration and can help external control.

  First, the vigilance plan is "meant to be drawn up in conjunction with the stakeholders [*parties prenantes*] of the company, where appropriate as part of multi-stakeholder initiatives [*initiatives pluripartites*] within sectors or at territorial level." (Commercial Code, art. L. 225-102-4.-I para. 4 as introduced by the Vigilance Law)

  Second, the "alert and complaint mechanism relating to the existence or realisation of risks" shall be (and this is mandatory) "established in consultation with the representative trade union organisations within the company". (Commercial Code, article L. 225-102-4.-I as introduced by the Vigilance Law)

- Alert and complaint mechanism: the vigilance plan includes an "alert and complaint mechanism relating to the existence or realisation of risks, established in consultation with the representative trade union organisations within the company". There is no information in the Vigilance Law on whether this alert mechanism should be directed only towards internal stakeholders (e.g. workers) or whether it should also cover external stakeholders (e.g. including local communities). There is, however, little doubt that this mechanism applies to both internal and external stakeholders, and it is actually considered as such by most commentators of the Vigilance Law.[271]

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[269] Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, p.2.

[270] National Assembly, report No 2628, 11 March 2015, available at http://www.assemblee-nationale.fr/14/pdf/rapports/r2628.pdf p.31, 55 and 59; National Assembly, No 3582, 16 March 2016, p.14, available at http://www.assemblee-nationale.fr/14/pdf/rapports/r3582.pdf.

[271] Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017 p.12 ("With reference to the final objective of the Law which is the protection of individuals and the environment, and to the Guiding Principles, it is very likely that this mechanism would firstly be intended for individuals potentially affected by the activities of the company and who wish to alert and question the company on its activities. It should therefore be open to any individuals, internal and external."); see also Sherpa, Vigilance Plans Reference Guidance,

- Evaluation processes: the vigilance plan also includes "regular evaluation processes regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping". There is no information on whether the evaluation should be led by the company establishing the vigilance plan or by external parties, but a mix of both is recommended by NGOs.[272]
- Injunction with potential periodic penalty payment: the injunction that could lead to a periodic penalty payment can also be viewed as a tool for external control. An injunction can be brought by any party with standing. If a company has failed to comply with its Vigilance Obligations, first, it is given a three months' official notice [*mise en demeure*] to comply. Then this party can ask the competent court to order the company to comply, including under periodic penalty payment (Commercial Code, article L. 225-102-4.-II). The parties that should be able to prove standing include NGOs, trade unions, individuals, etc. This procedure could be considered "a privileged tool for members of civil society to check whether the Vigilance Obligations are being observed, irrespective of whether any actual damage has been sustained".[273]
- Civil liability action: in the event of a civil liability action, both the parties and competent court will also have to assess the vigilance plans and how effectively they have been implemented.

f. Transparency and disclosure requirements

Transparency and disclosure are at the core of the Vigilance Law. Three examples can be mentioned:

- The Vigilance Obligations are closely connected to transparency and disclosure. In particular, this is demonstrated by 1) the inclusion in the vigilance plan of the five reasonable vigilance measures; and 2) the publication of the vigilance plan and report concerning its effective implementation.

  To comply with their Vigilance Obligations, companies must first establish a vigilance plan containing five reasonable vigilance measures. They then have to effectively implement the plan. Finally, companies must make the plan and the report on its effective implementation public and include them in the company's annual management report (Commercial Code, article L. 225-102-4.-I). Note that according to the wording of the Vigilance Law, it is recommended to consider that the plan and report on its effective implementation should be made public (in the sense of being made accessible to the public) AND included in the company's annual management report.[274]
- The injunction could also lead a company to publish information to demonstrate its respect of the Vigilance Obligations.
- The court can also order its decision (or part of it) on civil liability to be published, disseminated or displayed liability (Commercial Code, article L. 225-102-5, para. 3). This decision is not systematic and is left to the appreciation of the court. It could be considered a "name and shame" process.

Also note that the Vigilance Law goes beyond transparency and disclosure by requiring the effective implementation of vigilance plans.

Feb. 2019 p.68-69 (discussing whether the alert mechanism should be open to third parties, which ones, and also discussing the protection of whistle-blowers).

[272] See also Sherpa, Vigilance Plans Reference Guidance, Feb. 2019, p.57.

[273] For more developments, see Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, p.4.

[274] In that sense, see also Sherpa, Vigilance Plans Reference Guidance, Feb. 2019, p.23.

g. Implementation of internal processes by business, including operational-level grievance mechanisms

A couple of general comments on the implementation of internal processes by businesses:

- The implementation of the vigilance plan is at the core of the Vigilance Law, and should be "effective", as required by one of the three Vigilance Obligations.
- The Vigilance Law does not specify to which extend the company entering into its scope should be involved in the development of the five items of the vigilance plan (as opposed to possible outsourcing). But, in all likelihood, the company would need to be closely involved in collaborating with various stakeholders as suggested by the Vigilance Law.
- Concerning the "alert and complaint mechanism relating to the existence or realisation of risks", it must be established in consultation with the representative trade union organisations within the company" (see II.3.e. on stakeholders contributions).

As to operational-level grievance mechanisms, the OHCHR defines them as "[…] formalized means through which individuals or groups can raise concerns about the impact an enterprise has on them—including, but not exclusively, on their human rights—and can seek remedy".[275]

The mechanism existing in the Vigilance Law does not seem to match perfectly this definition *stricto sensu* as it does not address remediation. The vigilance plan includes an alert and complaint mechanism relating to the existence or realisation of **risks**. As it has been already commented, the vigilance plan "does not have to include remedies to be put into action once human rights abuses have already occurred."[276] However, the setting in place of such remedies could be accounted for in the report showing the effective implementation of the vigilance plan. In addition, regarding item 4 of the vigilance plan, Sherpa, a leading NGO, including on issues related to the Vigilance Law, argues that such item also includes remediation measures.[277]

As for the injunction and civil liability action, they can be viewed as State-based judicial mechanisms. Concerns related to the vigilance plan and its implementation can be raised using such actions and remedies can be sought using the civil liability action (see next section for details on the sanction regime set in the Vigilance Law).

4. Monitoring, sanction and enforcement

a. Monitoring body

The Vigilance Law does not provide for a body in charge of monitoring the implementation of the Vigilance Law.

A possible parliamentary evaluation mission may be set in the next few years to evaluate the implementation of the Vigilance Law.[278]

At present several NGOs are pro-actively monitoring how the Vigilance Law is being implemented. The Vigilance Law opens a possibility for them, as for any party with standing, to file an injunction (with potential periodic penalty payment) when a

[275] OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, 2012, question 70, available at https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.
[276] Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44.
[277] See also Sherpa, Vigilance Plans Reference Guidance, Feb. 2019, p.18 (considering that the mitigation and prevention measures include "preventive, mitigation and remediation measures").
[278] This possibility has been mentioned by Dominique Potier, as reported, for instance in Stéphane Bechaux, Vigilance : comment les entreprises essaient de ne pas faire leur devoir, Alternatives Economiques, 12 Dec. 2018, available at https://www.alternatives-economiques.fr/vigilance-entreprises-essaient-de-ne-faire-devoir/00087474 (last accessed 30 April 2019).

company entering into the scope of the Vigilance Law does not comply with its Vigilance Obligations.

b. Form of monitoring/evaluation, timelines for investigating complaints, procedures for review

There is no information provided in the Vigilance Law in relation to the timeline for the competent courts to decide on applications for an injunction (with potential periodic penalty payment) and civil liability action.

Note, however, that the filing of an injunction is subject to giving the company a three months' prior notice [*mise en demeure*] to comply.

Besides, the injunction (and potential periodic penalty payment) can be deferred to the president of the competent court in the context of interim/emergency proceedings [*statuant en référé*].[279]

c. Form of sanctions

Note that the civil fine provided for in the final draft of the law as adopted by Parliament was found unconstitutional by the French Constitutional Court [*Conseil constitutionnel*].[280] This civil fine could have gone up to a maximum of 10 million of euros for failure to comply with the Vigilance Obligations. Moreover, in the event of a damage resulting from the failure to comply with the Vigilance Obligations, the civil fine could have reached 30 million of euros. The rationale behind the Court's decision was that this civil fine was equivalent to a criminal penalty. In that situation, the Court further considered that the breach of the Vigilance Obligations sanctioned by this civil fine was defined in an "insufficiently clear and precise" manner with respect to the constitutional requirement that criminal offences and penalties be defined by law [*légalité des délits et des peines/nullum crimen nullapoena sine lege*].[281] Note however that although this definition of the breach was deemed unconstitutional from the perspective of criminal law, it remains a condition for any finding of civil liability, despite being "insufficiently clear and precise".[282]

The sanctions provided in the Vigilance Law are the following:[283]

- Periodic penalty payment [*astreinte*] following an injunction to comply (Commercial Code, article L. 225-102-4.-II). Should a company fail to comply with its Vigilance Obligations, and after having been given a three months' official notice [*mise en demeure*] to comply, any person with standing can ask the competent court to order the company to comply, including under a periodic penalty payment [*astreinte*]. The case may also be referred for the same purpose to the president of the court in the context of interim/emergency proceedings [*statuant en référé*].

  Note that a periodic penalty payment consists in injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation. The amount of the periodic penalty payment will be determined by the courts. It is likely that the courts will determine this amount on a case-by-case basis.

[279] Commercial Code, art. L. 225-102-4.-II para. 2.
[280] French Constitutional Court, Decision No 2017-750 DC, para. 13.
[281] For a comment of the decision, see Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Loménie, The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All, Business and Human Rights Journal, vol 2, 2017, p.317-323.
[282] Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [Revue Internationale de la Compliance et de l'Ethique des Affaires], June 2017, Comm 44, p.2.

[283] For more information and analysis on the sanction regime of the Vigilance Law, see Anne Danis-Fatôme & Geneviève Viney, La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Recueil Dalloz, p.1610, 2017 (in French); see also Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44.

- Civil liability action [*action en responsibilité civile*] (Commercial Code, article L. 225-102-5). The Law provides that companies failing to comply with the Vigilance Obligations will have to remedy the damage that "the execution of these obligations could have prevented". As a reminder, the Vigilance Law's civil liability regime is based on the parent or instructing company's own fault (i.e. a breach of the Vigilance Obligations). The Vigilance Law does not create a civil liability regime for the parent or instructing company based on the fault of other entities in their supply chains. This is clear from the reading of the Vigilance Law, and it has also been specifically noted by the French Constitutional Court [*Conseil constitutionnel*].[284] The general conditions for civil liability are provided in articles 1240 and 1241 of the Civil Code, as specified in the Vigilance Law. There are three conditions for establishing civil liability under the general law of tort: damage, a breach of one of the obligations defined in the law and a causal link between the damage and the breach of the obligation. The burden of proof is on the claimant who has to prove the case satisfies all three conditions.

  Note moreover that the obligation to effectively implement a vigilance plan was specifically introduced by the Vigilance Law as an obligation for companies to take all steps in their power to reach a certain result [*obligation de moyens*] rather than to guarantee the actual attainment of that result [*obligation de résultat*]. Thus, a breach of an obligation cannot be inferred merely from the existence of damage.

- Publication of the court decision regarding civil liability (Commercial Code, article L. 225-102-5, para. 3): the court can also order its decision (or part of it) on civil liability to be published, disseminated or displayed. This could be considered a "name and shame" process. This sanction is not systematic and is left to the appreciation of the court.

d. Incentives or implications, such as link to procurement, licensing or export credit

There is no such provision in the Vigilance Law.

e. Enforcement methods

The injunction with potential periodic penalty payment could be viewed as an enforcement method.

f. Examples of enforcement and how the requirement is applied in practice

The injunction with potential periodic penalty payment has not been applied in practice yet but is likely to be sought in 2019.

Several NGOs and mayors of French municipalities and communities [*municipalités et collectivités*] have, for example, sent a written letter to a large petroleum multinational company. They considered that this company's first vigilance plan was not in line with the requirements set out in the Vigilance Law. They explained in detail why such a vigilance plan "does not reflect the reality of the impacts of the [company's] activities and induced risks of severe impacts on the climate system".[285] Should the company fail to integrate climate change in its next vigilance plan (published in 2019), they expressed their intention to bring an action before the competent court to ask for an injunction with a potential periodic penalty payment pursuant to article L. 225-102-4.-II of the Commercial Code.

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[284] Note that under the French law of tort, an individual is liable for his/her own fault [*responsabilité du fait personnel*] except in certain circumstances, where an individual can be liable for the acts of someone else [*responsabilité du fait d'autrui*] or of things [*responsabilité du fait des choses*]; see also French Constitutional Court, Decision No 2017-750 DC, para. 27.

[285] Notre Affaire à Tous, ZEA, Sherpa, Les Eco Maires et al, 1,5°C, 13 collectivités réclament une vigilance TOTALe !, 23 Oct. 2018, available at https://www.asso-sherpa.org/wp-content/uploads/2018/10/DP_-INTERPELLATION-TOTAL-3-compressed.pdf ("*il ne reflète pas la réalité des impacts de vos activités et les risques d'atteintes graves au système climatique qu'elles induisent*.").

5. Procedural Framework

a. Competent Court or other body

For both the periodic penalty payment and the civil liability action, the Vigilance Law refers to the "competent court" [*juridiction compétente*]. During the early stages of the debates at the National Assembly, it was explained that the competent court would be determined by rules governing jurisdiction as set out in ordinary law.[286]

Depending on the rules governing jurisdiction applicable to a given case, the competent jurisdiction could be the civil court (and more specifically the *Tribunal de Grande Instance*) or the commercial court (and more specifically the *Tribunal de Commerce*).

b. Standing (including participation of foreign plaintiffs/representative entities such as NGOs or trade unions)

- Injunction with possible periodic penalty payment: the action can be initiated by any party with standing. It is expected that a number of parties should be able to prove that they have standing to initiate such an action (including NGOs and trade unions).[287] This action could be considered "a privileged tool for members of civil society to check whether the Vigilance Obligations are being observed, irrespective of whether any actual damage has been sustained".[288]
- Civil liability action: while reviewing the Vigilance Law, the French Constitutional Court [*Conseil constitutionnel*] noted that the general rules of civil liability cannot be understood as "allow[ing] actions to be brought on behalf of the victim by a third party, since only the victim has standing [*locus standi*]."[289] In France, the possibility for NGOs and trade unions to bring class actions for remediation in a civil court for damage incurred by third parties or by their own members is quite limited. Some NGOs advocate for a broadening of the scope of class actions in order to allow victims to have more options for obtaining remedies.[290]

c. Jurisdictional restrictions (including forum non conveniens, place of business incorporation)

Although not specified in the Vigilance Law, territorial competence shall be determined by reference to the place of residence of the defendant. This solution aligns with the ordinary law applicable with regards to jurisdiction in France and it has been confirmed by legal commentators. French courts will thus have territorial jurisdiction over any action brought against companies registered in France and entering into the scope of the Vigilance Law (see article 42 of the French Code of Civil Procedure [*Code de procédure civile*] and EU Regulation 1215/2012 on jurisdiction and the recognition and

[286] National Assembly, report No 2628, 11 March 2015, p.75, available at http://www.assemblee-nationale.fr/14/pdf/rapports/r2628.pdf .
[287] See e.g. AN, report No 2628, 11 March 2015, p.76, available at http://www.assemblee-nationale.fr/14/pdf/rapports/r2628.pdf (the rapporteur explaining there is no need to specify that trade unions could initiate such action because all legal or natural person able to prove they have standing will be able to initiate such action), for more developments, see Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, p.4.
[288] For more developments, see Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, p.4.
[289] French Constitutional Court, Decision No 2017-750 DC, para. 28.
[290] French Ministry of Foreign Affairs and International Development, Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises, April 2017, p.56 (noting the option of class actions in several fields, especially discrimination, health, personal data protection); Sherpa, press release, Réaction publique de Sherpa au Plan national d'action pour la mise en œuvre des Principes directeurs des Nations Unies relatifs aux droits de l'Homme et aux entreprises, 4 May 2017 (recommending that the option of bringing class actions be extended to cover human rights).

enforcement of judgments in civil and commercial matters ("Bruxelles I"), article 4).[291]

For challenges related to the applicable law, see II.5.d.

d. Main procedural rules and challenges (formalities, deadlines, expediency, in court settlement options, evidence/discovery rules, multi-stage process, etc.)

The answer to this question only covers the civil liability action provided in the Vigilance Law and its main associated challenges.

The burden of proof for claimant

The burden of proof has been presented as a main challenge for victims to bring a civil liability action. It remains to be seen, with the first actions to be introduced before the courts, if it will be the case in practice.

The claimant bringing the civil liability action bears the burden of proof and has to prove the case satisfies all three conditions for establishing civil liability. This task may be made more difficult due to the ambiguity of certain concepts, such as the breach of obligations or the causal link as applied to the Vigilance Law.

In addition, a number of challenges from the ground can prevent victims not only from collecting evidence of the three conditions for establishing civil liability but also from taking any legal action before the courts. This is especially the case when both the victims and the damage are located outside of France. Obstacles are numerous and can relate to material, social, cultural, institutional and linguistic circumstances.

The civil liability regime is based on an "*obligation de moyens*", and not an "*obligation de résultat*" (see II.3.d. on these two concepts). Had the later regime been adopted, a breach of the Vigilance Obligations by a company could have been inferred from the mere existence of damage, unless the said company could prove it had fulfilled its obligations.

Note that a number of NGOs are asking for a reversal of the burden on proof.[292] This would entail the burden of proof shifting from the claimants to the companies entering into the scope of the Vigilance Law.

Other challenges

- A further challenge is the question of whether the Vigilance Law is the applicable law in the event of damage occurring outside of France. If the Rome II Regulation is applicable, article 4 of that Regulation provides that "[u]nless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."[293]

  The provision of this Regulation could prevent the Vigilance Law from being applied in cases where the damage has occurred outside of France. In that case, the applicable law would then be that of the country in which the damage has occurred.

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[291] For further discussions on juridiction in relation to the Vigilance Law (in French), see Etienne Pataut, Le devoir de vigilance – Aspects de droit international privé, Droit social, 2017, p.833; Anne Danis-Fatôme & Geneviève Viney, La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Recueil Dalloz p 1610, 2017.

[292] Action Aid France-Peuples Solidaires, Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, Collectif Ethique sur l'Etiquette et Sherpa, Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1: les entreprises doivent mieux faire, March 2019 (in French), available at https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-process-pedagogy-and-pragmatism-as-the-way-forward.

[293] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), article 4, para. 1.

This issue of private international law has been commented on by some academics.[294] They have explored exceptions to the rule that would allow the Vigilance Law to be the applicable law even when a damage occurs outside of France.

These solutions include: 1) applying the exception to the aforementioned general rule pursuant to article 4 para. 3 of Rome II Regulation (i.e. when there is a "manifestly closer connection with another country"; 2) applying article 7 of Rome II Regulation regarding "environmental damage" should the condition set in the article be met; 3) applying article 16 of Rome II Regulation, provided that the provisions of the Vigilance Law are characterised as "overriding mandatory provisions" [*lois de police*]; 4) applying article 17 of Rome II regarding the "rules of safety and conduct"; and 5) applying article 26 of Rome II Regulation regarding the "public policy of the forum" [*ordre public*], although this is unlikely to succeed according to specialists.[295]

- An external challenge relates to the fact a civil liability action is limited by the ambit *rationae personae* of the vigilance plan. Any damage occurring outside this ambit would therefore not be covered by the civil liability action as provided in the Vigilance Law. In particular, as already noted elsewhere, "[i]n certain cases, moreover, remediation is even less likely since subcontractors [and suppliers] involved in adverse human rights impacts are not necessarily within the [ambit] of the vigilance plan, if they have no established commercial relationship."[296]

6. Available Remedies

a. Civil, criminal and administrative remedies

See II.4. and II.5. The Vigilance Law only provides civil remedies.

b. Whether sanctions include compensation

Yes. See II.4.

c. Redress for victims including type and allocation of damages between claimants

Victims, like any other party with standing, may seek an injunction with potential periodic penalty payment in order to force a company to comply with its Vigilance Obligations.

Victims can also bring a civil liability action. The remedies that the court may order can theoretically be 1) "*réparation en nature*" [the closest form in common law would be specific performance, with the judge asking the person found liable to take specific actions to compensate the damage which has occurred]; or 2) "*reparation par equivalent*" [damages paid in monetary form/liquidated damages]. Liquidated damages are the most common form of damages ordered by courts and are most likely to be ordered in the context of the Vigilance Law.

Note that in France, as per the principle of "*réparation intégrale*", the damages to be paid to the victims are limited to the actual harms suffered by the victims (be it physical, moral or psychological injury, loss of revenue, damage to goods etc.). Damages cannot be awarded beyond the amount needed to compensate such harms

[294] For further details and discussion see, Etienne Pataut, Le devoir de vigilance – Aspects de droit international privé, Droit social, 2017, p.833; Horatia Muir Watt, Devoir de vigilance et droit international privé – Le symbole et le procédé de la loi du 27 mars 2017, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], Dec. 2017, comm 95; Laurence Sinopoli, Ancrer la "RSE" des multinationales - Pistes sur le terrain des conflits de lois , Cahiers de droit de l'entreprise, No 5, Sept 2017, dossier 31.
[295] Etienne Pataut, Le devoir de vigilance – Aspects de droit international privé, Droit social 2017, p.833.
[296] Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, p.4.

suffered by the victims. The expenses [*depens*] and the costs [*frais*] can also be awarded in accordance to the rules set in Code de procedure civile.

d. Remedies that are only available to certain categories of claimants, such as workers or consumers

N/A with regard to the Vigilance Law. Other laws provide remedies only available to certain categories of claimants (see II.2 and II.1).

e. Existence and use of judicial and non-judicial grievance mechanisms

With regard to judicial and non-judicial mechanisms and comments on those: see II.3.g.

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

No official estimate has been made available.

Note that with only a few exceptions, draft laws introduced by the Government [*projets de loi*] require an impact assessment to be conducted prior to the introduction of these draft laws. These assessments typically include an evaluation of the economic, financial, social and environmental consequences, costs and benefits for the State and the interested natural and legal persons. The Vigilance Law was a draft law introduced by members of the Parliament [*proposition de loi*]. According to publicly available information, no impact assessment appears to have been conducted.

Also note that there have been discussions whether a parliamentary mission should be established to evaluate *a posteriori* the implementation of the Vigilance Law. Cost of enforcement could be considered at this stage. At the time of writing this report, there is no information available about the timing for the creation of such a parliamentary evaluation mission (see also II.4.a.).

8. Impact of the Regulation

For most of the questions below, it is too early to have a clear idea of the impacts of the Vigilance Law. The year 2019 will mark the publication of the second vigilance plans for companies entering into the scope of the Vigilance Law. Following the publication of these second vigilance plans, we anticipate a better assessment of the potential effects of the Vigilance Law. Assessments could be conducted by comparing 1) the content of the vigilance plans of 2018 and those of 2019; and 2) reading the reports on the effective implementation of the vigilance plans of 2018.

a. Impact of the national regulation on behaviour/ policy of businesses (both direct and indirect)

This answer only provides general observations and it focuses principally on human rights. It is based for the most part on observations made following the enactment of the Vigilance Law and the publication of the vigilance plans in 2018. The non-profit organisation *Entreprises pour les Droits de l'Homme* is preparing a report that contains its preliminary observations on these plans (to be published in May/June 2019).

First and foremost, the Vigilance Law and the parliamentary debates that preceded its adoption have contributed to raise the awareness of a number of companies about the respect of human rights by businesses across their activities and supply chains. The Vigilance Law has also served to reinforce internal collaboration within companies. Several companies have created task forces dedicated to establishing and effectively implementing the Vigilance Obligations. These task forces gather individuals from

different departments, including audit and risk, legal, sustainability, corporate social responsibility, procurement, etc.

Admittedly, companies that enter into the scope of the Vigilance Law do not all have the same experience with business and human rights issues. Some companies already had processes in place prior to the enactment of the Vigilance Law. This facilitated the drafting of their vigilance plans. But overall, a "business and human rights" culture is still absent/insufficient within a number of companies entering into the scope of the Vigilance Law, including at the levels of top management and of operational staff. This results in a more difficult implementation of the Vigilance Obligations within companies and a lack of appropriate drive at the executive management level. This may explain why some companies view the Vigilance Law as a tick-box exercise, or why they conduct risk mapping by looking at their own risks, as opposed to risks to rights holders as the Vigilance Law requires. This can also lead to internal tensions within companies, with some people feeling uncomfortable disclosing too much information in the vigilance plan for fear of exposing their company to legal actions.

The first vigilance plans (published in 2018) were not yet fully in compliance with the Vigilance Law. Admittedly, they were the very first plans and a number of companies were uncertain on how to approach the preparation of such plans. We hope that a number of improvements will appear in the 2019 plans.

A number of brief observations or recommendations can be made about the 2018 vigilance plans. The methodologies used by companies to comply with the five items of the vigilance plans could be clarified in the body of their vigilance plans. Indeed, the vigilance plans could improve on a number of key items, including (but not limited to) risk mapping and associated identification of risks, evaluation measures, alert and complaint mechanism and the consultation of stakeholders. The accessibility and visibility of the vigilance plans are other main issues.

In addition, some companies confuse the processes set out in the Vigilance Law with the processes set in the recent anti-corruption law (Law No 2016-1691 of 9 December 2016 ("Sapin II Law")). This confusion is due to the fact that some of the processes prescribed by the Vigilance Law and those of the Sapin II Law have similar names, such as "risk mapping" or "alert mechanisms". However, these two laws do not have the same objectives; they do not address the same risks (the risks to the company itself for the Sapin II Law, and the risks to rights-holders for the Vigilance Law). Other avenues for improvement (especially for 2019) include the effective implementation of a vigilance plan and the assessments of its effective implementation (including using appropriate indicators).

There are also a number of companies which may enter into the scope of the Vigilance Law but have not established their vigilance plan (or made it public) yet. It is difficult to identify these companies because information on their corporate structure and their number of employees is not always public. This is a reason why Dominique Potier [the *Rapporteur* of the Vigilance Law], in an oral question to the Government on 27 March 2019, requested the Government to issue a list of companies that enter into the scope of the Vigilance Law. This list has also been requested by several NGOs.

As remarked by Dominique Potier in a recent conference to mark the second anniversary of the Vigilance Law, to date we are still in a "learning phase" [*phase d'apprentissage*], where the objective is not to sanction immediately companies that are making efforts to comply with the Vigilance Law.[297] This learning phase is expected to continue as companies progressively implement Vigilance Obligations (with a number of individuals mobilised inside companies, including recent hires, to manage the implementation of the Vigilance Law, the Sapin II Law and the GDPR). This learning phase is also expected to continue as environmental issues and human rights

[297] Conference at the National Assembly, Devoir de vigilance des multinationales: du premier bilan en France à l'impératif d'une réglementation européenne et internationale, 27 March 2019 (introductory speech).

in value chains gain more momentum in public debates. Similarly, NGOs, trade unions, consumers, and investors are becoming increasingly pro-active about these topics. Environmental issues and human rights are also becoming more central in parliamentary debates, as exemplified in France with the debates on the draft law PACTE (see II.1.) and in other countries considering legislation related to human rights due diligence.

Other comments

- Comments on the first vigilance plan and/or recommendations to improve the next generation of vigilance plans and the effective implementation of current plans (in particular addressing stakeholders consultations, setting in place vigilance measures, transparency, trainings etc.) have been formulated by different stakeholders.[298]
- Among such reports, several NGOs have formulated recommendations following an analysis of the vigilance plans of 80 companies with a focus on high-risk industries for human rights and the environment (extractives industries, armament, textile, agriculture, and banking).[299] In light of the involvement of these NGOs in the implementation of the Vigilance Law (including their possible involvement to activate the sanction regime of the Vigilance Law), it is relevant to present some of their views as expressed in their report. Their report:
    - Provides some recommendations for companies based on the analysis they made of the vigilance plans and the Vigilance Plans Reference Guidance authored by Sherpa (NGO)[300];
    - Asks the French public authorities to reinforce the Vigilance Law, and ensure its effective implementation. Suggestions include: the annual publication of the list of companies entering into the scope of the Vigilance Law; the creation of an administrative authority in charge of monitoring the vigilance Law's effective implementation; a centralised access to all the vigilance plans made public by companies; the reduction of the legal threshold related to a company's number of employees in order to enter into the scope of the Vigilance Law; and the reversal of the burden of proof in civil liability actions so that it rests with the companies and not the victims; and
    - Requests that the French public authorities "bring their proactive and constructive support" to a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises and to a European binding legislation with regard to the vigilance of multinational companies.

b. Impact of the national regulation on victims and potential victims (both direct and indirect)

Note that the injunctions and the civil liability actions are likely to be triggered from 2019 onwards. Thus, it is very early to assess the impact of the Vigilance Law on the victims and potential victims. Nevertheless, see references listed on II.8.a. and II.8.d. for some information and a view of the situation of rights-holders in specific sectors.

[298] Entreprises pour les Droits de l'Homme, Application of the Law on the Corporate Duty of Vigilance, Analysis of the first published plans, 1st edition, April 2018. 2019 edition forthcoming; Elsa Savourey, "France's Law on the Corporate Duty of Vigilance: Process, Pedagogy and Pragmatism as the Way Forward", Nov. 2018, available at https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-process-pedagogy-and-pragmatism-as-the-way-forward; Action Aid France-Peuples Solidaires, Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, Collectif Ethique sur l'Etiquette et Sherpa, Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1: les entreprises doivent mieux faire, March 2019 (in French), available at https://www.asso-sherpa.org/wp-content/uploads/2019/02/2019-etude-interasso_devoir_de_vigilance-ilovepdf-compressed-3.pdf.

[299] See Action Aid France-Peuples Solidaires, Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, Collectif Ethique sur l'Etiquette et Sherpa, Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1: les entreprises doivent mieux faire, March 2019 (in French).

[300] Sherpa, Vigilance Plans Reference Guidance, Feb. 2019.

These reports show that a number of NGOs in France and abroad are strongly mobilised to make sure that the Vigilance Law is enforced and can provide preventive and remedial measures for actual and potential victims.

c. Impact of the regulation on workers

See II.8.a.

d. Impact of the regulation on environmental rights (including biodiversity) and climate change

See, for instance, the two NGOs reports (in French) addressing this question.[301]

See also II.4.f. regarding a written letter sent by several NGOs and mayors of French municipalities and communities [*municipalités et collectivités*] to a large petroleum multinational company. They consider that this company's first vigilance plan was not in line with the requirements set in the Vigilance Law. They explain in detail why such vigilance plan "does not reflect the reality of the impacts of the [company's] activities and induced risks of severe impacts on the climate system".[302]

e. Public responses of stakeholders to regulation

See II.8.a. and 2.8.b.

A number of stakeholders in France and abroad are strongly mobilised to make sure the Vigilance Law is enforced and can provide preventive and remedial measures for actual and potential victims.

Several foreign governments and parliaments have expressed interest in the Vigilance Law. They have approached various actors in different stakeholder groups to have a better understanding of the Vigilance Law.

In terms of the consultation with stakeholders, note that reports from various stakeholder groups mentioned the insufficient consultation of stakeholders at the time of establishing the first vigilance plans in 2018. It remains to be seen if this situation will be resolved in the vigilance plans to be published in 2019.

f. Degree of overcoming of obstacles for victims to bring claims in Member State

See II.5.d.

g. Relevant jurisprudence which has had an impact on corporate behaviour regarding climate change

No case law yet in relation to the Vigilance Law.

Aside from the Vigilance Law, note that some case law, including the Erika case[303] opened the way to the introduction of the notion of "ecological damage" [*préjudice écologique*] into the Civil Code [*Code civil*] in 2016.[304]

h. Change in industry standards, codes of conduct and other business sector activity

Too early to be commented.

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[301] CCFD-Terre Solidaire, La vigilance au menu, Les risques que l'agro-industrie doit identifier, March 2019; Mighty Earth, Sherpa, FNE, Devoir de vigilance et déforestation: le cas oublié du soja, March 2018.
[302] Notre Affaire à Tous, ZEA, Sherpa, Les Eco Maires et al, "1,5°C, 13 collectivités réclament une vigilance TOTALe !", 23 October 2018; https://www.asso-sherpa.org/wp-content/uploads/2018/10/DP_-INTERPELLATION-TOTAL-3-compressed.pdf ("*il ne reflète pas la réalité des impacts de vos activités et les risques d'atteintes graves au système climatique qu'elles induisent*.").
[303] Cour de cassation, Chambre criminelle, arrêt No 3439, 25 sept. 2012, pourvoi No 10-82.938.
[304] Articles 1246 to 1252 of the Civil Code created by the Law No 2016-1087 of 8 August 2016.

i. Impact of the regulation on business enterprises (including economic burden as well as corporate benefits)

No public information available.

III. COMPARATIVE ANALYSIS

This section is also focused mainly on the Vigilance Law, with the exception of the preliminary section below. Such preliminary section provides a summary of the domestic law resulting from the transposition of Directive 2014/95/EU of 22 October 2014 on non-financial reporting.

9. Comparisons between different regulations within the Member State

a. Summary of the domestic law resulting from the transposition of Directive 2014/95/EU of 22 October 2014 on non-financial reporting[305]

Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups has been transposed into French Law through the Order No 2017-1180 of 19 July 2017 [*Ordonnance No 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises*]. This type of transposition has resulted in the amendment of several provisions of the Commercial Code [*Code de commerce*]. Some of these provisions have been later amended including by the Law No 2018-998 of 23 October 2018 related to the fight against fraud which has widened the ambit of the declaration on extra-financial performance [*Loi n° 2018-898 du 23 octobre 2018 relative à la lutte contre la fraude*].

Scope[306]

Article L. 225-102-1.-I of the Commercial Code read in conjunction with its supporting decree[307] sets the scope of companies which have to prepare a declaration on extra-financial performance [*déclaration de performance extra-financière*] to be integrated in their annual management report. This includes:

- All companies whose securities are admitted to trading on a regulated market, with 20 million euros of balance sheet total [*bilan*] OR 40 million euros of net turnover [*chiffre d'affaires*], AND 500 employees (calculated based on the average of the number of permanent employees during the financial year); and
- All companies whose securities are not admitted to trading on a regulated market, with 100 million euros of total balance sheet OR 100 million euros of net turnover, AND 500 employees (calculated based on the average of the number of permanent employees during the financial year).

In addition to these criteria, these companies have to be registered under some specific corporate forms.[308]

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[305] 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, as transposed by Order No 2017-1180 of 19 July 2017.

[306] Note that the following developments provide only an overview of the main provisions in French law on the declaration of extra-financial performance, this country report being mostly focused on the Vigilance Law. For further information (in French) on the scope of companies required to establish a declaration on extra-financial performance, its content and publication, and the mandatory verification of the information included in the declaration on extra-financial performance by an independent third party (only for some companies) see e.g. MEDEF (in collaboration with Deloitte and EY), Guide Méthodologique Reporting RSE, Déclaration de performance extra-financière, 2e ed, Sept 2017, available at https://www.medef.com/uploads/media/node/0001/12/f6ee1c6ad233ebb1fa87922f046d062b59f1a4b2.pdf.

[307] Decree No 2017-1265 of 9 August 2017.

[308] For a summary of these criteria, see (in French) Béatrice Parance, La declaration de performance extra-financière, nouvelle ambition du reporting extra-financier, La Semaine Juridique, édition générale, No 44-45, 30 Oct 2017.

Note that article L. 225-102-1 of the Commercial Code also includes provisions applicable to companies drawing up consolidated accounts [*comptes consolidés*]. These companies have to prepare a consolidated declaration on extra-financial performance for the group. This situation is not covered in this overview.

Content of the declaration on extra-financial performance

- The declaration on extra-financial performance "presents information on how the company takes into account the social and environmental consequences of its activity" (article L. 225-102-1.-III of the Commercial Code). In addition, and only for companies mentioned at No 1 above (i.e. all companies whose securities are admitted to trading on a regulated market with 20 million euros of total balance sheet [*bilan*] OR 40 million euros of net turnover [*chiffre d'affaires*] AND 500 employees), the declaration shall also report "the effects of [the company's] activity in relation to the respect of human rights and the fight against corruption and fiscal evasion." Note that the reference to "fiscal evasion" was introduced subsequently by Law No 2018-998 of 23 October 2018 related to the fight against fraud.
- Article R. 225-105 of the Commercial Code provides that the declaration on the extra-financial performance includes the business model [*le modèle d'affaires*] of the company or group of companies. In addition, for each category of information listed in this article (social information, environmental information, societal information, and for companies mentioned at No 1, information on the respect of human rights and the fight against corruption and fiscal evasion), the declaration on extra-financial performance shall present:
    - 1° A description of the **main risks** related to the activity **of the company or the group of companies**, **and where relevant and proportionate, the risks created by its business relationships, its products and services**;
    - 2° A description of the policies applied by the company or the group of companies, including the **reasonable diligence procedures** [*procédures de diligence raisonnable*] implemented to prevent, identify, and mitigate the occurrence of risks mentioned at 1°; and
    - 3° The **results of these policies** with **key performance indicators**.

  This article further provides that when a company does not apply a policy with regard to one or several risks, the declaration includes a clear and reasoned explanation of why it does not apply such policy [*une explication claire et motivée des raisons*].

  Note that there is no information in relation to what "reasonable diligence procedures" entails. Clarifications would be helpful, at the very least by reference to international standards detailing such procedures. Generally speaking, there is little information and guidance provided on the above described three-fold process.
- The decree provides a detailed list of the information to be included in the declaration on extra-financial performance, should such information be relevant in light of the identified risks and the policies applied by the companies. This list, provided in article R. 225-105 of the Commercial Code includes detailed information for each category of information (i.e. social information, environmental information, societal information, and for companies mentioned at No 1, information on the respect of human rights and the fight against corruption and fiscal evasion). For instance, regarding environmental information and information on human rights:
    - **Environmental information**: companies have to provide information on general environmental policies, pollution, circular economy, climate

change, protection of biodiversity. Each category includes additional specific items.[309]

- **Human rights information**: only companies mentioned at No 1 above (i.e. all companies whose securities are admitted to trading on a regulated market with 20 million euros of total balance sheet [*bilan*] OR 40 million euros of net turnover [*chiffre d'affaires*] AND 500 employees) also have to provide information in relation to human rights. The information to be provided is the following:

  2. "(a) Promotion and respect of the provisions of the fundamental conventions of the International Labour Organisation relating to:
  3. - the respect for freedom of association and the right to collective bargaining;
  4. - the elimination of discrimination in employment and occupation;
  5. - the elimination of forced or compulsory labour;
  6. - the effective abolition of child labour;
  7. (b) Other actions initiated in favour of human rights."[310]

Note that the information requested under the categories "social information" and "societal information" is likely to have a connection with human rights. For instance, such categories include information in relation to health and safety at work, equal treatment and the fight against discrimination, and in the relationships with suppliers and subcontractors, the consideration of their social and environmental responsibility. This "social information" and "societal information" is to be included in the declaration on extra-financial performance for all companies entering into the scope of the legislation, whether or not their securities are admitted to trading on a regulated market.

Sanctions

Article L. 225-102-1.-VI of the Commercial Code provides that when the annual management report does not include the required declaration on extra-financial performance, any interested person may ask the president of the court in the context of interim/emergency proceedings [*statuant en référé*] to order, where appropriate under periodic penalty payment, the company's board of directors [*conseil d'administration*] or its executive board [*directoire*] to communicate the required information. When the injunction is granted, the periodic penalty payment and costs of proceedings shall be borne by the directors or members of the executive board, individually or severally, as the case may be.

Articulation with the Vigilance Law

As provided in article L. 225-102-1.-III, "The [extra-financial performance] declaration can, when appropriate, refer to the information provided in the vigilance plan." [*La déclaration peut renvoyer, le cas échéant, aux informations mentionnées dans le plan de vigilance prévu au I de l'article L. 225-102-4*].

b. Corporate and directors' liability regime in case of violations or damage caused by operators in the EU parent company's supply chain, including relevant jurisprudence, even in the absence of legislation on due diligence

The answer to this question only covers the Vigilance Law's civil liability regime. It also excludes specific instances of possible corporate and directors' liability under general commercial and criminal law and the law of torts (and related case law) in the event of

[309] Commercial Code, art. R. 225-105-II.-A2°.
[310] Commercial Code, art. R. 225-105-II.-B2°.

damages caused in companies' supply chains.[311] Note that the definition of a "director" [*dirigeant*] is defined in the Commercial Code.

By way of reminder, the Vigilance Law focuses on civil liability and does not include provisions on criminal liability.

On the civil liability action provided in the Vigilance Law, see II.4 to I.6.

The company whose liability can be established does not have to be an "EU parent company" as formulated in this question. It could be a parent *or* instructing company. Actually, the company which liability can be established could be the subsidiary of a foreign parent company (EU or non-EU) as long as it has its registered office in France and meets certain criteria related to its corporate form and number of employees (see II.2.).

The Vigilance Law provides that "a breach of the obligations defined at article L. 225-102-4 […] engages the **author's liability** and requires them to remedy any damage that the execution of [the Vigilance Obligations] could have prevented".

The Vigilance Law only refers to companies [*sociétés*], without any mention of natural persons such as directors. Similarly, the explanatory memorandum of the draft law, clearly explains that the objective of the civil liability action is to engage the civil liability of **companies**.[312] Besides, in its decision reviewing the constitutionality of the Vigilance Law, the French Constitutional Court [*Conseil constitutionnel*] also only refers to the civil liability of companies.[313]

c. The extent to which the legal regime translates a corporate duty to respect human rights and abstain from other abuse(s) and from causing damage into a civil law obligation by requiring a standard of reasonable care from the directors

See answer to previous question.

d. The level of "duty of care"/"due diligence" required of the business or its administrative organs, in order to fulfil their obligations, and the key elements of this legal "duty of care"

Companies entering into the scope of the Vigilance Law have to establish a vigilance plan setting out "reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship" (Commercial Code, article L. 225-102-4.-I). They must effectively implement their vigilance plan, and make the plan and the report on its effective implementation public and include them in the company's annual management report.[314]

A couple of comments below about the level of the vigilance measures that is expected, including:

- First, the Vigilance Law explicitly refers to "**reasonable** vigilance measures" [*mesures de vigilance raisonnable*] (emphasis added). Note that we chose to use this translation as it is closer to the original in French. However, in the UNGPs, the

[311] For an overview of this civil liability and criminal liability, see, JurisClasseur Commercial, Fasc. 1053 Dirigeant sociaux – responsabilité civile, 3 April 2019; Jurisclasseur Commercial, Fasc. 1060 Responsabilité des Dirigeants Sociaux, 1 April 2010 (latest update 12 Jan.2018).
[312] National Assembly, draft law No 2578, 11 Feb. 2015, p.12, available at http://www.assemblee-nationale.fr/14/propositions/pion2578.asp.
[313] French Constitutional Court, Decision No 2017-750 DC, para. 27.
[314] Note that France is a civil law jurisdiction and that the "duty of care" is a common law concept and not a civil law concept. For a comparative analysis of the duty of vigilance and the duty of care, see Béatrice Parance & Elise Groulx, Regards croisés sur le devoir de vigilance et le duty of care, Journal du Droit International (Clunet) No 1, Jan. 2018.

English expression "human rights due diligence" is translated in French as "*procédure de diligence raisonnable*". Similarly, the OCDE Guidelines for Multinational Enterprises use the English expression "due diligence' which is translated in French as "*diligence raisonnable*".[315]

- Second, the reasonable vigilance measures are meant to "identify **risks** and prevent **severe** impacts".
- Third, the vigilance plan includes a risk mapping (item 1) that aims at identifying risks, analysing them and **prioritising** them with the view of preventing severe impacts. This means that the Vigilance Law acknowledges that companies can (and should) prioritise their responses.
- Fourth, the civil liability regime is based on an "***obligation de moyens***", and not an "*obligation de résultat*" (see II.3.d.).

e. How directors' responsibility can be engaged

On the Vigilance Law, see III.2.

f. Whether the concept of due diligence is used in the domestic regulation of other areas of corporate governance, and if so, what the legal elements are to establish a duty and/or liability (including, if any, for subsidiaries and in the supply chain).

Law No 2016-1691 of 9 December 2016 on Transparency, Anti-corruption and Modernisation of Economic Life ("Sapin II Law") [*Loi No 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*]. The Sapin II Law was debated in Parliament at about the same time as the Vigilance Law. In several respects, article 17 of the Sapin II Law and the Vigilance Law have a similar structure. However, the processes to be implemented such as "risk mapping" or "alert mechanisms" are not the same. These two laws do not have the same objectives; they do not address the same risks (the risks to the company itself for the Sapin II Law, and the risks to rights-holders for the Vigilance Law). In addition, other differences relate to the sanction regime and the scope of both laws.

This section only provides an overview of article 17 of the Sapin II Law. This article provides for an obligation to prevent and detect corruption and influence peddling in France and abroad and details specific measures for doing so.[316]

The scope of the Sapin II Law combines an employee and turnover threshold. The obligation provided in article 17 applies to "chairpersons, managing directors and managers [*les présidents, les directeurs généraux et les gérants*] of a company that employs at least five hundred employees [*au moins 500 salariés*], or [of a company] part of a corporate group [*groupe de sociétés*] with the parent company having its registered office in the French territory and employing at least 500 employees [*employant au moins 500 salariés*], **and** with a net turnover [*chiffre d'affaires*] or

[315] See e.g., UNGPs, Principle 15; OECD MNE, General Principles 10 & 14.

[316] Note that the other principal provisions of the Sapin II Law includes the creation of the French anticorruption agency [*Agence française anticorruption*] (articles 1 to 5), the provision of a general status for whistle blowers (articles 6 to 15) that is distinct from the whistle blowing system of article 17, a penalty of mandatory compliance [*programme de mise en conformité*] (article 18), a system presented as similar to the deferred prosecution agreements [*convention judiciaire d'intérêt public*] (article 22). For more information on Sapin II Law, see French anticorruption agency, Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, Dec. 2017, available at https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/French_Anticorruption_Agency_Guidelines.pdf; see also Agence française anticorruption, Guide sur la fonction conformité anticorruption en entreprise, Jan. 2019 (in French) available at https://www.economie.gouv.fr/files/files/directions_services/afa/2019-01-29_-_Guide_pratique_fonction_conformite.pdf (note that this guide is the first of a series of six upcoming guides to be published by the French anticorruption agency). For a discussion on the articulation of the EU General Data Protection Regulation, the Vigilance Law and Sapin II Law (in French), see e.g., Géraldine Péronne & Emmanuel Daoud, Loi Sapin II, loi vigilance et RGPD – Pour une approche décloisonnée de la *compliance*, Dalloz IP/IT, Nov. 2017, p.584.

consolidated net turnover superior to 100 million euros." (article 17.-I, emphasis added).[317]

This obligation also applies, with the same employee and turnover thresholds, to chairpersons and managing directors of public establishments of an industrial and commercial nature [*établissements publics à caractère industriel et commercial*] or belonging to a public group [*groupe public*] and to some extent to the members of the management board [*membres du directoire*] of *sociétés anonymes.* (See article 17.-I 1° and 2° for more details).

See article 17.-I. for additional details as to the situation of corporate groups and the entities inside these groups which are covered by the obligation provided in article 17. Article 17.II details the measures and procedures required to comply with the obligation to prevent and detect corruption and influence peddling. The persons mentioned at article 17.-I as well as the company, as a legal person, can be held liable in case of failure to comply with the measures provided in article 17.-II.[318]

These measures are:

1° A code of conduct defining and illustrating the various types of behaviours to be forbidden as they are likely signs of corruption [*faits de corruption*] or influence peddling [*trafic d'influence*]. The code of conduct must be included in the company's r*èglement intérieur*;

2° An internal whistle-blowing system to allow employees to disclose conduct or situations that do not comply with the code of conduct;

3° Risk mapping taking the form of a structured written document regularly updated and aimed at identifying, analysing, and prioritising the risks of external solicitations for corrupt purposes to which the company is exposed, with due consideration of the business sectors and geographical areas in which the company operates;

4° Evaluation procedures regarding the situation of customers, first-tier suppliers, and intermediaries [*clients, fournisseurs de premier rang et intermédiaires*], in line with the risk mapping;

5° Internal and external accounting control procedures to ensure that books, records and accounts are not used to conceal acts of corruption or influence peddling;

6° A corruption risk training system directed to managers and staff [*cadres et personnels*] who have the greatest exposure to risks of corruption and influence peddling;

7° Disciplinary rules allowing the enforcement of sanctions upon employees [*salariés*] of the company in case of infringement of the code of conduct; and

8° An internal monitoring and assessment system of the measures implemented.

The French anticorruption agency ensures compliance with the above listed measures. If a company fails to adopt these measures, the magistrate [*magistrat*] head of the agency has the possibility to seize the agency's sanction commission [*Commission des sanctions*]. The commission can (article 17.-IV and V):

- Issue an injunction requiring the company and its representatives [*ses representants*] to comply with its recommendations;
- Impose fines up to 200,000 euros for natural persons and one million euros for legal persons. The quantum of the fine must be proportionate to the breach and to the financial situation of the natural person or legal person subject to the fine; and

[317] Translations of the Sapin II Law are based, when possible, on the translations used in the following document: French anticorruption agency, Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, Dec. 2017.
[318] Sapin II Law, article 17.-II."*Indépendamment de la responsabilité des personnes mentionnées au I du présent article, la société est également responsable en tant que personne morale en cas de manquement aux obligations prévues au présent II*.".

- Order the publication, dissemination or display of the decision regarding the injunction or fine or an extract thereof. The costs are borne by the person found liable.

For references to other domestic laws, see I.2 and II.1 and III.1.

g. How parent companies can be held liable in the Member States for the impacts of their subsidiaries, including non-EU based subsidiaries (including in comparative areas of corporate governance such as anti-bribery and corruption, anti-money laundering, taxation, competition, health and safety)

See developments on the Vigilance Law, section II.

For comparative area for corporate governance, see previous question.

h. How companies in Member State can be held liable for the impacts of their supply chain, including non-EU based suppliers, and including suppliers beyond the first tier of the supply chain

See developments on the Vigilance Law, section II.

Note that the vigilance plan is not limited to EU-based suppliers or first-tier suppliers in the supply chain. Indeed, the vigilance plan covers: 1) the activities of a company that enters into the scope of the Vigilance Law and which has to establish the vigilance plan; 2) the activities the companies that such a company controls, within the meaning of article L. 233-16 II, directly or indirectly; and 3) the activities of **subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship.**

Any supplier can thus enter into the ambit of a company's vigilance plan as long as there is an established commercial relationship and the activities are related to this relationship, irrespective of where the supplier operates, where it is registered or its rank in the supply chain.

i. Whether any other area of law requires due diligence for cross-border corporate impacts, such as cross-border pollution or environmental hazards.

Vigilance Law covers cross-border corporate risks provided that:

- Such risks enter into the ambit *rationae materia* of the vigilance plans (i.e. risks to human rights and fundamental freedoms, to the health and safety of persons and to the environment); and
- Such risks arise in entities which enter into the ambit *rationae personae* of the vigilance plans (i.e. risks resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are linked to this relationship).

Regarding other laws requiring due diligence for cross border impact, see I.2. and II.1.

j. Whether due diligence over own operations or the supply chain is a legal requirement in other areas of law regulating business, including whether due diligence is available as a defence

Regarding other areas of law regulating business, see I.2. and II.1.

With regards to the use of the vigilance plan as a possible defence, it is important to note that the vigilance plan is the cornerstone of the Vigilance Obligations. As a result, the showing that a vigilance plan has been properly established and implemented may be viewed as a means of defence in the event of a civil liability action. In practice, the court will have to assess a vigilance plan's comprehensiveness and how effectively it is

implemented. This will likely determine the extent to which a vigilance plan may be used as a means of defence in a civil liability action.

k. Whether the severity of the human rights abuses is relevant, taking into account the specific risks of certain activities

Severity is a key concept in the Vigilance Law since the vigilance plan "shall contain reasonable vigilance measures adequate to identify risks and to prevent severe impacts on […]." The Vigilance Law, however, does not specify how and at what scale the notion of severity should be assessed. The UNGPs may however offer a possible interpretation.[319]

l. The burden of proof to hold a business or its board/director liable for human rights or other impacts, including which regulations are the most efficient for victims in this respect

In relation to the Vigilance Law, the burden of proof is on the claimant.

10.Access to remedy by individuals

The Vigilance Law's civil liability regime provides access to remedies for individuals whose rights are affected. To date, the Vigilance Law appears as one of the most advanced domestic regimes that provide access to remedy for individuals whose rights have been impacted along supply chains and for environmental impacts.

A number of challenges, however, exist at this stage. These challenges raise questions as to the effectiveness of this regime (see II.5. and II.6.).

The Vigilance Law has a twofold objective: remediation and prevention.[320] It remains to be seen how effective remediation will be when the first actions are introduced before the competent courts. In the meantime, the very existence of the civil liability action (and of the sanction regime of the Vigilance Law as a whole) serves the objective of prevention and could even lead to new standards of behaviour for companies.[321]

a. Adherence by Member States to their fundamental human rights obligations

The French National Action Plan refers to the Vigilance Law, together with other domestic laws, as a way for France to adhere to its fundamental human rights obligations. The Vigilance Law also appears to be one of the most advanced domestic regimes with respect to mandated human rights due diligence. The Vigilance Law has the potential to contribute to France's effective adherence to "its obligations to respect, protect and fulfil human rights and fundamental freedoms", as provided in the UNGPs.[322] In practice, this will depend on how French institutions take ownership of the Vigilance Law (including courts in the enforcement phase, the Government in the promotion and support phase, and the Parliament in its possible monitoring of the implementation of the Vigilance Law through a parliamentary evaluation mission).

b. Under which conditions and how victims can hold the Member State parent companies or their subsidiaries liable in case of human rights violations or other relevant damage caused within the supply chains

See II.5. and II.6. for more details on the civil liability regime provided in the Vigilance Law.

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[319] See, UNGPs, Principle 14; see also II.3.a. on the interpretation of some expressions in the Vigilance Law
[320] National Assembly, draft law No 2578, 11 Feb. 2015, p.4 available at http://www.assemblee-nationale.fr/14/propositions/pion2578.asp; see also II.2.a.
[321] Stéphane Brabant & Elsa Savourey, A Closer Look at the Penalties Faced by Companies, International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Ethique des Affaires*], June 2017, Comm 44, p.5 ("preventive action is essential to raising company awareness, limiting the negative impact of their activities on human rights and thus reducing the number of potential victims of such impacts.").
[322] UNGPs, General Principles, p.1.

Note that the company whose liability can be established does not have to be a "Member State parent company" as formulated in this question. It could be a parent or an instructing company. Moreover, the company which liability can be established could be the subsidiary of a foreign parent company (EU or non-EU), as long as its subsidiary has its registered office in France and meets certain criteria related to its corporate form and number of employees (see II.2.).

To sum up, a victim can hold a company liable in case of human rights violations or other relevant damage under the following conditions:

- The company enters into the scope of the Law; and
- The victim is able to prove that the three conditions for civil liability are met.

c. What are the main obstacles and difficulties

Some obstacles related to remediation include (see II.5. and II.6. for more developments):

- The burden of proof rests on the victims. This situation has been presented as a main challenge for the civil liability action. It remains to be seen with the first actions introduced before the courts, whether this will be the case in practice. A number of NGOs are asking for a reversal of the burden of proof so that it shifts from the claimant to the company entering into the scope of the Vigilance Law.
- Access to court for claimants.
- Knowledge of the Vigilance Law and of related business and human rights standards by courts and by the legal profession in general.
- Another challenge is the question of whether the Vigilance Law would be the applicable law in the event of a damage occurring outside of France.

IV. REGULATORY FRAMEWORK

a. Which regulatory model is most effective in achieving corporate implementation of adequate due diligence

This is a difficult question to address as the Vigilance Law is only two years old and the sanction regime has not yet been triggered. At this preliminary stage, a few comments are possible.

The Vigilance Law has integrated into domestic "hard law" what can be viewed as mandatory due diligence in relation to human rights, health and safety of the persons and the environment. As such, it has contributed to both raising the awareness of companies on these topics and to integrating these topics in the legal risk analysis of companies. In particular, the risk of severe impacts on human rights now appears better captured as a legal risk by companies in light of the litigation risks associated with the Vigilance Law. It is possible to anticipate that the sanction regime as a whole is serving as a strong incentive for companies to comply with the Vigilance Law and implement adequate human rights due diligence. On this subject, see also III.14.

In terms of "regulatory model", and based on the preliminary observations about the Vigilance Law, a regulatory approach with associated sanctions may contribute to a large mobilisation within companies on the topics of human rights, health and safety of persons and the environment. It may also help to ensure that companies more closely integrate these topics in the risk analysis they conduct with respect to their various projects, including as part of their legal risk analysis (and thus going beyond a "reputational risk" approach).

Beyond the Vigilance Law, it would also be worth exploring the effectiveness of an incentive-based "model" (in connection for instance with participation in public procurement) as an alternative or complement to a sanction-based approach.

Having a general regime for human rights and environmental due diligence at the EU level may provide clarity in a context where a number of EU regulations and directives

(in place and under discussion) refer to the UNGPs, the OECD Guidelines for Multinational Enterprises, and human rights due diligence. In addition, a potential EU regime may contribute (depending on the companies entering into the scope of such regime) to levelling the playing field so that the same rules apply to a larger number of companies operating in/from the EU. This would also be helpful, for instance, when these companies compete on international projects. It is possible to consider that having a level playing field at the EU level may also help increase the "acceptability" of mandatory due diligence for the companies concerned. An important part of the acceptability of such an EU-wide initiative (and the ability of companies to take ownership of it) would rely on pedagogy. A pedagogical approach would include explaining and providing guidance to companies on the processes to be conducted, including on due diligence. It would also consist in acknowledging that the implementation of these processes can take time for companies that are not used to addressing questions relating to human rights/environment.

b.Which regulatory model is most effective in providing victims with access to remedy

This is a difficult question to address as the Vigilance Law is only two years old and the sanction regime has not yet been triggered. In any event, and as previously explained, the existence of the civil liability regime in the Vigilance Law serves as an incentive to achieve corporate implementation of adequate due diligence.

The Vigilance Law uses civil liability as a mechanism to provide remedies. However, in light of the foreseeable obstacles with such a remedy mechanism, a number of questions should be clarified when considering regulatory models. These clarifications should also be based on how the courts will enforce the Vigilance Law. They include: 1) whether this regime is the most appropriate to provide access to remedies (especially in the context where the claimant is located outside of France and where the damage has occurred outside of France); 2) who should be able to bring a suit before the court, which raises the question of the possibility of class actions; and 3) whether the conditions to establish civil liability should be adjusted (possibly leading to a reversal of the burden of proof in favour of the claimants). These questions would also be of relevance if the EU considers a legislative approach to human rights and environmental due diligence. Such approach would need to be carefully considered within the context of Rome II Regulation.

Lastly, it is also important for EU Member States to approach the development of any regulatory model providing access to remedy in connection with their obligations under pillars 1 and 3 of the UNGPs.

c. An overall assessment of the main strengths and weaknesses (risks and opportunities) of the examined legislative regimes, providing a detailed comparative analysis, including whether they are effective to address the most important potential harms and negative impact of companies in their operation and in their supply chain

The list below tries to provide an account of the main strengths and weaknesses of the Vigilance Law. The list is not exhaustive.

Other legislative initiatives are not reviewed here. For a commentary on the non-financial reporting legislation, see III.1.

Main strengths of the Vigilance Law:

- The Vigilance Law and the parliamentary debates that preceded its adoption have contributed to raise the awareness of a number of companies (and also of the public in general) about the respect of human rights by businesses across their activities and supply chains. Within a number of companies, it has also served to reinforce internal collaboration through the creation of task forces dedicated to establishing and effectively implementing the Vigilance Obligations.

- The Vigilance Law is not merely about reporting but it is also about effectively implementing a vigilance plan.
- The Vigilance Law is not limited to a discrete set of human rights (e.g. those related to slavery and forced labour or child labour). It has a much broader ambit as it covers risks and severe impacts on human rights and fundamental freedoms, on the health and safety of persons, and on the environment.
- In the presence of a corporate veil between legal entities in a supply chain, the Vigilance Law uses the Vigilance Plan as a connection between the parent or instructing companies, certain legal entities in the supply chains of such companies and subsidiaries. The sanction regime is thus attached to the parent or instructing companies and not to any other legal entities.
- While the number of companies entering into the scope of the Vigilance Law may not be significant (between 150 and 300 according to various estimates), the number of companies entering into the ambit of a company's vigilance plan and therefore subject to the processes to be put in place as part of the establishment and effective implementation of the vigilance plan, is large.
- There is no "comply or explain" mechanism: any company entering the scope of the Vigilance Law has to comply with the Vigilance Obligations. The Vigilance Obligations range from the establishment of a vigilance plan covering the five measures listed in the Vigilance Law, the effective implementation of such plan, and its publication and inclusion in the company's annual management report as provided in the Vigilance Law.
- The sanction regime is a key element of the Vigilance Law. This sanction regime is three fold: injunction, civil liability, and the publication of the civil liability decision. Hence it is a unique combination of an implementation process, a remediation process, and a name and shame process.

  As it has already been discussed in this Report, the existence of the sanction regime serves the two-fold objective of the Vigilance Law: prevention and remediation, although it remains to be seen how the court will enforce such a regime.

  Although "hard sanctions" already existed in the event of non-compliance by businesses with human rights "soft law" standards, the existence of the Vigilance Law's sanction regime, even if it has not yet been enforced before the courts, is an incentive for companies to comply with the Vigilance Obligations.

  As a side note, this sanction regime also contributed to have a number of lawyers (who may not have viewed "soft law" standards as a sufficient justification for companies to respect human rights) taking the respect of human rights by businesses more seriously.
- The number of parties with standing who may seek an injunction with potential periodic penalty payment is large. This empowers NGOs, trade unions and various other stakeholders to monitor the implementation of the Vigilance Obligations by the companies entering into the scope of the Vigilance Law.
- Provisions of the Vigilance Law in relation to the involvement of stakeholders are quite innovative. Indeed, the vigilance plan "is meant to be drawn up in conjunction with the stakeholders [*parties prenantes*] of the company, where appropriate as part of multi-stakeholder initiatives [*initiatives pluripartites*] within sectors or at territorial level."[323] In addition, the Vigilance Law provides that trade unions in particular shall be consulted in the set-up of the alert and complaint mechanism. In addition, and providing they can prove standing, the injunction

[323] Commercial Code, art. L. 225-102-4.-I para. 4 ("*Le plan a vocation à être élaboré en association avec les parties prenantes de la société, le cas échéant dans le cadre d'initiatives pluripartites au sein de filières ou à l'échelle territoriale*.").

mechanism is also a tool for various stakeholders to ensure that companies entering into the scope of the Vigilance Law comply with the Vigilance Obligations.

Main weaknesses:

- Only a limited number of companies fall within the scope of the Vigilance Law. In addition, foreign companies that have no subsidiaries in France entering into the scope of the Vigilance Law do not have to comply with the Vigilance Law, even if they have activities in France.
- There is a difficulty in identifying the companies entering into the scope of the Vigilance Law, due to the lack of publicly available information in relation to the corporate structure of a company/group of companies and their number of employees in France and globally. It is difficult to know with certainty whether companies which have not published a vigilance plan fall outside the scope of the Vigilance Law. This explains why a number of NGOs and the French rapporteur of the Vigilance Law are asking the Government to issue a list of companies entering into the scope of the Vigilance Law.
- The same comment applies to the identification of the entities that enter into the ambit *rationae personae* of the vigilance plan. This also explains why certain NGOs have asked companies to disclose a list of companies that enter into the ambit of the vigilance plan.
- Some concepts included in the Vigilance Law are likely to be clarified by the courts as they are currently not defined in the Vigilance Law and therefore subject to diverging interpretation. In such a context, an important question is whether the judges and the legal profession in general will have pre-existing knowledge of the UNGPs and related standards and practices pertaining to the emerging field of "business and human rights" which may prove helpful tools to implement and enforce the Vigilance Law.
- Sanctions regime: access to remedy through civil liability may be difficult as a result of the challenges previously identified (see II.5., II.6., III.17.) Several provisions of the Vigilance Law remain subject to the courts' interpretation. The applicable law in the event of a damage occurring abroad needs to be clarified.
- The monitoring of the implementation of the Vigilance Law so far mostly relies on civil society organisations, which may have limited financial and operational capacity. This raises the question of whether a monitoring agency should be established to provide independent advice and guidance on the implementation of the Vigilance Law and/or contribute to its enforcement.
- The Vigilance Law was enacted approximately at the same time as the Sapin II Law on anti-corruption. Processes to be implemented have similar names, such as "risk mapping" or "alert mechanisms". These two laws, however, do not have the same objectives; they do not address the same risks (the risks to the company itself for the Sapin II Law, and the risks to rights-holders for the Vigilance Law). This may be a source of confusion for some companies.
- The articulation of the Vigilance Law with trade secrets and whistleblowing could be clarified. So far, a number of companies are hesitant to disclose risks that exist but have not yet entered into the public domain. The alert and complaint mechanism also needs to provide sufficient protection for the persons using it.
- The coexistence, for the non-financial reporting legislation and the Vigilance Law, of different thresholds in terms of scope of application and of complementary information to be published may lead to various confusions for companies having to prepare a declaration on extra-financial performance and, when applicable, a vigilance plan. The articulation of the Vigilance Law with more specific due diligences initiatives (mentioned at II.1.) may also be complex to navigate for companies and their stakeholders.

Comments on the first vigilance plans:

- This subject is partially covered in II.8.a. and by reports from various stakeholders. These reports note that, in spite of some positive aspects, the first vigilance plans are generally not fully satisfactory. See these reports for details on the positives aspects of the first vigilance plans and suggestions to improve them in the future.[324] Overall, methodologies used by companies to comply with the five items of the vigilance plan could be clarified in the body of their plans. Indeed, the vigilance plans can be improved with regard to a number of key items, including risk mapping and associated identification of risk, evaluation measures, alert and complaint mechanism and the consultation of stakeholders. Another relevant question is the effective implementation of a vigilance plan and the assessment of such implementation (including through the identification of relevant indicators). Accessibility and visibility of the vigilance plans are other main issues.
- Overall, there is still a lack of a "business and human rights" culture within a number of companies entering into the scope of the Vigilance Law, including at the levels of top management and operational staff. This results in a more difficult implementation of the Vigilance Obligations within companies and a lack of appropriate drive at the executive management level. This may explain why some companies view the Vigilance Law as a tick-box exercise, or conduct risk mapping by looking at their own risks, as opposed to risks to rights holders, as the Vigilance Law requires. This can also lead to internal tensions within companies, with some people feeling uncomfortable disclosing too much information in the vigilance plan for fear of exposing the company to legal action.
- Admittedly, we are still in a learning phase, as noted by Dominique Potier in a conference on the Vigilance Law on 27 March 2019. Given this learning phase, a question remains as to the guidance that should be offered to help companies comply with the Vigilance Law or whether such guidance should not be issued in order maintain companies' flexibility in the implementation of the Vigilance Law. Sherpa, a leading NGO, including on issues related to the Vigilance Law, has issued such guidance late 2018 (English version was published in 2019). But other questions are whether it would have been appropriate to issue guidance before the first vigilance plans were implemented and if so, which other entity/entities should have issued such guidance, and whether it is still timely to do so now.

11. Review of Proposals for Regulation

a. How would new or planned legislative regimes have changed/would change this situation

See previous sections on the Vigilance Law.

b. What have been the critiques or limitations of regulatory proposals (if any)

See III.20. on the main weaknesses of the Vigilance Law

[324] Entreprises pour les droits de l'Homme & BL Evolution, The application of the Law of the Corporate Duty of Vigilance, Analysis if the first published plans, 1st edition, 25 April 2018, available at https://www.e-dh.org/userfiles/Edh_2018_Etude_EN_V4.pdf (see summary of key recommendations p.6-7); EY, Loi sur le devoir de vigilance: analyse des premiers plans de vigilance, Sept. 2018, available at https://www.ey.com/Publication/vwLUAssets/ey-analyse-des-premiers-plans-de-vigilance-du-sbf-120/$File/ey-analyse-des-premiers-plans-de-vigilance-du-sbf-120.pdf; ActionAid France-Peuples Solidaires, Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, Collectif Ethique sur l'Etiquette et Sherpa, Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1: les entreprises doivent mieux faire, March 2019 (in French), available at https://www.asso-sherpa.org/wp-content/uploads/2019/02/2019-etude-interasso_devoir_de_vigilance-ilovepdf-compressed-3.pdf; Sherpa, Mighty Earth, FNE, Devoir de vigilance et déforestation: le cas oubliés du soja, March 2019, available at http://www.mightyearth.org/wp-content/uploads/rapport_soja_WEB_bassdef2.pdf; Elsa Savourey, France's law on the corporate duty of vigilance: process, pedagogy and pragmatism as the way forward, Nov. 2018, available at https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-process-pedagogy-and-pragmatism-as-the-way-forward.

c. What kind of regulation is available at EU level for regulating corporate due diligence in the Member State, and how this is likely to be applied and/or incorporated into Member State law (including civil, criminal and administrative measures, and possible remedies)

This answer is limited to Regulation (EU) 2017/821 of 17 May 2017 on conflict minerals laying down supply chain due diligence obligations (such obligation being applicable from Jan 2021 onward) for EU-based importers of minerals or metals containing or consisting of tin, tantalum, tungsten their ores, and gold originating from conflict-affected and high-risk areas.

Member States shall designate one or more competent authorities responsible for the application of this Regulation and for conducting ex-post check of the conduct of due diligence. France's competent authority is the Ministry for an ecological and solidarity transition; General Directorate for Urban Development, Housing and Natures; Bureau of Non-Energy Mineral Resources Policy [*Ministère de la transition écologique et solidaire; Direction générale de l'aménagement, du logement et de la nature (DGALN); Bureau de la politique des ressources minérales non énergétiques*]. [325] Possible sanctions may be introduced at a later stage.[326]

[325] List of the competent authorities of Member States designated under article 10(1) of Regulation (EU) 2017/821, available at http://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157843.pdf.

[326] 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, art. 17(3) ("Based on the findings of the review under paragraph 2, the Commission shall assess whether Member State competent authorities should have competence to impose penalties upon Union importers in the event of persistent failure to comply with the obligations set out in this Regulation. It may, as appropriate, submit a legislative proposal to the European Parliament and to the Council in this regard.").

GERMANY COUNTRY REPORT

Daniel Augenstein[327]

I. OVERVIEW

The German legal order contains examples of different types of due diligence obligations, whose concrete scope and content is tailored to the respective purpose of the law and the risks it aims to address. In one way or the other, all due diligence obligations are subject to standards of reasonableness, appropriateness, adequacy, cost-benefit analysis, etc., which ultimately give effect to the constitutional proportionality principle. These standards are fleshed out with regard to the type of risk to be addressed, the likelihood and severity of the impact/damage to be expected, and the economic costs involved in minimising or excluding the risk. Part II considers due diligence obligations in German public law, private law, labour law, and industry and multi-stakeholder initiatives. Part III provides a comparative analysis, focussing on the key elements of regulation of corporate due diligence; its application to foreign subsidiaries and suppliers; and its public and private law enforcement. Part IV examines a recent German legislative proposal to regulate corporate human rights and environmental due diligence through global value chains as a promising avenue to render the notion of corporate human rights due diligence contained in the 2nd pillar of the UNGPs legally binding *via* domestic public law. Particular attention is paid in that Part to the concept of adequacy, also found in other areas of German law, as a means to flesh out the corporate responsibility to respect human rights.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

A. Due Diligence Obligations in German Public Law

Given the overall focus of the study, this section briefly examines human rights due diligence obligations in German constitutional law and then focusses on the regulation of due diligence requirements in environmental law. In addition, the section discusses due diligence obligations in product liability law, the German Administrative Offences Act, and public procurement.

1. Human Rights Due Diligence Obligations in Constitutional Law

German constitutional law distinguishes between a state duty to respect basic/fundamental rights (Grundrechte als Abwehrrechte) and a state duty to protect basic/fundamental rights (Grundrechte als staatliche Schutzpflichten). While the duty to respect imposes an obligation of result, the duty to protect imposes an *obligation of diligent conduct* on public authorities. The scope of the duty to protect is determined by the intensity and probability of the impending violation of human rights, in the light of the proportionality principle. The limit of discretion accorded to public authorities in complying with their duty to protect is reached in cases of evident violations of the core values protected by a human right (so-called 'Untermaßverbot').[328] Where a regulation pertains to dangerous facilities such as nuclear power plants, the duty to protect entails an obligation to take all steps necessary to

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[328] German Federal Constitutional Court, BVerfGE 88, 203 – Schwangerschaftsabbruch.

minimise the risk of human rights violations.[329] The duty to protect furthermore requires public authorities to put into place administrative and judicial procedures aimed at preventing and redressing human rights violations (so-called verfahrensrechtliche Funktion der Grundrechte). These procedures can range from the imposition of industrial licencing and process safety requirements to the creation of participation rights for all those potentially affected in the exercise of their human rights by public and private activities.[330]

2. Due Diligence Obligations in Environmental Law

Many due diligence obligations in German environmental law owe their existence to the precautionary principle which, as laid down in Article 20a of the German Constitution, requires the state to prevent risks to the environment from materialising even where cause-and-effect relationships are not fully established scientifically. The federal law that provides for **protection of humans, animals and the environment against harmful emissions** (Bundesimmissionsschutzgesetz, BISchG) is one such example. § 5 BISchG imposes on operators of industrial compounds (factories, machinery, etc.) a duty of protection and a duty of precaution. As concerns *scope and content* of these duties, the duty of protection (§ 5 I (1) No 1 BISchG) requires operators to take the measures necessary for preventing probable environmental impacts from occurring (so-called 'vorbeugende Gefahrenabwehr'), irrespective of whether these impacts are caused by the industrial compound or by external factors. The duty of precaution (§ 5 I (1) No 2) requires operators to take measures, in accordance with the scientific and technical state of the art ('Stand der Technik', § 3 VI (1) BISchG), to reduce risks of environmental nuisance whose materialisation is possible yet not sufficiently probable to trigger a duty of protection. The concrete scope of the latter duty is determined in the light of criteria such as the risk-potential of the emissions, the severity of damages to be expected, and the economic costs of minimising risks. Compliance of operators is *monitored and enforced* by the competent public authority. Unlike the duty of protection, the duty of precaution is generally not considered to confer subjective rights on third parties.

§ 6 of the Federal Law for the Regulation of Genetic Engineering (Gesetz zur Regulierung der Gentechnik, GenTG) imposes on operators of biogenetical compounds a general due diligence obligation. The overall *purpose* of the law is to protect the life and health of human beings, the environment, animals, plants and material goods from the harmful effects of genetic engineering processes and products, while also creating a legal framework for developing their scientific, technological and economic potential (§ 1 GentTG). Accordingly, the *scope* of the due diligence obligation is not confined to the operation of biogenetical compounds but also applies when operators release or bring into circulation genetically modified organisms or products (§ 6 I GenTG). The *key legal elements* of the due diligence process consist of (a) a comprehensive analysis of relevant risks and safety measures in place, which should be reviewed whenever necessary but at least periodically in the light of the scientific and technical state of the art; and (b) the adoption of precautionary measures which, in accordance with the risk assessment, are necessary to protect the legal goods listed in § 1 GenTG from possible dangers and to prevent such dangers from occurring. The latter obligation continues even after the operation of the plant has ceased (§ 6 II GentTG). § 6 III GenTG regulates *documentation and monitoring* requirements: the operator has to keep records of genetic engineering work and the release of genetically modified material and submit these records to the competent authority upon request. § 6 IV GenTG contains an obligation to appoint project managers and biological safety officers or committees.

[329] German Federal Constitutional Court, BVerfGE 49, 89 – Kalkar I.
[330] German Federal Constitutional Court, BVerfGE 53, 30 – Mühlheim-Kärlich.

The *purpose* of the German law regulating **environmental impact assessments** (Gesetz über die Umweltverträglichkeitsprüfung, UVPG) that implements EC Directive 85/337/EWG of 27 June 1985 is the early identification, description and evaluation of all direct and indirect impacts of a project on the environment, including ecological interdependencies (§ 2 II UVPG).[331] The UVPG also covers cross-border environmental impacts (§ 2 III UVPG). The competent public authority has to identify, describe and evaluate the environmental impacts in accordance with applicable laws (nach Maßgabe der geltenden Gesetze, § 3 UVPG), which entails that the project must also comply with *environmental due diligence requirements* regulated elsewhere. One such example is the general due diligence obligation laid down in the Water Resources Act (Gesetz zur Ordnung des Wasserhaushalts – WHG) that gives effect to the precautionary principle. According to § 5 I WHG, every person is required to act with due diligence as required by the circumstances (die nach den Umständen erforderliche Sorgfalt) to avoid a deterioration of the water quality; to use water sparingly having regard to the water balance; to maintain the efficiency of the water balance; and to avoid an enlargement or acceleration of water drainage. A violation of the due diligence obligation that causes an environmental damage can result in liability for restoring the environment (§ 90 II WHG in conjunction with the environmental liability law, Umwelthaftungsgesetz).

3. Due Diligence Obligations in Product Liability Law

The *rationale* behind the German (and EU) regulation of product liability is that consumers should be protected in their physical integrity and personal property against damages caused by faulty products.[332] Manufacturers are liable if their products do not conform to the standards that a reasonable objective consumer can expect (§ 3 Produkthaftungsgesetz, ProdHaftG). In this regard, producers are subject to a *variety of due diligence requirements* that have been developed through case-law and that map onto the different stages of the production process:[333]

- Oversight of the production process to minimise the risk of product failure, including through the selection and monitoring of employees, the provision of instructions, and the customization of work stations and equipment.
- Control of the construction design and the manufacturing process to ensure that the product complies with the standards a reasonable and objective consumer can expect.
- Provision of correct and adequate operating instructions, notes and warnings to ensure a proper usage of the product.
- Continuous observation of products that have been placed in the market, including where necessary warnings and retraction of products.

With regard to *remedies*, the product liability law modifies the civil liability rules on the allocation of the burden of proof, considering the difficulties consumers encounter in proving negligence in the organisational sphere of the producer. Consumers only have to prove that the violation of their legal interests was caused by a faulty product. The producer, in turn, has to prove that he/she acted without negligence. Where the fault of the product is due to the construction design or manufacturing process, the producer also has to prove compliance with his/her corresponding due diligence obligations. Finally, the producer has to prove that, in organising the production process, he/she has taken all necessary measures to prevent faulty products from entering the market.[334]

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[331] See further W. Erbguth & S. Schlacke, *Umweltrecht* (Baden-Baden: Nomos, 2016, 6th edn.) 100-112.
[332] The German Produkthaftungsgesetz implements Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ L 210, 07.08.1985, p. 29-33.*
[333] See further D. Looschelders, *Schuldrecht BT* (München: Verlag Franz Vahlen, 2013) 462-469.
[334] See, generally, Federal High Court of Justice (BGH), BGHZ 51, 91, Urteil vom 26.11.1968 ("Hühnerpest-Entscheidung"); and regarding the producer's duty to prevent faulty products from entering the market BGHZ 104, 323, Urteil vom 07.06.1988.

4. Due Diligence Obligations in the Administrative Offences Act

§ 130 of the Administrative Offences Act (Ordnungswidrigkeitsgesetz – OWiG) authorises the competent public authority to impose fines on business owners for failure to comply with their *monitoring and supervision obligations* (Aufsichtspflichten).[335] A business owner is liable if, intentionally or negligently, he/she fails to take the supervisory measures necessary for his/her business to comply with legal duties incumbent upon him/her as its owner. A further condition is that a violation of these legal duties could have been prevented or significantly impeded had a proper supervision taken place. The nature and scope of the monitoring and supervisory measures are not further defined in the OWiG. They are determined within the context of the law that stipulates the business owner's duties, having regard to the likelihood of an infringement, the size of the business organisation, and the complexity of the tasks to be monitored.[336] Feasible and reasonable organisational measures are those which a diligent member of the profession would consider necessary and adequate to ensure compliance with the relevant regulations. The owner's supervisory obligations also extend to the selection, appointment and monitoring of supervisors (Aufsichtspersonen).

A fine can also be imposed on *the business entity itself* if its director commits an offence that violates duties incumbent upon the company or that leads to an unjustified enrichment of the company (§§ 130, 30 OWiG). Absent corporate criminal liability in Germany, this is of significant practical relevance for sanctioning violations of due diligence requirements. For example, in the 2018 Volkswagen exhaust emissions scandal, a public prosecutor imposed a fine on the company for breach of its supervisory duties in ensuring compliance with the German regulation implementing Framework Directive 2007/46/EC (approval of motor vehicles).

5. Human Rights and Environmental Due Diligence in Public Procurement Law

In the National Action Plan implementing the UN Guiding Principles on Business and Human Rights (German NAP), the German federal government has committed to examining whether and to what extent binding minimum requirements for corporate human rights due diligence can be enshrined in public procurement law.[337] The bulk of German regulation on public procurement consists of a transposition of EU directives into domestic law.[338] According to the German Government, one important limitation imposed by EU law in this regard is that the specification of human rights due diligence requirements must be tailored to the specific subject of the contract and cannot take into account the overall business- and corporate policy of the bidder.[339]

Following domestic legal reform implementing the EU directives on public procurement, § 97 III of the German Law against Restraints of Competition (Gesetz gegen

[335] See further E. Göhler, *Gesetz über Ordnungswidrigkeiten*, Beck'sche Kurzkommentare Bd. 18 (München: Beck, 2002).
[336] See BGH, Urteil vom 25.06.1985, NStZ 1986, 34 (prevention of antitrust violations by the business owner).
[337] German Federal Foreign Office, *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020*, p. 16.
[338] See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors; and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.
[339] See German Government, *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Michel Brandt, Heike Hänsel, Zaklin Nastric, weiterer Abgeordneter und der Franktion DIE LINKE*, Deutscher Bundestag, Drucksache 19/6512 (14.12.2018); and German government, *Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Uwe Kekeritz, Katharina Dröge, Harald Ebner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN: Ökologische, soziale und menschenrechtliche Kriterien in der öffentlichen Beschaffung als Beitrag für eine nachhaltige Entwicklung weltweit*, Deutscher Bundestag, Drucksache 19/7567 (02.02.2019).

Wettbewerbsbeschränkungen – GWB) now provides that social and environmental aspects shall be taken into consideration when awarding contracts.[340] Regarding the suitability of the bidder, § 124 GWB contains a number of 'optional' reasons for exclusion (facultative Ausschlußgründe). Subject to the principle of proportionality, a company can be excluded from the bidding process if that company has demonstrably violated existing environmental, social or labour law obligations in the execution of public contracts (§ 124 I (1) GWB). The exclusion from participation in public tenders is limited to maximum period of three years (§ 126 GWB). According to § 127 I GWB, the contract must be awarded to the most economic tender, determined by a price-performance ratio. In addition to the price or cost, environmental and social aspects 'can' be taken into account.[341] In any case, the chosen award criteria must be connected to the subject of the contract, which includes criteria pertaining to the production, provision or disposal of the service, to trade in the service, or to another stage in the life cycle of the service (§ 127 III GWB). After the acceptance of a bid, the contracting authority can require companies to observe social and environmental aspects in the execution of the contract (§ 128 GWB). Non-acceptance of these conditions by the bidder can result in a cancellation of the award; later violations of these conditions constitute a breach of contract and can result in liability.

B. Due Diligence Obligations in German Private Law

This section focusses on the law of non-contractual obligations which contains the probably most comprehensive body of rules concerning the regulation and enforcement of due diligence requirements in the German legal order. In addition, the section considers due diligence obligations in company law, corporate reporting requirements, and competition law.

1. Due Diligence Obligations in the Law of Non-Contractual Obligations

In Germany, one of the most important areas of law with respect to corporate due diligence requirements is the law of non-contractual obligations or tort law (Deliktsrecht). Of particular relevance is § 823 of the German Civil Code (Bürgerliches Gesetzbuch – BGB), whose *purpose* is to provide persons with a cause of action for infringements of their life, bodily integrity, freedom, property and personality rights – thus covering a wide range of legal goods that are also protected by international human rights law.

In order to establish liability, claimants must prove a number of requirements. With respect to infringements resulting from positive acts, they must prove that the defendant caused damage to a protected interest through intentional or negligent conduct. Defendants act intentionally when they know that their conduct involves a risk of damage and accept that such damage may occur; they act negligently when their conduct was contrary to *the diligence required by general business practice* (die im Verkehr erforderliche Sorgfalt, § 276 II BGB). Courts apply an objective test to determine negligence, comparing the defendant's factual conduct to the conduct that can be expected from a person of average circumspection and capability. With respect to infringements resulting from omissions, the claimants must additionally prove that the defendant incurred a 'safety duty' (Verkehrspflicht) – an affirmative duty to prevent the infringement whose breach satisfies

[340] Other than the Law against Restraints of Competition, the German Regulation on the Award of Public Contracts (Vergabeverordnung) also contains provisions on sustainable sourcing that include social and environmental aspects: for an overview see Beschaffungsamt des Bundesministeriums des Inneren, *Vergaberecht und Nachhaltigkeit*.
[341] Das wirtschaftlichste Angebot bestimmt sich nach dem besten Preis-Leistungs-Verhältnis. Zu dessen Ermittlung können neben dem Preis oder den Kosten auch qualitative, umweltbezogene und soziale Aspekte berücksichtigt werden.

the negligence requirement if the ensuing damage was foreseeable.[342] Bearers of safety duties recognised in the case-law include land owners, manufacturers, medical practitioners, tour operators and building contractors.

Perhaps most significant with regard to the *content of regulation* is that these safety duties can be viewed as binding due diligence obligations, given that they were developed to determine whether defendants are obliged to take safety measures to prevent an infringement of protected interests. Safety duties exist where a person creates, maintains or controls a source of danger to the protected interests of third parties (Sicherungspflichten gegenüber Gefahrenquellen); and where a person assumes a responsibility to protect the interests of third parties (Fürsorgepflichten gegenüber Rechtsgütern). Bearers of safety duties must take all reasonable measures to prevent infringements of these interests. Reasonable measures are all those which are factually and legally possible and which a careful person of average circumspection and capability would consider necessary and *adequate* in order to prevent infringements of protected interests. The relevant threshold is determined on the basis of a cost-benefit analysis: the more probable and serious the possible impact/damage and the lower the costs of preventing it, the more precautionary measures a reasonable person is expected to take.[343]

Litigants can also claim damages for violations of statutory laws protecting individual interests (Schutzgesetze) under § 823 II BGB. The claimant and the claimed damage must fall within the scope of protection of § 823 II BGB. In addition, the defendant must have violated the statutory norm intentionally or negligently, and the violation must have caused the damage at issue.[344] The main relevance of § 823 II BGB for the present purpose is that it *integrates due-diligence obligations found in other laws* into the ambit of non-contractual liability. For example, violations of the Water Resources Act discussed in section II.2 above can give rise to non-contractual liability if these violations also cause damage to persons and property.

As concerns *business entities covered* by these due diligence obligations, companies can be sued for breaches of safety duties on the basis of § 823 I in conjunction with § 831 I or § 31 BGB. § 831 I BGB constitutes a form of negligence liability with a reversed burden of proof. A company incurs liability for damages unlawfully caused by vicarious agents unless it can prove that it exercised due diligence in selecting, equipping or supervising these agents; or that the damage would have occurred in spite of exercising the required due diligence. § 31 BGB constitutes a form of vicarious liability. Companies can be held liable for damages caused by acts and omissions of constitutionally appointed representatives when acting in their capacity as company officials. In addition, a company can incur safety duties itself.[345] For example, a petrochemical company must take all reasonable measures to ensure that the storage and disposal of mineral oil wastes does not cause environmental impacts harming third parties. Where companies incur safety duties, they have to appoint a representative for whom they are vicariously liable under § 31 BGB. This representative must organize the company's operations and instruct and supervise its employees to ensure

[342] On the relation between safety duties and negligence see further: H. Kötz. & G. Wagner, *Deliktsrecht* (München: Franz Vahlen, 2010).
[343] These requirements have been developed in the case-law of the Bundesgerichtshof (BGH), the highest German court of appeal in civil matters; see BGH, Urteil vom 31. Oktober 2006 - VI ZR 223/05, VersR 2007, 72; BGH, Urteil vom 5. Oktober 2004 - VI ZR 294/03, VersR 2005, 279; BGH, Urteil vom 15.07.2003 - VI ZR 155/02, VersR 2003, 1319; BGH, Urteil vom 19.12.1989 - VI ZR 182/89, VersR 1990, 498.
[344] In principle, the burden of proof concerning the violation of the statutory norm, damage, fault and causation rests on the claimants. However, if they can prove that the defendants have violated a statutory rule that prescribes the required conduct in a sufficiently specific way and if that rule protects against the type of damage suffered, the courts will consider this as *prima facie* evidence of fault and causation which must be rebutted by the respondent.
[345] See further P. Wesche and M. 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) *Human Rights Law Review* (2016) 370–385.

the implementation of the required precautionary measures (betriebliche Organisationspflicht).

Absent relevant case-law, it remains unclear whether the German law of non-contractual liability would be suitable for cases of transnational parent or supply chain liability.[346] Within corporate groups, the separate legal personality principle generally applies and the recognised exceptions ('veil-piercing') are largely irrelevant for the cases of interest here. As concerns negligence liability across corporate groups, affiliates or employees of affiliates do not qualify as vicarious agents of other companies of the group under § 831 I BGB.[347] It is however arguable that a parent company could itself incur safety duties under § 823 I BGB in relation to violations committed by its subsidiaries. This could for example be the case where a parent company effectively directs or administers the harmful operations of its subsidiary, thus creating or controlling the source of danger that gives rise to safety duties; or where the parent company formulates health and safety standards at the subsidiary, thus assuming by way of delegation a responsibility to protect the interest of third parties.[348] There is in principle no reason why the same should not also apply in the relation between a company and its suppliers, provided the conditions for assuming a safety duty on the part of the company (control or delegation) are met.

2. Due Diligence Obligations in Company Law

§ 93 I of the German Companies Act (Aktiengesetz – AktG) requires all members of the company's executive board (Vorstand) to act with the *diligence of a decent and conscientious manager*.[349] Members of the executive board bear the burden of proof for complying with their due diligence obligations (§ 93 II AktG). Pursuant to § 91 II AktG, the executive board has to take appropriate measures, and in particular to set up a monitoring system, to ensure that developments which threaten the continued existence of the company are detected at an early stage. Following a much-discussed judgment of the Munich District Court (Landgericht), all members of the executive board have a joint due diligence obligation to set up and supervise a firm-wide compliance system for damage prevention and risk control.[350] Members of the executive board breach their due diligence obligations if they fail to establish a functioning compliance system that ensures effective monitoring and control of business processes. This due diligence obligation to ensure a functioning compliance system also applies in the relation between the members of the executive board. It extends to all of the companies' subsidiaries even if they are located abroad (in the case at hand, in Nigeria). The *scope* of the due diligence obligation is determined in view of the type, size and organisation of the company, the legal regulations to be complied with (in the case at hand, the prevention of bribes) and the risk of violations in the light of past performance. Once concrete breaches of legal regulations become known, the executive board has to regularly follow up on internal investigations and attempts to remedy the violation. Apart from criminal and administrative (§ 130 OWiG) sanctions, violations of due diligence obligations can lead to civil liability in the relationship between the company and members of the executive board. While the *Neubürger* judgment

[346] Pursuant to Article 4 I Rome-II Regulation, the German material law of non-contractual obligations will generally not apply to such cases.
[347] BGH, decision of 06 November 2012 — VI ZR 174/11, NJW 2013, 1002; BGH, decision of 02 December 2014 — VI ZR 520/13; BGH, decision of 03 June 2014 — VI ZR 394/13, VersR 2014, 1018; BGH, decision of 10 December 2013 — VI ZR 534/12, NJW-RR 2014, 614.
[348] See Wesche and Saage-Maaß (n 19).
[349] Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsführers anzuwenden.
[350] See LG München I, Urteil vom 10 Dezember 2013 – 5 HK O 1387/10 – Siemens/Neubürger; and further R. Grabosch & C. Scheper, *Die menschenrechtliche Sorgfaltsplicht von Unternehmen: Politische und rechtliche Gestaltungsansätze* (Berlin: Friedrich Ebert Stiftung, 2015) 34-35.

concerned a stock corporation, the same requirements should also pertain to limited liability companies where § 93 II AktG applies by analogy.

The central role of the board of directors is to supervise the management of the company (§ 111 I AktG). This supervisory role not confined to monitoring completed business matters but also has future-oriented dimension. The board of directors must control the legality as well as the expediency and economic viability of decisions by the executive board. It has to intensify its monitoring efforts where there are indications of a breach of managerial duties.[351] In this regard, the German National Baseline Assessment for implementing the UNGPs proposes to examine whether and how due diligence obligations could be better integrated into the supervisory role of the board of directors, given the important monitoring role the latter could play in ensuring corporate respect for human rights.[352] The *core instrument* for the board of directors to exercise its supervisory functions is the imposition of reporting duties on the company's management (§ 90 AktG). In addition, the board of directors has a number of inspection and auditing rights *vis-à-vis* the executive board (§ 116 II AktG).

3. Human Rights Due Diligence in Non-Financial Reporting

Implementing the EU directive on the disclosure of non-financial and diversity information by certain large undertakings and groups,[353] the German Parliament enacted in April 2017 a law to strengthen companies non-financial reporting in their management and group management reports (Gesetz zur Stärkung der nicht-finanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten – CSR Richtlinie Umsetzungsgesetz), which amends the German commercial code (Handelsgesetzbuch – HGB).

Companies that fall within the scope of the law have to report on the human rights, environmental, labour and social aspects of their business activities, as well as on their efforts in combatting corruption and bribery (§ 289c II HGB). § 289c III No 1-6 specifies the content on non-financial reporting, which must contain the following information:

- A description of the 'concepts' (Konzepte) used by the company, including the implementation of due diligence processes and their result;
- A description of significant risks associated with the company's own operations that are very likely to have severe adverse impacts on the legal goods listed in § 289c II HGB, and a description of how the company addresses these risks;
- A description of significant risks associated with the company's business relations, products and services that are very likely to have severe adverse impacts on the sustainability aspects listed in § 289c II HGB, and where relevant and proportionate a description of how the company addresses these risks;
- A description of the most significant non-financial performance indicators relevant to the business activity of the company; and
- Where necessary for comprehending the report, references to the annual balance sheet and additional information.

In addition, companies have to explain their business model. Companies that do not have a 'concept' in relation to sustainability aspects listed in § 289c II HGB are subject to the 'comply or explain' requirement of § 289c IV HGB. Companies do not have to report on

[351] See further J. Kindl, *Gesellschaftsrecht* (Baden-Baden: Nomos, 2019, 2nd edn.) 396-397.
[352] Deutsches Institut für Menschenrechte, *National Baseline Assessment: Umsetzung der UN-Leitprinzipien für Wirtschaft und Menschenrechte* (Berlin: 2015) p. 15.
[353] 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.

sustainability aspects if this would cause them a significant disadvantage, provided the omission does not impede a meaningful comprehension of the impacts of their business activities (§ 289e HGB).

4. Due Diligence Obligations in Competition Law

One of the *purposes* of the German law against unfair competition (Gesetz gegen den unlauteren Wettbewerb, UWG) is to protect consumers against unfair ('unlauter') business practices by corporations, including through misleading advertisement. The prohibition of unfair business practices furthermore serves to maintain a level playing field between competing corporations. Both rationales of the law can lend themselves to protecting human rights when products that have been manufactured abroad in violation of international human rights and labour standards are introduced into the German market. Regarding the *scope* of the law, § 3 II UWG defines unfair business practices as business actions towards consumers that do not satisfy the requirements of *corporate due diligence* (unternehmerische Sorgfalt) and that are likely to materially affect consumers' economic behaviour. Corporate due diligence means the standard of expertise and diligence that an entrepreneur can be reasonably be expected to observe in relation to consumers, considering his/her field of activity, the principle of good faith, and honest market practices (§ 2 I No 7 UWG).[354]

Companies that mislead consumers into believing that their products have been manufactured (abroad) in compliance with international human rights and labour standards can fall under the prohibition of unfair business practices within the meaning of § 3 UWG. For example, in 2010 an unfair competition complaint was brought against German retailer Lidl for claims made in the company's advertisements about fair working conditions in its supply chain.[355] Lidl was accused of deceiving consumers by falsely creating the impression that working conditions in Bangladeshi factories from which it sourced its products conformed to the standards set by the Business Social Compliance Initiative (BSCI) and its code of conduct. The company had to issue a declaration of discontinuance in which it committed to ceasing the contested advertising pledge about world-wide fair working conditions.

Irrespective of misleading advertisement, unfair competition complaints in relation to violations of international human rights and labour standards abroad can be based upon the UWG's purpose to maintain a level playing field between companies competing in the German market. According to the German Federal Court of Justice (Bundesgerichtshof), the economic exploitation of lower protection standards in third countries does not as such constitute an unfair business practice. However, a violation of corporate due diligence within the meaning of § 2 UWG can be assumed where foreign working conditions violate basic ethical requirements every legal order should aim to protect and are therefore incompatible with the principle of good faith and honest market practices.[356]

C. Due Diligence Obligations in German Labour Law

[354] „Unternehmerische Sorgfalt": der Standard an Fachkenntnissen und Sorgfalt, von dem billigerweise angenommen werden kann, dass ein Unternehmer ihn in seinem Tätigkeitsbereich gegenüber Verbrauchern nach Treu und Glauben unter Berücksichtigung der anständigen Marktgepflogenheiten einhält.
[355] European Center for Constitutional and Human Rights, *Complaint Re Fair Working Conditions in Bangladesh: Lidl forced to back down* (2010).
[356] See BGH GRUR 1980, 858ff – Asbestimporte; and R. Grabosch & C. Scheper (n 24) 41-42.

This section focusses on due diligence obligations in the form of protective duties that the employer owns to its employees. It discusses occupational safety measures and measures for the protection of working mothers next to obligations to ensure wage payments of posted workers.

1. Due Diligence Obligations in the Labour Protection Act

The *purpose* of the Labour Protection Act (Arbeitsschutzgesetz – ArbSchG) is to ensure the safety and health of employees at work through occupational safety measures.[357] The Act does not apply to employees in private households. As regards the law's *scope*, the ArbSchG is based on a broad understanding of occupational safety which includes not only measures to prevent work-related accidents and health hazards but also measures to ensure decent working conditions (menschengerechte Gestaltung der Arbeit). § 3 I ArbSchG requires employers to take the steps necessary for supervising, adapting and improving occupational safety. Employers must monitor their business premises in regular intervals and adapt occupational health and safety measures as required by the circumstances and necessary for their effectiveness.

§ 4 ArbSchG contains a number of *principles* that guide employers when designing occupational safety measures:
- Work must be organised in such a way that dangers to life and physical and mental health are avoided and remaining risks are minimised;
- Dangers must be tackled at their source;
- Measures must take into account the state of the art, occupational medicine and hygiene, and other proven findings of occupational science;
- Measures must be planned with a view to appropriately linking technology, work organisation, other working conditions, social relations, and environmental impacts on the workplace;
- Individual protection measures are subordinate to other measures;
- Specific hazards for particularly vulnerable groups of workers have to be taken into account;
- Employees must be given appropriate instructions by the employer; and
- Direct or indirect gender-specific regulations are only permissible if this is imperative for biological reasons.

Pursuant to § 5 ArbSchG, employers must identify the concrete health and safety hazards bound up with a particular activity and determine which protective measures are actually required. Employers must furthermore ensure that employees are physically and mentally capable of observing and complying with protective measures (§ 7 ArbSchG). They also have an obligation to instruct employees about occupational health and safety in a way that is sufficient and adequate considering the individual work situation (§ 12 ArbSchG). *Failure to comply* with the instruction obligation reverses the burden of proof regarding fault and causality. Failure to ensure observance of occupational health and safety standards can give rise to civil liability provided the violated norm is also intended to protect the individual employee. For example, the employee can demand that the employer formally assesses occupational risks at his/her workplace as a secondary employment obligation (§§ 5 ArbSchG, 618 I BGB).

2. Due Diligence Obligations in the Protection of Mothers Act

[357] See further T. Dieterich et al., *Erfurter Kommentar zum Arbeitsrecht* (München: C. H. Beck, 2013, 14th edn.), ArbSchG, §§ 1-14 (Wank).

The *purpose* of the German Protection of Mothers Act (Mutterschutzgesetz – MuSchuG) is to require employers to take the necessary measures for protecting pregnant and breastfeeding mothers and their children. This includes measures to protect the health of the mother and her child; and measures to ensure that the mother can continue her work during and/or after the pregnancy in a responsible way and without suffering disadvantages (§ 1 MuSchuG).[358] These protective duties cannot be amended or set aside by the working contract. Pursuant to § 9 I MuSchuG, the employer has to take the measures necessary to protect the physical and psychological health of the mother and her child, in accordance with the proven findings of work science, medicine and technology. The employer must ensure a working environment and working conditions in which all technically, medically and ergonomically necessary protection measures can be realised.

What particular measures are necessary in a concrete case must be determined by way of *a risk analysis*. § 10 MuSchuG requires employers to conduct a general and independent risk assessment of working conditions (§ 5 ArbSchG) under maternity protection aspects. The need for protective measures should be determined in advance, having regard to the type, extent and duration of hazards to which a pregnant or breastfeeding woman or her child may be exposed (§ 10 I (1) MuSchuG). The obligation to conduct a risk assessment exists irrespective of whether the business enterprise currently employs women.[359] The protective measures have to be implemented without delay after a woman has notified the employer that she is pregnant or nursing (§ 10 II MuSchuG). The employer also has to ensure that pregnant or nursing women only exercise work tasks for which protective measures have been implemented (§ 10 III MuSchuG). Violations of protective duties listed in § 32 MuSchuG constitute administrative offences, some of which are also punishable as crimes if committed intentionally (§ 33 MuSchuG).

3. Due Diligence Obligations in the Posted Workers Act

The *objectives* of the Posted Workers Act (Arbeitnehmerentsendegesetz – AEntG) are to create and enforce appropriate minimum working conditions for workers posted across borders, and to ensure fair and efficient conditions of competition by extending the reach of sectoral collective agreements. This should also contribute to preserving employment subject to social security contributions and to strengthening collective bargaining autonomy (§ 1 AEntG).[360] To *implement these objectives*, § 14 AEntG provides for no-fault joint and several liability of an entrepreneur (the general or main contractor) for contractors commissioned by him (subcontractors) with regard to the payment of minimum wages and holiday fund contributions of employees. Civil liability regardless of negligence or fault aims to incentivise the main contractor to ensure that subcontractors comply with the working conditions laid down in the AEntG, including 'tariff-loyalty'. The 2014 German Minimum Wage Act (Gesetz zur Regelung eines allgemeinen Mindestlohns – MiLoG) extends the no-fault liability of the main contractor (§ 14 AEntG) to the illegal employment of foreigners in Germany (§ 13 MiLog).

[358] See further T. Dieterich et al., *Erfurter Kommentar zum Arbeitsrecht* (München: C. H. Beck, 2013, 14th edn.), MuSchuG, §§ 9-10 (Schlachter).
[359] Failure on the part of the employer to conduct a proper risk assessment deprives (putative) female employees of protective measures to which they are entitled pursuant to Article 4 (1) of Council Directive 92/85/EEC of 19 October 1992 (on measures to improve the health and safety of pregnant workers), which according to the European Court of Justice constitutes a discrimination based on sex within the meaning of Article 19 of Directive 2006/54/EC of 05 July 2006 (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation); see ECJ, Case C-531/15 – *Elda Otero Ramos* (Judgment of 19 October 2017).
[360] See further W. Däubler et al., *Arbeitsrecht: Individualarbeitsrecht mit kollektivrechtlichen Bezügen* (Baden-Baden: Nomos, 2017, 4th edn.), AEntG, §§ 1-23 (Kühn).

This civil liability scheme is supported by a public-law control- and sanction system that primarily seeks to protect (foreign) workers unaware of their rights under the AEntG or unable to assert them (§ 8 AEntG). Subcontractors that violate the compulsory employment requirements listed in § 23 AEntG can be fined with up to 500.000 EUR. The main contractor commits an administrative offence if he/she knows or negligently fails to know that the subcontractor violated his/her obligations under § 8 AEntG. In this regard, the general contractor is obliged to exercise *due diligence* in the selection and inspection of subcontractors. When concluding the contract, the main contractor should require written confirmation of the subcontractor's (and his/her subcontractors) compliance with § 8 AEntG. In case of objective indications for breaches of compulsory employment requirements by the subcontractor or his/her subcontractors, the general contractor must take reasonable organisational and bureaucratic measures, within the realm of his/her legal possibilities, to ensure compliance.

D. Due Diligence Requirements in Industry and Multi-Stakeholder Initiatives

This section first provides a brief overview of international industry- and multi-stakeholder initiatives on human rights diligence in which major German companies participate. The section then focusses on the probably most important German industry standard of supply chain management, the Partnership for Sustainable Textiles.

1. Overview

Many German companies, in particular large corporations, adhere to industry standards and participate in multi-stakeholder processes formulating HRDD requirements.[361] As the initiatives listed below are international in nature and therefore not specific to the German context, the sole purpose of this brief overview is to convey an idea about the uptake of international standards by German-based companies. Industry standards in which German companies participate include AIM Progress (consumer goods); the Automotive Industry Action Group and the European Automotive Working Group on Supply Chain Sustainability (automotive); the Business Environmental Performance Initiative and the Business Social Compliance Initiative (commerce); the Electronics Industry Citizenship Council (electronics); the Global e-Sustainability Initiative and the Joint Audit Cooperation (telecommunications); ICTI Care (toys); the Pharmaceutical Supply Chain Initiative (pharmaceuticals); Railsponsible (rail transport); the Responsible Sport Initiative (sports equipment); the Sustainable Apparel Coalition (textiles); and Together for Sustainability (chemicals).[362] In addition, German companies take part in multi-stakeholder initiatives formulating due-diligence requirements, some of which encompass companies from different business sectors while others are industry-specific. Among those are, for example, the Global Compact (non-sector specific); the Better Cotton Initiative and the Fair Wear Foundation (textile); the Ethical Trading Initiative (commerce); the Extractive Industries Transparency Initiative (extractives); the Global Coffee Platform and the International Cocoa Initiative (coffee & cocoa); and the Roundtable on Responsible Soy and the Roundtable on Sustainable Palm Oil (soy & palm oil).

2. The Partnership for Sustainable Textiles

[361] Industry standards are understood as common standards to avoid the causation of, contribution to, or linkages with adverse human rights impacts that are agreed upon by associations of companies within an industry, sometimes in collaboration with other stakeholders, such as government and non-governmental organizations.

[362] For an overview of these initiatives and their relevance with respect to human rights due diligence along the supply chain, see: M. Müller & Y. Bessas, *Potenziale von Brancheninitiativen zur nachhaltigen Gestaltung von Liefer- und Wertschöpfungsketten* (Berlin: Bundesministerium für Arbeit und Soziales, 2017).

The arguably most advanced German initiative with respect to industry standards of supply chain due diligence is the Partnership for Sustainable Textiles.[363] The Partnership was founded in 2014 upon the initiative of the German Federal Minister for Economic Cooperation and Development in response to a number of tragic accidents in the textile industries of Bangladesh and Pakistan. It is a multi-stakeholder body with about 130 representatives from five different actor groups: government, business, nongovernmental organizations, trade unions and standard-setting organizations. It covers roughly half of the German market in relation to the 100 top-selling companies in the German textile retail industry. The *purpose* of the Textile Partnership is to achieve social, ecological and economic improvements along the entire textile supply chain – from the production of raw materials for textile production to the disposal of textiles. To this end, all members commit to binding and verifiable targets that become gradually more ambitious. The Partnership's Steering Committee comprises twelve representatives of business associations (2), companies (2), standard-setting (1) and nongovernmental (3) organizations, trade unions (1) and government (3).[364] In cases of non-compliance by members, that is, failure to move towards the objectives or making adequate progress, the Steering Committee can *impose sanctions* up to an exclusion from the Partnership.[365] In 2018, the Steering Committee excluded seven members for not complying with their obligations.[366]

The Textile Partnership operates on the basis of three pillars: individual responsibility, collective engagement and mutual support. Under the *mutual support pillar*, members learn from one another by exchanging information, discussing content-related questions, participating in various training programs and receiving practical assistance. Under the *collective engagement pillar*, members jointly devise and implement so-called Partnership Initiatives in textile producing countries that aim at improving basic conditions on the ground, integrating suppliers and local actors, and creating best practices in the process. Under the *individual responsibility pillar*, members commit to binding and verifiable procedural obligations. These include an obligation to publish roadmaps and progress reports in which each member defines binding individual targets for the coming year and reports on their implementation.[367] In addition, the Textile Partnership has defined a number of stakeholder-specific deadlines and volume targets, applicable to all members since 2018. These targets are based on international frameworks, including the UNGPs, the ILO and the OECD. Some of these targets are overarching while others are sector specific; some are obligatory while others merely constitute recommendations.

The overarching targets include a number of *mandatory measures* relating to supply chain management. All brands, retailers and manufactures must:[368]

- Contribute to raising public awareness of sustainable textile production by 2018.
- Recognise and prioritise their risks and potential negative impacts by 2018;
- Systematically record their business partners and producers by 2018;
- Establish a system for reviewing implementation of their requirements in the supply chain on an ongoing basis by 2019; and
- Introduce a procedure for dealing with violations of their requirements by business partners and producers by 2020.

  In addition, the overarching targets include recommendations with respect to supply chain due diligence. All brands, retailers and manufactures should:

[363] See https://www.textilbuendnis.com/en/
[364] See https://www.textilbuendnis.com/en/who-we-are/panels/
[365] See https://www.textilbuendnis.com/steuerungskreis-beschliesst-ueber-sanktionen/
[366] See https://www.textilbuendnis.com/steuerungskreis-beschliesst-ueber-sanktionen/
[367] See https://www.textilbuendnis.com/en/what-we-do/individual-responsibility/
[368] See https://www.textilbuendnis.com/wp-content/uploads/2018/02/targets-overview-2017.pdf

- Publish a list of their producers and business partners;
- Keep a record of stakeholders in the deeper supply chain; and
- Prohibit producers and business partners from engaging in unauthorised subcontracting practices.

The sector-specific targets also contain some mandatory measures on supply chain management. For example, all brands, retailers and manufacturers must:[369]
- Require their business partners and producers to comply with the Textile Partnership's Manufacturing Restricted Substances List, which contains substances that should not be used in textile production by 2018;
- Require their producers and business partners to comply with the Textile Partnership's social goals and support them in implementation by 2018;
- Establish a procedure for dealing with cases of child and forced labour, including access to remedy, by 2018;
- Require their producers and business partners to comply with a wastewater standard by 2019; and
- Take account of identified social risks and potential negative effects when selecting suppliers and awarding contracts.

III. COMPARATIVE ANALYSIS

a. Sources of corporate due diligence regulation in German law relevant to human rights and environmental protection

The German legal order contains ample examples of corporate due diligence requirements relevant to human rights and environmental protection. Requirements pertaining to corporate human rights due diligence are ultimately rooted in the state duty to protect human rights, which imposes an obligation of diligent conduct on public authorities. This constitutional obligation assumes effect in the relation between corporations and private persons *via* domestic legislation and adjudication. Many examples of corporate environmental due diligence give expression to the precautionary principle (Article 20a German Constitution) which requires the state to prevent risks to the environment from materialising even where cause-and-effect relationships are not fully established scientifically. In addition, various laws that contain corporate due diligence requirements implement European Union legislation, including the laws regulating environmental impact assessments, product liability, public procurement, and reporting duties.

b. Type of due diligence obligations and key elements of regulation, including the risks addressed and the severity and likelihood of impact/damage

The German legal order contains examples of different types of due diligence obligations, including precautionary duties, supervision duties, protective duties and safety duties, whose concrete scope and content is tailored to the respective purpose of the law and the risks it aims to address. In one way or the other, all due diligence obligations are subject to standards of reasonableness, appropriateness, adequacy, cost-benefit analysis, etc., which ultimately give effect to the constitutional proportionality principle. These standards are fleshed out with regard to the type of risk to be addressed, the likelihood and severity of the impact/damage to be expected, and the economic costs involved in minimising or excluding

[369] *Id*.

the risk. For example, acting with due diligence within the meaning of the German law of non-contractual obligations requires the adoption of reasonable measures that a careful person of average circumspection and capability would consider necessary and adequate in order to prevent infringements of protected interests. The threshold of reasonableness is determined on the basis of a cost-benefit analysis: the more probable and serious the possible impact/damage and the lower the costs of preventing it, the more precautionary measures a reasonable person is expected to take. In this regard, the particularity of precautionary duties in environmental law (such as laid down in § 5 I (1) No 2 BISchG) is that they aim to address risks whose materialisation is possible yet not sufficiently probable to trigger a more robust duty of protection. This is of particular importance where – as often in cases of environmental harm – the damage may prove irreversible.

An important purpose of supervision duties that can be found in different areas of law is to prevent human rights risks from materialising through the organisation and monitoring of production and working processes. In this vein, the Product Liability Law imposes due diligence obligations on producers that are mapped onto the different stages of the production process, including an obligation to observe products that have been placed in the market. Or, § 91 II AktG makes it part of the due diligence of a 'decent and conscientious' member of the executive board to set up a firm-wide monitoring and compliance system for risk control and damage prevention. Supervision duties also equip corporations with the necessary knowledge to adapt safety- and protection measures in response to changing conditions. § 3 I ArbSchG, for example, requires employers to monitor business premises in regular intervals and to adapt occupational health and safety measures as required by the circumstances and necessary for their effectiveness. In some cases, supervision duties are coupled with requirements to inform the concerned parties about impeding risks and the way they should be addressed, such as the obligation to warn consumers about the dangers of faulty products in product liability law or the obligations to instruct employees about health and safety at work in the Labour Protection Act.

Protective and safety duties imbue due diligence obligations with more substantive content, generally tailored to the purpose of the law in the context of which they operate. The German law against unfair competition, for example, protects consumers by prohibiting business practices that do not satisfy the requirements of corporate due diligence. A particularity of the Protection of Mothers Act is that it requires employers to conduct an analysis of the type and extent of hazards at work that a breastfeeding mother or her child may be exposed to in advance of any concrete manifestation of risks and irrespective of whether the business enterprise currently employs women. The German law of non-contractual obligations specifies the diligence required by general business practice in terms of safety duties in two main constellations: where a person creates, maintains or controls a source of danger to the protected interests of third parties; and where a person assumes a responsibility to protect the interests of third parties. Bearers of safety duties recognised in the case-law include land owners, manufacturers, medical practitioners, tour operators and building contractors.

c. Regulation of corporate due diligence requirements in relation to foreign subsidiaries and suppliers and/ or with extraterritorial effect ('abroad')

The due diligence obligation of members of the executive board to set up a firm-wide compliance system for damage prevention and risk control contained in § 91 II AktG also applies includes foreign subsidiaries. However, this due diligence obligation has no third-party effect, that is, it can only be enforced in the relationship between the company and the members of its executive board. Pursuant to the German Posted Workers Act, the general contractor must take all reasonable organisational and bureaucratic measures to

ensure compliance with minimum working conditions for the benefit of posted workers. These obligations of the main contractor apply in relation to subcontractors and their subcontractors. There is in principle no reason why the safety duties contained in the German law of non-contractual obligations would not apply in relation to foreign subsidiaries and contractors, provided the factual conditions of assuming such duties on the part of the company (control or delegation) are met. There is, however, no relevant case-law to confirm this, which is mainly due to the fact that in transnational tort litigations before German courts, the existence and scope of due diligence obligations is generally determined on the basis of the (foreign) law of the place where the delict was committed (*lex loci delicti*).[370]

The German law against unfair competition requires business actors to observe the standard of expertise and diligence that an entrepreneur can be reasonably expected to observe in relation to consumers, considering his/her field of activity, the principle of good faith, and honest market practices (§ 2 I No 7 UWG). Business actors that mislead consumers into believing that their products have been manufactured in compliance with international human rights and labour standards can fall under the prohibition of unfair business practices within the meaning of § 3 UWG. Irrespective of misleading consumers, a violation of due diligence obligations can be assumed where foreign working conditions violations basic ethical requirements every legal order should aim to protect and are therefore incompatible with the principle of good faith and honest market practices. While the UWG only applies to products placed in the German market, the law has extraterritorial effect in that the prohibition of unfair business practices extends to foreign subsidiaries and suppliers (the distinction is immaterial in this context) whose production processes violate international human rights and labour standards.

As concerns public procurement, the German Act against Restraints of Competition allows the competent authorities to take into account social and environmental aspects pertaining to the production, provision or disposal of the service, to trade in the service, or to another stage in the life cycle of the service. It also entitles the competent authorities to impose, on a contractual basis, conditions of environmental and social protection on the successful bidder. This regulation has extraterritorial effect insomuch as it enables the competent authorities to take into account and regulate conditions for the provision of the service outside the German domestic jurisdiction. The effectiveness of the regulation is mitigated by the fact that the inclusion of social and environmental aspects at the bidding and the execution stage remains optional.

d. Corporate liability for violations of due diligence requirements, including burden of proof

To facilitate the enforcement of corporate due diligence obligations, some areas of German law provide for a reversal of the burden of proof. In some cases, this accounts for the weaker bargaining position of the beneficiaries of such obligations. In this vein, the German Labour Protection Act provides for a reversal of the burden of proof regarding fault and causality if the employer fails to instruct the employee in a sufficient and adequate way about occupational health and safety measures. The Posted Workers Act goes further by establishing no-fault liability of the main contractor for subcontractors who violate protective duties with regard to the payment of minimum wages and holiday fund contributions of the employee. In other cases, the reversal of the burden of proof is justified with regard to the fact that the beneficiary of due diligence obligations has no meaningful access to, or

[370] This would change if, as proposed by the draft German *Wertschöpfungskettengesetz* discussed further below, corporate due diligence requirements would be considered mandatory rules of the forum.

information about, the sphere of the duty bearer. According to German company law, members of the executive board bear the burden of proof for having acted with due diligence in setting up a firm-wide compliance system. Or, product liability law modifies the general civil liability rules on proving compliance with due diligence obligations, considering the difficulties consumers encounter in accessing the organisational sphere of the producer.

German law provides for public and private enforcement of corporate due diligence obligations. In practice, the most important instrument of public law enforcement is § 130 of the Administrative Offences Act. § 130 OWiG authorises public authorities to impose fines on business owners for failure to comply with their monitoring and supervision obligations with regard to compliance with legal duties contained in other areas of law and addressed to them in their capacity as business owners. A fine can also be imposed on *the business entity itself* if its director commits an offence that violates duties incumbent upon the company or that leads to an unjustified enrichment of the company. The most important instrument of private enforcement of corporate due diligence requirements is the law of non-contractual obligations. In addition to § 823 I BGB which renders due diligence obligations enforceable as safety duties, § 823 II BGB enables litigants to claim damages for violations of due diligence obligations contained in other law, provided these laws also aim to protect individual interests.

Public and private law enforcement of corporate due diligence obligations often combine and intersect. For example, the civil liability scheme under the Posted Workers Act is supported by a public law control- and sanction system that seeks to protect (foreign) workers unaware of their rights or unable to assert them through civil litigation. Or, the general due diligence obligation contained in the German Water Resources Act not only makes part of environmental impact assessments conducted by public authorities (UVPG) but also provides a legal basis for civil litigation for damages in conjunction with the environmental liability law and § 823 II BGB.

There is a German National Contact Point under the OECD Guidelines. There is one complaint under this non-judicial process which is relevant. In 2016 Dominic Whiting brought a complaint against NORDIX SE. The complaint related to the general risk-based due diligence of the respondent in relation to supplies of wind turbines to wind park projects. Following the conciliation procedure, the respondent agreed to improve its implementation of the OECD due diligence recommendations, but refused to sign a Joint Final Statement to this effect.[371]

IV. REGULATORY INITIATIVES AND LEGISLATIVE PROPOSALS

This part discusses three recent German initiatives that may result in a legally binding regulation of human rights due diligence (HRDD) in global supply/value chains. While some of these initiatives remain at present rather unspecific and hypothetical, they are important to appreciate the current political and regulatory context in Germany. The three initiatives discussed differ not only with regard to the appropriate (German/EU) forum of regulation but also with regard to the preferred regulatory method. Moreover, the recent proposals advanced by the Ministry of Labour and Social Affairs and the Ministry of Economic Cooperation and Development may conflict with the timeline agreed for the implementation of HRDD in the German National Action Plan (NAP) under the auspices of the Ministry of Foreign Affairs.

[371] https://www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/national-contact-point-ncp.html

a. Implementation of Corporate Human Rights Due Diligence *via* the German National Action Plan on Business and Human Rights

The German NAP formulates an expectation that 'all enterprises' introduce human rights due diligence in line with the UNGPs and 'in a manner commensurate with their size, the sector in which they operate and their position in supply and value chains'.[372] The *scope* and *content* of human rights due diligence (HRDD) envisaged by the NAP corresponds to the requirements laid down in the second pillar of the UN Guiding Principles.

Corporate compliance with the above NAP requirement is *monitored* annually from 2018 onwards. The reference group of the monitoring are German-based enterprises with more than 500 employees, including subsidiaries of foreign companies based in Germany. Chapter VI of the NAP specifies that monitoring shall take the form of an annual survey conducted on the basis of a representative sample of enterprises and shall include qualitative interviewing on the substantive depth of HRDD measures introduced and challenges encountered during their implementation.[373] Enterprises participate in the monitoring process on a voluntary basis. The annual survey contains a 'comply or explain' mechanism whereby participating enterprises 'can' explain why they have not implemented particular procedures or measures.[374] The annual surveys are conducted by a consortium led by Ernst & Young that produced an Inception Report in September 2018.[375] Civil society organisations are involved in the monitoring process *via* the National CSR-Forum, Working Group on Business and Human Rights.

As concerns *sanctioning and enforcement*, the eventual goal of the monitoring is to establish whether at least 50% of all German-based enterprises with more than 500 employees have incorporated HRDD into their business processes by 2020. Failing 'adequate compliance', the German Government 'will consider further action, which may culminate in legislative measures and in a widening of the circle of enterprises to be reviewed'.[376] The present governing coalition agreement of March 2018 goes further in announcing the government's intention to work towards a national or European legal regulation of corporate human rights due diligence should the 50% benchmark not be reached by 2020.[377]

As concerns *stakeholder responses*, while the 50% benchmark of corporate HRDD implementation by 2020 is one of the elements of the German NAP that has been received rather positively, civil society organisations have complained about the reluctance of the German government to develop legally binding standards and have voiced concerns about their role in monitoring process.[378] Data on the corporate *uptake* of HRDD, on obstacles encountered in the implementation process, and on the *impact* of the measure more generally is not yet available.

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[372] German Federal Foreign Office, *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020*, p. 7.
[373] *Id.* p. 28.
[374] *Id.* p. 28.
[375] Ernst & Young et al., *Inception Report: Monitoring des Umsetzungsstandes der im Nationalen Aktionsplan Wirtschaft und Menschenrechte 2016-2020 beschriebenen menschenrechtlichen Sorgfaltspflicht von Unternehmen* (04 September 2018); and further German Federal Foreign Office, *Erhebung zur Überprüfung des Umsetzungsstandes der im Nationalen Aktionsplan Wirtschaft und Menschenrechte 2016-2020 beschriebenen menschenrechtlichen Sorgfaltspflicht von Unternehmen (Monitoring), FAQ* (14 March 2019).
[376] See NAP (n 1) p. 7.
[377] See German Federal Foreign Office (n 4) p. 2.
[378] See CorA et al., *Kein Mut zur Verbindlichkeit: Kommentar deutscher Nichtregierungsorganisationen zum Nationalen Aktionsplans Wirtschaft und Menschenrechte der Bundesregierung* (February 2017, revised version); CorA et al., *Stellungnahme zum Monitoring der menschenrechtlichen Sorgfalt deutscher Unternehmen* (December 2018).

b. Proposal by the Federal Ministry of Labour and Social Affairs to promote EU-wide Legal Regulation of Human Rights Due Diligence in Global Supply Chains

In a public speech of 20 February 2019, the Federal Minister of Labour and Social Affairs, Hubertus Heil, expressed the intention of his Ministry to work towards an EU-wide legal regulation of corporate human rights due diligence in global supply chains.[379] According to Heil, there are 'weighty reasons' to push for such EU legislation – irrespective of the corporate uptake of HRDD in the German NAP implementation process (*see* I.1). As concerns *scope* and *content*, the regulation should formulate a 'process-standard' for large enterprises on how to implement human rights due diligence in their supply chains, presumably based on the requirements of the UNGPs. The regulation should also apply to non-European enterprises that 'do business' in the European Union. The Ministry of Labour and Social Affairs apparently pursues this initiative in close collaboration with France, the Netherlands and other EU Member States, with a view to securing a majority by the second half of 2020 when Germany takes over the leadership of the Council of the European Union.

c. Draft German Legislation on Corporate Human Rights and Environmental Due Diligence in Global Value Chains (Nachhaltige Wertschöpfungskettengesetz – NaWKG)

i. Purpose, Scope and Regulatory Approach of the NaWKG

In early February 2019, a draft law that aims to regulate corporate human rights and environmental due diligence in global value chains was leaked from Federal Ministry for Economic Cooperation and Development.[380] The Nachhaltige Wertschöpfungskettengesetz (NaWKG) bears significant resemblance with an earlier proposal to regulate HRDD in German public law that was developed by a small consortium of NGOs, legal practitioners and academics and that was published in March 2016 with extensive legal commentary.[381] The NaWKG has received wide support from civil society organisations but has not (yet) been endorsed by other German ministries.[382]

The *purpose* of the NaWKG is to ensure the protection of human rights and the environment in the context of global value chains, in the public interest and the interest of individuals employed in global value chains or otherwise immediately affected by their operation (§ 1 NaWKG). As concerns the *size and type of business covered*, the draft law applies to all 'major companies' (Großunternehmen) within the meaning of § 267 III of the German Commercial Code (§ 2 NaWKG). In addition, it covers 'other companies' (with the exception of 'minor companies' (Kleinunternehmen)) and subsidiaries controlled by their parent company (beherrschtes Unternehmen), provided these companies (a) operate in a 'high risk sector' (agriculture, forestry and fishery; mining; manufacturing industries, including food, textile and electronics; and energy supply, § 3 VI NaWKG) *or* (b) operate in conflict-affected or high-risk areas (§ 3 VII NaWKG).

[379] Bundesministerium für Arbeit und Soziales, *Wirtschaftlicher Erfolg und soziale Gerechtigkeit sind keine Gegensätze*, Public Speech on Occasion of the Zukunftsforum „Globalisierung gerecht gestalten" in Berlin (20 February 2019).
[380] Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, *Entwurf eines Gesetzes zur nachhaltigen Gestaltung globaler Wertschoepfungsketten und zur Änderung wirtschaftsrechtlicher Vorschriften (Nachhaltige Wertschoepfungskettengesetz NaWKG)* VS/NfD (01.02.2019).
[381] Remo Klinger et al, *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht* (Berlin, March 2016).
[382] See, for example, Germanwatch, *Germanwatch begrüpt Gesetzesvorhaben für nachhaltige Wertschöpfungsketten aus dem Bundesentwicklungsministerium* (February 2019); CorA, *CorA-Netzwerk begrüßt Gesetzesvorschlag für Menschenrechtsschutz in Wertschöpfungsketten von Entwicklungsminister Gerd Müller* (February 2019).

Following the approach found inter alia in the Brussels I Regulation, the NaWKG applies to all companies that have their statutory seat, central administration or principal place of business in Germany (§ 2 I NaWKG). It also covers business activities of these companies outside Germany ('ausländische Geschäftstätigkeit', § 2 II NaWKG). From a jurisdictional perspective, the draft law adopts a model of so-called 'home-state' or 'parent-based' regulation which, rather than directly reaching out to foreign subsidiaries of German-based companies, regulates companies domiciled in Germany with extraterritorial effect. This regulatory method, which the SRSG John Ruggie dubbed 'domestic measures with extraterritorial implications', relies on territory as jurisdictional basis and is generally considered fairly unproblematic from the perspective of public international law.[383]

ii. Regulation of corporate human rights and environmental due diligence, including the concept of adequacy

As concerns the *content of regulation*, the draft law requires companies to comply with comprehensive due diligence requirements to protect human rights and the environment. The draft law covers all 'internationally recognised human rights' (as listed in the draft's annex, § 3 I NaWKG). In the area of environmental protection, it requires companies to fulfil 'basic environmental requirements' and to avoid damage to the environment. 'Basic environmental requirements' are defined with reference to environmental legislation of the country where the damage occurs ('Erfolgsort') and international treaties that bind Germany (§ 3 VIII NaWKG).

To prevent negative human rights and environmental impacts, companies have to conduct an annual country- and sector-specific risk assessment which is 'adequate' in the light of the expected probability and gravity of negative impacts, the company's size, the immediacy of the company's contribution, and its *de facto* and economic influence on the entity that directly causes the violation/damage (§ 5 NaWKG). In this regard, § 5 IV NaWKG clarifies that a company's contribution to a violation/damage extends to the company's products and services and the acts of third parties (enterprises and public authorities) if they unlawfully contribute to the violation/damage in the course of the company's business activities. Whenever a company identifies relevant risks, it has to take adequate preventative measures (§ 6 NaWKG) and, if applicable, take prompt remedial action (§ 7 NaWKG). For the latter purpose, the company has to establish an internal grievance mechanism or participate in an effective non-judicial grievance mechanism by a multi-stakeholder initiative (§ 9 NaWKG). Companies are furthermore required to establish a whistle-blower system (§ 10 NaWKG) and to draw up comprehensive documentation of its compliance with the draft law's due diligence obligations (§ 11 NWKG).

While corporate due diligence obligations thus apply across the entire value chain, their scope is delimited by a *notion of 'adequacy'* (Angemessenheit) that applies at the stages of risk analysis (§ 5 II NaWKG), preventative measures (§ 6 I NaWKG) and remedial action (§ 7 NaWKG).[384] § 5 III NaWKG furthermore specifies that in order to satisfy the requirement of adequacy, business enterprises have to conduct an 'enhanced risk analysis' whenever they become aware of concrete risks of human rights impacts. There are numerous precedents in German law for delimiting the scope of due diligence obligations relating to risk analysis, prevention and remediation with help of a notion of adequacy. As part of the

[383] See H. R. C., *Business and Human Rights: Further Steps towards the Operationalisation of the 'Protect, Respect, and Remedy Framework*, A/HRC/14/27 (2010) para 55.
[384] The same approach also informs the earlier proposal to regulate corporate HRDD in German public law; see Klinger et al (n 9) 58-61. This proposal explicitly ties the notion of adequacy to the commentary attached to Principle 14 of the UNGPs, according to which the means through which a business enterprise meets its responsibility to respect human rights should be 'proportional' to the company's size and/or the severity of the human rights impacts, judged by their scale, scope and irremediable character.

proportionality principle (Grundsatz der Verhältnismäßigkeit or Übermaßverbot), adequacy is enshrined in the German Constitution and binds all public authorities *via* the protection of fundamental (basic) rights. Adequacy requires a proportionate relationship between means and ends. In constitutional law, an act of public power is only adequate if, considering all relevant circumstances the measure deployed is not out of proportion with the goal pursued. This entails that the more severe a measure interferes with fundamental rights, the weightier the public interest in regulation has to be.[385]

A notion of adequacy is also found in a variety of German laws, in some cases specifically tied to requirements of risk analysis. § 25a I of the **Law regulating the Credit System** (Gesetz über das Kreditwesen – KWG), for example, provides that 'proper business administration must include adequate and effective risk management, on the basis of which the credit institute must continuously ensure its risk-bearing capacity'.[386] What is required for adequate risk management depends on the type, scope, complexity, and risks inherent in the business activity. The adequacy and effectiveness of the risk management must be regularly assessed by the credit institute (§ 25a KWG). Further examples are found in the German **Money Laundering Act** (Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – GwG). § 10 II (4) GwG provides that upon request of the regulating authority, addressees of the law's 'general due diligence obligations' (allgemeinen Sorgfaltspflichten) have to demonstrate that the scope of due diligence measures taken is 'adequate' in relation to the risks of money laundering and terrorist financing. § 15 GwG imposes 'enhanced due diligence obligations' (verstärkte Sorgfaltspflichten), among others if the risk analysis indicates a 'higher risk' of money laundering or terrorist financing. The same requirement of demonstrating the adequacy of due diligence measures taken applies (§ 15 II (3) GwG). § 17 KWG provides that where the implementation of due diligence obligations is delegated to third parties, the credit institute that bears the obligation has to verify the 'adequacy' of measures taken by the third party, and to take 'adequate steps' to ensure that the third party submits upon request the relevant documentation. Finally, adequacy plays a role in the German **law of non-contractual obligations**, discussed in section III.1 below, where it determines the reasonable measures necessary to prevent an infringement of protected interests.

iii. Monitoring and Enforcement of the NaWKG

Companies have to appoint *a compliance officer* that *monitors* compliance with the draft law's due diligence obligations (§ 8 NaWKG). The compliance officer is responsible for establishing the complaints mechanism and the whistle blower system, and for fulfilling the company's documentation and reporting obligations. He must be consulted in advance of 'strategic entrepreneurial decisions' (in particular concerning fundamental changes of the company's business activities, § 3 XI NaWKG). As other German laws with similar provisions (such as the Money Laundering Act discussed above), the NaWKG provides for a number of safeguards to ensure that the compliance officer can exercise his/her tasks in a competent and independent way. These safeguards include requirements imposed on companies to establish close ties between the compliance officer and the company management and to ensure that the compliance officer has access to the necessary resources and information; and enhanced protection of the compliance officer against discrimination and dismissal.

The draft law also envisages various channels of *administrative oversight*. The company's management must notify the competent public authority of the appointment and dismissal

[385] See, for example, BVerGE 30, 292 – Erdölbevorratung.
[386] Eine ordnungsgemäße Geschäftsorganisation muss insbesondere ein angemessenes und wirksames Risikomanagement umfassen, auf dessen Basis ein Institut die Risikotragfähigkeit laufend sicherzustellen hat.

of the compliance officer (§ 8 II NaWKG). In monitoring corporate compliance with the NaWKG, the competent public authority can issue ordinances as necessary for the execution of the draft law. For that purpose, public authorities are empowered to enter business premises and to request disclosure of information and documents (§ 12 NaWKG). From the perspective of victims of corporate-related human rights violations, the fact that public authorities investigate *ex officio* can contribute to alleviating burdens relating to proof- and disclosure requirements and costs and resources that often hamper (cross-border) civil litigation.

The compliance officer also plays a role in the *sanctioning and enforcement* of the draft law. Culpable breaches of his/her obligations (such as a violation of documentation duties that causes serious bodily harm) incur criminal liability (§ 14 NaWKG). The competent public authority can impose fines up to five million Euro for non-compliance with the draft law's human rights and environmental HRDD requirements (§ 13 NaWKG). Companies that are found to have committed serious violations of the draft law (indicative are administrative fines of a minimum of 250.000 Euro) should be excluded from public procurement. The exclusion should last for an 'appropriate time' necessary to re-establish the reliability (Zuverlässigkeit) of the company (§ 16 NaWKG). Finally, the draft law contributes to facilitating attempts by victims to vindicate their rights through private litigation in German civil courts. Companies are obliged to waive the statute of limitations pending completion of the corporate non-judicial grievance procedure (§ 9 VI). Furthermore, as mandatory rules of the forum, the draft law's due diligence requirements apply to non-contractual liability claims against German-based companies irrespective of the otherwise applicable law (pursuant to the lex loci delicti rule under the Rome-II Regulation).

IRELAND COUNTRY REPORT

Shane Darcy*

I. OVERVIEW

Ireland does not generally require business enterprises to undertake due diligence in their own operations or in their supply chains, to prevent, mitigate and account for human rights or environmental impacts. The role of human rights due diligence in advancing business respect for human rights has been recognised by the Irish government, civil society, political representatives and business representative organisations, but to date no legislation has been adopted or formally proposed for the purpose of explicitly mandating human rights or environmental due diligence by business enterprises. The Irish Government has largely favoured a voluntary approach to human rights due diligence by either State-owned or private business enterprises. A narrow due diligence requirement is provided for in legislation and statutory instruments giving effect to European Union directives addressed to a variety of discrete areas, although these are not usually related to the protection of human rights and the environment. Nonetheless, non-financial reporting requirements for large Irish companies in furtherance of EU Directive 2014/95 touch on the role of due diligence processes. Certain State-owned or financed companies also appear subject to the "public sector duty" on human rights and equality which requires that such entities identify, take measures and report on human rights and equality issues of relevance to their functions. Irish legislation frequently provides for a defence of due diligence in relation to a wide range of offences by corporate actors, although the majority of these are not germane to business impacts on human rights and the environment. A number of Irish companies with business activities in the United Kingdom have publicly addressed the issue of due diligence in the context of slavery and trafficking when reporting under the United Kingdom Modern Slavery Act 2015. This section seeks to provide an overview of the legal and policy context in Ireland relating to due diligence by business enterprises in regard to their potential human rights and environmental impacts, before turning to a more in-depth examination of the relevant legislative undertakings.

Ireland's *National Plan on Business and Human Rights 2017-2020* is aimed at implementing the United Nations Guiding Principles on Business and Human Rights and includes a number of commitments addressed to human rights due diligence. The *National Plan*, for example, notes the Irish government's support for the implementation of the EU regulation on conflict minerals.[387] It also envisages the establishment of a Business and Human Rights Implementation Group with responsibility for meeting the following commitments of relevance:

- develop a practical toolkit on business and human rights for public and private entities within 12 months to assist them in their human rights due diligence
- encourage and support awareness of effective human rights due diligence by state owned or controlled companies
- encourage and support effective human rights due diligence in the context of state support to business and NGOs
- encourage companies and NGOs funded by the state to carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risk of adverse human rights impacts
- encourage and facilitate the sharing of best practice on human rights due diligence,

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[387] Government of Ireland, *National Plan on Business and Human Rights 2017-2020*, November 2017, p. 20, *available at*: https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf.

including effective supply chain audits.[388]

Following the adoption of the *National Plan*, the Minister for Foreign Affairs and Trade, Simon Coveney referred to building awareness "of the need to exercise effective due diligence on human rights issues, particularly where there is a risk of adverse human rights impacts".[389] Although the *Working Outline* of the National Action Plan on business and human rights had described human rights due diligence as forming "a central component of a business enterprise's ability to assess and act upon potential and actual risks to their operations",[390] neither the *Working Outline* nor the *National Plan* included a commitment to developing a regulatory framework to address human rights due diligence for business enterprises. The Business and Human Rights Implementation Group was formally convened in January 2019, [391] and is in the early stages of addressing the commitments in the *National Plan* related to human rights due diligence.

In furtherance of a commitment in Ireland's *National Plan*, the Department of Foreign Affairs and Trade commissioned an independent study to provide a baseline assessment of Ireland's legislative and regulatory framework for business and human rights. The *Baseline Assessment* addressed human rights due diligence in some detail, taking some issue with the approach adopted by Ireland as set out in the *National Plan*:

> The commitments in the National Plan propose a largely voluntary regime, whereby the role of the State is to encourage and support rather than to ensure compliance by way of a mandatory regime. While such an approach may derive results in some cases, it may not result in compliance across the board, and indeed may take longer to achieve compliance.[392]

The *Baseline Assessment* recommended that consideration "ought to be given to the adoption of mandatory human rights due diligence", as well as to the provision of benefits to companies undertaking human rights due diligence, or to making it a requirement for eligibility for State investment, participation in trade missions or listing on the Irish Stock Exchange.[393] It also suggested that human rights due diligence be considered for those business enterprises seeking to do business with the State or to receive State support, including when operating extra-territorially:

> [H]uman rights due diligence ought to be considered as a minimum requirement for State companies, businesses that obtain government contracts through the public procurement process, businesses that Ireland engages with through its embassies and State agencies and bodies that derive State support and that act outside the jurisdiction. Human rights due diligence should include reporting on human rights practices outside the jurisdiction so that companies that provide human rights reporting in Ireland, whether due to being domiciled in Ireland, or otherwise, must also report on the human rights of their out of territory operations.[394]

The *Baseline Assessment* highlighted the importance of human rights due diligence for "companies connected to high risk industries or conflict jurisdictions", and the need for "clear guidance" for such companies in order to "facilitate compliance with human rights

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[388] Ibid., pp. 18-19.
[389] Dáil Eireann Debates, Thursday, 4 October 2018.
[390] Department of Foreign Affairs and Trade, *Working Outline of Ireland's National Plan on Business and Human Rights 2016-2019*, p. 6, *available at*: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/Working-Outline-of-Irelands-National-Plan-on-Business-and-Human-Rights-2016---2019.pdf.
[391] Press Release, Department of Foreign Affairs and Trade, **Tánaiste addresses Inaugural Meeting of Business and Human Rights Implementation Group, 16 January 2019, *available at*:** https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2019/january/tanaiste-addresses-inaugural-meeting-of-business-and-human-rights-implementation-group.php
[392] ReganStein / Leading Edge Group / Department of Foreign Affairs and Trade, *National Plan on Business and Human Rights; Baseline Assessment of* Legislative and Regulatory Framework, March 2019, p. 20 *available at*: https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Baseline-Study-Business-and-Human-Rights-v2.pdf.
[393] Ibid., p. 21.
[394] Ibid., p. 22.

due diligence".[395] The recommendations in the *Baseline Assessment* are intended to guide the work of the Business and Human Rights Implementation Group in meeting the commitments in the *National Plan*.[396]

Key legislative enactments in Ireland related to human rights due diligence are the 2017 Regulations implementing the EU Directive on Non-Financial Reporting and the Irish Human Rights and Equality Commission Act 2014.[397] The Regulations, adopted by way of a statutory instrument which creates binding obligations, use a "comply or explain" approach to non-financial reporting and although they do not require business enterprises to undertake human rights due diligence, they recognise the role of this process in ensuring business respect for human rights and have been suggested as a potential basis for future legislation. The Regulations apply to a specific set of larger companies only.[398] They establish that the directors' annual report must contain a non-financial statement containing information "to the extent necessary for an understanding of the development, performance, position and impact of its activity" relating to:

(i) environmental matters;

(ii) social and employee matters;

(iii) respect for human rights;

(iv) bribery and corruption.[399]

These statements shall include a description of policies pursued in relation to such matters and "due diligence processes implemented and a description of the outcome of those policies". The Regulations do not mandate the undertaking of due diligence, but rather require the business enterprises in question to report on such processes as have been undertaken. Directors must also report on the environmental, human rights and other risks linked to the company's operations and "where relevant and proportionate … its business relationships, products or services which are likely to cause adverse impacts in those areas, and … how the applicable company manages those risks".[400] If companies do not pursue policies in these areas, then directors are required under the legislation to "include a clear and reasoned explanation for not so doing".[401]

While the Regulations on non-financial reporting do not require human rights or environmental due diligence by business enterprises, they have been considered as a "useful foundation upon which mandatory human rights due diligence could be developed".[402] The *Baseline Assessment* undertaken pursuant to Ireland's *National Plan* on business and human rights emphasised the direction of legislative developments in other European jurisdictions concerning mandatory human rights due diligence and suggested that examples such as the Netherlands Compact, France's Duty of Vigilance Law or the United Kingdom Modern Slavery Act could be followed in the Irish context.[403] This recommendation echoes those previously made by a number of Irish civil society organisations and statutory bodies calling on the Irish government to place a human rights due diligence requirement for Irish business enterprises on a statutory footing.[404]

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[395] Ibid., p. 45.
[396] Minister for Foreign Affairs and Trade, Simon Coveney, Dáil Eireann Debates, Thursday, 4 October 2018.
[397] S.I. No. 360/2017 - European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017, *available* at: http://www.irishstatutebook.ie/eli/2017/si/360/made/en/print; Irish Human Rights and Equality Act 2014, s42, *available at* https://www.ihrec.ie/download/pdf/ihrec_act_2014.pdf.
[398] S.I. No. 360/2017, s4.
[399] Ibid., s5(1)-(2).
[400] Ibid., s5(2).
[401] Ibid., s5(3).
[402] *National Plan on Business and Human Rights; Baseline Assessment of Legislative and Regulatory Framework,* p. 21.
[403] Ibid.
[404] See for example Irish Human Rights and Equality Commission, *Submission on Ireland's National Action Plan on Business and Human Rights*, March 2015, p. 19 *available at*: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Irish-Human-Rights-and-Equality-Commission.pdf; Trócaire, *Making a Killing: Holding corporations to account for land and human rights violations*, March 2019, p. 47, *available at*:

In the absence of a mandatory framework, undertaking human rights due diligence remains largely discretionary for most Irish business enterprises. A small number of large Irish companies have provided brief overviews of their due diligence processes with regard to modern slavery when reporting under the United Kingdom's Modern Slavery Act 2015 on account of their activities in that jurisdiction.[405]

For State-owned or financed companies, certain requirements approximating human rights due diligence exist under the public sector duty as enshrined in the Irish Human Rights and Equality Commission Act 2014. The Act requires public entities to identify, take measures and report on human rights and equality issues of relevance to their functions. Section 42 of the Act sets out that in the performance of its functions a public body shall "have regard to the need to (a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services".[406] The Act requires that such public bodies undertake a form of human rights due diligence:

> [A] public body shall, having regard to the functions and purpose of the body and to its size and the resources available to it—
>
> (a) set out in a manner that is accessible to the public in its strategic plan … an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and
>
> (b) report in a manner that is accessible to the public on developments and achievements in that regard in its annual report[407]

According to the Irish Human Rights and Equality Commission, the public sector equality and human rights duty applies not only to government departments, local authorities, and other public authorities, but also to companies "wholly or partly financed" or a majority stake is owned by the Irish government.[408] As elaborated further below, the requirements under the Irish Human Rights and Equality Commission Act 2014 regarding human rights and equality have not as of yet been implemented by the important but narrow set of companies to which they apply. Moreover, the legislation does not provide for robust monitoring, sanction or enforcement of the requirements set down.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

a. Company Law

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https://www.trocaire.org/sites/default/files/resources/policy/making_a_killing_holding_corporations_to_account_for_land_and_human_rights_violations_1.pdf; Irish Congress of Trade Unions, *Congress Submission on Ireland's Proposed National Action Plan on UN Guiding Principles on Business and Human Rights*, February 2015, available at: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/ICTU.pdf.

[405] See for example Allied Irish Bank (https://group.aib.ie/content/dam/aib/group/Docs/modern-slavery-statement.pdf); Keelings (https://keelings.ie/corporate/wp-content/uploads/2016/07/modern-slavery.pdf); Dornan (https://www.dornan.ie/anti-slavery-policy/); Seetec (https://www.seetec.ie/modern-slavery-statement); Bosch (https://www.bosch.ie/modern-slavery-statement/).

[406] Irish Human Rights and Equality Commission Act 2014, s42(1).

[407] Ibid., s42(2).

[408] Irish Human Rights and Equality Commission, *Public Sector Equality and Human Rights Duty- FAQ*, *available at:* https://www.ihrec.ie/our-work/public-sector-equality-and-human-rights-duty-faq/

Irish company law does not generally establish human rights or environmental obligations for companies or company directors, although reporting requirements under this body of law, including legislation giving effect to European Union directives, make reference to human rights and environmental matters, including the concept of due diligence.

As regards reporting requirements under Irish company law, the directors' report for a financial year must contain "a description of the principal risks and uncertainties facing the company" and where appropriate, "to the extent necessary for an understanding of such development, performance or financial position or assets and liabilities … an analysis using non-financial key performance indicators, including information relating to environmental and employee matters".[409] The Companies Act 2014 makes clear that such indicators are understood as "factors by reference to which the development, performance and financial position of the business of the company can be measured effectively".[410] However, as noted above, the European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017 require that the directors of certain large companies include in their annual report a non-financial statement containing information relating to the development, performance, position and impact of the company's activity on:

(i) environmental matters;

(ii) social and employee matters;

(iii) respect for human rights;

(iv) bribery and corruption.[411]

Human rights or environmental due diligence are not required under this legislation, although directors may report on "due diligence processes implemented and a description of the outcome of those policies". These regulations apply to financial years commencing on or after 1 August 2017, and thus companies coming under this legislation have yet to issue the required non-financial statements.

b. Human Rights Law

State-owned or financed companies may fall under the public sector duty arising under the Irish Human Rights and Equality Commission Act 2014, which requires such entities to identify, take measures and report on human rights and equality issues of relevance to their functions. Section 42 of the Act sets out that in the performance of its functions a public body shall "have regard to the need to (a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services".[412] The Act requires that such public bodies undertake a process that is comparable to, although far less prescriptive than human rights due diligence as understood in the United Nations Guiding Principles on Business and Human Rights: public bodies must "set out in a manner that is accessible to the public in its strategic plan … an assessment of the human rights and equality issues it believes to be

[409] Companies Act 2014, s327(1)-(3), *available at*: http://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html.
[410] Ibid., s327(7).
[411] S.I. No. 360/2017 - European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017, s5(1)-(2), *available* at: http://www.irishstatutebook.ie/eli/2017/si/360/made/en/print.
[412] Irish Human Rights and Equality Commission Act 2014, s42(1).

relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and … report in a manner that is accessible to the public on developments and achievements in that regard in its annual report".[413] There is no evidence to date of State-owned or financed companies meeting the requirements of the public sector duty under this legislation.

2. Scope

Non-financial reporting

The European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017 were introduced in order to give effect to EU Directive 2014/95/EU. Upon entry into effect of the 2017 Regulations, the Minister for Business, Enterprise and Innovation, Francis Fitzgerald, stated that "I believe that public disclosure of this type will help to encourage sustainable growth in Irish enterprise. I expect that it will also be of interest to investors, consumers, non-governmental organisations and wider society. A flexible approach has been taken in framing these new transparency requirements, which bears in mind the needs of both companies and those who will rely on the new disclosures".[414]

The Regulations create a non-financial reporting obligation for companies, including holding companies, which qualify as a large company under Section 280H of the Companies Act 2014, have an average number of employees exceeding 500, and are "an ineligible entity", meaning they have transferable securities listed on a regulated market, are a credit institutions, or an insurance undertaking, for example.[415]

With regard to terminology, the Regulations refer specifically to "environmental matters" and "respect for human rights", as well as "social and employee" matters, although each of these terms is not defined in the specific legislation. As regards the jurisdictional scope of the Regulations, little detail is provided in the legislation, although s5(11) provides as follows:

> An applicable company which is a subsidiary company shall be exempt from the obligation to prepare a non-financial statement if that company and any subsidiaries of the company are included in the group non-financial statement or the separate statement of another undertaking, drawn up in accordance with these Regulations or in accordance with the provisions implementing the Directive in a Member State other than the State.

It is not clear whether the obligation arising under the Regulations requires an applicable company to address the activities of its subsidiaries in its non-financial statement where those subsidiaries are not themselves applicable companies.

Public sector duty

The public sector equality and human rights duty under the Irish Human Rights and Equality Commission Act 2014 applies to government departments, local authorities, and other public agencies, and also, in the view of Irish Human Rights and Equality Commission to:

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[413] Ibid., s42(2).

[414] **Department of Business, Enterprise and Innovation, Press Release: New rules will see some of Ireland's biggest companies publishing information on a range of policies from gender diversity on boards of directors to greenhouse gas emissions, 21 August 2017, available at: https://dbei.gov.ie/en/News-And-Events/Department-News/2017/August/21082017.html.**

[415] S.I. No. 360/2017, s4(1). On "ineligible entities" see Companies (Accounting) Act 2017, s12, *available at*: http://www.irishstatutebook.ie/eli/2017/act/9/enacted/en/print.

a company wholly or partly financed by or on behalf of a Government Minister, in pursuance of powers conferred by or under another enactment

a company where the majority of shares are held by or on behalf of a Government Minister.[416]

Furthermore, "any other person, body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas, may, in the public interest, be prescribed as a public body by the Minister for Justice and Equality, following consultation with the Irish Human Rights and Equality Commission".[417] To date, a number of government departments and local authorities have undertaken measures relating to the public sector duty on human rights and equality, although as of yet it is not apparent that any State-owned or financed companies have acknowledged the application of the public sector duty or taken appropriate measures in this respect.[418] Semi-state agencies, including those constituted as companies, are audited by the Comptroller and Auditor General.[419] No reference is made to the size or type of industries covered, or to the jurisdictional extent of businesses covered in the Irish Human Rights and Equality Commission Act 2014.

Regarding the use of the terminology of human rights, the Irish Human Rights and Equality Commission Act 2014 refers to the elimination of discrimination, the promotion of equality of opportunity and the protection of human rights of a public body's "members, staff, and persons to whom it provides services".[420] Human rights are understood in this legislation as meaning:

(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution,

(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party, and

(c) without prejudice to the generality of paragraphs (a) and (b), the rights, liberties and freedoms that may reasonably be inferred as being—

(i) inherent in persons as human beings, and
(ii) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State;[421]

No reference is made to environmental issues, such as climate change, to sustainability or to governance in this legislation, which reflects both the mandate of the Irish Human Rights and Equality Commission and the indirect way in which the requirements can be considered applicable to certain business enterprises.

3. Content of Regulation

Non-financial reporting

The European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017 require the directors of an applicable

[416] Irish Human Rights and Equality Commission, *Public Sector Equality and Human Rights Duty- FAQ*, *available at:* https://www.ihrec.ie/our-work/public-sector-equality-and-human-rights-duty-faq/
[417] Ibid.
[418] See generally Niall Crowley, 'A duty to value: Implementing the public sector equality and human rights duty', 65(3) *Administration* (2017) 141, pp. 156-158.
[419] For a list of Irish semi-state agencies, including companies, see: https://www.audit.gov.ie/en/About-Us/WHO-WE-AUDIT/State-Bodies/.
[420] Irish Human Rights and Equality Commission Act 2014, s42(1).
[421] Ibid., s2(1).

company to include a statement containing non-financial information within the directors' report issued each financial year. Such a statement shall:

> *(b)* contain information, to the extent necessary for an understanding of the development, performance, position and impact of its activity relating to, at least, the following matters:
>
> (i) environmental matters;
>
> (ii) social and employee matters;
>
> (iii) respect for human rights;
>
> (iv) bribery and corruption

The non-financial statement shall also:

> (*d*) include a description of the policies pursued by the applicable company in relation to the matters referred to in subparagraph (*b*), including due diligence processes implemented and a description of the outcome of those policies,
>
> (*e*) include a description of the principal risks related to the matters referred to in subparagraph (*b*), linked to the applicable company's operations including, where relevant and proportionate—
>
> (i) its business relationships, products or services which are likely to cause adverse impacts in those areas, and
>
> (ii) how the applicable company manages those risks.[422]

Where the directors of a company do not pursue policies in these areas, the non-financial statement should include "a clear and reasoned explanation for not so doing".[423] Applicable companies can rely upon national, European or international frameworks in preparing their non-financial statements.[424] In addition to the above reporting requirements, large traded companies must also include a "diversity report" in their corporate governance statement relating to the composition of the company's board with regard to aspects of age, gender or educational and professional backgrounds.[425]

The Regulations make no reference to any external control or evaluation of the human rights or environmental policies as may be undertaken by a company, including any due diligence processes.

Public sector duty

Section 42 of the Irish Human Rights and Equality Act 2014 requires that public bodies undertake what can be considered as a soft form of human rights due diligence:

> For the purposes of giving effect to subsection (1), a public body shall, having regard to the functions and purpose of the body and to its size and the resources available to it—
>
> (a) set out in a manner that is accessible to the public in its strategic plan (howsoever described) an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and

[422] Ibid., s5(2).
[423] Ibid., s5(3).
[424] Ibid., s5(7).
[425] Ibid., s6 (1)-(2).

(b) report in a manner that is accessible to the public on developments and achievements in that regard in its annual report (howsoever described).[426]

The legislation establishing these requirements for relevant public bodies, which can include certain companies connected with the Irish State, does not address the issue of subsidiaries or business relationships in the supply chain, or grievance mechanisms.

4. Monitoring, sanction and enforcement

Non-financial reporting

Failure to comply with the obligation under the 2017 Regulation constitutes an offence, for which an individual director "shall be liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 6 months, or to both".[427] A class A fine can range from €4,001 to €5,000.[428] The Office of the Director of Corporate Enforcement, a statutory body which enforces and encourages compliance with the requirements of the Companies Acts, has a recognised role in enforcement under the 2017 Regulations.[429] The Office of the Director of Corporate Enforcement may:

(*a*) investigate instances of suspected offences under these Regulations,

(*b*) enforce these Regulations, including by the prosecution of offences by way of summary proceedings, and

(*c*) do all such acts or things as are necessary or expedient for the performance of his or her functions under these Regulations.[430]

There have been no reported offences of failure to comply with the Regulations on non-financial reporting at the time of writing.

Public sector duty

The Irish Human Rights and Equality Commission, Ireland's independent national human rights institution, has a particular role in relation to the public sector duty. In general, the Commission, as one of its strategic priorities, seeks to "[h]old government, public bodies, agencies and businesses to account".[431] In relation to the public sector duty, the Commission can assist public bodies by offering guidance and encouragement in developing policies and exercising good practice in relation to human rights and equality. [432] It can also prepare guidelines or codes of practice regarding "the development by public bodies of performance measures, operational standards and written preventative strategies" on human rights and equality.[433] Where the Irish Human Rights and Equality Commission considers that a public body has failed to perform its functions consistent with the public sector duty on human rights and equality, it may invite the body in question to carry out a review if its performance or prepare and implement an action plan in respect of its duty.[434]

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[426] Ibid., s42(2).
[427] S.I. No. 360/2017, s8.
[428] Fines Act 2019, s4.
[429] See http://www.odce.ie/en-gb/abouttheodce/ourrole.aspx.
[430] Ibid., s9.
[431] Irish Human Rights and Equality Commission, *Strategy Statement 2019-2021*, 2019, p. 6, *available at*: https://www.ihrec.ie/app/uploads/2019/02/Final-Strategy-Statement-ENG-VERSION.pdf.
[432] Ibid., s42(3).
[433] Ibid., s42(4). See Irish Human Rights and Equality Commission, *Implementing the Public Sector Equality and Human Rights Duty*, March 2019, *available at:* https://www.ihrec.ie/app/uploads/2019/03/IHREC_Public_Sector_Duty_Final_Eng_WEB.pdf.
[434] Ibid., s42(5).

5. Procedural Framework

Neither the 2017 Regulations nor Section 42 of the Irish Human Rights and Equality Commission Act 2014 establish a procedural framework that envisages access to a specific court or body for victims of alleged violations of human rights or environmental harms by relevant companies.

6. Available Remedies

Non-financial reporting

The 2017 Regulations do not provide for remedies for victims, providing only for sanctions against directors that fail to meet their obligations under the legislation to disclose the relevant non-financial information. The sanction applies to the failure to meet the reporting requirements, as opposed to causing harm to human rights or the environment.

Public Sector Duty

The Irish Human Rights and Equality Act 2014 seeks to preclude any liability on the part of the relevant public body for failing to fulfil the requirements of the public sector duty on human rights and equality. Section 11 of the Act states that "[n]othing in this section shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under subsection (1)". However, the European Convention on Human Rights Act 2003 provides that "every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions", and sets out that any person "who has suffered injury, loss or damage as a result of a contravention … may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court".[435] If State-owned or financed companies are considered as "organs of the State" under this legislation, then a possible cause of action before the High Court arises for breach of rights under the European Convention.[436]

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

Given that implementation of both the non-financial reporting requirements under the 2017 Regulations and the public sector duty under the Irish Human Rights and Equality Commission Act 2014 remain at a nascent stage, it is not possible to determine the costs of enforcement to either the State or the relevant companies covered by the non-financial reporting requirements or the public sector duty.

8. Impact of the Regulation

[435] European Convention on Human Rights Act 2003, s3, *available at*: http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print#sec3.

[436] On the definition of organs of the State see Padraic Kenna, 'Local Authorities and the European Convention on Human Rights Act 2003', *Irish Human Rights Law Review* (2010) 1, pp. 8-10; Colin Scott, 'Variety in Public Agencies', *UCD Geary Institute Discussion Paper Series*, 4 February 2008, *available at:* http://www.ucd.ie/geary/static/publications/workingpapers/gearywp200804.pdf. See also *Reid* v. *Industrial Development Agency (Ireland) & ors* [2013] IEHC 433; *Byrne & another* v, *National Asset Management Agency* [2018] IEHC 526.

Given that implementation of both the non-financial reporting requirements under the 2017 Regulations and the public sector duty under the Irish Human Rights and Equality Commission Act 2014 remain at a nascent stage, and in light of the narrow set of companies to which these apply, it is difficult to determine their impact at this time. That being said, most of the largest law firms in Ireland have published advice on the requirements for applicable companies under the 2017 Regulations, perhaps on account of the criminal sanctions which attached to directors for non-compliance.[437] With regard to the potential application of the public sector duty to State-owned or financed companies, the seeming failure of any such company to implement this duty suggest a limited impact of this legislation on those business enterprises, and by extension victims, workers and other stakeholders.

III. COMPARATIVE ANALYSIS

9. Comparisons between different regulations within the Member State

Directors Duties

The liability of companies and directors for violations or damage by EU or non-EU based subsidiaries or in the supply chain is underexplored in the Irish context. A corporate duty to respect human rights as understood in the United Nations Guiding Principles on Business and Human Rights has not been established in legislation, nor translated into a civil law obligation entailing a duty of care on the part of companies. Under Irish company law, the duties of directors are generally owed to the company itself, although in the performance of their functions, they are also required to "have regard" for "the interests of the company's employees in general, as well as the interests of its members".[438] Efforts to follow the model of directors duties in the United Kingdom Companies Act 2006, which requires directors to have regard to the interests of the company, its members, and its employees, as well as "the impact of the company's operations on communities and the environment, have been rejected.[439] The Minister of State at the Department of Jobs, Enterprise and Innovation, Sean Sherlock, explained why it was not considered appropriate to establish a duty towards employees as had been proposed by way of an amendment to the bill:

> Under existing law, directors are required to have regard to the interests of employees. This amendment would change it to a duty to employees. This may mean that members and employees would have a directly enforceable right against directors where they act contrary to their respective interests. This would compromise the fundamental structure of the directors' relationship with the company, which is described to be fiduciary, that is to say it requires directors to prefer the interests of the company over their interests or those of others, even where those others include some members of the company.[440]

The Companies Act 2014 makes it clear that the section of this legislation that makes reference to directors having regard for the interests of employees imposes a duty on

[437] See for example A&L Goodbody (https://www.algoodbody.com/insights-publications/new-non-financial-and-diversity-disclosure-obligations-affecting-directors); McCann Fitzgerald (https://www.mccannfitzgerald.com/knowledge/company-secretarial-and-compliance/new-mandatory-reporting-requirements-for-many-large-companies); Matheson (https://www.matheson.com/news-and-insights/article/new-non-financial-and-diversity-disclosure-obligations); William Fry (https://www.williamfry.com/newsandinsights/news-article/2018/11/28/large-companies-preparing-to-disclose-non-financial-and-diversity-information).
[438] Companies Act 2014, s224(1).
[439] Brian Conroy, *The Companies Act 2014: An Annotation* (Round Hall, 2015), pp. 330-331.
[440] Ibid., p. 331.

directors that "shall be owed by them to the company (and the company alone)".[441] It gives rise to a right "enforceable by the company or by derivative action; it does not fall properly to be construed as conferring a direct right of enforcement on employees".[442]

Environmental Regulation

With regard to environmental due diligence, there is at present no overarching regulatory framework requiring environmental due diligence of Irish companies in order to identify, prevent, mitigate and account for the impact of their actives on the environment, such as in relation to climate change. Business enterprises operating in Ireland are at risk of liability for certain environmental harms, although a defence of due diligence may be available (see further below). Environmental impact assessments and audits are required under Irish planning law in particular instances: for certain projects and activities requiring a permit, "an ongoing environmental auditing procedure will apply as part of an environmental management system and the monitoring and reporting procedure set out in the conditions of a permit".[443] An environmental impact assessment is required under Irish planning law and relevant EU Directives "at the development stage of all projects that are likely to have a significant impact on the environment".[444] Assessments are also required where activities may impact on designated protected areas or special areas of conservation.[445] The Supreme Court has held that the Irish Planning Board (*An Bord Pleanála*) was entitled to consider the possible transboundary effects outside of the State of a proposed development.[446]

Recent proposed legislation – the Climate Action and Low Carbon Development (Climate Change Reporting) Bill 2018 – seeks to amend the Climate Action and Low Carbon Development Act 2015 in order to expand the responsibilities of the Climate Change Advisory Council to include the publication within two years of "guidelines for companies seeking to identify and include climate-related reporting in their annual directors' reports".[447] The envisaged guidelines may include the development of key performance indicators and assist companies to identify "the financial and strategic implications" of climate change and transition to a low carbon economy, although no reference is made to a due diligence obligation for companies.

Due Diligence

The concept of due diligence is present in a number of areas of regulation in Ireland, such as in relation to data protection, money laundering, terrorist financing, banking and the sale or transfer of certain products. Such legislation often gives domestic legal effect to European Union laws.[448] Under Irish data protection laws, "a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to

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[441] Companies Act 2014, s224(2).
[442] *O'Sullivan* v. *Conroy Gold and Natural Resources Plc.* [2017] IEHC 543, 98.
[443] See Rachel Dolan and Sinéad Marten, 'Ireland' *in The International Comparative Legal Guide to Environment and Climate Change Law 2018* (Global Legal Group, 2018) 97, p. 98, *available at*: https://www.mccannfitzgerald.com/uploads/ENV18_Chapter-14-Ireland.pdf.
[444] Ibid. See EU Directives 2011/92/EU amended by 2014/52/ EU. See also John Gore-Grimes, *Planning and Environmental Law in Ireland* (Bloomsbury 2011) pp. 903-996.
[445] Ibid.
[446] *Keane* v. *An Bord Pleanála* [1998] 2 ILRM 241 SC.
[447] Climate Action and Low Carbon Development (Climate Change Reporting) Bill 2018, *available at*: https://data.oireachtas.ie/ie/oireachtas/bill/2018/82/eng/initiated/b8218d.pdf.
[448] See for example S.I. No. 183 – European Communities (Control of Animal Remedies and their Residues) Regulations 2009, s27(1), *available at*: http://www.irishstatutebook.ie/eli/2009/si/183/made/en/print.

the data subject concerned".[449] The Office of the Data Protection Commissioner has previously "identified issues with some data controllers who failed to carry out proper due diligence" prior to the award of contracts.[450] In relation to the use of big data and analytics, however, there are "no specific laws or binding guidance covering the precise due diligence required".[451] In relation to defence products, the Cluster Munitions and Anti-Personnel Mines 2008, places on obligation on public investors to "avoid investing public moneys in collective investment undertakings or investment products unless, having exercised due diligence, the investor is satisfied that there is not a significant probability that the public moneys will be invested in a munitions company".[452] Where public monies have been so invested, the investor

> (*a*) establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or
>
> (*b*) divest itself of its investment in that company in an orderly manner.[453]

With regard to Ministerial authorisation for the transfer of certain defence related products within the European Union, relevant recipient undertakings must make a written commitment "to provide to the Minister, with due diligence, detailed information in response to requests and inquiries concerning the end-users or end-use of all products exported, transferred or received under a transfer licence from another Member State".[454]

Detailed due diligence requirements are found in Irish law in the area of banking and finance. Such legislation often gives effect to relevant international or EU laws. For example, in relation to money laundering and terrorist financing, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 sets down requirements and modalities for due diligence to "manage and mitigate risk" in relation to customers who may be implicated in such activities.[455] The Act addresses both "simplified" and "enhanced due diligence", with the latter relating to customers in high risk third countries or those of heightened risk.[456] Group-wide policies and procedures are also envisaged for carrying out customer due diligence and preventing the acts in question.[457] The competent authority may direct a group to not enter into a business relationship or to terminate an existing relationship where it "is not satisfied that the additional measures applied in accordance with that subsection are sufficient for the purposes of carrying out customer due diligence and preventing and detecting the commission of money laundering and terrorist financing".[458] There are also specific obligations set down in Irish law for the legal profession to undertake due diligence in relation to clients or potential clients in order to prevent money laundering and terrorist financing.[459]

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[449] Data Protection Act 1988, s7, *available at*: http://www.irishstatutebook.ie/eli/1988/act/25/enacted/en/print.
[450] Data Protection Commissioner - Ireland [2013] IEDPC 14 (2013).
[451] Anne-Marie Bohan and Andreas Carney, 'Ireland' *in The International Comparative Legal Guide to Data Protection 2017*, 4th Edition (Global Legal Group, 2017) 125, p. 134.
[452] Cluster Munitions and Anti-Personnel Mines 2008, s14(1), *available at*: http://www.irishstatutebook.ie/eli/2008/act/20/enacted/en/print.html.
[453] Ibid., s13(2)
[454] S.I. No. 346/2011 – European Communities (Intra-Community Transfers of Defence Related Products) Regulations 2011, s15(3)(d), *available at*: http://www.irishstatutebook.ie/eli/2011/si/346/made/en/print.
[455] Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018, s10 *available at:* http://www.irishstatutebook.ie/eli/2018/act/26/enacted/en/print.html.
[456] Ibid., s13, 18 and 19
[457] Ibid., s 29.
[458] Ibid., s 30.
[459] S.I. No. 33/2016, Solicitors (Money Laundering and Terrorist Financing Regulations) 2016, s13, 14, 18, *available at*: http://www.irishstatutebook.ie/eli/2016/si/533/made/en/print.

Credit institutions in Ireland, such as banks, are required to demonstrate to the Central Bank that they have undertaken detailed due diligence before investing in certain securities.[460] According the relevant legislation:

> (1) Before investing, and as appropriate thereafter, a credit institution is required to be able to demonstrate to the Bank, for each of its individual securitisation positions, that—
>
> (*a*) it has a comprehensive and thorough understanding of, and
>
> (*b*) it has implemented formal policies and procedures appropriate to its trading book and non-trading book and commensurate with the risk profile of its investments in securitised positions for analysing and recording, the following matters—
>
> (i) information disclosed under Regulation 64C by the originator or sponsor of the position to specify the net economic interest that the originator or sponsor maintains in the securitisation position,
>
> (ii) the risk characteristics of the individual securitisation position,
>
> (iii) the risk characteristics of the exposures underlying the securitisation position,
>
> (iv) the reputation and loss experience in earlier securitisations of the originators or sponsors in the relevant exposure classes underlying the securitisation position,
>
> (v) the statements and disclosures made by the originator or sponsor, or by any agent or advisor of an originator or sponsor, about the due diligence on the securitised exposures and, where applicable, on the quality of the collateral supporting the securitised exposures,
>
> (vi) where applicable, the methodologies and concepts on which the valuation of collateral supporting the securitised exposures is based and the policies adopted by the originator or sponsor to ensure the independence of the valuer, and
>
> (vii) all the structural features of the securitisation that can materially affect the performance of the securitisation position.[461]

While few of the above legislative enactments can be considered as directly related to human rights and the environment, it is evident that the concept of due diligence is widely used in other areas of domestic regulation in Ireland to identify, prevent, and account for identified harmful activities.

Due Diligence as a Defence

The defence of due diligence has long been recognised in Irish law, and has been set down in numerous pieces of legislation relating to a variety of offences and upheld by

[460] S.I. No. 627 of 2010 European Communities (Directive 2009/111/EC) Regulations 2010, *available at:* http://www.irishstatutebook.ie/eli/2010/si/627/made/en/print.
[461] Ibid., Regulation 61.

the courts in a number of proceedings.[462] As a recent example of primary legislation enshrining the due diligence offence, the Criminal Justice (Corrupt Offences) Act 2018 provides that "it shall be a defence for a body corporate against which such proceedings are brought to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence".[463] The Act provides for extraterritorial jurisdiction for offences of corruption committed outside the State by Irish citizens or companies.[464] In the context of employment law, the Employment (Miscellaneous Provisions) Act 2018 provides for a due diligence offence for employers:

> In proceedings for an offence under this section, it shall be a defence for the accused to prove that he or she exercised due diligence and took reasonable precautions to ensure that this Act was complied with by the accused and by any person under the control of the accused.[465]

The defence of due diligence is applicable under Irish law therefore to both natural and legal persons, and has been deemed applicable to a range of offences.[466] It has not been extended by legislation to offences consisting of serious violations of human rights, such as trafficking in persons.[467]

IV. REGULATORY FRAMEWORK

10. Overall Review of Regulatory framework

In Ireland, there has been limited legislative activity or proposed legislation specifically related to human rights and environmental due diligence by business enterprises. Notwithstanding Ireland's commitment to the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, both of which advocate the exercise of human rights due diligence by business enterprises, there has been negligible progress to date in encouraging Irish business enterprises, state-owned or private, to undertake due diligence on a voluntary basis. Even where a statutory obligation can be said to exist for certain companies, as is arguable under the Irish Human Rights and Equality Commission Act 2014, compliance has been notably weak to date. Narrowly focused due diligence obligations for companies have been mandated under a limited number of domestic laws, some of which give effect to EU Directives. These have enjoyed far greater compliance, although as noted above, these legislated requirements have largely not been addressed to matters concerning human rights and the environment. The due diligence component of the requirements set down for company directors under the European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017 merely serves to illustrate how a company might seek to address human rights and environmental impacts of its activities. This non-financial reporting legislation only mandates the issuance of a "non-financial statement", but leaves considerable discretion to applicable business enterprises as to whether policies are pursued for the purpose of addressing environmental, social and employee matters, human rights, bribery and corruption.

The principal regulations examined in this report do not seek to provide access to remedy for individuals whose rights have been affected and can accordingly be

[462] See for example *Waxy O'Connors Ltd* v. *Judge Riordan & others* [2016] IESC 30 (08 June 2016); *Reilly* v. *Judge Patwell* [2008] IEHC 446 (17 October 2008); *C.C.* v. *Ireland & ors* [2006] IESC 33 (23 May 2006).
[463] Criminal Justice (Corrupt Offences) Act 2018, s18(2), *available at*: http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html.
[464] Ibid., s12.
[465] Employment (Miscellaneous Provisions) Act 2018, s10, *available at*: http://www.irishstatutebook.ie/eli/2018/act/38/enacted/en/html.
[466] See for example Criminal Justice (Offences Relating to Information Systems) Act 2017, s9(2); S.I. No. 290/2013 - European Union (Birds and Natural Habitats) (Sea-fisheries) Regulations 2013, s23; Consumer Protection Act 2007, s78; National Minimum Wage Act 2000, s38; S.I. No. 316/2014 – European Union (Timber and Timber Products) (Placing on the Market) Regulations 2014, (s4(3)).
[467] Criminal Law (Human Trafficking) Act 2008, *available at*: http://www.irishstatutebook.ie/eli/2008/act/8/enacted/en/html.

considered as ineffective in this regard. While legislative enactments can be read as demonstrating some commitment on the part of the Irish State in meeting its fundamental human rights obligations, they suggest a minimalist approach to advancing business respect for human rights by way of regulation. The Irish Human Rights and Equality Commission Act 2014 addresses the human rights responsibilities of certain companies almost inadvertently, while the non-financial reporting regulations ultimately arose on account of Ireland's obligations as a member of the European Union. Such legislation does not sufficiently advance the stated goal of putting "human rights at the heart of all our business practices", as espoused by Minister for Foreign Affairs and Trade, Simon Coveney.[468] At the launch of the *National Plan*, Minister Coveney stated that the plan sought to avoid a "hard-hitting legalistic approach" to business and human rights, as is clearly evidenced by the promotional approach adopted throughout the document. [469] Since the endorsement of the United Nations Guiding Principles on Business and Human Rights, successive Irish governments have demonstrated little commitment to regulatory activity in this area, including in relation to due diligence.

Neither of the two regulatory models explored in detail in this report have proven effective in achieving corporate implementation of adequate human rights or environmental due diligence or in providing victims with access to remedy. The weaknesses are evident: an absence of any mandatory obligation to undertake due diligence in the non-financial reporting regulations; limited scope of application, to large companies in the case of the non-financial reporting regulations, and to companies owned or financed by the Irish State under the Irish Human Rights and Equality Commission Act 2014 (which is weakened by the absence of any direct reference to such companies in the legislation itself); an underdeveloped model of human rights due diligence in the Irish Human Rights and Equality Commission Act 2014, which requires considerable elaboration, and which makes no mention of environmental issues, including climate change; limited monitoring, sanction and enforcement; the purposeful exclusion of any cause of action for victims under the Irish Human Rights and Equality Commission Act 2014. Notwithstanding these shortcomings, it should be borne in mind that it was not the specific purpose of the examined legislation to require business enterprises to undertake due diligence in their operations or supply chains in order to prevent, mitigate and account for human rights or environmental impacts.

Neither the Irish government nor opposition political parties have formally proposed legislation to bring into Irish law regulatory regimes requiring human rights and/or environmental due diligence by business enterprises. Nonetheless, as noted above, the independently prepared *Baseline Assessment* commissioned by the Department of Foreign Affairs and Trade in furtherance of a commitment in the *National Plan*, suggested that the existing non-financial reporting regulations could serve as a basis for developing mandatory human rights due diligence for Irish companies. [470] This recommendation echoes those previously made by a number of Irish civil society organisations and statutory bodies calling on the Irish government to place a human rights due diligence requirement for Irish business enterprises on a statutory footing. For example, the Irish Human Rights and Equality Commission recommended in 2015 that:

> The Irish Government should make due diligence a mandatory requirement with a legislative underpinning, especially where the State-business nexus exists or where Irish companies operate in conflict-affected areas or countries with poor human rights records.[471]

[468] Foreword, *National Plan on Business and Human Rights 2017-2020*, p. 5.
[469] Shane Darcy, 'Ireland's national plan on business and human rights: some initial thoughts', *Business and Human Rights in Ireland*, 15 November 2017, *available at*: https://businesshumanrightsireland.wordpress.com/2017/11/15/irelands-national-plan-on-business-and-human-rights-some-initial-thoughts/.
[470] *National Plan on Business and Human Rights; Baseline Assessment of Legislative and Regulatory Framework,* p. 21.
[471] Irish Human Rights and Equality Commission, *Submission on Ireland's National Action Plan on Business and Human Rights*, March 2015, p. 19 *available at*:

One of Ireland's largest civil society organisations Trócaire, has similarly called for "mandatory human rights due diligence and environmental impact assessments in order to avoid further violations of fundamental rights".[472] The Irish Congress of Trade Unions has recommended that the Irish government introduce human rights due diligence in all its interactions with business "such as through contracts, investment policies, procurement processes, legislation, or regulation".[473] Amnesty International made similar recommendations, and considered the national plan as an opportunity to consider how legislation could be developed on human rights due diligence.[474] None of these organisations have prepared draft legislation on human rights (or environmental) due diligence.

Business representative organisations have expressed some concern at the potential burden of mandatory human rights due diligence for certain enterprises, particularly small and medium size enterprises. Chambers Ireland, for example, considered that human rights due diligence could be useful "as a strategic tool" for companies, but expressed the view that it "must not be made mandatory":

> The additional administrative burden that would be imposed on Irish businesses would impede competitiveness and drain scarce resources and capacity. Again, there is the issue of relative burden, as larger companies would be in a better position to dedicate resources to reporting on their policies. Therefore we welcome the position of the Department […] that companies should be encouraged to carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risk of adverse human rights impacts.[475]

The role of proportionality in the context of requirements for human rights due diligence was noted in the *Baseline Assessment* published in March 2019:

> The UNGPs and the OECD Guidelines envisage that the nature of due diligence ought to be appropriate to the size and scale of the business, and indeed the tailoring of requirements to reflect the size and type of businesses may address these concerns. Human rights due diligence of a mandatory rather than discretionary character can therefore be developed in a manner that takes account of the size of businesses and also serves to give effect to the imperative to develop business in a human rights compliant manner.[476]

In this respect, the focus on a narrow set of large companies as under the 2017 non-financial reporting regulations may serve to assuage the stated concerns regarding the impact of mandatory human rights diligence on small and medium sized enterprises. Consideration could be given to an amendment of the existing regulations, as has

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https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Irish-Human-Rights-and-Equality-Commission.pdf.

[472] Trócaire, *Making a Killing: Holding corporations to account for land and human rights violations*, March 2019, p. 47, *available at*: https://www.trocaire.org/sites/default/files/resources/policy/making_a_killing_holding_corporations_to_account_for_land_and_human_rights_violations_1.pdf.

[473] Irish Congress of Trade Unions, *Congress Submission on Ireland's Proposed National Action Plan on UN Guiding Principles on Business and Human Rights*, February 2015, available at: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/ICTU.pdf.

[474] Amnesty International, *Submission to the Department of Foreign Affairs and Trade on its preparation of a National Action Plan on Business and Human Rights,* March 2015, p. 4, *available at:* https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Amnesty-International.pdf.

[475] Chambers Ireland, *Submission on the Working Outline of Ireland's National Action Plan on Business and Human Rights,* January 2016, available *at*: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Chambers-Ireland.pdf.

[476] *National Plan on Business and Human Rights; Baseline Assessment of Legislative and Regulatory Framework,* p. 21.

already occurred in relation to other matters,[477] in order to require human rights and environmental due diligence by applicable companies.

Although not broached in the *Baseline Assessment*, Section 42 of the Irish Human Rights and Equality Commission Act would also provide a foundation for developing mandatory human rights due diligence requirements, specifically for State–owned or financed companies. An amendment to this legislation could strengthen its presently soft approach by acknowledging more explicitly the application of the public sector duty on human rights and equality to such companies connected with the State, by elaborating and developing the requirements under Section 42 so as to align with an appropriate human rights and environmental due diligence standard, and by providing for more robust monitoring, sanctions, enforcement and remedies for affected individuals and communities. Such legislative developments seem unlikely in the Irish context in the absence of the development of European Union laws requiring member states to have in place regulatory regimes addressing human rights and environmental due diligence at the national level.

[477] S.I. No. 410/2018 - European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups)(Amendment) Regulations 2018, *available at*: https://dbei.gov.ie/en/Legislation/Legislation-Files/SI-No-410-of-2018.pdf.

ITALY COUNTRY REPORT

Giacomo Maria Cremonesi[478]

I. OVERVIEW

The current Italian regulatory framework requires business enterprises to undertake certain due diligence processes to prevent, mitigate and account for specific human rights violations and environmental impacts. Regulations concerning the impacts on the environment derive in large part from the transposition of European Directives on the subject.

Most of the norms analysed in Section II relate to certain due diligence processes concerning alternatively specific human rights (such as health and safety) or specific impacts on the environment (such as decontamination). However it should be noted that the Legislative Decree 231 of 2001 introduced a due diligence process that covers both aspects and that to a certain extent coordinates the other regulations.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

A) L.D. 8 June 2001, no. 231: Administrative Responsibility of Legal Entities

B) L.D. 9 April 2008, n. 81 Consolidated Text on Health and Safety at Work

C) L.D. no. 254/2016: Non-Financial Reporting implementing EU Directive 2014/95/EU

D) L.D. n. 152/2006 (TUA) II Part: VIA VAS and AIA

E) L.D. n. 152/2006 (TUA) Title V: Decontamination of polluted sites

F) L.D. no 105/2015: Control of major-accident hazards

1. Area of Regulatory Framework

A) Legislative Decree 8 June 2001, no. 231

(hereinafter L.D. no. 231/2001), *Regulation on administrative responsibility of legal entities, companies and associations, including those not having legal personality, according to art. 11, Law 29 September 2000, no. 3001*[479].

Covered areas of law:

a. Corporations law (including director's liability)

b. Health, safety and regulatory law – Art. 25*Septies*

c. Environmental law (including on climate change) – Arts. 25*ter* and 25*undecies*

d. Human rights law (see the below)

e. Rights of the child and child law – Art. 25*quinquies*

f. Stock exchange listing and related regulations – Arts. 25se*xies* and 25*octies*

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479 The full text of the Legislative Decree is available in Italian language at https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2001-06-19&atto.codiceRedazionale=001G0293&queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D231%26testo%3D%26annoProvvedimento%3D2001%26giornoProvvedimento%3D&currentPage=1

g. Third State, EU and international regulation (since the Decree has been adopted to comply with EU and international obligations, as specified below).

2. Scope

a. Rationale given by the State for the regulation (or lack of regulation)

Legislative Decree (L.D.) no. 231/2001 has been introduced to comply with obligations deriving from EU Law and international conventions among which one of the most relevant is the OECD Anti-Bribery Convention. By the means of this Decree, Italy introduced for the first time into its legal system direct corporate liability for crimes committed in the interest or to the benefit of a legal entity. The term used by the Italian legislator is "*corporate administrative responsibility arising from a criminal offence*".

Despite the administrative "label", the introduced liability is substantially of a punitive nature. The very idea behind the Decree is in fact the principle *societas delinquere potest*: crimes committed within a company are often the result of a well-established corporate policy and the outcome of top management decisions[480]. In addition, the administrative sanctions against the company is applied by the criminal judge with the jurisdiction to ascertain the crime committed by the physical person, following a criminal process.

However, taking into account the term used by the lawmakers and the Government Report on the Decree, both scholars and the case law mostly opted for an intermediate interpretation, considering the "231 liability" as a *tertium genus* which combines essential elements of the criminal and the administrative systems[481]. Corporate liability arises under L.D. no. 231/2001 when the following requirements are met:

a) one of the crimes listed in Art. 24 and following of the Decree is committed **in its interest or to its benefit** (Art. 5). The interest is the expected advantage deriving from the crime (to be evaluated *ex ante*, before the commission of the crime). On the contrary, the benefit is the profit that concretely derived from the commission of the crime (to be evaluated *ex post*). However, in case of culpable crimes, such as crimes of murder and culpable personal injuries committed in violation of laws on the protection of health and safety on the workplace as well as environmental crimes, interest and benefit refer to the (omitted) behaviour. Indeed in this case, the event is not intentional and clearly does not correspond to the interest and/or the benefit of the corporation. Accordingly, corporate liability arises whether the omission of the proper behaviour is a benefit to the legal entity representing a cost saving[482].

b) **the perpetrator of the crime is connected to the corporation.** The Decree (Art. 5) make a distinction between persons who hold "*representative, or administrative or managerial positions within the legal entity or in one of its departments having financial and organisational autonomy*" (high-level employees) and employees "*managed or supervised*" by the persons holding senior positions.

c) the corporation was involved in an "***organisational fault***" since it has not previously taken adequate measures to prevent offences of the type occurred, failing to adopt and effectively implement a suitable "***compliance program***" to this regard.

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2 See D. Pulitanò, *Diritto Penale*, 2017.

481 On the issue see the Supreme Court decision in the *ThyssenKrupp* case (Cass. Penale, Sez. Unite, 24 April 2014, *Espenhhahn, ThyssenKrupp Acciai Speciali Terni S.p.a*, n. 38343, in CED Cass., n. 261112), available in Italian language at The full text of the ruling is also available at https://www.penalecontemporaneo.it/d/3292-caso-thyssenkrupp-depositate-le-motivazioni-della-sentenza-delle-sezioni-unite-sulla-distinzione-tr

482 See again the decision of the Supreme Court in the *ThyssenKrupp* case (Cass. Penale, Sez. Unite, 24 April 2014).

b. *Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included.*

According to Art. 1, L.D. no. 231/2001 applies to "*corporate entities and companies and associations, regardless of whether they have legal personality*". Consequently, all types of business are covered.

Exceptions are provided by par. 3 of Art. 1, which states that the Decree does not apply to the State, to territorial public bodies, to other non-economic public bodies or to bodies performing constitutionally significant functions.

c. *Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights*

Following several amendments, the scope of Legislative Decree no. 231/2001 has been extended and it currently includes specific human rights violations and environmental crimes. Among these are: crimes connected to slavery and trafficking in human beings (Art. 25*quinquies*, introduced in 2003); crimes of child prostitution, child pornography and child grooming (Art 25*quinquies*, introduced in 2003); mutilation of female genitals (Art 25*quater* 1, introduced in 2006); manslaughter or serious bodily harm committed with breach of laws governing the safeguarding of workplace health and safety (Art. 25s*epties,* introduced in 2007); employment of illegally staying Third-Country nationals (Art. 25d*uodecies* introduced in 2012); and environmental crimes (such as environmental disaster, environmental pollution, failure to decontaminate, etc., Arts. 25*Ter* and 25*undecies*, introduced in 2011 and recently extended in 2015).

Following the extension of its scope, L.D. no.231/2001 can be currently considered the most relevant Italian law with regard to Business and Human Rights issues, even if the Decree does not refer to "*human rights terminology*". Accordingly, among the planned measures of the Italian NAP on Business and Human Rights, adopted in December 2016, there is the commitment to "*conduct a comprehensive study of the Law 231/2001 in order to evaluate potential extension of the scope and application of the administrative liability of legal entities*"[483] in order to assess the scope of its implications in relation to the UNGPs.

d. *Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation*

In case of multinational groups or corporations that conduct part of their business outside the Italian national borders the following scenarios are possible pursuant to L.D. no. 231/2001:

- Crimes committed in Italy:

Italian criminal law applies to anyone who is within the Italian territory (Art. 3 of the Italian Criminal Code). However, Decree no. 231/2001 does not specify whether and under which conditions **foreign corporations** can be prosecuted in Italy under the Decree in case of a crime committed within the Italian territory in their interest or benefit by their employees.

According to the prevailing interpretation among scholars and to the case law, **foreign companies can be sanctioned (and subject to caution) pursuant to L.D. no.**

483 Italian National Action Plan on Business and Human Rights 2016-2021: https://cidu.esteri.it/ComitatoDirittiUmani/resource/doc/2018/11/all_2_-_nap_bhr_eng_2018_def_.pdf

231/2001 for offences committed in Italy by their top managers or subordinates, regardless of whether or not these have a secondary office or establishment in the national territory and, therefore, regardless of the place where the organizational gap occurred [484].

- Crimes committed abroad:

In specific cases corporate liability under Legislative Decree n. 231/2001 could be invoked also in relation to crimes committed by Italian and foreign enterprises operating abroad. To this regard, it is necessary to make a distinction:

a) Cases where part of the violation occurred in Italy (e.g. when the crime is the result of a decision taken in Italy by the parent company), and partly abroad. According to the Italian Criminal Code (Art. 6), a crime is considered committed in Italy when part of the criminal action or omission happened within the national territory. Such situation occurs when part of the criminal activity takes place in Italy or the crime produces its effects in Italy or involves a multinational group operating also in Italy[485]. In these cases, it will be possible to prosecute in Italy both foreign companies (for example foreign subsidiaries of Italian companies), and Italian companies operating abroad if the involvement of their corporate representatives or employees in committing the crime partially abroad will be demonstrated. No further requirements will be needed to affirm the Italian jurisdiction over the crime.

b) Cases where the violation occurred entirely abroad. According to Art. 4 of L.D. no. 231/2001, a corporation headquartered in Italy can be prosecuted and sanctioned for crimes committed entirely abroad in its interest or to its benefit, under the following conditions: I) Italian jurisdiction can be invoked on the basis of Art. 7 to 10 of the Criminal Code[486]; II) the corporation has its headquarter in the Italian territory[487]; III) the State where the offence occurred did not yet proceed against it; IV) in specific cases, there's a request from the Ministry of Justice. However, when the crime is committed entirely abroad within a foreign corporation controlled by an Italian parent company, the company located in Italy can be held liable only if it can be demonstrated that its representatives or employees took part in the crime committed abroad (see below point 3, c) by subsidiaries and groups of companies).

c) Transnational crimes. According to Law no. 146/2006, which ratified the United Nations Convention against Transnational Organized Crime adopted by the UN General Assembly on 15 November 2000 (the so-called Palermo Convention or TOC) **corporations can be prosecuted and sanctioned in Italy regardless of the conditions of Art. 4, L.D. no. 231/2001 with regard to specific transnational organised crime.**

3. Content of Regulation

a. Overview and description of the required measures for business

In order to avoid incurring in corporate administrative liability under L.D. no. 231/2001, the legal entity shall firstly demonstrate that it has adopted a model of organization,

484 According to this case law "*both foreign natural and legal persons, whenever working in Italy […] have the duty to comply to Italian laws and enforce them and this includes Legislative Decree no. 231 of 2001*". The leading case embracing this interpretation was the 2004 *Siemens AG case*(cfr. Tribunale di Milano Giudice per le indagini preliminari, April 27, 2004, "*Siemens AG*" case, published in *Foro it.,* 2004, II, 434). Recently, see the judgement on the *Viareggio train wreck case* (Tribunale di Lucca, July 31 2017, n. 222 available at http://www.giurisprudenzapenale.com/2017/08/20/strage-di-viareggio-depositate-le-motivazioni/). For a comment on the issue see M. Riccardi, *L'internazionalizzazione della responsabilità "231" nel processo sulla strage di Viareggio: gli enti con sede all'estero rispondono per l'illecito da reato-presupposto "nazionale", in Giurisprudenza Penale Web, 2018, 1, http://www.giurisprudenzapenale.com/wp-content/uploads/2018/01/Riccardi_gp_2018_1.pdf.*

485 On this issue see G. Di Paolo, *Italian Report on Prosecuting Corporations for Violations of International Criminal Law*, in S. Gless, S. Broniszewska-Edmin, *Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues* (International Colloquium Section 4, Basel, 21-23 June 2017).

486 These provisions establish universal jurisdiction over a set of serious offences against national interest and according to specific conditions, as better specified below.

487 Commercial law applies in order to determine where the head office is based.

management and control designed to prevent crimes (so called "*compliance programs*", in Italian language "*modelli di organizzazione e gestione*") and secondly, that it has established a supervisory body (in Italian language "*organismo di vigilanza*" or "*ODV*") overseeing the respect of the model.

L.D. no. 231/2001 does not expressly provide for the mandatory legal obligation to adopt such model. However, the adoption and the implementation of adequate compliance programs can exonerate a company from corporate administrative liability. The adoption of the model is a necessary condition to this regard, even though it is not sufficient, in order to assert that the corporation has not facilitated the commission of the offence. In addition, when the adoption of the model is subsequent to the crime, it can mitigate the application of sanctions [488].

In details, if the offence is committed by a **high-level employee** there's a **presumption of corporate liability**, unless the corporation can demonstrate that (Art. 6):

a) the board of directors adopted and efficiently enacted, prior to commission of the rime, "*organisational and management models*" which are capable of preventing offences of the type occurred;

b) the corporation entrusted the task of overseeing the observance of the model to an independent body (so called supervisory body, "*organismo di vigilanza*" or "*ODV*") and in the specific case there was no lack of vigilance on the part of the supervisory body;

c) the perpetrator committed the offence by fraudulently circumventing the organisational and management models.

On the contrary, if the offence is committed by an **employee** there is no presumption of guilt of the corporation. In this case, the legal entity is considered liable only if the criminal conduct was made possible by means of non-compliance with managerial and supervisory obligations. Moreover, there is a **negative presumption** since the Decree excludes the failure to comply with managerial and supervisory obligations when the corporation, before commission of the offence, adopted and efficiently implemented an organisational, management and control model which is capable of preventing offences of the type occurring.

b. Key legal elements of the obligation

Article 6, paragraph 2, L.D. no. 231/2001 indicates the essential characteristics for the construction of an adequate organization, management and control model.

Models are adequate if they identify risky activities and provide for specific protocols and decision-making processes in the covered fields in order to prevent the commission of illicit activities.

More specifically, the model must fulfil the following requirements:

a) identify the activities in relation to which offences may be committed;

b) provide for specific protocols aimed at planning decision making processes and implementation of corporate decisions with regard to the offences to be prevented;

c) identify procedures for managing financial resources which are suitable to prevent the commission of crimes;

d) introduce **information duties**, imposing all employees and other subjects within the company to promptly inform the body assigned to supervise to model application and operation (so called supervisory body);

[488] See Art. 17, L.D. no. 231/2001.

e) introduce a **suitable disciplinary system** to punish non-compliance with the measures set out in the model.

In order to guarantee that the previous requirements are met, corporations may adopt their own model on the basis of codes of conduct drawn by industry associations and declared suitable by the Justice Ministry (Art. 6, par. 3). On the basis of these provisions, Confindustria, the main association representing manufacturing and service companies in Italy, provided specific *Guidelines* for the adoption of proper organisational models[489].

The creation of the supervisory body ("*organismo di vigilanza", "ODV*") is, together with the adoption of the model, a necessary (but not sufficient) condition to exonerate a company from corporate administrative liability.

c. Risk assessment requirements and risk mitigation measures

Letters a) and b) of Art. 6, par. 2 mentioned above clearly refer to some activities related to a process of sound and prudent risk assessment and definition of related mitigation measures. To this regard Confindustria *Guidelines* defined *soft-law* criteria for conducting proper risk assessment.

The process recommended by the *Guidelines* is summarized below:

I) The company should carry out **risk assessment** activities with the purpose of identifying the areas and the business activities in relation to which the crimes foreseen by the Decree could be committed, causing a responsibility for the company. Risk assessment should be organized as follows:

a) Preliminary analysis of the company structure and organization in order to identify all business process and activities carried out within the corporation. The result of this analysis should be the identification of so-called "Sensitive areas" or "Sensitive processes", that is to say those business areas or processes within which the commission of the offences envisaged by L.D. no. 231/2001 could be abstractly possible, as well as the identification of potentially relevant crimes.

b) Specific risk analysis for each of the identified sensitive area or process in order to how the potentially relevant crimes could be committed and the inherent risk.

II) The company should **develop a control system** suitable to prevent the identified risks, through the adoption of specific protocols. To this regard, the company should start from an evaluation of the preventive control measures already existing within the company in relation to the sensitive areas and/or processes and evaluate their suitability for the purposes of crime prevention, amending and improving them when necessary. At the end of this process the risk of commission of crimes within the sensitive business areas and/or processes should be reduced to an "*acceptable level*". According to Confindustria *Guidelines* the residual risk of commission of 231 crimes is *acceptable* when the control system is **designed in a way that it cannot be bypassed in a non-fraudulent way.**

d. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers

L.D. no. 231/2001 does not explicitly refer to groups of companies. Criminal Law principles prevent any automatic application of the Decree to companies belonging to the same group. Indeed, according to the relevant case law of the Italian Supreme Court, a

489 To this regard, see the *Guidelines* provided by Confindustria, available at https://www.confindustria.it/notizie/dettaglio-notizie/linee-guida-confindustria-231-modelli-organizzativi

company belonging to a group – and in particular the parent company – may be considered accountable for the crimes committed by other members of the same group, only when all the legal requirements provided by L.D. no. 231/2001 are met[490].

More specifically, the following conditions need to be met:

a) a natural person acting on the behalf of the parent company or of another company of the group participated in the crime committed within a company belonging to the same group (case of aiding),

and

b) the crime has been committed also in the interests or to the advantage of the parent company or of another company of the group.

With regards to the second requirement (b), the Italian Supreme Court clarified that simply indirect advantage (such as the economic gain deriving from the corporate links and the incremental profitability of the subsidiary, so called "*interesse di gruppo*") is not enough[491]. On the contrary, **a direct, concrete economic advantage is necessary**.

Following such considerations, Confidustria *Guidelines* recommend that each company of a group adopt its own organisational and management model and entrusts its own supervisory body ("*organismo di vigilanza*", "*ODV*"). At the same time, Confindustria recommends that the model of the parent company takes into account processes and activities which also involves its subsidiaries (for example in case of outsourcing of specific activities).

e. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

L.D. no. 231/2001 does not provide for external control procedures. However, within the control system designed by the organisational and management model, corporations should entrust the task of overseeing on the implementation of the model to an internal and independent supervisory body ("*organismo di vigilanza*", "*ODV*") and guarantee proper internal whistle-blowing mechanisms (see below).

f. Implementation of internal processes by business, including operational-level grievance mechanisms

An effective implementation of the model requires (Art. 7, par. 4):

a) periodic verification and, where appropriate, amendments to its content when significant breaches of rules are discovered or otherwise when changes are made to the organisation or the activity of the corporation;

b) a disciplinary system to punish non-compliance with the measures set out in the model.

The task of overseeing the effective implementation of the Model has to be entrusted to an internal – but independent – supervisory body ("*organismo di vigilanza*", "*ODV*").

With regard to grievance and whistle-blowing mechanisms, Law no. 179/2017 [492] introduced a new paragraph to Art. 6 of the Decree (par. 2 *bis*) specifying that

[490] See Art. 2 of the Decree which refers to the Principle of Legality.

[491] Cass. Penale, Sez. 5, 18 January 2011, no. 24583, *Tosinvest case*. Full text of the judgement is available in Italian language at https://www.penalecontemporaneo.it/d/761-gruppi-d-imprese-e-responsabilita-ex-dlgs-n-2312001-prima-pronuncia-della-cassazione. On the issue see G. Amato, *L'attribuzione della responsabilità amministrativa ex D.Lgs. 231/2001 all'interno dei fruppi di imprese, Rivista231 <http://www.rivista231.it/ >.*

[492] Law November 30 2017, no. 179, on whistle-blowing ("Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato", full text availble at https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2017-12-

organisational models must establish internal channels and procedures for reporting unlawful conducts that might be relevant pursuant to the Decree and are based on precise and consistent facts, or other violations of the organization and management model, of which they have become aware due to the functions performed. The internal channels guarantee the confidentiality of the identity of the person reporting. The Law also forbid the adoption of retaliatory or discriminatory measures against the whistle-blower. In particular, the retaliatory or discriminatory dismissal of the whistle-blower is invalid, as well as any change of duties or other retaliatory or discriminatory measure adopted against him/her. In case of disputes related to the imposition of disciplinary sanctions, or to demotion, dismissal, transfer, or submission of the reporter to other organizational measures having negative effects, direct or indirect, on working conditions, following the whistle-blowing activity, it is employer's burden to demonstrate that these measures are based on reasons unrelated to the report.

At the same time, the adoption of a disciplinary sanction system applicable in the event of violation of the Model, makes the action of the supervisory body more efficient.

4. Monitoring, sanction and enforcement

a. Monitoring body

As laid down in Art. 6, par. 1 of the Decree, the task of monitoring the functioning and the observance of the model and of overseeing their updating has to be entrust to a supervisory body ("*organismo di vigilanza*", "*ODV*") with proper powers of initiative and control. The creation of the supervisory body is, together with the adoption of the model, a necessary (but not sufficient) condition to exonerate a company from corporate administrative liability.

Confindustria *Guidelines* recommend that the supervisory body (ODV) has the following requirements:

- autonomy in the powers of initiative and control – in the sense that there should be no correspondence or interference between who carries out checks with respect to the function being checked;
- adequate professionalism and competence;
- continuity of action.

In case of small and medium-size enterprises, the tasks of overseeing the implementation of the model may be performed directly by the executive board, while in case of capitalised companies, the board of auditors, the supervisory board or the management control committee can perform the functions of the supervisory body[493].

b. Form of monitoring/evaluation, timelines for investigating complaints, procedures for review

Except for the provisions on whistle-blowing mechanisms mentioned before, L.D. no 231/2001 left to the discretion of the companies on how to organise the supervisory body' monitoring activities. According to Confindustria *Guidelines* the supervisory body should have the following tasks:

14&atto.codiceRedazionale=17G00193&queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D179%26testo%3D%26annoProvvedimento%3D2017%26giornoProvvedimento%3D&currentPage=1 .

[493] Art. 6, par. 4 and 4 *bis*.

- surveillance on the effectiveness of the model, carried out through periodical checks on sensitive activities and processes and through the processing of significant information flows;
- examination about the Model's efficacy, namely its real ability to prevent, in principle, the unwanted behaviours, for example promoting initiatives the initiatives for disclosing awareness and comprehension of the model among employees;
- updating of the Model, in the event that adjustments became essential;
- activation of the sanction system in case of violation of the measures provided by the Model.

When carrying out the tasks assigned, the supervisory body has unlimited access to corporate information.

c. Form of sanction(s), if any (In particular, whether monetary or other sanctions)

According to the Decree a disciplinary system to punish non-compliance with the measures set out in the model is necessary for an effective implementation of the said model[494]. This disciplinary system is internal and can be activated by the supervisory body in any case of infringement of the measures provided by the model. The model should define the procedure and the criteria for the application of the sanctions.

In addition to the internal sanction system, in the event that a criminal offence listed by the Decree is committed in the interest or to the benefit of the company, the Decree also provide for the following "administrative" sanctions to be enforced by the criminal judge with jurisdiction on the crime, within a criminal procedure:

- pecuniary fines (which always apply)[495];
- disqualification sanctions[496];
- seizure of the proceeds or profit of crime, or an equivalent measure (which always applies);
  publication of the sentence[497].
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5. Procedural Framework

a. Competent Court or other body

In the event of commission of a crime listed by the Decree in the interest or to the benefit of a corporation, the administrative sanctions against the corporation should be applied by the criminal judge with the jurisdiction to ascertain the crime committed by the physical person.

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[494] Art. 7, par. 4.

[495] The amounts of pecuniary fines are determined in a rather articulated manner, in summary art. 10 and art. 11 of the Decree clarify that pecuniary fines are applied for "quotas" that are determined by the judge on the basis of the company's economic condition and its assets in order to ensure that the penalty is effective. The amount of each quota ranges from no less than 258,00 Euro to a maximum amount of 1.549,00 Euro. The number of quotas is provided by articles 24 and followings of the Decree for each of the listed crimes.

[496] The disqualification sanctions, identified in art. 9, paragraph 2, LD. No. 231/2001, could be enforced for some kinds of offences: debarment from trading or exercising business activities; suspension or revocation of authorizations, licenses or concessions useful for the commission of the offence; ban on contracting with Public Administration Agencies, unless this is so as to obtain the provision of a public service; exclusion from concessions, loans, grants and subsidies, as well as the withdrawal of those which may have already been granted; ban on advertising goods or services. When a corporation has gained a significant profit and has already been convicted three times in seven years, or when a corporation (or one of its departments) is regularly used for the sole or main purpose of allowing or facilitating the commission of crimes, disqualification is definitive (Art. 16, L.D. no. 231/2001).

[497] The publication of the judgment against the corporation can be ordered when a disqualification sanction is applied.

b. ***Jurisdictional restrictions (including forum non conveniens, place of business incorporation)***

See above point 2, d).

c. ***Main procedural rules and challenges (formalities, deadlines, expediency, in court settlement options, evidence/discovery rules, multi-stage process, etc.)***

L.D. 231/2001 also set down the rules to establish the corporation's liability. In principle and to the extent to which they are compatible, the provisions of the Criminal Procedure Code apply to corporations. The corporation is usually prosecuted within the same criminal trial of the physical person to whom the crime is attributed. Special procedural arrangements are established for corporations by L.D. 231/2001.

Concerning the burden of proof, it might be challenging with regard to crimes committed abroad or within a subsidiary or within the supply chain to prove aiding. In addition, with regard to culpable crimes it might be challenging to prove the causal link.

Admissibility of a civil action ("*costituzione di parte civile*") against the corporation for damages caused directly by the corporate administrative offence is controversial (see below).

6. Available Remedies

a. Civil, criminal and administrative remedies

See point 2, a) on *hybrid* nature of corporate liability provided by L.D. no. 231/2001 (criminal and administrative).

b. Whether sanctions include compensation (see 4(c) above)

Administrative sanctions provided by L.D. no. 231/2001 does not include compensation. However before the criminal trial is declared open, the corporation can request that the trail is suspended in order to pay damages that are consequences of the crime[498].

c. Redress for victims including type and allocation of damages between claimants

L.D. no. 231/2001 does not specify if victims have the right to bring a civil action for damages directly caused by the corporation within the criminal procedure. The Supreme Court excluded this right[499]. However, recently the right of victims to bring civil action and claim compensation against corporation within 231 criminal procedures has been recognized in the well-known ILVA case on environmental crimes (discussed below)

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

The cost for adopting a model depends on the size and activity of the company. A certain budget can be allocated for the ODV.

[498] Art. 65 and 17 of the Decree.

[499] Cass. sez. VI, 5 October 2010, O.M.S. salieri s.p.a, confirmed by ECJ, Maurizio Giovanardi and others, Case C-79/11, 12 July 2012. The Court has ruled out the admissibility of the civil party in the trial established for the liability of a corporation pursuant to L.D. 231 as it was not expressly envisaged by the Decree as a consequence of a "conscious and legitimate choice made by the legislator".

8. Impact of the Regulation

a. Impact of the national regulation on behaviour/ policy of businesses (both direct and indirect)

The voluntary adherence to the regulatory system outlined by L.D. no. 231/2001 contributed to create a non-homogeneous scenario.

However, L.D. no. 231/2001 has helped the growth of a compliance culture within legal entities, where the organizational model increasingly represents evidence of an effective corporate governance system.

b. Impact of the regulation on environmental rights (including biodiversity) and climate change

With regard to workers' rights see the Thyssenkrupp case, concerning manslaughter and serious injuries committed with violation of the rules on the protection of health and safety at work following the 2007 terrible fire in the company's plant in Turin in which seven workers died as a result of the very serious burns reported[500].

With regard to workers' rights and to environmental rights the case involving ILVA, the biggest steel company in Italy, has to be cited. The case is relevant particularly because the Tribunal of Taranto ordered the seizure of the plants blast furnaces[501]. In addition, the Taranto Criminal Court of Appeal also recognized the right of victims to become a civil party and claim compensation in the 231 proceedings against ILVA.

In addition, the provisions contained in Legislative Decree 231/2001 on the prevention of environmental crimes may lead more companies to adopt an environmental management system such as ISO 14001 or EMAS[502] in order to be compliant.

c. Impact of the regulation on the rights of the child

L.D. no 231/2001 covers the crimes of child prostitution, pornography and child grooming (art. 25-quinques).

d. Impact of the regulation on other human rights

- See the ILVA case concerning environmental crimes: the judicial order issued by the Tribunal of Taranto concerning the seizure of ILVA furnaces stated clearly that the plant had caused and continued to cause sickness and death[503].
- Rights to freedom from slavery and freedom from interference with privacy are covered by L.D. no. 231/2001.
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[500] Cass. Penale, Sez. Unite, 24 April 2014, Espenhhahn, ThyssenKrupp Acciai Speciali Terni S.p.a, n. 38343, in CED Cass., n. 261112, available in Italian language at The full text of the ruling is also available at https://www.penalecontemporaneo.it/d/3292-caso-thyssenkrupp-depositate-le-motivazioni-della-sentenza-delle-sezioni-unite-sulla-distinzione-tr

[501] For the analysis of the ILVA case see the Report "*The Environmental Disaster and Human Rights violations of the ILVA steel plant in Italy*" published in April 2018 by HRIC, FIDH, Unione Forense per la Tutela dei Diritti Umani and Peacelink, available at https://www.humanrightsic.com/single-post/2018/04/17/Available-now-the-English-version-of-the-Report-The-Environmental-Disaster-and-Human-Rights-Violations-of-the-ILVA-steel-plant-in-Italy.

[502] See Il Sistema di Gestione ISO 14001 ed EMAS nella prevenzione dei reati ambientali ex d.lgs. n. 231/2001, Maggio 2013 https://www.assolombarda.it/servizi/ambiente/monografie/dispensa-il-sistema-di-gestione-iso-14001-ed-emas-nella-prevenzione-dei-reati-ambientali-ex-d.lgs.-n.-231-2001-maggio-2013

[503] See again the Report "The Environmental Disaster and Human Rights violations of the ILVA steel plant in Italy", op cit note 23.

e. Public responses of stakeholders to regulation

According to NGOs the provision raised awareness among companies about the idea of preventing eventual offences, in accordance with the objectives of Human Rights Due Diligence[504].

1. Area of Regulatory Framework

B) Legislative Decree 9 April 2008, n. 81 Consolidated Text on Health and Safety at Work

a. Health, safety and regulatory law

b.

2. Scope

The consolidated text on health and safety in the workplace (also known by the acronym TUSL) is a set of rules of the Italian Republic, concerning health and safety at work, issued with the Legislative Decree 9 April 2008, n. 81. Art. 1 refers to EU regulations and international conventions on the subject, guaranteeing uniformity in the protection of workers on the national territory by respecting the essential levels of services concerning civil and social rights, also with regard to gender, age and the condition of migrant workers.

One of the main obligations for employers is to carry out a risk assessment in writing, drafting a document called the "Risk Assessment Document" (Documento di Valutazione dei Rischi – DVR)[505]. In order to assess the risks of a work situation, it is necessary to carry out a sort of due diligence that identifies all the dangers connected with the activity carried out and quantifies the risk, that is the probability that each danger turns into an adverse event, taking into account the entity of the potential damage.

The Risk Assessment Document is mandatory for all companies that have at least one employee or one collaborator[506] and must be drawn up within 90 days for a new activity. The employer may not delegate the assessment of the risks in the workplace and the subsequent adoption of the Risks Assessment Document.

The obligation does not include the activity of subsidiaries located in a different State and operating outside the State of the regulation.

In the case of assignment of works and/or supplies to a contractor within the company premises, the employer evaluates the specific risks existing in the working environment and indicates the measures taken to eliminate or minimize the risks from interference between the activities entrusted to contractors (and any subcontractors) and the activities carried out by the employer in the same workplace[507]. A single risk assessment document is then prepared (Documento Unico Valutazione Rischi da Interferenze - DUVRI)

3. Content of Regulation

The Risk Assessment Document must contain the following elements:

- a report concerning all the potential risks to safety and health that exist at the workplace, indicating the ways in which they have been identified;

[504] See Human Rights International Corner (HRIC) overview on Legislative Decree 231/2001 and its implications in relation to B&HR https://www.humanrightsic.com/single-post/2017/07/25/HRIC-overview-on-Legislative-Decree-2312001-and-its-implications-in-relation-to-BHR

[505] See D.Lgs 81/08 art. 17, 28 and 29

[506] According to Legislative Decree 81/08 Art.4 are exempted from the obligation to draft the DVR the companies that do not have employees, namely: freelancers, family businesses, sole proprietorships, companies with a single worker member.

[507] See D.Lgs 81/08 art. 26

- the specification of prevention and protection measures aimed at eliminating or reducing these risks;
- the description of the procedures aimed at implementing the aforementioned measures, with an indication of which professional figures should deal with them;
- the identification of those who collaborated in the risk assessment, that are usually the Head of the Prevention and Protection Service, the competent doctor and the Workers' Safety Representative (Rappresentante dei Lavoratori per la Sicurezza - RLS);
- the identification of tasks from which risks may arise and which require specific skills and professional training;
- a specific assessment related to the risks related to any pregnant workers as well as those related to gender differences, age, origin from other countries
- a mention and assessment of stress related to specific work;
- the date on which the assessment was made and the document itself was drawn up[508].

The risk assessment must be immediately revised, on the occasion of changes to the production process or work organization that are significant for the health and safety of the workers, or in relation to the degree of technical, prevention or protection evolution, following accidents, or when the results of health surveillance highlight the need for it. Following this revision, the preventive measures must be updated[509].

In all companies, or production units in accordance with the procedures set forth in art. 47, are elected one or more Workers' Safety Representatives (RLS).

According to art. 50 the RLS is consulted in advance and in a timely manner with regards to risk assessment, identification, planning, implementation and verification of prevention in the company or production unit. Moreover:

- He/she monitors the risk conditions in the company and in the event of changes in the risk conditions it asks the Employer to call a specific meeting;
- He/she promotes health and safety activities such as the development, identification and implementation of appropriate preventive measures to protect the health and physical integrity of workers and makes some proposals and initiatives related to the prevention activity.
- RLS Appeals to the competent authorities if the measures adopted by the company for the prevention and protection from risks and the means employed are not suitable to guarantee the safety and health of the workers.
- RLS takes part in the visits and verifications of the competent authorities by making his own observations.

After conducting a health and safety risk assessment and identifying unacceptable risk situations, the employer must put safety measures in place (such as implementing a compliance programme) to offset the identified risks. The final goal is to lower the residual risk to a level that is considered acceptable. To avoid liability, the employer must demonstrate that all the measures required by the law have been taken to protect employees at the workplace.

4. Monitoring, sanction and enforcement

The supervisory body of the Decree 231 (ODV) exercises a second level control on health and safety: in this perspective, it does not coincide with the' control system 'pursuant to

[508] See D.Lgs 81/08 art. 28.
[509] See D.Lgs 81/08 art. 29.

art. 30, paragraph 4, legislative decree n. 81/2008, but verifies its suitability and implementation limited to its own functions, as established by Legislative Decree n. 231/2001, and within the scope defined by the same, with the consequent need for two-way information flows[510].

The external bodies that can carry out the checks are the following: the ASL (local health authority; the INPS (pension institute); the INAIL (state body providing sickness benefit to people injured at work); the Vigili del fuoco (Firemen).

In the event of failures or non-compliance regarding the preparation of the DVR, the supervisory bodies and the bodies responsible for the verification can impose criminal[511] and administrative sanctions, and prison sentences of up to a maximum of eight months. Furthermore, in the event that the failure to draft is repeated and other severe violations, the business activity can be suspended.

5. Procedural Framework

The trade unions and the associations of the families of the victims of accidents at work have the right to exercise the rights and the faculties of the offended person referred to in articles 91 and 92 of the Code of criminal procedure, with reference to the crimes committed with violation of the norms for the prevention of accidents at work or occupational hygiene or which have led to an occupational disease[512].

6. Available Remedies

Civil and criminal[513] remedies are available to victims.

Right to compensation in favour of the worker: art. 2087 of the civil code requires the employer to adopt all the measures that - considering the specific characteristics of the working activity - are necessary to avoid damage to the physical and psychological integrity of the worker. Failing this, the worker is entitled to compensation.[514]

In labour disputes, even in the case of an accident at work, the judge has ample instructing powers that facilitate access to justice for victims. In fact, according to art. 420 and 421 of Code of Civil Procedure the Judge may at any time on its own initiative order the admission of any type of evidence, even beyond the limits set by the Civil Code, and also provides for the free questioning of the parties during the hearing on the case

1. Area of Regulatory Framework

C) The L.D. no. 254/2016 on non-financial reporting implementing EU Directive 2014/95/EU

The Legislative Decree no. 254 of 30 December 2016 in force since 25 January 2017 introduces the requirement for public interest entities (PIEs) to provide a 'dichiarazione

[510] See on relationship between ODV of L.D. 231 and control system of L.D. n. 81/2008 https://www.puntosicuro.it/sicurezza-sul-lavoro-C-1/tipologie-di-contenuto-C-6/sgsl-mog-dlgs-231/01-C-58/dlgs-81-dlgs-231-sistema-di-controllo-organismo-di-vigilanza-AR-16683/

[511] See D.L. 81/2008 Art. 55

[512] See D.L. 81/2008 Art. 61, however the right to constitute as a civil party and ask for damages is not envisaged.

[513] The following offences are listed in the Criminal Code:
Article 437: removal or wilful omission of precautions against accidents in the workplace.
Article 451: negligent omissions of precautions or protection against disasters or accidents in the workplace.
Article 589: involuntary manslaughter.
Article 590: personal injury through negligence.

[514] The damage is established according to the ordinary criteria of Italian Law. For the biological damage the "Tabelle of the Court of Milan" are used throughout all Italy
https://www.tribunale.milano.it/files/news/TABELLE%20MILANO%20EDIZIONE%202018.pdf.

di carattere non finanziario' (non-financial statement). It falls under the following areas of law:

1. Corporation law;
2. Italian Civil law;
3. European law;
4. International law.

Relevant EU Directive:

- DIRECTIVE 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups

2. Scope

The Decree 256/2016 came into force on the 1st of January 2017, and it is mandatory for public interest entities[515] that fall within the dimensional parameters set by art. 2:

(i) companies with more than 500 employees on average;

(ii) companies that exceeded even one of the two following parameters of their consolidated financial statements: 20 million euros of total assets from the balance sheet, and/or 40 million euros from revenues net sales;

PIEs that are parent companies of a group that meets (on a consolidated basis) the same criteria set for large PIEs (i.e. a large public-interest group) must prepare on an annual basis a consolidated non-financial statement containing information necessary for an understanding of the group's development, performance, position and the impact of its activity.

The Decree also provides that other companies not subject to the obligation can voluntarily submit a non-financial statement on the areas indicated in article 3 of the Decree, providing simplified forms for SMEs. In fact, the statements of companies with less than 250 employees, unlike the others, can be considered in compliance with the regulations without being subject to the provisions on verification.

Companies during the financial year shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.

Public interest entities subject to the obligation to draft the non-financial statement that they do not practice policies in relation to one or more of the areas referred to, provide within the same declaration, for each of these areas, the reasons for this choice, indicating the reasons in clear and articulated manner[516].

3. Content

The non-financial statement must contain [517] information relating to environmental matters, social and employee matters, respect for human rights, as well as anti-corruption and bribery matters. In relation to these ESG factors, the statement must contain, as a minimum, a description of:

[515] According to art. 16, comma 1, L. D. 27 gennaio 2010, n. 39 PIEs are:
i. italian companies admitted to trade on Italian regulated markets or on regulated markets of any other EU Member State;
ii. banks;
iii. Italian insurance companies; and
iv. reinsurance companies having registered office or a secondary office in Italy

[516] Art. 3 par. 6 Decree 256/2016.

[517] Art. 3 par. 1 Decree 256/2016.

i. the company's business model, including the compliance model of the L.D. 231/2001 with reference to the ESG factors that are being reported on;
ii. the company's policies, including any internal due diligence process implemented, the results achieved by the policies, and the related KPIs;
iii. the principal risks, including the methods for managing them[518] deriving from the company's activities, products, services or business relationships, including, where relevant, supply chains and subcontractors.

According to Art. 3 par. 2 in relation to the environmental, social and governance factors, information by companies must be provided on, at least:

i. the use of energy resources (distinguishing between renewable and non-renewable energy) and water use;
ii. greenhouse gas emissions and air pollution;
iii. the impact of the principal risks linked to the company's operations on the environment and on health and safety, measured where possible on realistic medium-term prospects;
iv. social and employee-related matters, together with the actions taken to ensure gender equality, implementation of relevant conventions of supranational and international organisations, and dialogue with social partners;
v. respect for human rights, measures implemented to prevent violations of human rights and actions taken to prevent forms of discrimination;
vi. measures taken to fight corruption (both active and passive) and bribery.

The information must be compared to that given in the previous financial years (although for the first year of application (2017) the comparison may be given in general terms only). Moreover, if a company wishes to adopt its own standards and KPIs (rather than those generally used in its industry) - or different ones compared to the previous financial years - the company must describe them and clearly explain the reason for their adoption in the non-financial statement.

In addition to the non-financial statement requirement, the Decree implements the Directive's requirements in relation to diversity.

Companies are now required to include in their annual corporate governance report a description of the diversity policy applied in relation to the composition of the management and control bodies with regard to aspects such as age, gender, educational and professional background, the objectives of the diversity policy and its results in the reporting period. If no such policy is applied, the company must provide a clear and detailed explanation as to why this is the case.

It is evident from the above that the Italian legislator has used the discretion left to EU Member States by the Directive and implemented more stringent requirements.

4. Monitoring, sanction and enforcement

The company's directors[519] are responsible for ensuring that the non-financial statement is prepared and published in accordance with the Decree and must act with due diligence and professionalism.

Any director who (1) omits to file the non-financial statement with the company's registry; (2) omits to attach the report issued by the auditors to the non-financial statement; or (3) files a non-financial statement that is not in compliance with the Decree; can incur administrative monetary penalties ranging from €20,000 to €100,000 imposed by the Italian Securities Commission (Commissione Nazionale per le Società e la Borsa - CONSOB).

[518] As recently modified by law 30 December 2018 n. 145.
[519] Art. 3 par. 7 Decree 256/2016.

Moreover, if the director omits material information and/or includes false material information in the non-financial statement, the applicable penalties range from €50,000 to €150,000.29

The company's board of statutory auditors (or the different internal control corporate body) is responsible for overseeing compliance with the Decree and reporting on its control activities to the general shareholders' meeting in its annual report[520]. The same sanctions applicable to the directors are applicable to the statutory auditors/internal control body should they: (a) omit to report on the non-conformity of the non-financial statement at the shareholders' meeting or (b) the non-financial statement filed with the registry omits material information and/or includes false material information.

Finally, the independent auditors appointed to audit the financial statement of the company are required to (1) verify the effective preparation of the non-financial statement by the directors and (2) issue a dedicated report (separate from the one on the financial statements and published together with the non-financial statement) on the conformity of the ESG information provided with the provisions of the Decree as well as the methodology and key indicators adopted by the company. Should they fail to do this, they are liable for penalties ranging from €20,000 to €50,000 and from €20,000 to €100,000 respectively[521].

Notably, these provisions go much further than the requirements of the Directive, whereby auditors are only entrusted with the responsibility of checking that the non-financial information has been provided[522].

5. Procedural Framework

Consob is the competent authority for ascertaining and imposing the aforementioned administrative pecuniary sanctions, the provisions set forth in articles 194-bis, 195, 195-bis and 196-bis of the TUF concerning the criteria for determining sanctions are observed, the sanctioning procedure and the procedures for publication of the sanctions.

Moreover, Consob is also the authority which, pursuant to Article 6 of the Decree, is responsible for examining the non-financial information carried out on a sample basis, as is the case for financial reporting. In particular, the non-financial statements subjected to control are selected annually on the basis of the findings, which may be relevant for the matters covered by the non-financial declaration, emerged from the reports received by Consob from the control body or from the auditor appointed to perform the statutory audit of the financial statements, by other public administrations or interested parties, or that have been acquired, with reference to the issuers disclosed and listed, due to the control carried out by the Authority on financial reporting pursuant to Article 89-quater of the Regulation Issuers.

In the circumstance in which Consob recognizes the incompleteness or discrepancy of the declaration, it asks the interested parties for the necessary modifications and/or additions and sets the deadline for the adjustment. In the event of failure to comply, the aforementioned penalties will apply.

Moreover Consob has established, with Resolution number 20267 of 2018, a new Regulation with regard to the implementation of the Non-financial Reporting.

6.. Impact of the Regulation

Under the Decree 256/2016 Italian companies are required by law to disclose their human rights and environmental risks, impacts and due diligence in their annual reports.

[520] Art. 8 Decree 256/2016.
[521] See art. 8 Decree 256/2016.
[522] See Comparing the implementation of the EU Non-Financial Reporting Directive in the UK, Germany, France and Italy Frank Bold 2017

However there remains a problem: it is not specified how companies are meant to do this.

According to a study[523], in the year 2018, 205 Italian companies have processed a non-financial report. Of these only three companies issued a non-financial report on a voluntary basis.

The most relevant topics identified by the 205 reports were: companies staff (75% health and safety, 72% human capital development and 65% promotion of diversity 65%), environmental issues (58% climate change, 57% energy efficiency, 43% waste management), anti-corruption (62%), relations with the community (60%) and protection of human rights (52%).

Most of companies have chosen the Global reporting initiative (GRI) as standard of reference in their reporting. Civil societies recommend companies to use the UN Guiding Principles reporting framework in the drafting of the non-financial report instead of the GRI. This is because it provides the clearest and most sophisticated common standard for companies as to how to undertake and report on their human rights risks, impacts and due diligence[524]. The use of a common reporting framework will also help to compare the results through a common standard.

1. Area of Regulatory Framework

D) The Environmental Impact Assessment Procedure - Valutazione di Impatto Ambientale (VIA), and the Environmental Strategic Environmental Assessment Procedure - Valutazione Ambientale Strategica (VAS) and the Integrated Environmental Authorization - Autorizzazione Integrata Ambientale (AIA)

These administrative proceedings aiming at assessing and mitigating environmental effects of business activities.

- Relevant Provisions of Italian Law:
  - **L.D. n. 152/2006 (TUA) II Part, concerns the Environmental Impact Assessment Procedure (VIA) and the Strategic Environmental Assessment Procedure (VAS) as well as the Integrated Environmental Authorization (AIA)**
  - **Law n. 114/2015 art. 4**
  - **L.D. n. 104/2017**
- Relevant European Directives:
  - 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
  - 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
  - 2010/75/EU on industrial emissions (integrated pollution prevention and control)
  - 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment
  - 96/61/EC concerning integrated pollution prevention and control (IPPC)

Area of Law:

Environmental law (including on climate change)

Administrative law

[523] KPMG, Informativa extra finanziaria (ESG): survey sull'applicazione del D.lgs. 254/2016. https://home.kpmg/content/dam/kpmg/it/pdf/2018/10/Survey-informativa-non-finanziaria.pdf

[524] A Human Rights Review of the EU Non-Financial Reporting Directive, ECCJ http://corporatejustice.org/eccj_ccc_nfrd_report_2019_final.pdf

2. Scope

a) VIA is an administrative procedure aimed at assessing in advance the effects of a project likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location. The legislation indicates the construction works or other installations that must be submitted to the procedure (for example Crude-oil, refineries, Thermal power station, Waste disposal installations, Dams, Oil Pipelines etc[525]). The procedure assesses in an integrated way all the impacts deriving from the realization of works and installations on the environment (Dir. N. 2011/92 / UE, art. 3), including impacts on human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage; and the interaction of all these elements combined together.

b) The VAS is an administrative procedure that stands at a stage prior to the VIA when other alternatives are still viable. The VAS does not concern single projects but general plans and programs[526] and guarantees the integration of environmental considerations in order to ensure "a high level of environmental protection" and "promote sustainable development"[527]. This kind of procedure is more likely to be promoted by public entities and therefore this report will contain less information on it.

c) The Integrated Environmental Authorization (AIA) is the measure that authorizes the operation of an installation under certain conditions that provide for compliance with IPPC requirements relating to industrial emissions (Integrated Pollution Prevention and Control), as well as to the environmental performances associated with Best Available Techniques (BAT). The installations carrying out activities listed in Annex VIII Part Two of the Legislative Decree 152/2006 are subject to the state AIA procedure (for ex. large combustion plants, pumped storage power stations to gas, refineries, steelworks, large chemical plants, plants at sea).

3.Content of Regulation

a/b) VIA[528] and VAS procedures are articulated in different phases.

A Business that is engaging in a VIA is required to provide a study on the environmental impact that have to contain among others[529] the following elements:
- a description of the likely significant effects on the environment, during construction, operation and disposal phase;
- a description of the measures envisaged to avoid, prevent or reduce and, possibly, compensate for the probable significant and negative environmental impacts;
- a description of the reasonable alternatives considered by the proponent that is appropriate to the project and its specific characteristics, including the alternative zero;

[525] See Annexes I and II of Dir. N. 2011/92/EU.
[526] See Art. 3 par 2 Directive 2001/42/EC Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes, (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
[527] Pag 161 Ambiente 2018 Erica Blasizza Ipsoa.
[528] VIA includes, according to the Italian regulatory provisions: 1. conducting a verification of suitability to VIA (screening); 2. the definition of the contents of the environmental impact study (scoping); 3. the presentation and publication of the project; 4. consultations; 5. evaluation of the environmental study and results of the consultations; 6. the decision phase; 7. information on the decision; 8. monitoring.
[529] Art. 22, comma 2, D.Lgs. n. 15 21 2006.

- the project to monitor the potential significant and negative environmental impacts deriving from the realization and operation of the project, which includes the responsibilities and the resources necessary for the implementation and management of the monitoring.
The competent authority in matters of state VIA is the Ministry of the Environment.

c) When presenting the AIA application, the company identifies its environmental impact by describing the measures adopted to mitigate the impact and by providing the appropriate documentation[530]. The law mentions expressly[531] that the relevant information contained in the norm UNI EN ISO 14001 or in the EU Eco-Management and Audit Scheme (EMAS)[532] can be provided in the application.

The AIA legislation goes beyond the concept of a default authorization duration[533] by establishing when the competent authority [534] re-examines the authorization conditions and, if necessary, updates them to ensure compliance with the objectives of preventing and reducing pollution, therefore a company should, at least in principle continue to monitor its performance in relation to the BAT standards. If an installation is certified according to UNI EN ISO 14001 or Emas-registered, the term of the review is extended respectively to 12 or 16 years from the 10 normally provided[535].

The public affected or likely to be affected by VIA VAS or AIA, or having an interest in the environmental decision-making procedures can participate[536] and have access to the documents[537].
"Non-governmental organizations that promote environmental protection and that meet the requirements of current state legislation, as well as the most representative trade union organizations" are considered to be of interest in the proceedings. The Ministry of Environment created a special model form for citizens' observations in VIA, VAS and AIA procedures[538].
Application and related documentation are online on the website of the competent authority.

4.Monitoring, sanction and enforcement

a) The company is required to comply with the environmental conditions contained in the VIA decision. The competent authority is in charge of verifying compliance with environmental conditions in order to promptly identify significant environmental impacts and unexpected negative ones and to adopt the appropriate corrective measures.

In cases where violations of the environmental conditions of the "VIA" provision are ascertained, the competent authority proceeds according to the seriousness of the infringements:

- to issue a warning, assigning a term to eliminate non-compliance;

[530] See https://va.minambiente.it/it-IT/ps/Comunicazione/IndicazioniOperativeAIA
[531] See art. 29 ter comma 3 D.Lgs 152/2006.
[532] See these interviews to Vincenzo Parrini EMAS responsible for ISPRA on the relations between AIA and EMAS by Daniela Patrucco https://www.scienzainrete.it/contenuto/articolo/daniela-patrucco-intervista-vincenzo-parrini/comunicazione-ambientale-emas-tra
[533] Pag. 215 Ambiente 2018 Erica Blasizza Ipsoa.
[534] The competent authority at the state level is the Ministry of the Environment and the Protection of the Territory and the Sea (MATTM) - General Directorate for Environmental Evaluations and Authorizations (DVA). The Preliminary Investigation Commission for Integrated Environmental Authorization - IPPC (CIPPC) carries out the technical investigation aimed at expressing the opinion on the basis of which the AIA provision is issued. The decision is also based on the proposal of the Higher Institute for Environmental Protection and Research (ISPRA) on the Monitoring and Control Plan (PMC) and on the opinions and determinations made by the administrations participating in the Services Conference (CdS).
[535] See Art. 29-octies D.lgs 152/2006.
[536] See Art. 24 D.lgs 152/2006.
[537] Documents can be viewed free of charge at the offices of the Public Administration after making an appointment with the competent offices, however the extraction of copies of documents is subject to the payment of the costs for the issue and extraction of copies, pursuant to art. 25 of the aforementioned Law 241/1990, and in the manner established by the individual Administrations. https://va.minambiente.it/it-IT/Comunicazione/Cittadino
[538] Ministry of Environment: http://www.va.minambiente.it/it-IT/Comunicazione/Cittadino

- to issue a warning and the simultaneous suspension of the activity, in the cases in which risks "of significant and negative environmental impacts" are ascertained;

- revocation of the "VIA" provision, if the violations imposed with the warning are repeated and in the cases in which the repeated violations give rise to "situations of danger or damage to the environment".

Law provides also administrative sanctions[539] in the hypothesis of works even partially realized in the absence of the "VIA" and in cases of violations of the VIA conditions.

d) For AIA, the company is required to comply with the conditions contained in the authorization. The competent authority, the control bodies[540] (ISPRA / ARPA / APPA) and the company itself, which must provide assistance in carrying out the technical inspections, are responsible for controls. In case of non-compliance the competent authority proceeds according to the seriousness of the infringements with warnings that can lead to suspension of the activity or the closing of the activity, administrative and even criminal sanction for the most serious violations[541]are also provided by law.

5. Procedural Framework

Administrative Courts have competence over these administrative procedures. The administrative judge can only perform a "weak" appreciation on the technical assessments on environmental matters [542] considered during the procedures, because the technical knowledge must be used only to carry out a control of the reasonableness and technical coherence of the administrative decision. Environmental NGOs have legal standing[543].

6. Available Remedies

In case of failure to acquire the environmental compatibility ruling, the VIA authorization or the adopted approval measures can be annulled for violation of the law[544].

Civil and criminal remedies may be available at a different stages in case individual rights are violated or in case an environmental crime is committed.

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

The following rates apply to VIA:
0.5 per thousand of the value of the works to be carried out for the VIA procedures;
0.25 per thousand of the value of the work to be carried out and, in any case, within the maximum limit of the amount of € 10,000 for the procedures for verifying that a project is subject to VIA;
25% of the amount already paid as 0.5 per thousand, during the review.
With regard to the VAS the charges are as follows:

[539] See Article 29, paragraphs 4 and ss. Legislative Decree 3 April 2006, n. 152. Sanctions are in a range from 20.000 up to 100.000 Euro.
[540] http://www.isprambiente.gov.it/it/controlli-e-ispezioni-ambientali
[541] Art. 29 quaterdecies D.lgs. n. 152/2006.
[542] http://www.giuristiambientali.it/documenti/VIA_AM_tec_sind.pdf
[543] See https://www.giurdanella.it/2018/06/06/tutela-dellambiente-legittimazione-ad-agire-delle-associazioni-ambientaliste-e-materia-ambientale-in-senso-lato/
[544] Art. 29, comma 1, D.Lgs. n. 152/2006.

€ 15,000 for VAS procedures
€ 10,000 for the VAS procedures preceded by a VAS verification procedure relating to the same plan or program;
€ 5,000 for the VAS verification procedures, pursuant to art. 12 of the legislative decree 3 April 2006, n. 152;
€ 3,000 for the review[545].
The Ministry of the Environment with the Decree of March 6, 2017, n. 58 has defined the costs for the issue of the renewal or updating of the Integrated Environmental Authorization (AIA).

8. Impact of the Regulation

Confindustria, the main association representing manufacturing and service companies in Italy, has positively considered the introduction of a single environmental authorization (Integrated Environmental Authorization - AIA) and the application of the best available technologies (BAT), although expressing some reservations on the implementation of the EU legislation[546].

The reunification into a single authorization of the various environmental authorizations previously envisaged is also positive for the process of citizen participation. However in this regard it has to be noted the difficulty often faced by the committees and self-organized citizens to identify the correct public interlocutor in case of an environmental issue.

For environmental associations, following these administrative procedures can be prohibitive due to the amount of information and the complexity of the same. Moreover, it is worth noting the difficulty of the institutions to respond adequately to the requests made by the stakeholders[547] that report little attention to their legitimate observations.

In relation to the AIA, it should be noted that the environmental impact of the procedure must be improved in consideration of major scandals such as the one of ILVA[548] in relation to which Italy has recently been condemned by the European Court of Human Rights[549] or considering that the 2017 SNPA Environmental Control Report on AIA has identified that out of 2,400 inspections 1,300 non-conformities were detected [550].

1. Area of Regulatory Framework

E) Decontamination of polluted sites - Bonifica di siti contaminati

- Relevant Provisions of Italian Law:
    - **L.D. n. 152/2006 (TUA) Title V**
- Relevant European Directives:
    - 96/61/EC concerning integrated pollution prevention and control
    - 2004/35/CE of on environmental liability with regard to the prevention and remedying of environmental damage

Area of Law:

[545] See https://www.ambientesicurezzaweb.it/via-e-vas/
[546] See https://www.confindustria.benevento.it/wp-content/uploads/2014/01/osservazioni-schema-dlgs-cdm-1-2014.pdf
[547] See Page 59 L'applicazione della direttiva sulla prevenzione e riduzione dall'inquinamento in Italia di Marco Caldiroli: http://www.ancorafischiailvento.org/2017/08/11/valutazione-impatto-ambientale-tutele-al-minimo-storico/
[548] See "The Environmental Disaster and Human Rights Violations of the ILVA steel plant in Italy, FIDH, PEACELINK, UFTDU, Human rights International Corner (HRIC)": https://www.humanrightsic.com/single-post/2018/04/17/Available-now-the-English-version-of-the-Report-The-Environmental-Disaster-and-Human-Rights-Violations-of-the-ILVA-steel-plant-in-Italy
[549] See Cordella and Others v. Italy (ECtHR: nos. 54414/13 and 54264/15)
[550] See COMUNICATO STAMPA 19 April 2018, ISPRA: http://www.isprambiente.gov.it/files2018/area-stampa/comunicati-stampa/COMUNICATO_AIA_SEVESO_ISPRACC.pdf

Environmental law (including on climate change)

Administrative law

Enforcement of EU Directives

2. Scope

The law regulates decontamination and environmental restoration and defines the procedures, criteria and methods for carrying out operations to comply with EU principles and EU norms, with particular reference to the polluter pays principle. When an incident takes place that has the potential to contaminate a site, the natural or legal person responsible for the pollution must initiate the procedure described in this law. In addition, the owner of a site who detects substances in concentrations exceeding the contamination threshold must implement the prevention measures described in the law.[551]

3. Content of Regulation

The decontamination procedure is articulated in different phases.
The environmental characterization is intended as the set of activities that allow to reconstruct the phenomena of contamination on environmental matrices, in order to obtain basic information on which to make feasible and sustainable decisions for the safety of the site and / or decontamination[552] .
The environmental characterization is eventually followed by the "site-specific environmental risk assessment", which is used to define the objectives of the decontamination.
This risk assessment can be used before during and after decontamination operations[553].
It should be noted that in Italy the risk assessment is aimed exclusively at human health, while in other countries such as the Netherlands, Spain and Germany, the ecotoxic effects are also taken into consideration[554].

4. Monitoring, sanction and enforcement

If the person who committed the pollution does not provide for the decontamination in accordance with the project approved by the competent authority, he/she commits the crime referred to in art. Art. 257 - Legislative Decree n. 152/2006[555].

1. Area of Regulatory Framework

F) Legislative Decree no 105/2015 control of major-accident hazards involving dangerous substances

- Relevant Provisions of Italian Law:
    - **L.D. n. 105/2015**
    - **L.D. n. 238/2005**

[551] See Tar Lombardia Milano, nn. 1914/15 and 1915/15.
[552] Annex 2 to Title V, Part Four of Legislative Decree 152/06 and subsequent amendments
[553] The documents "Methodological criteria for the application of absolute risk analysis to contaminated sites" and "Methodological criteria for the application of absolute risk analysis to landfills" have been prepared by the ARPA / APPA, ISS, ISPESL working group, ICRAM established and coordinated by ISPRA. The objective is the elaboration and revision of technical documents containing the theoretical and applicative indications for technicians of Public Administrations, researchers, professionals and operators of the sector who draw up and / or evaluate reclamation projects of contaminated sites containing risk analysis processing health and environmental. The approach used in the manuals refers to the RBCA standard of the ASTM (E 1739-95, E 2081-00). See http://www.isprambiente.gov.it/it/temi/siti-contaminati/analisi-di-rischio
[554] "In Italia la valutazione del rischio è mirata esclusivamente alla salute umana, mentre in altri paese come Olanda, Spagna, Germania e Svezia vengono presi in considerazione anche gli effetti ecotossicologici".See Pag. 343 Ambiente 2018, Erica Blasizza, Ed. Ipsoa and the summary table at page 344 343 Ambiente 2018, Erica Blasizza, Ed. Ipsoa
[555] https://www.brocardi.it/codice-dell-ambiente/parte-quarta/titolo-vi/capo-i/art257.html

- Relevant European Directives:
  - 2012/18/EU on the control of major-accident hazards involving dangerous substances
  - 96/61/EC on the control of major-accident hazards involving dangerous substances

Area of Law:

Environmental law

Administrative law

Enforcement of EU Directives

Health and safety

2. Scope

The law lays down rules for the prevention of major accidents involving dangerous substances and for the limitation of their consequences for human health and the environment. The operator of an establishment[556] is obliged to take all necessary measures to prevent major accidents and to limit their consequences for human health and the environment.

3. Content of Regulation

According to art. 12 the operator is obliged to take all necessary measures to prevent major accidents and to limit their consequences for human health and the environment and to demonstrate at any time to the competent and control authorities, in particular for the purposes of inspections and controls, the adoption of all the necessary measures envisaged by the legislative decree.

The operator has to send a detailed notification to the competent authority giving the information that allows to identify the dangers present in the activity[557].

According to art. 14 operatosr draw up and keep in the establishment a document in writing setting out the major accident prevention policy, attaching the program for the implementation of the safety management system (Sistema Gestione della Sicurezza - SGS).

The operator of an upper-tier establishment has to produce also a safety report[558] and an internal emergency plan for the measures to be taken inside the establishment. Moreover the operator supplies the necessary information to the Prefettura, to enable the latter to draw up external emergency plans.

According to art. 23 the information held by the competent authorities in application of this decree is made available to the public upon request. The municipality where the establishment is located promptly makes available to the public, also in electronic

[556] See the definition in art. 3 of Directive 2012/18/EU:
'establishment' means the whole location under the control of an operator where dangerous substances are present in one or more installations, including common or related infrastructures or activities; establishments are either lower-tier establishments or upper-tier establishments;
'**lower-tier establishment'** means an establishment where dangerous substances are present in quantities equal to or in excess of the quantities listed in Column 2 of Part 1 or in Column 2 of Part 2 of Annex I, but less than the quantities listed in Column 3 of Part 1 or in Column 3 of Part 2 of Annex I, where applicable using the summation rule laid down in note 4 to Annex I;
'upper-tier establishment' means an establishment where dangerous substances are present in quantities equal to or in excess of the quantities listed in Column 3 of Part 1 or in Column 3 of Part 2 of Annex I, where applicable using the summation rule laid down in note 4 to Annex I;

[557] See Art. 7of Directive 2012/18/EU.

[558] With modalities of D.P.C.M 31.3.1989. For Details of safety report see art. 15 – 17 of the L.D. no 105/2015.

format and through publication on its website, the information provided by the operator.

4. Monitoring, sanction and enforcement

For the performance of the functions referred to in the decree, the Ministry of the Interior establishes, within each Region, a Regional Technical Committee (CTR).

The CTR in relation to the upper-tier establishment has the following responsbilities:
a) carry out the preliminary investigations on security reports and adopt the final provisions;
b) plan and carry out the ordinary inspections referred to in Article 27 and adopt the measures descending from the relevant outcomes;
c) applies, through the Regional or Interregional Directorate of Fire Brigades, the pecuniary administrative sanctions referred to in Article 28;
d) provides the Ministry of the Environment with the necessary information.

Each Region is in charge of inspections of lower-tier establishment[559].

Each Municipality exercises the functions:
a) relating to the control of urbanization in relation to the presence of establishments;
b) relating to information, consultation and participation in decision-making processes of the public[560].

The law provides for administrative and criminal sanctions and in certain case also for the suspension of the activity.

III. COMPARATIVE ANALYSIS

9. Comparisons between different regulations within the Member State

a. Corporate and directors' liability regime in case of violations or damage caused by operators in the EU parent company's supply chain, including relevant jurisprudence, even in the absence of legislation on due diligence

There is no single regime concerning corporate and directors' liability in case of violations or damage caused by operators in the EU parent company's supply chain. However liability can arise in certain circumstances in relation to specific provisions.

As a general rule tort law establishes the rights of victims of torts to obtain compensation for damage if they can demonstrate a causal link between the corporate activity and the damages they have suffered. Article 2043 of the Civil Code provides that any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.

Pursuant to L.D. no. 231/2001 the parent company or another company of the group may be liable of the crime committed by a subsidiary belonging to the same group provided that the unlawful act was committed also pursuing the interest or for the benefit of the parent company or of the other company of the group (interest or advantage to be verified in practice) and that a natural person who acts on behalf of

[559] Art. 7 of L.D. no 105/2015.
[560] Art. 8 of L.D. no 105/2015.

the parent company or of the other company belonging to the group has contributed to the offence (case of aiding)[561].

One relevant case to the application of L.D. no. 231/2001 in this context of the EU supply chain is the case of Siemens AG, concerning a bribery committed in Italy to obtain contracts for the installation of gas turbines in Enelpower plants. The Court of Milan ordered the prohibition of contracting with the Public Administration for a period of one year against Siemens AG based in Monaco (Germany) which operated in Italy through a temporary association of companies[562].

A responsibility of the parent company pursuant to art. 2497 of the civil code towards the subsidiary company of the group can arise if the parent company undertakes a course of conduct that is detrimental to the assets of the subsidiary, if certain additional requirements are satisfied.[563]

The regulation of public and private tenders provides for several specific responsibilities of the contractor towards subcontractors.

Concerning rights of consumer and defective products, the manufacturer is the prime liable subject[564]. The importer, supplier or distributor of the allegedly defective product may also be held liable when the manufacturer is unidentified; or the supplier does not provide the injured party with the identity of the manufacturer within three months from receiving a request from the injured party; or service of the writ of summons.

b. The extent to which the legal regime translates a corporate duty to respect human rights and abstain from other abuse(s) and from causing damage into a civil law obligation by requiring a standard of reasonable care from the directors;

As explained in the legal analysis concerning L.D. no. 231/2001, the nature of liability is labelled as administrative. However it can be inferred that directors are required to adopt appropriate measures to prevent certain specific crimes and shield the corporation from liability. In particular, as clarified in Section II regarding L.D. no. 231/2001, when one of the crimes listed by the Decree is committed by a corporation's employees, the corporation incurs an "organisational fault" if it has failed to take adequate measures to prevent its employees from committing such an offence by neglecting to adopt or effectively implement a suitable "compliance program." The compliance program is considered adequate if designed in a way that it cannot be bypassed in a non-fraudulent way.

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[561] A person working for the defendant company must have aided/abetted the crime See above point 3, d), section II, on L.D. no. 231/2001.

[562] Trib.di Milano – ordinanza Gip Salvini (27 aprile 2004) Trib. di Milano – riesame (28.10.2004), see Siemens «paga» lo scandalo Enelpower, https://www.ilsole24ore.com/fc?cmd=art&artId=402700&am and LA RESPONSABILITÀ "AMMINISTRATIVA" DEGLI ENTI CON SEDE ALL'ESTERO di Elisabetta Stampacchia https://www.penalecontemporaneo.it/upload/1380098797STAMPACCHIA%202013a.pdf

[563] The additional requirements are: management and coordination by one company of another; an unlawful course of conduct, or conduct of business to one's own or others' advantage and therefore unrelated to the interests of the company subject to management and coordination and in violation of the principles of proper corporate and business management of the subsidiaries; a damaging event or a prejudice caused to the company under management; and a causal link between the conduct and the event or prejudice.

[564] To exclude its liability, a product manufacturer must prove that:
it did not put the product into circulation;
the defect did not exist when the product was put into circulation;
the product was neither manufactured for sale nor manufactured or distributed in connection to the manufacturer's professional activity;
the defect is a consequence of complying with a binding law or provision;
the state of the art and the scientific knowledge on the date that the product was put into circulation prevented the defect from being identified; or the defect was entirely due to: the design of the product in which the raw material or component was incorporated; or compliance with the instructions provided by the manufacturer for incorporation of the raw material or component into the final product. (This defence applies in cases where the manufacturer or the supplier provided only the raw material or a product component.)
Further, liability can be excluded or reduced if the injured party adopted negligent conduct (eg, wrongful use of the product) which contributed to the cause of the damage. See The product liability regime in Italy
Hogan Lovells link https://www.lexology.com/gtdt/tool/workareas/report/product-liability/chapter/italy

c. The level of "duty of care"/"due diligence" required of the business or its administrative organs, in order to fulfil their obligations, and the key elements of this legal "duty of care"

See the previous answer.

In general, under Italian Civil law, directors are required to act in the best interest of the company, with a degree of diligence reflecting the specific knowledge and skills required by their office and within the powers granted to them by law and by the company's by-laws for the achievement of the company's object[565].

d. How directors' responsibility can be engaged

Normally the proceedings relating to the liability of the company under L.D. no. 231/2001 are joined with criminal proceedings brought against the individual perpetrator of the related crime (possibly a director) and his/her liability is identified by criminal law.

Under Italian Civil Law directors are jointly and severally liable toward the company[566], the shareholders, and third parties[567] in general for damages suffered by each of them as a direct result of the directors' negligence in fulfilling their fiduciary duties according to law, articles of incorporation and by-laws.

In the context of tort law, victims may be able to initiate proceedings based upon the director's failure to exercise his or her obligations toward the company. Victims have to prove the causal link between the violation of an obligation of the director and the damage suffered[568].

Whether the concept of due diligence is used in the domestic regulation of other areas of corporate governance, and if so, what the legal elements are to establish a duty and/or liability (including, if any, for subsidiaries and in the supply chain).

EU Regulation[569] 2016/679 (GDPR) art. 24 provides that taking into account the nature, scope, context and purposes of processing, as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

According to the GDPR a Controller can be responsible for a data breach occurring down the supply chain if the supplier acts as a data Processor in the following cases:

- the processor was not suitable according to Art. 28 GDPR, i.e. not providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of GDPR and ensure the protection of the rights of the data subject;

- the processor is placed in a third country and the provisions of Art. 44-49 GDPR have not been observed.

[565] See art. 2392 of the Italian Civil Code.
[566] In particular, directors are liable if they carry out detrimental acts, or if, being aware of detrimental acts, they do not act to prevent their occurrence or to eliminate or reduce their harmful effects or if they fail to supervise the general management. De facto directors can be held liable as well. See art. 2392 Civil Code.
[567] The responsibility of the directors towards the shareholders and third parties, means that the shareholders and third parties can ask the administrators for compensation for damages only in the event that the performance of an unlawful act by the directors in the exercise of their office has caused direct damage to the assets of the individual shareholder or of the single third party. See art. 2392 Civil Code.
[568] See art. 2043 of the Italian Civil Code.
[569] See Italian D.Lgs. 10 august 2018, n. 101.

Moreover art. 35 requires a Data Protection Impact Assessment (DPIA) for certain type of processing[570]. A DPIA is a process designed to describe the processing, assess its necessity and proportionality, and help manage the risks to the rights and freedoms of natural persons resulting from the processing of personal data by assessing them and determining the measures to address them. DPIAs are important tools for accountability, as they help controllers not only to comply with requirements of the GDPR, but also to demonstrate that appropriate measures have been taken to ensure compliance with the Regulation. In other words, a DPIA is a process for building and demonstrating compliance[571].Under the GDPR, non-compliance with DPIA requirements can lead to fines imposed by the competent supervisory authority.

In general, in case of infringements of certain provisions of the GDPR the supervisory authority shall ensure that the imposition of administrative fines taking into account inter alia: the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them; any action taken by the controller or processor to mitigate the damage suffered by data subjects; and the degree of responsibility of the controller or processor taking into account technical and organisational measures[572].

The Italian legislature has also provided for specific types of crime on data privacy[573].

e. How parent companies can be held liable in the Member States for the impacts of their subsidiaries, including non-EU based subsidiaries (including in comparative areas of corporate governance such as anti-bribery and corruption, anti-money laundering, taxation, competition, health and safety)

As a general rule tort law establishes the rights of victims of torts to obtain compensation for damage if they can demonstrate a causal link between the corporate activity and the damages they have suffered. Article 2043 of the Civil Code provides that any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages

In this context, it is interesting to mention the civil proceeding against ENI (the Italian State-owned energy company) and NAOC (its Nigerian subsidiary) that is currently pending before the Tribunal of Milan. The action filed by Ododo Francis Timi, the legal representative of the Nigerian Ikebiri community, addresses the defendants' tort liability arising from the alleged environmental damages and the connected human rights violations that the defendants allegedly caused in 2010 through their extractive activities in Nigeria[574].

In the case of multinational corporations or corporations that conduct part of their business outside the national borders (for example by outsourcing production, or taking

[570] Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. See art. 35 Regulation 2016/679 (GDPR).

[571] See Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679 link: https://ec.europa.eu/newsroom/document.cfm?doc_id=47711

[572] See art. 83 Regulation 2016/679 (GDPR)

[573] See articles 43 – 44 – 45 and 46 of L.D. 18 May 2018, n. 51.

[574] The legal proceedings against the parent company were filed in Italy on the basis of the Brussels I Recast Regulation. Since Eni has its statutory seat in Italy, the claimants sustained that Italian courts have jurisdiction to hear the claims. However, the scope of application of the Brussels I Regulation is limited to EU domiciled defendants, therefore excluding the Nigerian subsidiary as its statutory seat is in Nigeria. The claimants invoked Italian law on connected lawsuits as a basis for adding the Nigerian subsidiary as a co-defendant. The defendants contested the jurisdiction of the Italian courts and contended that the proceedings against the parent company were instrumentally filed solely to bring the Nigerian subsidiary under Italian jurisdiction, thereby constituting an abuse of procedural law. Court has not taken position on the point yet and the case is still pending.
See from page 56, Access to legal remedies for victims of corporate human rights abuses in third countries, European parliament, Policy Department for External Relations, Dr. Claire BRIGHT,
http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf

part in foreign calls for tenders) the following scenarios are possible under Italian criminal law and Decree 231:

Italian corporation operating abroad:

1. Crime committed partly in Italy, partly abroad: the corporation can be called upon to appear before an Italian court if the crime was committed in Italy, in its interest or to its benefit, according to the territoriality principle;
2. Crime committed entirely abroad: a corporation headquartered in Italy can be called upon to appear before an Italian court if the crime was committed in its interest or to its benefit, under the conditions indicated in art 4 Decree 231/2001[575].
3. Crime committed entirely abroad within a foreign corporation controlled by a parent company located in Italy: the company located in Italy will be held responsible (under the conditions outlined in point 2) only if it can be proven that an employee or representative of the corporation took part in the offence committed abroad[576].
4. Transnational organised crime covered by the United Nations Convention against Transnational Organized Crime adopted by the UN General Assembly on 15 November 2000 (the so-called Palermo Convention or TOC): corporations can be prosecuted and sanctioned in Italy regardless of the conditions of Art. 4, L.D. no. 231/2001.

In any case, the Italian Supreme Court clarified that simply indirect advantage (such as the economic gain deriving from the corporate links and the incremental profitability of the subsidiary, so called "interesse di gruppo") is not enough. On the contrary, a **direct, concrete economic advantage is necessary[577]**.

With reference to scenario 1) the case of a crime committed partly in Italy and partly abroad, it is relevant to mention the OPL 245 case against Eni and Shell, now pending. The trial began hearing evidence in Milan in September 2018. Eni's current CEO Claudio Descalzi, and former Royal Dutch Shell Executive Director for Upstream, Malcolm Brinded CBE are currently under trial before the Tribunal of Milan for the international corruption allegedly committed in Nigeria, paying briberies amounting to 1.3 billion US dollars for the 2011 acquisition of a Nigerian oil block known as OPL 245[578].

f. How companies in Member State can be held liable for the impacts of their supply chain, including non-EU based suppliers, and including suppliers beyond the first tier of the supply chain[579]

As a general rule tort law establishes the rights of victims of torts to obtain compensation for damage if they can demonstrate a causal link between the corporate activity and the damages they have suffered. Article 2043 of the Civil Code provides that any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.

Another interesting issue from the tort law perspective concerns the legal value and enforceability of corporate codes of conduct. In fact, pursuant to the Italian Consumer Code, the lack of compliance by a professional with the standards set forth pursuant to his/her code of conduct shall be considered as misleading advertising, if the commitment can be ascertained and referred as binding, in accordance with the professional usages.

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[575] i. if, based on art 7, 8, 9, 10 there is jurisdiction with regard to the perpetrator (physical person);
ii. if the corporation is headquartered in Italy;
iii. if the State in which the crime was committed has not already prosecuted the corporation;
iv. for certain types of crime, if there is a request from the Minister of Justice.

[576] See page 264, the Conclusions of the article ITALIAN REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW, Author Professor Gabriella Di Paolo, Sabine Gless.

[577] See Cass. Pen., sez. II, 27/09/2016, n. 52316.

[578] For public available documents and the point of view of NGOs (The Corner House, Global Witness, Heda, Re:Common) See website https://shellandenitrial.org/intro/

[579] First tier suppliers are understood as those suppliers with which the company does not have a direct contractual relationship.

If this condition is met, the consumers can claim the lack of respect of the code of conduct before the Autorità garante della concorrenza e del mercato or file a collective civil action (class action) before the competent tribunal[580]. This can happen if the company define its product as ethical or complying with human rights protection, but at the same time human rights violations occur down the supply chain even beyond the first tier.

In case the violation of the supplier also involves employees of the Italian company (case of aiding), L.D. no. 231/2001 can be applied under the conditions specified above in point f).

g. Whether any other area of law requires due diligence for cross-border corporate impacts, such as cross-border pollution or environmental hazards.

In the case of VIA and VAS that may have significant impacts on the territory of another State[581] or at the request of another state, the Ministry of the Environment together with the Ministry of Foreign Affairs notifies the project and the documentation and sets a deadline for the expression of interest in participating in the procedure[582] that is published on the website of the competent authority. In the event of interest, the competent authority and the public participate in the procedure with methods agreed between the states concerned.

h. Whether due diligence over own operations or the supply chain is a legal requirement in other areas of law regulating business, including whether due diligence is available as a defence

Concerning L.D. no. 231/2001 due diligence is available for the company as a defence in case of a crime committed by its representatives or employees. In particular:

a) if the offence is committed by a representative or high-level employee there's a presumption of corporate liability, unless the corporation can demonstrate that it adopted and effectively implemented, prior to commission of the crime, "organisational and management models" which are capable of preventing offences of the type occurred;

b) if the offence is committed by an low-level employee there is no presumption of guilt of the corporation since the Decree excludes liability in case of adoption of a suitable organisational model.

With regards to groups of companies and subsidiaries, the model of the parent company should take into account processes and activities that also involves its subsidiaries (for example in case of outsourcing of specific activities).

i. The burden of proof to hold a business or its board/director liable for human rights or other impacts, including which regulations are the most efficient for victims in this respect

In general, in the Italian Civil Procedure the burden of proof is governed by the principles set out in art. 2697 of the Civil Code, which provides that: "*Those intending to enforce a right before a court shall provide evidence of the facts supporting the claim. A party challenging the validity of those facts, or claiming that the right has changed or is exhausted, shall provide evidence of the facts supporting such objection*."
Therefore, the applicant is required to prove the facts on which the claim is based. The defendant, on the other hand, must provide evidence of facts precluding liability.

[580] See pag. 171 CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE ACCOUNTABILITY: THE ITALIAN PRIVATE INTERNATIONAL LAW PERSPECTIVE, Author Professor Angelica Bonfanti.
[581] See The Convention on Environmental Impact Assessment in a Transboundary Context (informally called the Espoo Convention) is a United Nations Economic Commission for Europe (UNECE) convention signed in Espoo, Finland, in 1991 that entered into force in 1997.
[582] See D.Lgs. 2006/152 Art. 32 on cross-border consultations.

However, if the applicant is unable to fulfil the burden of proof, the application is dismissed, irrespective of whether the defendant submits argument and supporting evidence.
The burden of proof on the applicant is mitigated in the case of "presumptions"[583].
With regard to causation of the damage from a certain event, there is no statutory definition of 'causal link'. Therefore, Italian case law has developed and consistently applies the 'more probable than not' standard[584], whereby causation is established if it is more probable than not that the damage has been caused by the alleged event rather than by any alternative events[585].

Directors are liable for any damage caused through a deliberate act of malicious intent or gross negligence. However, directors and auditors can only be held liable if the violation of a legal or contractual obligation, as well as the cause of damages can be proven. The damages claimed have to be allocated directly to a specific misconduct of a single director. In this context, demonstration of a causal link between the violation of an obligation and the damage caused is crucial. In the context of tort law, third parties may be able to initiate proceedings based upon the director's failure to exercise his or her obligations toward the company.

With regard to the auditors' liability, it is further required to demonstrate that the auditors exercised insufficient supervision and that the damage could have been avoided had the auditors properly performed their supervisory duties[586].

The Italian Criminal Procedure is an adversarial system and is governed by the presumption of innocence. The burden of proof falls on the Public Prosecutor, who must prove the guilt of an accused person. The standard of proof required is "beyond a reasonable doubt". Unless this standard is met the defendant must be acquitted. The court must consider and evaluate any doubt a reasonable person could have.
In event-related offences, the causal link has to be proved on the basis of universal scientific laws or statistical laws with probabilistic coefficient close to certainty[587].

With regard to L.D. no. 231/2001, see Section II part 3, a), in respect to the presumptions in case of adoption or failure to adopt the organisational models. In any case, it's necessary to consider that the commission of a crime is the first condition to be met in order to make a corporation liable under L.D. no. 231/2001. Accordingly, Criminal Law also applies in this regard.

Legislation on health and safety for workers could be considered the most efficient for victims in order to obtain compensation in case of an accident at work, considering that art. 2087 of the civil code requires the employer to adopt all the measures that - considering the specific characteristics of the working activity - are necessary to avoid damage to the physical and psychological integrity of the worker. Failing this, the worker is entitled to compensation.

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[583] Presumptions are divided into:
legal presumptions, those established by law, which may be rebuttable (iuris tantum), meaning that they may be overthrown if evidence is produced to the contrary, or irrebuttable (iuris et de iure), meaning that they cannot be overthrown by seeking to produce contrary evidence in court;
simple presumptions, which the court must assess in its discretion, accepting only serious, precise and consistent presumptions; simple presumptions are not admitted in relation to facts in respect of which the law does not allow witness evidence (Section 2729 of the Civil Code);
well-known facts (fatti notori), i.e. facts which are generally known at the time and place of the ruling, so that they are not open to doubt (Section 115 of the Code of Civil Procedure);
uncontested or admitted facts, i.e. facts put forward by both parties or admitted – even tacitly – by the party that might have an interest in challenging them (Section 115(1) of the Code of Civil Procedure).
[584] It should not be understood in a statistical sense, but in a logical sense according to Case-Law.
[585] See Cass. SU, 11 gennaio 2008, n. 581
[586] See Directors' and Officers' liability in Italy, pg legal, http://www.pglegal.it/attachment.ashx?uid=0371926c-c57c-463b-8c12-72451acdc1e3
[587] See Cass. SU, 12 July 2002, Franzese.

IV. REGULATORY FRAMEWORK

10. Overall Review of Regulatory Framework

a. To what extent the regulations are effective in terms of a) providing individuals whose rights are affected access remedy and b) adherence by Member States to their fundamental human rights obligations

In principle Italian regulations are in line with the duty of the State to protect victims against human rights abuses by third parties, including business enterprises within Italian territory. For violations occurring in the supply chain outside Italy, there is much room for improvement.

Generally speaking, in terms of effectiveness in providing access to remedy to victims, there are important critical issues concerning particular procedural hurdles in the civil litigation system and the well-known problem of the excessive length of criminal and civil proceedings.[588]

In particular, Italy has been criticized for its failure to address the serious environmental impacts of industrial activities within Italian territory and the European Court of Human Rights found violations of Art. 8 of the ECHR in relation to environmental pollution[589].

In the recent case concerning the pollution at ILVA's Taranto plant, the European Court of Human Rights found that Italy had violated Articles 8 and 13 of the ECHR. The Court concluded that the entire population is living in an area at risk and that the applicants had not had available an effective remedy enabling them to raise with the national authorities their complaints concerning the fact that it was impossible to obtain measures to secure decontamination of the relevant areas[590].

b. What are the main obstacles and difficulties

Victims of human rights violations can hold a Member State parent company or its subsidiary liable under tort law if they can demonstrate the causal link between the corporate activity and the damages suffered by them. This kind of law suits face several problems concerning limited liability within corporate groups (i.e. corporate veil), limited access to evidence, difficulty to fulfil the burden of proof, financial and procedural burdens. Jurisdiction over subsidiaries located outside Italy and applicable law are also an issue in the context of transnational litigation. These obstacles as well as possible solutions are well described in the legal Opinion of the FRA Improving access to remedy in the area of business and human rights at the EU level[591].

Apart from the excessive length of proceedings in the context of Italian Civil Proceedings victims may find particularly difficult to fulfil their burden of proof. In particular, the capability of victims to access evidence is crucial to support their claims. Such information is, however, rarely publicly available and in most situations, it is in the possession of the defendant. Limited rules of discovery or disclosure of information have a direct impact on admissibility and reliability of evidence[592], thus making it more difficult for victims to obtain adequate evidence[593].

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[588] For more on the excessive length of proceedings, *see* European Court of Human Rights, *Press Country Profile: Italy* (last updated March 2019), pp. 2 & 9, *at* https://www.echr.coe.int/Documents/CP_Italy_ENG.pdf.
[589] See Di Sarno and Others v. Italy 10.01.2012 ECHR, or Guerra and Ors. v. Italy or Application No. 14967/89; (1998) ECHR
[590] Cordella and Others v. Italy (applications nos. 54414/13 and 54264/15) ECHR (2019)
[591] See https://fra.europa.eu/en/opinion/2017/business-human-rights
[592] A victim cannot testify in its own proceeding and there is no cross examination in civil law proceedings.
[593] In particular, the order of exhibition of evidence provided by Art. 210 of the code of civil procedure (c.p.c.), and especially the strict way in which it has been interpreted by the Case Law of the Corte di Cassazione, makes this provision inadequate in the context of transnational litigation (as well as national). In fact, such order of exhibition of evidence cannot obviate to the burden of proof on the claimant, it can concern only a specific existent document that must be specifically indicated by the claimant, and it is subject to the discretionary power of the judge. Moreover, eventual costs should be anticipated by the claimant according to Art. 210 comma 3 c.p.c.

In case of human rights and environmental violations that constitute one of the offences listed in L.D. no. 231/2001, victims could lodge a criminal complaint against the author of the crime as well as against the involved corporations. The public prosecutor carries out investigations and has the power to access evidence according to Criminal Law Procedure. Extraterritorial violations might be prosecuted in Italy under the condition already specified above also basing on the relation between parent company and subsidiary[594].

The main obstacles with regard to L.D. no. 231/2001 are:

a) lack of an express provision for victims' right to bring a civil action for damages ("*costituzione di parte civile*") directly against the corporation. Within the criminal procedure victims can claim compensation against the physical person who is the author of the crime under the conditions set out in the code of criminal procedure (Art. 74 and following). Admissibility of a civil action ("*costituzione di parte civile*") against the corporation for damages caused directly by the corporate administrative offence is controversial [595].

b) the burden of proof typical for Criminal Law, since the commission of a crime is the first condition to be met in order to make a corporation liable under L.D. no. 231/2001. Indeed, it might be challenging for the prosecution to satisfy the burden of proof with regard to crimes committed abroad or to prove aiding and abetting for crimes committed within a subsidiary or within the supply chain. In addition, with regard to culpable crimes it might be challenging to prove the causal link.

c. Which regulatory model is most effective in achieving corporate implementation of adequate due diligence

Legislative Decree no. 231/2001 represents the most effective model in achieving corporate implementation of adequate due diligence, even if the adoption of compliance programs currently remains a voluntary choice of the company [596]. In order to be adequate and prevent corporate liability under L.D. no. 231/2001, compliance programs already require companies to undergo a due diligence process to identify and prevent potential risks of specific crimes, among which environmental crimes and some serious human rights violations (i.e. forced labour, human trafficking, etc.).

d. Which regulatory model is most effective in providing victims with access to remedy

Legislation on health and safety for workers could be considered the most efficient for victims in order to obtain compensation in case of an accident at work, considering that art. 2087 of the Civil Code requires the employer to adopt all the measures that - considering the specific characteristics of the working activity - are necessary to avoid damage to the physical and psychological integrity of the worker. Failing this, the worker is entitled to compensation.

In labour disputes, even in the case of an accident at work, the judge has ample instructing powers that facilitate access to justice for victims. In fact, arts. 420 and 421 of Code of Civil Procedure allow the Judge at any time on his own initiative to order the admission of any type of evidence, even beyond the limits set by the Civil Code, and also provide for the free questioning of the parties during the hearing on the case.

See The UNGPs Third Pillar in the Italian Action Plan: an assessment of the existing NAPs and of the barriers to the Italian judicial system by Giacomo Maria Cremonesi and Marta Bordignon http://media.wix.com/ugd/6c779a_23632619d7fd456aaaa4434551f1ef54.pdf

[594] See before Section II, point 2, d) and point 3, d) and Section III, point 1, f) of this report.
[595] See before Section II, point 6, c) of this report.
[596] An amendment proposal to this regard has been submitted to the Parliament in September 2018 and is now pending: see DDL 726/2018 at http://www.senato.it/service/PDF/PDFServer/DF/339575.pdf

e. *An overall assessment of the main strengths and weaknesses (risks and opportunities) of the examined legislative regimes, providing a detailed comparative analysis, including whether they are effective to address the most important potential harms and negative impact of companies in their operation and in their supply chain*

The model of organization, management and control provided by L.D. 231 2001 has the potential to provide companies with the opportunity to manage in an integrated way at least the most important risks of the other legislative provisions indicated in this report.

In particular, the supervisory body of L.D. no. 231/2001 ("*organismo di vigilanza*" or "ODV") exercises a second level control on health and safety that does not coincide exactly with the "*control system*" pursuant to Legislative Decree n. 81/2008, but verifies its suitability and implementation limited to its own functions and within the scope defined by the same, with the consequent need for two-way information flows.

In addition, the provisions contained in Legislative Decree 231/2001 on the prevention of environmental crimes may lead more companies to adopt an environmental management system such as ISO 14001 or EMAS[597] to be compliant.

Moreover, the disclosure on risks, protocols and procedures on the subject of 231 compliance, which until now was the exclusive prerogative of the Supervisory Body (ODV) which conveyed it to the administrative body of the company, can now be incorporated into the consolidated management report according to the Legislative Decree number 254 of the 30 December 2016 adopting Directive 2014/95 / EU on non-financial reporting[598].

Despite these advantages of coordination of other legislations and the fact that corporate liability under L.D. no. 231/2001 is substantially punitive[599], the fact that the liability of the entity is connected solely to the commission of criminal offences is a major limitation.

Moreover, the analysis of relevant case law and implementation practices over the years shows some enforcement deficiencies that should be redressed in order to extend the scope of L.D. no. 231/2001. In particular, difficulties arise with regard to transnational cases and violations in the supply chain committed outside the Italian territory as well as with regard to corporate groups.

11. *Review of Proposals for Regulation*

a. *How would new or planned legislative regimes have changed/would change this situation*

Access to evidence, especially in the context of civil litigation, remains a critical issue in the Italian system and the recommendation from the Fundamental Rights Agency in its Legal Opinion "Improving access to remedy in the area of business and human rights at

[597] See Il Sistema di Gestione ISO 14001 ed EMAS nella prevenzione dei reati ambientali ex d.lgs. n. 231/2001, Maggio 2013 https://www.assolombarda.it/servizi/ambiente/monografie/dispensa-il-sistema-di-gestione-iso-14001-ed-emas-nella-prevenzione-dei-reati-ambientali-ex-d.lgs.-n.-231-2001-maggio-2013

[598] In other words, previously the ODV reported confidentially to the Board of Directors on 231 compliance, but now the company is expected to include certain information in its consolidated management report thanks to the implementation of the EU Directive on non-financial reporting.

[599] This is in accordance with 2016 UN guidance requirement to assess corporate criminal liability for severe impact on human rights. See FRA Opinion 1/2017, p. 41, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf.

the EU level"[600] should be enforced by EU or the Italian legislator in order to make the legal provisions examined above in section II of this report effective for victims.

To this regard, it's worth mentioning a new law, that the Parliament recently adopted[601], extending class action against companies. Class action is now available to all those who make claims for damages in relation to the infringement of "homogeneous individual rights"[602].

The law includes a disclosure regime[603] that can facilitate access to evidence for victims of corporate abuses. These provisions should be extended in all cases of litigation against corporations also outside the context of class actions.

Within the Italian NAP on Business and Human Rights, adopted in December 2016, there is the commitment to "*conduct a comprehensive study of the Law 231/2001 in order to evaluate potential extension of the scope and application of the administrative liability of legal entities*" [604] in order to assess the scope of its implications in relation to the United Nations Guiding Principles on Business and Human Rights (UNGPs).

A draft proposal introducing mandatory organisational, management and control models under L.D. no. 231/2001 for all limited companies with a certain annual profit is currently pending in the Italian Parliament[605].

Proper amendments should be introduced to L.D. no. 231/2001, in order to redress the enforcement deficiencies observed above and extend its scope in relation to the UNGPs, such as:

- introduction of a legal requirement to publish compliance programs, or at least those specific protocols adopted by the company to mitigate the risk of offences that are also human rights and environmental violations;
- introduction of explicit reference to multinational corporations and clarification of the legal requirements to be met in order to hold parent companies or their subsidiaries liable in case of crimes and/or serious human rights abuses and environmental violations caused within the supply chain;
- explicit regulation of victims' rights, particularly with regard to the right to bring a civil action for damages directly caused by the corporation within the criminal/231 process.

[600] In its Opinion, Fundamental Rights Agency of the European Union (FRA) recommended that: *The EU should assess how, what and when evidence can be accessed from business in cases of business-related human rights abuse in the EU Member States. The EU should also facilitate the development of clear minimum standards on how, what and when business should share information with plaintiffs. The EU could also encourage the Member States to ensure a rebuttable presumption requiring a certain level of evidence. In this case, the burden of proof would be shifted from a victim to a company to prove that a company did not have control over a business entity involved in the human rights abuse. See https://fra.europa.eu/en/opinion/2017/business-human-rights*

[601] Disegno di legge n. 844 recante "Disposizioni in materia di azione di classe" approvato in via definitiva il 3 aprile 2019 https://www.altalex.com/documents/news/2019/04/03/azione-di-classe. The Italian National Action Plan (see below) provided for the introduction of a general class action against corporation. The main reason is that the applications introduced with the "old" class action dedicated only to consumer rights were very often declared inadmissible.

[602] Concept to be further clarified by the case-law.

[603] Art. 840 - quinques Upon a motivated request of the paintiff, containing indicating the facts and evidence reasonably expected to be available from the other party, with sufficient basis to support the plausibility of the request, the judge can order the defendant to show relevant evidence that is available to him.

[604] Italian National Action Plan on Business and Human Rights 2016-2021: https://cidu.esteri.it/ComitatoDirittiUmani/resource/doc/2018/11/all_2_-_nap_bhr_eng_2018_def_.pdf . This review has been commissioned and is due to report in October 2019.

[605] To this regard see the current proposal in DDL 726/2018 http://www.senato.it/service/PDF/PDFServer/DF/339575.pdf . The draft proposal provides the following reasons: "spreading the culture of legality, combating crime, preventing corruption and reducing the huge costs they entail for the entire economic system and, in general, in terms of increasing the competitiveness and efficiency of institutions and national companies".

THE NETHERLANDS COUNTRY REPORT

Prof.dr. L.F.H. (Liesbeth) Enneking[606]

I. OVERVIEW[607]

The Dutch parliamentary dossier on the topic of socially responsible business conduct (*maatschappelijk verantwoord ondernemen* or *MVO*), which literally translates as 'corporate social responsibility' or 'CSR') dates back to 1999.[608] Over time, the dossier has become increasingly focused on the international dimension of the topic, i.e. on human rights violations and environmental harm related to business activities in the global supply chains of Netherlands-based internationally operating business enterprises. The term that has in recent years become associated with this international dimension is that of international responsible business conduct (IRBC) (*internationaal maatschappelijk verantwoord ondernemen* or *IMVO*).

In November 2014, the Dutch government presented the results of a Sector Risk Analysis in which thirteen sectors of Dutch industry were identified as involving relatively high risks of adverse impacts on human rights and the environment.[609] The government indicated that it expected companies in these sectors to both take steps aimed at preventing and mitigating the CSR-related risks in their value chains, and engage with other companies and stakeholders to come to concrete agreements on the ways in which these risks could be dealt with in a structural manner.[610] Those agreements were to be laid down, preferably, in so-called covenants: agreements between the Dutch government and one or more societal parties aimed at realizing certain policy aims, which typically take the form of a written document setting out the actions that each of the parties is expected to take in furtherance of those aims.[611] These covenants on International Responsible Business Conduct (IRBC-covenants) were to be drafted along the lines set out in a 2014 report by the Dutch Social and Economic Council (SER) on the same topic.[612]

At the time of writing (May 2019), nine IRBC-covenants are operational, with two more covenants in the process of being developed.[613] The existing covenants relate to garments and textile, banking, the gold sector, sustainable forestry, the food products sector, insurance, pension funds, the metals sector, and natural stone. The parties to these covenants voluntarily commit themselves to making certain efforts and/or implementing certain measures (notably due diligence procedures) with the aim of enhancing responsible business conduct in their global value chains. The different covenants differ in scope somewhat, with some focusing on human rights impacts only (like the Banking Covenant) and others focusing on a broader palette of issues, including

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607 This paragraph is largely based on: L.F.H. Enneking & M.W. Scheltema, 'The Netherlands', in: C. Kessedjian & H. Cantú Rivera (eds.), *Private International Law Aspects of Corporate Social Responsibility*, Cham: Springer 2019 (forthcoming) (hereinafter: Enneking & Scheltema 2019 (forthcoming)); L.F.H. Enneking, 'Corporate duties of care in relation to responsible business conduct in global value chains', in: L.F.H. Enneking et al. (eds.), *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains*, London: Routledge 2019 (forthcoming) (hereinafter: Enneking 2019 (forthcoming) I) .

608 See Parliamentary Dossier 26485 at zoek.officielebekendmakingen.nl/dossier/26485.

609 These include construction, chemicals, retail, energy, financial services, wholesale, wood and paper, agriculture and horticulture, oil and gas, garments and textile, food, electronics, and metal. See KPMG, 'MVO Sector Risico Analyse – Aandachtspunten voor dialoog', report for the Dutch Minister of Foreign Trade and Development Cooperation and the Dutch Minister of Economic Affairs (September 2014), available at rijksoverheid.nl/documenten/rapporten/2014/09/01/mvo-sector-risico-analyse.

610 See *Kamerstukken II*, 2013/14, 26 485, no. 197.

611 See, for a definition of and more information on covenants by the Dutch Ministry of Justice and Security: kcwj.nl/node/13707/convenant?cookie=no.1545150904990-2057775079.

612 SER, 'IMVO-Convenanten', formal notice to the Dutch Minister of Foreign Trade and Development Cooperation and the Dutch Minister of Economic Affairs, nr. 4 (April 2014), available at ser.nl/-/media/ser/downloads/adviezen/2014/imvo-convenanten.pdf.

613 See, for an overview and more information: https://www.imvoconvenanten.nl/agreements?sc_lang=en.

not only human rights impacts but also for instance impacts on the environment, health & safety, living wage and animal welfare (like the Garments and Textile Covenant). The covenants that are currently under development relate to floriculture and the agricultural sector. A covenant relating to vegetable proteins was terminated in April 2019, two years after its conclusion, upon joint agreement by the adhering parties following the liquidation of the branch organization that represented most of the sector of industry involved.[614]

A number of the existing covenants (including garments and textile, banking, gold and insurance) are administered by the SER and share the same basic features. Those include: (i) a due diligence requirement that builds on the UNGPs and the OECD Guidelines, (ii) access to remedy if a company causes or contributes to human rights (or environmental) violations and (iii) a reporting requirement on due diligence (policies) and (where relevant) access to remedy. Each of these covenants has a Steering Committee, which is responsible for dealing with day-to-day governance issues for the implementation of the agreement.[615] Furthermore, progress by the parties involved in these covenants as regards the aims set out in them is monitored by independent Monitoring Committees, which submit yearly reports to the respective Steering Committees on the progress made by the parties in carrying out the activities as agreed upon; a summary of these reports may be made public.[616] The remaining covenants vary quite widely in set-up and content.

Since membership to most covenants is voluntary, members may unilaterally decide, in principle, to terminate their membership to the covenant, following which their commitments to the agreement will cease to apply.[617] There are exceptions to this general principle, like the Insurance Covenant, which has been concluded between the two branch organizations in the Dutch insurance sector, the Dutch government and a number of NGOs, and is thus automatically binding on all of the members of the branch organizations involved.[618] At the same time, most of the existing covenants include a provision stating that the agreement is not legally enforceable and that disputes between the parties about the implementation of the agreement shall be dealt with in accordance with the agreement itself.[619] In most cases, this means that they are resolved bilaterally or, failing that, by the agreement's Steering Committee, which may as a last resort expel the non-adhering party.[620] An exception is the Garments and Textile Covenant, which includes an independent mechanism for operational complaints and disputes that may deal not only with disputes between the covenant's Steering Committee and adhering companies over (the quality of) their action plans, but also with complaints by stakeholders who claim to have suffered injury, loss or damage caused by adhering companies in relation to the topics set out in the covenant.[621]

The Dutch government's focus on concluding covenants – a regulatory instrument that is in essence consensus-driven – in its policy with respect to responsible business conduct in global value chains has so far largely put off debate on the possibility of more binding regulation in this context. In this sense, developments in the Netherlands are moving in a somewhat different direction than those in countries like the UK, France and Switzerland, where over the past few years specific legislation on certain key issues in

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614 See, for the notice of termination, mvonederland.nl/system/files/media/190419%20Kennisgeving%20beeindiging%20IMVO%20Convenant%20Plantaardige%20Eiwitten.pdf.

615 See, for instance, section 13.1 of the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, available at ser.nl/-/media/ser/downloads/overige-publicaties/2016/dutch-banking-sector-agreement.pdf.

616 *Ibid.*, section 13.2.

617 *Ibid.*, section 14(5)

618 See consideration 8 in the Preamble of Agreement on Responsible Investment in the Insurance Sector (July 2018), available at imvoconvenanten.nl/~/media/files/imvo/verzekeringssector/agreement-insurance-sector.ashx

619 See, for instance, section 14(11) of the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, available at ser.nl/-/media/ser/downloads/overige-publicaties/2016/dutch-banking-sector-agreement.pdf.

620 *Ibid.*, section 13.3.

621 See section 1.3 of the Agreement on Sustainable Garment and Textile, available at ser.nl/-/media/ser/downloads/engels/2016/agreement-sustainable-garment-textile.pdf.

the IRBC-context has either been realized or is being discussed. The Dutch government's IRBC-policy, including the covenants, is currently under evaluation; the results of this evaluation will likely become public in the summer of 2019. According to the Dutch government's 2017 Coalition Agreement, 2019 will also be the year in which it will consider whether more binding measures should be introduced and, if so, in what form.[622] A development that runs counter to the Dutch government's cautious approach to adopting binding legislation in the IRBC-context took place in May 2019, as a majority in the Dutch Senate voted in favour of a Private Member's bill seeking to introduce a due diligence obligation with respect to the use of child labour in the supply chain. The bill, which had been adopted by the Dutch House of Representatives in February 2017 but faced strong(er) opposition in the Dutch Senate, will enter into force at a date that is yet to be determined, but no sooner than January 1st, 2020.[623]

Apart from these legislative and policy developments, Dutch courts have been confronted with a variety of cases in which Dutch companies (sometimes along with their foreign subsidiaries) have been held to account for irresponsible business conduct in global value chains using existing legal bases in civil law or criminal law.[624]

One of the most high-profile civil liability cases with respect to IRBC-issues is the one that has been brought by a number of Nigerian farmers and the Dutch NGO Milieudefensie against Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC) in relation to various oil spill incidents from SPDC-operated pipelines in the Niger Delta.[625] Others include claims brought by citizens from the Ivory Coast against the Anglo-Dutch petroleum trading company Trafigura for its involvement in the Probo Koala waste dumping-incident in Abidjan in 2006[626], and claims brought by widows of Nigerian environmental activists against RDS and SPDC for their alleged involvement in human rights violations perpetrated in Nigeria in the mid-1990s[627]. Cases in the field of criminal law include, among others, the criminal prosecution of Trafigura, one of its directors and the captain of the Probo Koala for their involvement in a number of crimes that took place on Dutch soil prior to the aforementioned waste-dumping incident (including the illegal transport of the waste out of the EU).[628] More recently, a criminal complaint was filed against a Dutch ship building company that has allegedly profited from the exploitation of North Korean workers at the Polish shipyards where it had its ships built.[629]

II. GENERAL REGULATORY FRAMEWORK WITH REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

The following regulatory instruments will be discussed in more detail below:

A) The Dutch Child Labour Due Diligence Act

B) IRBC Agreement on Sustainable Garment and Textile

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622 Regeerakkoord 'Vertrouwen in de toekomst' (10 October 2017), available at kabinetsformatie2017.nl/documenten/publicaties/2017/10/10/regeerakkoord-vertrouwen-in-de-toekomst, p. 49.

623 See for the latest developments: Eerste Kamer der Staten Generaal, Initiatiefvoorstel-Kuiken Wet zorgplicht kinderarbeid. Available at eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken.

624 See, for an overview: L.F.H. Enneking et al., *Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen*, report for the Dutch Ministries of Foreign Affairs and Security & Justice, Den Haag: Boomjuridisch 2016 (hereinafter: Enneking et al. 2016), p. 89-102.

625 See, in more detail: L.F.H. Enneking, 'Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria', in: I. Feichtner, M. Krajewski & R. Roesch (eds.), *Human Rights in the Extractive Industries – Transparency, Participation, Resistance*, Cham: Springer 2019 (forthcoming) (hereinafter: Enneking 2019 (forthcoming) II).

626 See, in more detail: Enneking et al. 2016, p. 93-99.

627 See, in more detail: Enneking 2019 (forthcoming) I.

628 See, in more detail: Enneking et al. 2016, p. 93-99.

629 See, for example: N. Smith, 'North Korean worker sues Dutch shipbuilder over slave labour claims', *The Telegraph* 15 February 2019, telegraph.co.uk/news/2019/02/15/north-korean-worker-sues-dutch-shipbuilder-slave-labour-claims/.

A) The Dutch Child Labour Due Diligence Act (hereinafter: CLDD Act)[630]

Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet Zorgplicht Kinderarbeid)[631]

1. Area of Regulatory Framework

Legislation in relation to rights of the child and child law

2. Scope

a. Rationale given by the MP for the regulation (or lack of regulation)

The CLDD bill was introduced in June 2016 as a Private Member's bill in the Dutch House of Representatives, by an MP from the Dutch Labour Party. It was adopted by the Dutch House of Representatives in February 2017 and by the Dutch Senate in May 2019. Essentially, the CLDD Act seeks to introduce a due diligence obligation for companies bringing goods or services onto the Dutch market to prevent the use of child labour. It however connects (or better perhaps: rephrases) this aim to that of consumer protection. The original bill's preamble stated in this respect:

"[…] that it is desirable to prevent people in the Netherlands from purchasing goods and services that have been produced using child labour and that it is therefore desirable to provide a statutory basis for the corporate duty to take due care [*zorgplicht*] to prevent the supply of goods and services that have been produced using child labour".[632]

In the most recent version of the bill, which is the version the Dutch Senate adopted in May 2019, this has been (slightly) altered to:

"[…] a statutory basis for the requirement that companies selling goods and services on the Dutch market take all reasonable measures to prevent the use of child labour in the production of those goods and services is desirable in order to ensure that consumers can purchase those goods and services in good conscience".[633]

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

The CLDD Act pertains to every company (whether domiciled in the Netherlands or abroad) that supplies goods or services to Dutch end-users. It defines end-users as 'the natural or legal persons that use or use up the goods or make use of the services'.[634] It defines company as 'a company in the sense of art. 5 of the Dutch Commercial Register Act 2007 or any other entity that engages in economic activities, regardless of its legal form and the way in which it is financed'.[635] Art. 5 of the Dutch Commercial Register Act 2007 sets out the categories of companies that should be registered in the Dutch Commercial Register. These include all businesses and legal entities in the Netherlands, such as private and public limited companies (*BVs* and *NVs*), sole traders, associations, foundations, professionals, and owners' associations.[636] Also included are foreign companies that have a branch or structurally conduct business in the Netherlands.[637]

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630 This section is largely based on Enneking 2019 (forthcoming) I.

631 See for the current version: *Kamerstukken I*, 2016/17, 34 506, A. Available at zoek.officielebekendmakingen.nl/kst-34506-A.html. See for the original version: *Kamerstukken II*, 2015/16, 34 506, nr. 2. Available at zoek.officielebekendmakingen.nl/kst-34506-2.html.

632 Preamble CLDD Bill (original version).

633 Preamble CLDD Act.

634 *Id.*

635 Art. 1(b) CLDD Act.

636 Art. 5a Dutch Commercial Register Act 2007 (*Handelsregisterwet 2007*). See also e-justice.europa.eu/content_business_registers_in_member_states-106-nl-en.do.

637 Art. 5d Dutch Commercial Register Act 2007 (*Handelsregisterwet 2007*). See also https://www.kvk.nl/english/registration/.

The Act contains a number of exemptions. First of all, it is evident from the description of its scope that companies that do not supply goods or services to Dutch end-users are not bound by the obligations set out in it. Secondly, it provides that companies that merely transport the goods that are to be supplied are exempted from compliance with the Act.[638] Furthermore, it leaves open the possibility that certain other categories of companies can also be exempted by General Administrative Order.[639] These other categories of companies may include for instance small companies and companies from low risk sectors.

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights (see above)

The CDLL Act pertains to child labour specifically. It defines child labour along the lines of ILO Conventions C138 (the Minimum Age Convention 1973) and C182 (the Worst Forms of Child Labour Convention 1999).[640]

d. Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation

The CLDD Act pertains to every company that supplies goods or services to Dutch end-users (see also under 2b). As such, it may pertain not only to companies that are registered in the Netherlands, but also to companies that are registered abroad. The due diligence requirement that is the focal point of the Act requires these companies to conduct due diligence throughout the supply chain to find out whether the production of the goods and services to be supplied has involved child labour (see also under 3). As such, it may pertain to the activities of any natural or legal person throughout the supply chain, even though the actual obligation (and enforcement thereof) is aimed at the company that supplies the goods or services to Dutch end-users.

e. Civil, criminal and administrative scope

A public supervisor, which will have to be appointed by General Administrative Order,[641] is to monitor and enforce compliance with the provisions set out in the CLDD Act (see also under 4).[642] Additionally, criminal sanctions can be imposed on (officers of) companies that are repeat offenders (see also under 4).[643]

3. Content of Regulation

a. Overview and description of the required measures for business

1) The CLDD Act requires every company (whether domiciled in the Netherlands or not) that supplies goods or services to Dutch end-users to issue a declaration that it conducts due diligence with a view to preventing child labour from being used in the production of those goods and services.[644]

2) In tandem with the declaration requirement, the Act contains an (implicit) requirement for the companies involved to conduct due diligence (*gepaste zorgvuldigheid*) with a view to preventing child labour from being used in the production of the goods and services they supply to Dutch end-users.[645]

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638 Art. 4(4) CLDD Act.
639 *Ibid.,* art. 6.
640 *Ibid.*, art. 2.
641 *Ibid.*, art. 1(d).
642 *Ibid.*, art. 3 and art. 1(b).
643 *Ibid.*, art. 9.
644 *Ibid.*, art. 4.
645 *Ibid.*, art. 5.

Note that due to the way in which these two requirements are set out in the CLDD Act (see below), it is in essence an example of due diligence legislation rather than of transparency legislation (contrary to first appearances, perhaps).

b. Key legal elements of the obligation

1) The declaration has to be submitted with the aforementioned public supervisor, which would publish the declarations in an online registry on its website.[646] Said declaration have to be sent promptly after a company has become registered in the Dutch Commercial Register. Companies that are already registered would have to send in their declarations no later than six months after entry into force of the proposed act. Companies that are not domiciled in the European part of the Netherlands[647] and that are not registered in the Dutch Commercial Register have to send in their declarations within six months of supplying goods or services to Dutch end-users for the second time in a year.

The Act contains no further requirements as to the form and contents of such declarations, but does provide that further requirements on these issues *may* be set by General Administrative Order.[648] It has been noted during the parliamentary discussions that under the Act's current wording, if a General Administrative Order setting out further requirements stays out, a one-sentence declaration would suffice.

Companies that only buy goods or services from suppliers that have submitted declarations with respect to those goods or services along the lines set out in the Act are not required to issue a declaration themselves.[649]

2) According to the Act, "[t]he company that […] investigates whether there is a reasonable presumption that the goods and services to be supplied have been produced using child labour, and that draws up and carries out an action plan in case there is such a reasonable presumption, conducts due diligence [*gepaste zorgvuldigheid*] [translation by the author]".[650] The Act follows up by providing that companies that buy goods or use services from a supplier that has submitted a declaration with respect to those goods or services along the lines set out in the Act, are also assumed to have conducted due diligence with respect to those goods or services. Moreover, companies that *only* buy such goods or services are not required to issue a declaration themselves.[651]

The due diligence requirement is not defined further in the Act, save for the fact that it also mentions that more detailed requirements with respect to both the investigation and the action plan will be set by General Administrative Order, taking account of the existing ILO-IOE Child Labour Guidance Tool for Business.[652] With respect to the investigation, the Act provides that it will need to be based on sources that can reasonably be known to and accessed by the company.[653]

According to the Act, the Dutch Minister for Foreign Trade and Development Companies can approve a joint action plan that is concluded between one or more civil society organizations, trade unions and/or employers' organizations and that aims to make the participating companies conduct due diligence in order to prevent the use of child labour in the production of goods and services. Any company that conducts its business in accordance with such a joint action plan is assumed to conduct due diligence along the lines set out in the Act.[654]

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646 *Ibid.*, art. 4(1) and 4(5).
647 The phrase 'the European part of the Netherlands' excludes the overseas regions of the Kingdom of the Netherlands, *i.e.* Bonaire, Saba and Sint-Eustatius.
648 Art. 4(3) CLDD Act.
649 *Ibid.*, art. 5(1)-5(3).
650 *Ibid.*, art. 5(1).
651 *Id.*
652 Art. 5(2) CLDD Act.
653 *Ibid.*, art. 5(1).
654 *Ibid.*, art. 5(4).

c. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers (if any)

The CLDD Act's obligations (declaration and due diligence) address companies that deliver goods or services to Dutch end-users. As such, they specifically target the last tier in the supply chain, *i.e.* the tier closest to the Dutch end-users of the goods and services supplied. The scope of the obligations imposed on these companies under the Act is not limited to certain tiers of the supply chain, however, as the companies involved are expected to investigate whether there is a reasonable presumption that the goods and services to be supplied have been produced using child labour. This essentially means that they will have to cover the entire supply chain. It is important to note that the last tier companies that are the primary addressees of the Act can fulfill their obligations by purchasing the goods or services they mean to supply to Dutch end-users from companies that have issued a declaration with respect to those goods or services along the lines set out in the Act (see under 3b). The reasoning behind this is that this provision will incentivize the last tier companies addressed to deal only with lower tier companies that also live up to the obligations set out in the Act, which will in practice have the effect of 'pushing' the Act's obligations 'down' the supply chain.

d. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

Any natural or legal person whose interests have been affected by the (in)actions of a company in complying with the provisions as set out in the Act, can file a complaint with the aforementioned public supervisor, but only if and insofar as there are specific indications of non-compliance by a specific company.[655]

e. Implementation of internal processes by business, including operational-level grievance mechanisms

The public supervisor will only respond to complaints that have first been filed with the company, but that have not been dealt with by the company within 6 months or have not been dealt with satisfactorily.[656]

4. Monitoring, sanction and enforcement

a. Monitoring body

A public supervisor, which will have to be appointed by General Administrative Order, is to monitor and enforce compliance with the provisions set out in the CLDD Act.[657]

b. Form of monitoring/evaluation, timelines for investigating complaints, procedures for review

Any natural or legal person whose interests have been affected by the (in)actions of a company in complying with the provisions as set out in it can file a complaint with the supervisor, but only if and insofar as there are specific indications of non-compliance by a specific actor (see above under 3e). The supervisor will only respond to complaints that have first been filed with the company, but that have not been dealt with by the company within 6 months or have not been dealt with satisfactorily (see above under 3g). The supervisor can in response to a complaint issue a binding order to a company that fails to comply with the provisions set out in the proposed act, and can also set a deadline for compliance with that order.[658]

c. Form of sanctions

[655] *Ibid.*, art. 3(2) and 3(3).
[656] *Ibid.*, art. 3(4).
[657] *Ibid.*, art. 1(d) and art. 3(1).
[658] *Ibid.*, art. 7(4)

If the company does not comply with the supervisor's order, the supervisor can impose a administrative fines: 1) of up to €4,100 for non-compliance with the duty to file a declaration (or, if this amount is not considered appropriate, a fine of up to €8,200); and 2) of up to €820,000 for non-compliance with the duty to conduct due diligence along the lines set out in the bill (or, if this amount is not considered appropriate, a fine of up to 10% of the company's annual turnover).[659] Additionally, criminal sanctions can be imposed on (officers of) companies that are repeat offenders. If, within 5 years of imposition of an administrative fine, a similar transgression is committed by the company by order or under supervision of the same (*de facto*) director, this is considered a criminal offence. If this second transgression was committed without intent, it is considered a misdemeanor, punishable by a maximum of 6 months' detention and a €20,500 fine. If the second transgression was committed with intent, it is considered a crime, punishable by a maximum of 2 years' imprisonment and a €20,500 fine.[660]

d. Incentives or implications, such as link to procurement, licensing or export credit

The CLDD Act contains an implicit link to the Dutch IRBC-covenants. According to the Act, the Dutch Minister for Foreign Trade and Development Companies can approve a joint action plan concluded between one or more civil society organizations, trade unions and/or employers' organizations that aims to make the participating companies conduct due diligence in order to prevent the use of child labour in the production of goods and services. Any company that conducts its business in accordance with such a joint action plan is assumed to conduct due diligence along the lines set out in the Act.[661]

5. Procedural Framework

c. Competent Court or other body

A public supervisor, which will have to be appointed by General Administrative Order, is to monitor and enforce compliance with the provisions set out in the CLDD Act (see above under 4a). The envisioned criminal sanctions can be imposed under the Dutch Economic Offences Act (*Wet op de Economische Delicten*), which may be enforced by the Dutch public prosecutor before (in many cases) the police court for economic offences or the economic division of the competent court.

d. Standing (including participation of foreign plaintiffs/representative entities such as NGOs or trade unions)

Any natural or legal person whose interests have been affected by the (in)actions of a company in complying with the provisions as set out in it can file a complaint with the supervisor, but only if and insofar as there are specific indications of non-compliance by a specific actor (see above under 4b).

6. Available Remedies

a. Civil, criminal and administrative remedies

See above under 4(c). The CLDD Act does not contain provisions relating to access to remedy for the actual victims of child labour. This is related to the fact that the stated aim of the Act is the protection of Dutch consumers, rather than the protection of the actual victims of child labour. As mentioned under 4b, the Act allows any natural or legal person whose interests have been affected by the (in)actions of a company in complying with the provisions as set out in the proposed act, to file a complaint with the supervisor. However, whereas the Act provides a range of administrative law and criminal law enforcement options aimed at non-adhering companies, it does contain any

[659] *Ibid.*, arts. 7(1)-7(3).
[660] *Ibid.*, art. 9.
[661] *Ibid.*, art. 5(4).

specific provisions aimed at providing or improving access to remedies for the actual victims of child labour. They will therefore have to rely on existing generic legal bases for claims in Dutch civil law and possible also criminal law (see below under III).

Although Dutch law already contains a number of provisions relating to unfair commercial practices and misleading advertisement (based on EU norms) that could also be of relevance in the IRBC-context, these are also generally aimed at the protection of consumers and/or competitors. As such, also these provisions only provide recourse for consumers or competitors who have suffered harm as a result of (for instance) misleading statements by the company relating to working conditions in the supply chain, and do not provide access to remedies for the actual victims of (for instance) those poor working conditions in the supply chain.[662]

Note that due to the requirement of relativity in Dutch tort law (requiring that the norm breached served to protect against damage such as that suffered by the person sustaining the loss)[663], the actual victims will, in civil liability cases based on Dutch tort law, not be able to base their claims directly on the violation of the CLDD Act.[664] They can rely on it indirectly, however, if and insofar as the violation of the Act can be constructed as an indication that an unwritten norm pertaining to proper societal conduct (*i.e.*, a duty of care or *zorgplicht* vis-à-vis these victims) has been violated by the company in question.[665] In cases where an infringement of the norms set out in the Act also constitutes an infringement of the OECD Guidelines for Multinational Enterprises and involves a Dutch multinational enterprise, stakeholders can (under certain circumstances) also file a notification with the Dutch NCP. If the NCP considers that further consideration of the specific instance is warranted, it will assist the parties involved to come to a mutually agreed solution of the issue in question through dialogue or mediation by the NCP, or via an external mediator.[666]

b. Whether sanctions include compensation

No

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

No estimate available as of yet.

8. Impact of the Regulation

There is no information available as of yet with respect to the impact of the CLDD Act on, for instance, the behaviour of the companies involved or the rights of the child. In line with its stated main aim of consumer protection rather than protection of the actual victims of child labour, the Act does not contain any provisions relating to access to remedy for the latter victims (see above under 6a).

As regards public responses of stakeholders to the CLDD Act, it should be noted that the CEO of Dutch sustainable chocolate company Tony Chocolonely in December 2017 wrote an open letter to the members of the Dutch Senate in order to convince them to vote in favour of the Act. This letter was co-signed by CEOs of around 40 other Dutch companies, including Aegon Nederland, Heineken, Nestlé Nederland, PLUS Retail and

662 See, in more detail: Enneking et al. 2016, p. 190-193.
663 Art. 6:163 Dutch Civil Code.
664 See L.F.H. Enneking, *Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability*, The Hague: Eleven International Publishing 2012 (hereinafter: Enneking 2012), p. 232.
665 *Id.*
666 See, for more information on the specific instance procedure at the Dutch NCP: www.oecdguidelines.nl/notifications.

Rabobank.[667] In the letter, it was posited that also among the Dutch business community a need is felt for a legislative framework with respect to child labour in global value chains. The main reasons for this, according to the letter, are: 1) that child labour is a serious issue that needs to be tackled through legislation; 2) that legislation on this issue would create a more level (national) playing field and would reward the companies that are forerunners when it comes to preventing child labour in global value chains; and 3) that it is important that the Netherlands remain among the group of countries that are leading when it comes to the enactment of national legislation with respect to IRBC-issues.[668]

The CLDD Act was adopted by the Dutch House of Representatives on February 7th, 2017 and by the Dutch Senate in May 14th, 2019. The date at which it will enter into force is yet to be set, but will not be before 1 January 2020.[669]

B) IRBC Agreement on Sustainable Garment and Textile (hereinafter: G&T agreement)

Convenant Duurzame Kleding en Textiel[670]

1. Area of Regulatory Framework

Multi-stakeholder initiative in relation to IRBC in the garment and textile sector.

2. Scope

a. Rationale given by the parties for the Agreement

In the preamble to the G&T Agreement, it is stated, among other things, that:

"[…] agreements on international responsible business conduct offer businesses the opportunity at sector level, together with the government and other parties, to find solutions for these complex problems [relating to IRBC in global value chains] in a structured way, thereby increasing their influence ("leverage") […]; garment and textile was identified as a sector with an increased risk of breaches of human rights, environmental standards and animal welfare according to the 2014 KPMG study into risks on adverse impacts in Dutch industry sectors commissioned by the Dutch government; the government expressed a wish to enter into an agreement on international responsible business conduct with the textile sector and, in response, the sector stated that it shared this wish […].[671]

It is stated in the Agreement that its main aims are:

1) "to achieve substantial progress towards improving the situation for groups experiencing adverse impacts in respect of specific risks in the garment and textile production or supply chain within 3-5 years"; 2) "to provide individual enterprises with guidelines for preventing their own operation or business relationships from having a (potential) adverse impact in the production or supply chain and for resisting it if it does

[667] See 'Een Wet Zorgplicht Kinderarbeid pakt kinderarbeid serieus aan', tonyschocolonely.com/storage/configurations/tonyschocolonelycom.app/files/wetzorgplichtkinderarbeid/een_wet_zorgplicht_pakt_kinderarbeid_serieus_aan.pdf.

[668] *Id.*

[669] See for the latest developments: Eerste Kamer der Staten Generaal, Initiatiefvoorstel-Kuiken Wet zorgplicht kinderarbeid. Available at eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken.

[670] Convenant Duurzame Kleding en Textiel, SER 2016, available at ser.nl/-/media/ser/downloads/overige-publicaties/2016/convenant-duurzame-kleding-textiel.pdf. See for the English translation: Agreement on Sustainable Garment and Textile, SER 2016, available at ser.nl/-/media/ser/downloads/engels/2016/agreement-sustainable-garment-textile.pdf.

[671] Agreement on Sustainable Garment and Textile, p. 3-4.

arise"; 3) "to develop joint activities and projects to address problems that enterprises in the garment and textile sector cannot [resolve] completely and/or on their own".[672]

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

At present, the G&T Agreement has been signed by around 95 companies from the Dutch garment and textile sector that have thereby expressed they are committed to achieving its goals.[673] The enterprises involved in the agreement 'are divided into three categories, each with specific due diligence requirements in keeping with the size of the enterprises and depending on whether they buy directly from the production countries: A) Turnover > €25 million in garments and textiles or turnover between €2.5 and €25 million and buying at least 25% of their turnover directly from production countries; B) Turnover between €2.5 million and €25 million and buying less than 25% directly from production countries; C) Turnover < €2.5 million'.[674]

The Agreement does include provisions on public procurement. It provides in this respect, among other things:

"By introducing the Action Plan for Socially Responsible Purchasing, the Dutch government will encourage governments to do their purchasing in accordance with the OECD Guidelines, e.g. by changing over to a single system with a due diligence requirement. By setting a good example as a government and purchasing in a socially responsible way, the government will help to create a market for sustainable innovative products and production processes".[675]

It also provides:

"The Dutch government will explore the possibilities at EU level of making due diligence as described in the OECD Guidelines a selection criterion for purchasing and will issue a report in this regard".[676]

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights (see above)

The Parties to the Agreement have identified nine specific themes which they feel currently merit the priority attention of enterprises in the garment and textile sector operating in the Netherlands in terms of IRBC. These themes are, in no particular order: 1) discrimination and gender; 2) child labour; 3) forced labour; 4) freedom of association; 5) living wage; 6) safety and health in the workplace; 7) raw materials; 8) water pollution and use of chemicals, water and energy; and 9) animal welfare.[677] These are worked out in more detail in the agreement.[678]

The participating enterprises are expected to perform due diligence and to focus particular attention on these themes. However, it is possible that individual companies in conducting their due diligence process encounter other problems in their value chain; when that is the case, they are to include them in their annual individual action plan.[679]

d. Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation

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672 *Ibid.*, p. 4.
673 See for lists of signatories, participating organizations and supporters: imvoconvenanten.nl/garments-textile/participants?sc_lang=en .
674 Agreement on Sustainable Garment and Textile, p. 6.
675 *Ibid.*, section 4(10).
676 *Ibid.*, section 4(11).
677 *Ibid.*, p. 15.
678 *Ibid.*, p. 26-40.
679 *Id.*

The due diligence requirements set out in the G&T Agreement in principle relate to corporate activities throughout the production, supply or value chain, which encompasses the process from raw material to consumer or user. According to the Agreement, the chain consists of six stages: 1) production of raw materials and fibres; 2) manufacture of materials (textiles) from yarn, including weaving, knitting, braiding, tufting, finishing and dyeing stages; 3) manufacture of components such as buttons, zips and garment trimmings; 4) manufacture of garments; 5) product design and development (often for brands); 6) retail trade.

3. Content of Regulation

a. Overview and description of the required measures for business (such as a requirement to adopt human rights due diligence or a vigilance plan)

According to the G&T Agreement, the enterprises involved must conduct due diligence (a term that also in the Dutch language version of the agreement is not translated into Dutch) in order to put their social responsibility into practice. It is therefore expected of individual enterprises supporting the Agreement that they sign a Declaration in which they state that: 1) they will conduct a due diligence process, which is consistent with their size and business circumstances; 2) present an annual action plan as part of their due diligence process to the secretariat of the Agreement on Sustainable Garment and Textile; 3) in their annual action plan i) explicitly discuss certain issues that are deemed to be relevant and ii) provide the agreement's Secretariat with certain information relating to their business activities and their value chains; and 4) agree to the rules and procedures of the agreement's complaints and disputes mechanism.[680]

b. Key legal elements of the obligation

The G&T Agreement follows the terminology of the OECD Guidelines and the UNGPs, according to which "due diligence is a process in which enterprises identify, avoid and mitigate the actual and potential adverse impact of their actions and account for how they deal with the risks identified. An important precondition for conducting due diligence on human rights is to formulate and embed a human rights policy. If the due diligence process reveals that the enterprise has caused or contributed to adverse impacts, the enterprise should (help to) seek redress and/or remedy. These are adverse impacts caused by the enterprise, to which its business activities have contributed and/or which are the direct result of its business activities".[681] Both instruments are specifically referred to in the agreement as together with the core labour standards of the ILO constituting "[…] the starting point for international responsible business conduct".[682]

c. Risk assessment requirements and risk mitigation measures

According to the G&T Agreement, the due diligence process consists of the following steps: 1) formulating human rights policy within the enterprise; 2) analysing and determining precautionary measures; 3) embedding in the enterprise; 4) monitoring progress and results; 5) remedy and redress; and 6) communication".[683]

The Agreement also provides, among other things, that the parties to the agreement will "[…] develop tools to help participating enterprises complete their due diligence process".[684] Those include specific guidelines for small and medium-sized enterprises in line with the structure of the OECD's Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. Furthermore, the Secretariat "[…] will prepare a list for every subsector of risks commonly associated with frequently used production countries to simplify the due diligence process for smaller enterprises" and

[680] Agreement on Sustainable Garment and Textile, p. 8-9.
[681] *Ibid.*, p. 41.
[682] Agreement on Sustainable Garment and Textile, p. 3 (preamble).
[683] *Ibid.*, p. 41
[684] *Ibid.*, p. 9.

prepare questionnaires on the basis of which companies "[…] will be able to arrive at an initial prioritisation of risks to be addressed and draw up a list of known measures that enterprises can take or initiatives which they can join to tackle each risk theme".[685]

d. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers (if any)

The G&T Agreement directly refers UNGPs and OECD Guidelines, under which "[…] enterprises bear a responsibility for preventing and reducing any adverse impact on people and the environment by their own operation or business relationships in the production or supply chain".[686] It then also refers to a figure in one of the appendices (Appendix 7) that visualizes how the UNGPs see the different modes of involvement in adverse impact on human rights and the expectations that the UNGPs set in this regard. There is no mention of liability of any of the companies involved.[687]

e. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

The G&T Agreement's Secretariat is tasked with, among other things, assessing the quality and the annual progress of the action plans that the companies involved will prepare as part of their due diligence.[688] Disputes between the Secretariat and adhering enterprises regarding the quality of their action plans will be resolved by an independent Complaints and Disputes Committee. The Secretariat will also "[…] carry out random verification of information supplied and improvements reported by enterprises".[689] The Secretariat may also receive signals from stakeholders about particular production locations, which it will then pass on to the companies concerned and report to the Steering Committee. The Agreement further provides that "[p]rogress on the nine priority themes will be monitored for the mid-term and final review by taking random samples in collaboration with local partners and civil society organisations".[690]

f. Transparency and disclosure requirements

The companies involved in the G&T Agreement, as part of their due diligence process, present an annual action plan to the Secretariat in which they explicitly discuss a number of elements. These include: a) insights gained into their production or supply chain through the due diligence process and the possible impacts in their supply chain; b) how their own purchasing process contributes to potential (risks of) adverse impacts and measures to be taken to mitigate them; c) the policy and the measures they pursue with regard to the nine themes prioritised by the Parties and how they will participate in the collective projects for these themes which are consistent with the substantial risks found in these themes; d) setting quantitative and qualitative objectives in terms of improvements for the duration of the Agreement, broken down into objectives after 3 and 5 years.[691] They also provide the Secretariat with certain information relating to their operational processes, supply chains and the risks involved therein; this information will be treated as confidential by the Secretariat.[692] Furthermore, from the second year onwards they also report to the Secretariat on the results of last year's plan.[693]

The Secretariat prepares an annual report for publication by the Steering Group of results achieved and specific improvements in the production or supply chain. In this

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685 *Ibid.*, p. 9-10.
686 *Ibid.*, p. 8.
687 *Ibid.*, p. 56.
688 *Ibid.*, p. 10.
689 *Ibid.*, p. 11.
690 *Id*.
691 Agreement on Sustainable Garment and Textile, p. 8.
692 *Ibid*., p. 8-9.
693 *Ibid*., p. 9.

report, the information submitted to the Secretariat by the enterprises is shown in aggregated form and cannot therefore be traced back to individual enterprises.[694]

4. Monitoring, sanction and enforcement

a. Monitoring body

The Parties to the G&T Agreement have established an operational complaints and disputes mechanism and have for this purpose appointed an independent Complaints and Disputes Committee.[695]

b. Form of monitoring/evaluation, timelines for investigating complaints, procedures for review

The Complaints and Disputes Committee "[…] will issue a ruling as speedily as possible, but in principle within six months at most, on any complaints and disputes submitted to it". It consists of three members and decides by majority of votes.[696] The Committee establishes its own procedure based on Principle 31 UGPs.[697]

The Secretariat may submit a dispute with an enterprise concerning (the quality of) its action plan and progress report to the Complaints and Disputes Committee, which will then assess, after hearing both sides of the argument, whether the company involved is acting in accordance with the G&T Agreement. The Committee's ruling will be motivated and submitted in writing to both the Secretariat and the company involved; the Secretariat will monitor compliance with the ruling by the company involved.[698]

A stakeholder who is suffering injury, loss or damage caused by one of the parties participating in the Agreement (or a party mandated to represent him) may submit a complaint to the Complaints and Disputes Committee, but not before the stakeholder and the company concerned have entered into direct dialogue and possibly mediation. When the Committee takes on a complaint, it makes public the subject of the complaint and the parties involved. If the company concerned is party to an equivalent grievance mechanism, the Committee will declare itself incompetent.[699]

The Complaints and Disputes Committee assesses, after hearing both sides of the argument, whether the company involved is acting in accordance with the Agreement. Its ruling is binding on all the parties involved in the procedure. It publishes its ruling and motivation while observing confidentiality where necessary.[700]

c. Form of sanctions

The Secretariat monitors compliance with the ruling.

In case a company fails to comply with a ruling concerning a dispute, the Secretariat informs the Steering Group. The Steering Group and/or one or more parties to the agreement will be entitled to issue written reminders to the company concerned. The Agreement further provides that "[i]f a dispute then arises between the enterprise concerned and one or more Parties to the Agreement with regard to failure to comply with the binding advice of the Complaints and Disputes Committee in a timely manner or at all, that dispute can be submitted to the Netherlands Arbitration Institute (NAI) by the enterprise concerned or one or more Parties to the Agreement within six months after the elapse of the time limit set by the Complaints and Disputes Committee.[701]

In case a company fails to comply with a ruling concerning a complaint, the Secretariat informs the Steering Group. If the ruling concerns the influencing of a supplier /

[694] *Ibid.*, p. 9.
[695] *Ibid.*, p. 11.
[696] *Ibid.*, p. 11-12.
[697] *Ibid.*, p. 11.
[698] *Ibid.*, p. 12.
[699] *Ibid.*, p. 12.
[700] *Ibid.*, p. 12.
[701] *Ibid.*, p. 13-14.

suppliers that cannot be induced to cooperate, the Steering Group may decide to place that supplier on a list of companies from which participating companies are not allowed to purchase anymore. In cases which involve an unjustifiable failure by a participating company to comply with the binding ruling of the Complaints and Disputes Committee, "[…] the parties involved and the parties to the agreement will be at liberty to make public substantive information on the complaint and their opinion of the failure to comply with the binding ruling of the […] Committee. In such cases, the Parties to the Agreement may propose to the Steering Group that the enterprise be expelled".[702]

5. Procedural Framework

See above under 4.

6. Available Remedies

Not Applicable

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

No estimate available as of yet.

8. Impact of the Regulation

See the agreement's annual reports 2016/2017 and 2018 at imvoconvenanten.nl/garments-textile/agreement/publicaties?sc_lang=en. The Dutch government's IRBC-policy, including the covenants, is currently under evaluation; the results of this evaluation will likely become public in the summer of 2019.

III. COMPARATIVE ANALYSIS

9. Comparisons between different regulations within the Member State

a. Corporate and directors' liability regime in case of violations or damage caused by operators in the EU parent company's supply chain, including relevant jurisprudence, even in the absence of legislation on due diligence[703]

As was mentioned before (see Overview), Dutch courts have over the past two decades been confronted with a variety of cases in which Dutch companies (sometimes along with their foreign subsidiaries) have been held to account for irresponsible business conduct in global value chains using existing legal bases in civil law or criminal law.[704] The most relevant case law with respect to IRBC-issues that has so far been rendered by Dutch courts stems from the aforementioned civil liability lawsuit between Nigerian farmers and NGO Milieudefensie against RDS and SPDC. The farmers claim that the oil spills at issue have caused damage to their lands and fishponds and have compromised their livelihoods, and that the defendant companies are liable for this damage on the basis of the tort of negligence under Nigerian law.[705]

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[702] *Ibid*., p. 14.
[703] This section is largely based on Enneking 2019 (forthcoming) II and Enneking et al. 2016, p. 139-220.
[704] See in more detail: Enneking 2019 (forthcoming) I; Enneking et al. 2016, p. 89-102.
[705] The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9854 (*Akpan et al. v. Royal Dutch Shell and Shell Petroleum and Development Company of Nigeria*), par.4.38-4.46.

In January 2013, the Hague District Court, on the basis of the evidence presented to it, came to the conclusion that the oil spills were the result of sabotage, and not the result of faulty maintenance as had been argued by the plaintiffs. This, in combination with the fact that under Nigerian law the operator of an oil pipeline is not liable, in principle, for harm resulting from oil spills caused by sabotage, led the court to dismiss the claims against the Nigerian Shell subsidiary SPDC in two out of the three proceedings.[706] The court also dismissed all of the claims against the parent company RDS, holding that under Nigerian tort law a parent company does not in principle have a legal obligation to prevent its subsidiaries from causing harm to third parties except under special circumstances, which the court did not find to exist.[707]

It did however grant one of the claims against the Nigerian subsidiary in one of the proceedings (the *Akpan* case) that related to two oil spills in 2006 and 2007 from an abandoned wellhead near the village of Ikot Ada Udo. It ordered SPDC to pay compensation for the resulting loss. Although starting, also here, from the assumption that the immediate cause of the oil spills had been sabotage, the court in this specific case decided that SPDC had been negligent in leaving behind the wellhead without adequately securing it, thus making it easy for saboteurs to unscrew its valves. This led the court to conclude that in failing to take sufficient precautions against the risk of sabotage, SPDC had violated the duty of care it owed to the neighbouring farmers.[708]

The case is currently pending before the Hague Court of Appeal, which rendered an interim judgment on a number of preliminary issues in 2015 but has not yet decided on the merits of the case.[709] The court did briefly address the issue of parent company liability in its 2015 decision, as this issue is very closely connected to that of personal jurisdiction. It stated, *inter alia*:

"Considering the foreseeable serious consequences of oil spills to the local environment from a potential spill source, it cannot be ruled out from the outset that the parent company may be expected in such a case to take an interest in preventing spills (or in other words, that there is a duty of care [...]), the more so if it has made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies, which is not to say that without this attention and involvement a violation of the duty of care is unthinkable and that culpable negligence with regard to the said interests can never result in liability".[710]

With this statement, it may have set the stage for a more lenient approach at the merits stage to the concept of parent company liability than that displayed by the Hague District Court.[711] In addition, the Hague Court of Appeal in its December 2015 decision confirmed the District Court's findings that jurisdiction existed not only with respect to the claims against the Netherlands-based parent company, but also with respect to those against the Nigeria-based subsidiary. Furthermore, like the Hague District Court, it rejected the defendants' argument that the claims against the parent company constituted an abuse of procedural rights as they were 'evidently without merit' and 'merely serve(d) as an anchor' to create jurisdiction over the claims against the subsidiary.[712]

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[706] The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9845 (*Dooh et al. v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria*), par. 4.43-4.58; The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (*Oguru et al. v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria*), par. 4.45-4.60

[707] The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9845, ECLI:NL:RBDHA:2013:BY9850, ECLI:NL:RBDHA:2013:BY9854.

[708] The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9854 (*Akpan et al. v. Royal Dutch Shell and Shell Petroleum and Development Company of Nigeria*), par.4.38-4.46.

[709] The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:2015:3586, ECLI:NL:GHDHA:2015:3587, ECLI:NL:GHDHA:2015:3588.

[710] The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:2015:3586 (*Dooh et al. v. Royal Dutch Shell and Shell Petroleum and Development Company of Nigeria*), para. 3.2.

[711] See, in more detail: Enneking 2019 (forthcoming) II.

[712] See, for example: The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:22015:3587 (*Akpan et al. v Royal Dutch Shell and Shell Petroleum and Development Company of Nigeria*).

b. The extent to which the legal regime translates a corporate duty to respect human rights and abstain from other abuse(s) and from causing damage into a civil law obligation by requiring a standard of reasonable care from the company[713]

As opposed to Dutch company law and Dutch criminal law, Dutch tort law (as laid down in book 6 of the Dutch Civil Code) is specifically geared towards protecting third parties' interests against the harmful effects caused by the activities of others, including both natural and legal persons, as it may be invoked at the initiative of an injured party in order to obtain compensation for the damage suffered from those responsible. As such, it is potentially very relevant when it comes to setting out duties of care for Dutch companies in relation to third parties (workers, neighbours, communities) who might be negatively impacted by human rights violations or environmental degradation caused by the activities of business enterprises (subsidiaries, sub-contractors, etc.) in their global value chains.[714]

Issues relating to responsible business conduct in global value chains typically relate to activities in weak governance zones, where legal standards relating to the protection of human rights, health and safety, and the environment are not very strict and/or poorly enforced. Therefore, the focus with respect to IRBC-related issues is on the possibilities offered by Dutch tort law to hold companies liable for violations of unwritten norms pertaining to due care for the interests of third parties. In proceedings on the basis of Dutch tort law by workers, neighbours of communities who have been exposed to human rights violations or environmental harm as a result of business activities in the global supply chains of Dutch companies, the open standard of "[…] an act or omission breaching […] a rule of unwritten law pertaining to proper societal conduct" will be especially relevant. [715] This open standard, which is generally referred to in the Netherlands as a duty of care (*ongeschreven zorgvuldigheidsnorm* or *zorgplicht*) opens up the possibility to include generally accepted non-binding standards of conduct in assessing the measure of care that could have been expected of the companies involved. Thus, the corporate responsibility to respect the human rights and environmental interests of third parties in global supply chains that is imposed by international soft law instruments like the UNGPs and the OECD Guidelines may, through this open standard, play a role in determining whether a Dutch company has violated a duty of care towards host country workers, neighbours or communities.

Despite the possibilities that exist in the Dutch field of tort law when it comes to addressing irresponsible business conduct in global value chains, no relevant case law exists as of yet. One reason for this is the fact that the corporate responsibilities to prevent and/or mitigate the risk of human rights abuse and environmental harm, as set out under the UNGPs and the OECD Guidelines, are a relatively recent phenomenon. At the same time, impediments exist with regard to the possibilities for host country victims to get access to home country courts in this type of litigation as a result of both jurisdictional and procedural barriers (*e.g.* with relation to the financing of claims, collective redress and access to evidence[716]). Furthermore, the potential role of Dutch tort law in this respect is limited by the fact that in these transnational tort cases it is usually host country rather than home country tort law that will be applied by the court in order to determine liability. In most European countries, the general rule as regards the applicable law in transnational tort cases is that the law will be applied of the country in which the harm has arisen, which in the IRBC context will typically be the host country where the human rights violations and/or environmental degradation have occurred.[717]

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[713] This section is largely based on: Enneking 2019 (forthcoming) I; Enneking et al. 2016, p. 162-196, 229-252; Enneking 2012, p. 229-244.

[714] Enneking et al. 2016, p. 217-222, 256-258.

[715] Art. 6:162(2) Dutch Civil Code.

[716] See, in more detail: Enneking 2019 (forthcoming) I; L.F.H. Enneking, 'Judicial remedies - The issue of applicable law', in: J.J. Alvarez Rubio & K. Yiannibas (eds.), *Human rights in business - Removal of barriers to access to justice in the European Union*, London: Routledge 2017 (hereinafter: Enneking 2017), p. 65-74; Enneking et al. 2016, p. 195-217.

[717] Art. 4 (1) Rome II Regulation. See, in more detail: Enneking 2017, p. 48-52; Enneking et al. 2016, p. 151-158.

Although there are some exceptions to this general rule, these have not yet been relied on in relevant cases before Dutch courts.[718]

c. The level of "duty of care"/"due diligence" required of the company, in order to fulfil their obligations, and the key elements of this legal "duty of care" [719]

Under the Dutch general provision on tort / delict (art. 6:162 Dutch Civil Code), the question whether a company has taken sufficient care in light of the potential risks of human rights violations and/or environmental harm that are inherent in its own activities or those of other companies in its global value chain, will be considered on the balance of four factors. These include: 1) the probability that the risk will materialize; 2) the seriousness of the expected damage; 3) the character and benefit of the activities in question; and 4) the burden of taking precautionary measures.[720] In essence, this balance between care and risk is rather pragmatic as it revolves around the aim of avoiding or mitigating the risk of harm on the one hand and the means (time, money, effort) by which to achieve this on the other. The larger the risks that are inherent in the company's activities, the more may be expected from it by way of precautionary measures. Special care is required when it comes to activities that are typical of the modern industrialized and motorized society, especially where the expected harm consists of personal injury or property damage as opposed to pure financial loss.

As the risk becomes more serious, the company's duty to take precautionary measures shifts from best practicable means to best technical means, in the sense that business-economic considerations will become less and less important in view of the aim of avoiding widespread and/or serious people- and planet-related harm. Slowly but surely, the obligation on the company to perform to the best of its ability in view of the costs involved, shifts in the direction of an obligation to perform to the best of its ability regardless of the costs and possibly even beyond, in the direction of an obligation to achieve (or, in this sense, rather: avoid) a particular result and stricter forms of liability.[721] Worth mentioning in this respect is a development in the Dutch Supreme Court's case law in the direction of what has been termed 'effective care', on the basis of which increasing significance is attached in certain areas, including where activities create certain foreseeable risks of personal injury for third parties (*gevaarzetting*), to the obligation to take effective precautionary measures.[722] Actual physical measures by the party creating the risk are preferred in this respect over mere warnings to those who may be at risk; in those situations where warnings are the designated type of precautionary measures, they too need to be effective in order for the party creating the risk to escape liability if that risk materializes.[723]

At the same time, for the company to be held liable for the harm caused by the wrongful behaviour in question on the basis of the Dutch general provision on tort/ delict, that behaviour needs to be imputable to it. This means that the risk involved in the company's activities must have been both foreseeable and avoidable, in the sense that a reasonably acting company could have known and foreseen it and could have taken steps to prevent the risk from materializing and/or to mitigate its harmful

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[718] For instance, art. 7 Rome II Regulation. See, in more detail: Enneking 2017, p. 52-61.

[719] This section is largely based on: Enneking 2012, p. 232-235. See also Enneking et al. 2016, p. 162-181.

[720] The seminal case in this respect is: Dutch Supreme Court, 5 November 1965, *NJ* 1966/136 (*Kelderluik*). See, for a discussion of this case in comparative perspective: G. Van Maanen, D. Townend & A. Teffera, 'The Dutch 'Cellar Hatch' judgment as a landmark case for tort law in Europe: A brief comparison with English, French and German law with a law and economics flavour', *European Review of Private Law* 2008/5, p. 871-889 (hereinafter: Van Maanen, Townend & Teffera 2008).

[721] See, in more detail: Enneking et al. 2016, p. 181-190; Enneking 2012, p. 245-247; L.F.H. Enneking, *Corporate social responsibility: tot aan de grens en niet verder?*, Utrecht: Wetenschapswinkel Rechten 2007, p. 71-73. See also more generally on the blurred borders between fault and strict liability: C.C. van Dam 2006, *European Tort Law*, Oxford: Oxford University Press 2006 (hereinafter: Van Dam 2006), p. 255-265.

[722] See, for instance: T. Hartlief, *Anno 2010*, Amsterdam: deLex 2009 (hereinafter: Hartlief 2009), p. 60-61.

[723] See, for instance, Dutch Supreme Court 28 May 2004, *NJ* 2005/105 (*Jetblast*). For a comprehensive discussion of this matter, see for instance: Van Maanen, Townend & Teffera 2008, p. 874-876; I. Giesen, *Handle with care!*, Den Haag: Boom Juridische uitgevers 2005.

consequences.[724] Expectations as to the knowledge and capacities of the company, which will generally be subjected to a rather objective test, are likely to be in line with the complexity of its business operations; after all, any societal actor may be expected to have the knowledge and capacities necessary to properly perform the societal activities it engages in.[725] Furthermore, Dutch case law suggests that companies may be expected, with a view to the interests of others, to be organized in such a way as to ensure the availability and use of the necessary knowledge and capacities throughout the organization.[726] Dutch case law also shows that especially with respect to activities in violation of unwritten (and/or written) rules of conduct and safety that seek to protect others against personal injury, Dutch courts will be quick to hold the actor liable for the resulting damages, even where the risk inherent in the activity and/or the harmful results were difficult to foresee.[727]

d. How directors' responsibility can be engaged[728]

Contrary to for instance Dutch tort law, Dutch company law (as laid down in book 2 of the Dutch Civil Code) applies in principle to all Dutch companies (*i.e.* all companies that are incorporated under Dutch law), regardless of the location where they carry out their operations.[729] It does not create specific duties of care for Dutch companies or their directors in relation to third parties (workers, neighbours, communities) who might be negatively impacted by human rights violations or environmental degradation caused by the activities of business enterprises (subsidiaries, sub-contractors, etc.) in their global value chains.[730] It also does not contain any general obligations for Dutch companies to implement the key elements of the responsibility to respect as set out in the OECD Guidelines or the UNGPs, like corporate codes of conduct on responsible business conduct in global value chains, human rights and environmental due diligence procedures and/or company level grievance mechanisms. Nonetheless, there are some provisions and there is some case law in the field of Dutch company law that may provide starting points for a further elaboration of the corporate responsibility to respect the human rights and environmental interests of third parties in global value chains.

One such starting point is the requirement that directors (and supervisory directors) in the execution of their tasks are to focus on the interest of the business enterprise associated with the corporation.[731] In the Netherlands, the notion of the corporate interest is interpreted broadly, in that it is considered to refer to the long-term interest of the business enterprise and comprises not only shareholder interests but also the interests of other stakeholders. According to the Dutch Corporate Governance Code[732], which contains soft law guidelines for good corporate governance of Dutch listed

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[724] See, on the element of imputability in the Dutch general provision on tort/delict: Enneking et al. 2016, p. 168-169; C.C. Van Dam, *Aansprakelijkheidsrecht – Een grensoverschrijdend handboek*, Den Haag: Boom Juridische uitgevers 2000 (hereinafter: Dam 2000), p. 247-286. See on the imputability of knowledge: Enneking et al. 2016, p. 131-133; B.E.L.J.C. Verbunt & R.F. Van den Heuvel, 'De rol van toerekening van wetenschap bij aansprakelijkheid voor zuiver nalaten in het rechtspersonenrecht', in: M. Holtzer et al. (eds.), *Geschriften vanwege de Vereniging Corporate Litigation 2006-2007*, Deventer: Kluwer 2007, p. 211-230; R.P.J.L. Tjittes, *Toerekening van kennis*, Deventer: Kluwer 2001.

[725] See generally: Van Dam 2006, p. 219-225; Van Dam 2000, p. 258-266. When applying an objective test, the court will make use of a standard of reference, such as the reasonable man or the *bonus pater familias*, or, in this context, a reasonably acting parent company.

[726] See generally, with further references: Van Dam 2000, pp. 266-275. For a more detailed discussion of the role that this requirement of proper knowledge management may play in corporate groups: Lennarts 2002. See also Enneking 2007, p. 67-68.

[727] See for instance Dutch Supreme Court 29 November 2002, *NJ* 2003/549 (*Legionellabesmetting Westfriese flora*). Especially with respect to risks related to moder-day society, such as those pertaining to climate change, new occupational diseases, radiation and/or food supply, even further-reaching duties may exist for those in a position to reduce those risks on the basis of the precautionary principle. See for instance Hartlief 2009, p. 96-97.

[728] This section is largely based on: Enneking 2019 (forthcoming) I; Enneking et al. 2016, p. 102-140.

[729] Arts 10:117 and 10:118 Dutch Civil Code.

[730] See, in more detail: Enneking et al. 2016, p. 102-140.

[731] Arts. 2:129(5) / 2:239(5) and 2:140(2) / 2:250(2) Dutch Civil Code. See in more detail and with a focus on the IRBC-context: L.F.H. Enneking & R. Heesakkers, 'Vennootschappelijk belang en (internationaal) maatschappelijk verantwoord ondernemen', in: B. Kemp, H. Koster, K. Schwarz (eds.), *Vennootschappelijk belang*, Deventer: Wolters Kluwer 2019 (forthcoming); Enneking et al. 2016, p. 105-110. Note that the Dutch company law provisions do not provide much guidance on what specific tasks (the members of) corporate boards are supposed to execute. Arts. 2:141 / 2:251 Dutch Civil Code suggest that those tasks include developing a company strategy, gaining insight into the general and financial risks of the company, and making sure that the company has an administrative and audit system in place,

[732] Monitoring Commissie Corporate Governance Code, 'De Nederlandse Corporate Governance Code' (2016). Available at mccg.nl/download/?id=3364.

companies, a company's stakeholders are those groups and individuals that have a direct impact on or are directly impacted by the company's pursuit of its goals, including employees, shareholders and other capital providers, suppliers, customers and other interested parties.[733] In executing their tasks, directors (and supervisory directors) are required to exercise due care with respect to the interests of all those who are directly involved in or linked to the corporation and the business enterprise that is associated to it, which means that they may need to refrain from doing things that would unnecessarily or unduly harm those interests.[734]

However, despite its broad interpretation and the duties of care that directors (and supervisory directors) may have with respect to the interests of certain stakeholders, the point of departure in Dutch company law remains that the corporate interest comes first, unless the law or the company's articles of incorporation provide otherwise.[735] Furthermore, there is no support in Dutch statutory or case law for an interpretation of the corporate interest and/or directors' duties that is as broad as to encompass 'external' stakeholders who are not directly involved in or linked to the corporation's business activities, like most stakeholders in the IRBC-context (*i.e.*, employees of subsidiaries or subcontractors, host country communities, the local environment). Consequently, directors (and supervisory directors) are only required (or, strictly speaking, permitted) to take the interests of such 'external' stakeholders into account if and to the extent that this is required by the law, follows from the company's articles of incorporation, or is in the company's own interest.[736] The latter may be relevant not only in situations where there is a business case for fair and sustainable production (like with green energy or slave-free chocolate), but also in situations where preventing negative impacts becomes a matter of risk-management due to the threat of legal or reputational penalties. However, there are many (empirical) studies that suggest that either situation is still the exception rather than the rule in the IRBC context.[737]

It should be noted that even if a duty could be said to exist under certain circumstances for directors (or supervisory directors) of Dutch companies to take the interests of 'external' stakeholders in the IRBC-context into account, Dutch company law does not provide them with enforcement mechanisms to hold (officers of) the corporation liable for any damage suffered as a result of its operations. This also explains why there is no case law in the field of Dutch company law that specifically deals with irresponsible business conduct in global value chains.[738] In theory, inquiry proceedings (the Dutch *enquêteprocedure*[739]) could provide an option for 'external' intervention in order to address serious and ongoing violations of human rights or environmental standards that occur as part of the international business activities of Dutch companies (and/or their subsidiaries). These proceedings may also be instituted in the general interest by for example trade unions or the Advocate General at the Dutch Supreme Court.[740] However, there are no examples to date of such proceedings being applied in the IRBC-context.

One case that may be mentioned here is the 1979 *Batco* case, which involved inquiry proceedings into the affairs of the company Batco Nederland, following a dispute between the company and the labour unions over the company's decision to close one of its factories. The Enterprise Division of the Amsterdam Court of Appeal came to the conclusion that there had been mismanagement by Batco in this respect, since the

733 *Ibid.*, p. 8.
734 Art. 2:8 Dutch Civil Code and Dutch Supreme Court, 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*).
735 Although there is no specific statutory provision to this effect, it is generally assumed that directors have a duty to obey relevant statutory rules, even if not doing so could be in the interest of the company. See, for instance: K.H.M. de Roo, 'De nalevingsplicht van het bestuur van rechtspersonen', *Ondernemingsrecht* 2018/1, p. 3-12. Furthermore, in managing the company the directors are subject to any restrictions flowing from the company's articles of incorporation. See for instance arts. 2:129(1) / 2:239(1) Dutch Civil Code.
736 Enneking et al. 2016, p. 103-117.
737 A complete overview and/or more detailed discussion of these studies goes beyond the scope of this chapter. See, however, for instance: A. van Baar, P.J. Engelen, J. van Erp, L.F.H. Enneking, 'Reputational penalties for corporate human rights violations' 2019 (forthcoming).
738 For a more detailed discussion including references to case law that may be indirectly relevant, see Enneking et al. 2016, p. 102-140.
739 Art. 2:344 Dutch Civil Code *et seq*.
740 Enneking et al. 2016, p. 117-133.

company had contravened elementary principles of responsible entrepreneurship by failing to properly take into account the factory workers' interests. One of the court's considerations was that while the company had expressly accepted the OECD Guidelines for Multinational Enterprises as a guideline for its policies in these matters, it had failed to live up to its responsibility under those guidelines to consult with the unions and the works council.[741]

Of course, there is always the possibility of seeking to hold directors (or supervisory directors) liable for damage suffered as a result of the company's operations on the basis of tort law (art. 6:162 Dutch Civil Code). However, it should be noted that the threshold for this type of what is often referred to as 'external' directors' liability is relatively high, as the point of departure in Dutch law is that it is the company that should be held liable if it commits unlawful behaviour that results in damage to third parties. A director can only under exceptional circumstances be held liable, next to the company, for the ensuing damage. In order for director's liability to arise in this context, it needs to be established that there is serious personal blame on the director in relation to the misconduct in question.[742] Perhaps also due to this high(er) threshold, there have so far not been any attempts to hold directors of Dutch companies personally liable on the basis of Dutch tort law for harm caused to third parties as a result of those companies' irresponsible business conduct in global value chains.

e. *Whether the concept of due diligence is used in the domestic regulation of other areas of corporate governance, and if so, what the legal elements are to establish a duty and/or liability (including, if any, for subsidiaries and in the supply chain).*

One field in which due diligence obligations exist that may be relevant to mention here is in the financial sector. There, obligations to conduct due diligence are incorporated in various statutes that aim to prevent the misuse of the financial system for money laundering and terrorist financing purposes, and to control integrity risks. These statutes include, among others, the Financial Supervision Act (*Wet op het financieel toezicht*), the Anti-Money Laundering and Counter-Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*), and the Trust Offices Supervision Act (*Wet toezicht trustkantoren*). They impose obligations on financial institutions to operate adequate 'customer due diligence' systems in order to know their customers and to avoid engaging in business relationships with persons who could damage trust in these institutions or, more specifically, are associated with money laundering or terrorist financing.[743]

It should further be mentioned that Directive 2014/95/EU on disclosure of non-financial and diversity information[744] has been transposed into Dutch law by Royal Decree (the *Besluit Bekendmaking niet-financiële informatie*).[745] In doing so, the text and meaning of the Directive have been followed relatively closely, even though the order of the relevant provisions has been changed and all of the Directive's terms have been translated into Dutch. The key phrase of "[…] due diligence processes implemented […]", for instance, has been translated to "[…] *toegepaste zorgvuldigheidsprocedures* […]". It is likely that in case of inconsistencies, Dutch courts will interpret the Dutch provisions in line with those of the Directive.

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741 Amsterdam Court of Appeals (Enterprise Division), 21 June 1979, NJ 1980/71 (*Batco*).

742 See, for instance: Dutch Supreme Court, 8 December 2006, *NJ* 2006/659 (*Ontvanger/Roelofsen*); Dutch Supreme Court, 23 November 2012, *NJ* 2013/302 (*Spaanse Villa*); Dutch Supreme Court, 5 September 2014, *NJ* 2015/21 (*Hezemans Air*); Dutch Supreme Court, 5 September 2014, *NJ* 2015/22 (*RCI/Kastrop*); Dutch Supreme Court, 6 Februari 2015, ECLI:NL:HR:2015:246 (*Crane/Staal*).

743 See, in more detail: De Nederlandse Bank, 'DNB Guidance on the Anti-Money Laundering and Counter-Terrorist Financing Act and the Sanctions Act', April 2015, available at toezicht.dnb.nl/en/binaries/51-212353.pdf.

744 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, *OJ* L 330/1 (15 November 2014).

745 Besluit van 14 maart 2017, houdende regels ter uitvoering van richtlijn 2014/95/EU van het Europees Parlement en van de Raad van 22 oktober 2014 tot wijziging van richtlijn 2013/34/EU met betrekking tot de bekendmaking van niet-financiële informatie en informatie inzake diversiteit door bepaalde grote ondernemingen en groepen (PbEU 2014, L 330) (Besluit bekendmaking niet-financiële informatie), *Stb.* 2017, 100.

f. How parent companies can be held liable in the Member States for the impacts of their subsidiaries, including non-EU based subsidiaries (including in comparative areas of corporate governance such as anti-bribery and corruption, anti-money laundering, taxation, competition, health and safety) [746]

In the field of Dutch company law, the notions of separate legal personality and limited liability are seen as fundamental, which means that in principle legal persons cannot be held liable for the actions of other legal persons. These notions also apply to corporations belonging to the same group; from a legal point of view they are viewed as separate entities and may therefore only be held liable for debts or actions of other group entities in exceptional cases.[747] As a consequence, under the present state of affairs there is little room for holding corporations liable for human rights abuses or environmental harm by their subsidiaries or supply chain partners on the basis of veil piercing doctrines.

Unlike Dutch company law, Dutch tort law does potentially offer possibilities for holding a company liable for harm caused to third parties not by its own activities but by the activities of others, such as foreign subsidiaries, sub-contractors or other companies in the value chain. Determining factors would be the degree to which the risks related to these activities could have been foreseeable for the company, and the degree to which it could have prevented or mitigated those risks on the basis of its *de facto* influence on / control of the relevant actors and activities. It has been suggested in the literature that such *de facto* control may result from a combination of a wide variety of circumstances that may typify the particular relationship between the company and the local operator. In relationships between a parent company and its foreign subsidiary, circumstances that may be relevant for establishing the existence of a controlling relationship may include: shareholding by the parent; de facto influence on the daily activities of the subsidiary by the parent; the existence and contents of group policies for example on health, safety and environmental matters and their monitoring and enforcement; the existence of a common brand; the need for 'parental' approval for certain business or policy decisions by the subsidiary; the appointment of parent company staff in key management functions within the subsidiary; and financial dependency of the subsidiary on the parent.[748] Whether the intensity of these connections is such as to be able to speak of a controlling relationship that gives rise to a duty of care on the part of the defendant parent company vis-à-vis third parties with respect to the harmful impacts of the acitivities of its subsidiary is dependent on the particular circumstances of each individual case; generally speaking, the mere fact of shareholding by the parent is not sufficient to assume that such a controlling relationship exists.[749]

There is a relevant line of case law in which Dutch parent companies of corporate groups have been held liable for breaching duties of care owed to their subsidiaries' (voluntary) creditors. These cases have not based on veil piercing doctrines (i.e. company law), but on the Dutch general provision on non-contractual liability (i.e. tort law). In each of these cases, the parent company was assumed to have insight into and control over the subsidiary's harmful activities due to its intensive involvement in (relevant aspects of) the management of that subsidiary.[750] All of these cases have so far revolved around parent company duties of care towards voluntary creditors of subsidiaries who have suffered financial harm due to the parent company's acts or omissions; there have not yet been any cases relating to human rights or environmental factors and/or to global value chains. However, there does not seem to be any reason why similar duties could not be accepted under Dutch tort law in relation to involuntary (tort) creditors like host

[746] This section is largely based on: Enneking 2019 (forthcoming) I; Enneking et al. 2016, p. 169-181; Enneking 2012, p. 229-244.
[747] See, for instance: Enneking et al. 2016, p. 126-131; Enneking 2012, p. 179-186.
[748] See, for example: R. Van Rooij, 'De moeder, de dochter, het concern en de calamiteit', in: M.J.G.C. Raaijmakers et al. (eds.), *Aansprakelijkheden*, Deventer: Kluwer 1990.
[749] *Id.*
[750] Well-known cases include: Dutch Supreme Court, 25 September 1981, *NJ* 1982, 443 (*Osby/LVM*); Dutch Supreme Court, 19 February 1988, *NJ* 1988, 487 (*Albada Jelgersma II*); Dutch Supreme Court, 12 June 1998, *NJ* 1998, 727 (*Coral/Stalt*); Dutch Supreme Court, 11 September 2009, JOR 2009, 309 (*Comsys*). See, in more detail: Enneking et al. 2016, p. 175-177; Enneking 2012, p. 235-238.

country workers, neighbours and communities who suffer personal injuries or other types of harm as a result of human rights violations and/or environmental degradation.[751] If anything, the threshold for a finding of liability tends to be lower under Dutch tort law in cases involving personal injuries and involuntary creditors than in tort cases pertaining to commercial parties and purely financial interests.[752]

g. How companies in the Member States can be held liable for the impacts of their supply chain, including non-EU based suppliers, and including suppliers beyond the first tier of the supply chain[753]

In principle, the general framework set out above with respect to the possibility of parent company liability under Dutch tort law would also apply to cases where a company is sought to be held liable in relation to the harmful impacts of the activities of other types of companies in the value chain, including non-EU based suppliers and suppliers beyond the first tier of the supply chain. Also in these cases, determining factors would be the degree to which the human rights and/or environmental risks related to the activities in question could have been foreseeable for the company, and the degree to which it could have prevented or mitigated those risks on the basis of its *de facto* influence on / control of the relevant actors and activities. However, it should be mentioned that whereas the existing body of case law with respect to parent company liability under Dutch tort law is very small, there is as of yet no case law whatsoever with respect to these other forms of corporate liability in relation to IRBC-issues in global value chains. This could change, however, if a Dutch court were to decide on the merits of a case like the civil liability lawsuit against Trafigura for its involvement in the Probo Koala waste dumping incident. In that case, claimants have sought to hold the defendant company liable in relation to the harm caused by the activities of a sub-contractor (i.e. the local company that was hired to dispose of the waste). However, it currently seems unlikely that this case will even reach the merits phase, since the organization filing the claims on behalf of the victims has so far been declared inadmissible by both the Amsterdam District Court (…)[754] and the Amsterdam Court of Appeal (in October 2018) [755], albeit for different reasons.

h. Whether any other area of law requires due diligence for cross-border corporate impacts, such as cross-border pollution or environmental hazards

N/a

i. Whether due diligence over own operations or the supply chain is a legal requirement in other areas of law regulating business, including whether due diligence is available as a defence

Yes, in the fields of company law and financial law, in particular in relation to commercial transactions between companies, changes in the ownership or control structures of legal persons, and (other) substantial financial transactions such as mergers and acquisitions, important investments or in case the intention exists of letting a company go public. There is no real Dutch equivalent for the term due diligence as it is used in this context; the closest approximation would be '*gepaste voorzichtigheid*' or '*verschuldigde oplettendheid*'. The objective of due diligence in this context is to get as much clarity as possible about the object of the transaction and/or the party with which the transaction is to be concluded, so that the investors or corporate decision makers involved can

[751] See, in more detail and with further references to case law: Enneking 2019 (forthcoming) I; Enneking et al. 2016, p. 162-181; Enneking 2012, p. 229-238. Similarly for instance: C. Van Dam, *Onderneming en mensenrechten*, The Hague: Boom Juridische uitgevers 2008, p. 55-63.

[752] Compare, for instance: Van Dam 2008, p. 67.

[753] First tier suppliers are understood as those suppliers with which the company does not have a direct contractual relationship.

[754] Amsterdam District Court 30 November 2016, ECLI:NL:RBAMS:2016:7841 (*Stichting Union des Victimes de déchets toxiques d'Abidjan/Trafigura Beheer*).

[755] Amsterdam Court of Appeal 16 October 2018, ECLI:NL:GHAMS:2018:3707 (*Stichting Union des Victimes de déchets toxiques d'Abidjan/Trafigura Beheer*).

assess whether the target company has made any unfavourable commitments, is involved in other issues, and/or may become subject to liability for past activities.[756]

A company may invoke the fact that it has conducted due diligence with respect to the object of the transaction and/or the party with which the transaction is to be concluded in order to defend itself against liability. An example is the situation in which banks underwrite a public offer of securities; if they have conducted adequate due diligence into the party offering the securities, they can under certain circumstances use this as a defence against liability in case the securities turn out to be less valuable than expected.[757] Another example is the situation in which an adequate due diligence procedure in relation to the risk of the target company of a merger or acquisition being or having been involved in bribery or corruption (ABAC due diligence) before the transaction takes place may result in a milder stance of enforcement authorities in case misconduct is revealed subsequent to the transaction.[758]

j. Whether the severity of the human rights abuses is relevant, taking into account the specific risks of certain activities

See above under 9a.

k. The burden of proof to hold a company liable for human rights or other impacts, including which regulations are the most efficient for victims in this respect[759]

One of the main principles of the Dutch law of evidence is that the plaintiff in a civil procedure before a Dutch court will have to furnish and where necessary prove the legal and factual circumstances underlying his claim.[760] Accordingly, in any civil liability case relating to IRBC-issues in global value chains that is brought before Dutch courts on the basis of Dutch tort law, the burden of proof with respect to the minimally required factual content of the legal rule upon which the claim is based will in principle be on the host country plaintiffs. Meeting this burden of proof may be particularly problematic for these plaintiffs, however, due to the lack of transparency that typically exists with respect to the internal control structures and transnational activities of the multinational corporations involved and the inequality of arms that typically characterizes the relations between these plaintiffs and their corporate opponents.[761]

Therefore, it is important to note that, at various points, Dutch substantive tort law allows for (partial) reversals of the burden of proof, assumptions of fact, or increased obligations for defendants to provide grounds, which together may in effect considerably lighten the host country plaintiffs' burden in these cases when it comes to furnishing and proving the necessary facts. Whereas the actual reversal of the burden of proof is relatively controversial and therefore also relatively rare, assumptions of fact and increased obligations for defendants to provide grounds are generally considered to be less drastic. A relevant example is the assumption of wrongfulness in tort cases pertaining to personal injury, where the fact that personal injury has arisen as a result of the defendant's activities may lead courts to assume, subject to proof to the contrary, that the defendant has failed to exercise due care. Also, when it comes to proof regarding the defendant's knowledge of the risk involved in a particular activity and his

[756] See, for instance: M. Brink & S. Martis, 'Enkele juridische aspecten van "due diligence"', *Bedrijfsjuridische berichten* 2010/29.

[757] See, for instance: V.P.G. de Serière, *Mr. C. Assers handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 2. Rechtspersonenrecht. Deel IV. Effectenrecht*, Deventer: Wolters Kluwer 2018, par. 468.

[758] See, for further detail: S. Oded & D.L.S. Ceulen, 'Anti-bribery due diligence in M&A transacties', *Bedrijfsjuridische berichten* 2016/18.

[759] The following is largely based on: Enneking 2012, p. 243-244.

[760] Article 150 Dutch Code of Civil Procedure.

[761] This issue is in turn closely related to the more procedural issue of access to evidence. See in more detail for instance: Enneking 2017, p. 38-77; Enneking et al. 2016, p. 205-217; L.F.H. Enneking, 'Multinationals and transparency in foreign direct liability cases - The prospects for obtaining evidence under the Dutch civil procedural regime on the production of exhibits', *The Dovenschmidt Quarterly* , 2013/3, p. 134-147..

capacity to prevent the risk from materializing (fault), the burden of proof is generally assumed to lie with the defendant rather than the plaintiff.[762]

As for proof of causation, difficulties may arise where the host country plaintiffs need to prove the existence of a *conditio sine qua non* connection between the allegedly wrongful activities by the corporate defendant(s) and the harm suffered. Also when it comes to primary causation, the burden of proof is in principle on the plaintiffs; in practice, however, Dutch courts may under some circumstances alleviate the burden of proof in this context.[763] It is generally accepted in Dutch case law, for example, that if the tortious acts or omissions create a certain risk of harm through violation of written or unwritten norms of safety and conduct and if this risk materializes, a causal connection between conduct and harm is in principle, subject to proof to the contrary, assumed to be present.[764] At the same time, Dutch courts have in various contexts come up with creative ways to deal with situations in which it is impossible to establish with certainty whether and to what extent a norm violation has resulted in damage, and/or whether the harm suffered has been caused by the norm violation in dispute.[765]

Secondary causation, on the other hand, is not a matter of fact but a matter of law and will thus be determined by the court on the basis of what has been established in the course of the procedure. Consequently, the burden of proof in relation to any assertion by the tortfeasor that the damage as a whole or particular types of loss are not sufficiently connected to the tortious conduct in dispute to be imputed on him, is much less important given that this involves a legal and not a factual determination.[766]

l. The implications of third State, EU and international regulation for regulating due diligence of business enterprises operating in the Member State

In the Netherlands, real discussion about more binding regulations with respect to (ir)responsible business conduct in global value chains is often fended off by referring to the anticipated negative effects of such regulations on the Dutch investment climate and the competitiveness of Netherlands-based companies. However, such claims are never substantiated with any evidence that such negative effects would indeed occur or have indeed occurred. In reality, studies relating to the effects on a country's investment climate of legislation, especially legislation relating to IRBC-related issues, remain scarce and otherwise lead to contradicting results.[767] Nonetheless, Dutch policymakers tend to remain wary of implementing national legislation that would 'burden' Dutch companies with more stringent obligations in relation to, for instance, human rights or environmental due diligence than their competitors from other European countries. This partly explains the Dutch preference for non-binding or at least less binding instruments like the IRBC-Covenants. It also explains why in discussions about more binding national regulations with respect to IRBC-issues it is often suggested that such regulations should be implemented at the EU-level, where they would be binding upon all EU-based companies, rather than in the Netherlands. Thus, it seems that the prospect of EU regulations in the IRBC context that would affecting not only Dutch companies but companies from all EU Member States, would actually be much more palatable for Dutch policymakers – who do not seem all that keen on being 'leaders' in this respect – than national regulations in that context.[768]

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[762] See, for further detail, for instance: I. Giesen, 'The burden of proof and other procedural devices in tort law', in: The European Centre of Tort and Insurance Law (ed.), *European tort law*, Wien: Springer, 2009, p. 49-67; I. Giesen, *Bewijs en aansprakelijkheid*, The Hague: Boom Juridische uitgevers 2001.

[763] See, for a more detailed discussion and further references to case law: C. Asser, A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte*, Deventer: Wolters Kluwer 2009 (hereinafter: Asser/Hartkamp & Sieburgh 6-II* 2009), par. 76-82.

[764] For more detail, see: I. Giesen, 'De aantrekkingskracht van Loreley - Over de opkomst en ondergang (?) van de 'omkeringsregel', in: T. Hartlief, S.D. Lindenbergh (eds.), *Tien pennestreken over personenschade*, The Hague: Sdu Uitgevers 2009, p. 69-86.

[765] See, with further references to case law: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 79-81.

[766] See, for instance: Asser/Hartkamp & Sieburgh 6-II* 2009, par. 82.

[767] See, in more detail: Enneking et al. 2016, p. 519-549.

[768] See, in more detail: Enneking 2019 (forthcoming) I.

As for international regulation, the focus is currently of course on the proposed Binding Treaty on Business and Human Rights. Dutch policymakers seem to still be struggling with determining their point of view on that matter, also in view of the current reluctance at the EU level to really engage with the discussions relating to this instrument. Dutch ngo's recently called on the Dutch government to take a more pro-active stance in view of the reluctance at the EU level, but whether this call will be followed up by the Dutch government is doubtful. In response to questions about this issue by members of Dutch Parliament, the Dutch Minister for Foreign Trade and Development Cooperation recently indicated that the Dutch government is not planning on plotting out an independent course in relation to the Treaty negotiations, as it is felt that they call for a joint EU approach.[769] As for legislative initiatives in neighbouring states, it should be noted that Dutch policymakers have over the past couple of years commissioned various studies looking at the developments on and impacts of such initiatives.[770] So far, this does not seem to have led however to concrete plans to come up with similar types of legislation in the Netherlands. See also the discussion on (the resistance against) the proposed Dutch CLDD act under 10 below.

IV. REGULATORY FRAMEWORK

10. Overall Review of Regulatory Framework

The covenant approach is currently the main focus of the Dutch government's policy on IRBC. It holds potential in mobilizing the companies involved and fostering an ongoing dialogue between these companies and the civil society actors that are also involved. At the same time, however, they provide an effective way of holding off further-reaching (more binding) regulatory initiatives. The level of ambition varies strongly among the different covenants. Level of participation by companies in the sector also varies strongly. Some of them are very selective in the issues addressed, e.g. only responsible investing. With the exception of the G&T covenant, they do not provide any recourse for victims. The Dutch government is currently evaluating its IRBC covenant policy, but it remains unclear against what benchmarks. If the evaluation turns out to be positive, it is likely that this will be interpreted as a sign that further-reaching (more binding) regulatory initiatives are not necessary. However, the question may be raised whether it is possible to reach such a (politically convenient) conclusion on the basis of the evaluations conducted. It should be noted that the covenant policy allows the Dutch government to comfortably sit back in its chair without having to do to much except facilitate the covenants. The question may be raised whether this is enough to dispose of its obligations under the UNGPs (although this is of course a soft law instrument) and other human rights instruments.

The CLDD Act , prior to its adoption by the Dutch Senate in May 2019, met with considerable resistance. The more legal arguments against adoption of the Act that were raised in the Senate can roughly categorized in arguments pertaining to legal uncertainty, insufficiently founded choices as to its scope and aims, and non-feasibility of its monitoring and enforcement mechanisms. One of the main arguments raised with

[769] Dutch Minister of Foreign Trade and Development Cooperation, 'Beantwoording vragen van het lid Alkaya over de voortgang van het VN-verdrag over mensenrechten en bedrijven' (23 April 2019), available at rijksoverheid.nl/documenten/kamerstukken/2019/04/23/beantwoording-kamervragen-over-voortgang-vn-verdrag-mensenrechten-en-bedrijven.

[770] The first of these was the comparative and empirical study on the duties of care of Dutch business enterprises with respect to international corporate social responsibility, the results of which have been published as Enneking et al. 2016 (and the original version of which is available online at rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgplichten-van-nederlandse-ondernemingen-inzake-internationaal-maatschappelijk-verantwoord-ondernemen. After that followed a comparative study on government policies to stimulate IRBC: Change in Context, 'Government policy to stimulate international responsible business conduct' (January 2018), available at business-humanrights.org/sites/default/files/government-policy-to-stimulate-international-responsible-business-conduct.pdf. This study was followed in turn by a more recent third study on strategies for responsible business conduct: PWC, 'Strategies for responsible business conduct' (December 2018), available at https://www.rijksoverheid.nl/documenten/rapporten/2019/02/22/strategies-for-responsible-business-conduct.

respect to legal uncertainty pertained to the liberal use of General Administrative Orders for issues that are fundamental for the Act's scope and consequences. Arguments raised with respect to scope and aims centred, among other things, around the Act's single-issue focus on preventing child labour rather than the protection of human rights and the environment more broadly, as well as its stated aim of consumer protection rather than the protection of the actual victims of child labour. Arguments raised with respect to monitoring and enforcement included, among other things, the fact that none of the existing public supervisors in the Netherlands have so far declared themselves to be capable and/or willing to fulfill the role of supervisor in this context, meaning that a completely new supervisory body will have to be established, and the expected difficulties of enforcing the Act's obligations extraterritorially.[771]

Despite these objections, a majority of the Dutch Senate voted in favour of the CLDD Act on May 14th, 2019. This is an interesting development, as despite its many flaws the Act does also hold potential for change in several ways. For instance when it comes to the public supervisor that will now have be introduced to monitor and enforce compliance, and when it comes to its international scope as regards companies covered (due to the focus on Dutch consumers' interests). It is important to note that one of the main challenges that faced the Act prior to its adoption was the lack of support not only among political parties (especially after the Dutch Labour party was decimated following the March 2017 Dutch general elections) but also among civil society actors. The latter felt left out of the drafting process and have generally been opposed to any regulatory initiative that does not include an access to remedy component. However, it could be argued that having a binding regulatory instrument in place, flawed and limited in scope as it may be, is better that having none at all. At the same time, the question may be raised whether it is even a good idea to try to combine both prevention and access to remedy in the same regulatory instrument, due to the risk that you may end up with sub-optimal results on both sides. In this sense, the CLDD Act, which mainly focuses on prevention, will undoubtedly create a really interesting precedent and potential case study.

All in all, the Netherlands has not exactly been the leader of the pack when it comes to introducing regulatory initiatives aimed at promoting IRBC and disposing of its obligations in this respect under the UNGPs and other HR instruments. However, this may have changed with the recent adoption of the CLDD Act. At the same time, its covenant approach potentially also does hold certain merit especially when it comes to impacting business conduct. It should be noted, however, that much like the CLDD Act the covenant approach does not do much to promote the right to remedy for victims of corporate human rights and environmental abuse. In this respect, victims remain largely dependent on the possibilities offered by the Dutch legal system for filing civil liability claims against Netherlands-based companies and, where relevant, their host country subsidiaries before Dutch courts. However, despite the fact that there a number of such cases have already been initiated in the Netherlands and a couple of interesting precedents have already been set, many of the practical and procedural barriers (including especially costs and access to evidence) that severely limit the possibilities in this regard, remain unaddressed. Even though the Dutch government says it is looking into these issues, it has as of yet not done much to try to resolve them. This means that for the time being it remains up to the victims and the NGOs representing them to come up with creative ways to try to work around these barriers. Although stakeholders can (under certain circumstances) also file a notification with the Dutch NCP in case of infringements of the OECD Guidelines for Multinational Enterprises by Dutch multinational enterprise, the Dutch NCP's mandate does not extend beyond assisting the parties involved to come to a mutually agreed solution of the issue in question through dialogue or mediation by the NCP, or via an external mediator. It does not have the authority to issue remedies in the form of compensation on its own initiative.[772]

[771] See, in more detail: Enneking 2019 (forthcoming) I.
[772] See, for more information on the specific instance procedure at the Dutch NCP: www.oecdguidelines.nl/notifications.

POLAND COUNTRY REPORT

Bartosz Kwiatkowski[773]

I. OVERVIEW

Polish regulations in the field of human rights and environmental protection are generally based on orders and prohibitions, only occasionally reaching for the due diligence instruments. Legal obligations to carry out risk assessments, mitigation or prevention of negative impacts, monitoring a given area, the disclosure of internal policies, or introducing grievance mechanisms, were not usually introduced to the legal system by the own initiative of the Polish legislator but due to the implementation or direct application of EU law. This is especially visible on the example of the environmental law, but also in such areas like anti-money laundering (AML) and counter-terrorism financing (CTF) or personal data protection. In the Polish legal system, there is still a lack of binding and effective regulations regarding the observance of human rights in the supply chain or protection of whistleblowers[774].

At the same time, the government promotes international standards in the area especially by translating and publishing OECD and UN guidelines, as well as preparing the National Action Plan on Implementing of UN Guidelines on Business and Human Rights for 2017-2020[775]. However, it did not lead to the creation of national or sectoral standards in the scope of human rights due diligence. On the other hand, there are entities - especially large corporations that are also subject to the obligation to report non-financial information - in which the relevant risk analysis, mitigation programs or internal policies are implemented[776]. Nevertheless, due to the lack of common regulations, these internal solutions differ from each other and are often far from ideal[777].

The due diligence approach begins to appear in the functioning of state bodies, for which the legislator imposes an obligation – for example as a stage preceding the implementation of compliance monitoring or as a tool for conducting control - for the analysis of the risk of infringing the law by a given enterprise.

However, it is important to point out that Polish law has covered for decades another concept of proper conduct, which – to some extent – includes elements which might be also found in due diligence – due care[778]. Its main legal source is art. 355 § 1 of the Civil Code[779] which states that a debtor is obliged to use the care commonly required in relations of a given type (due care). It is due care that the legal system most often identifies as a criterion for assessing the behaviour of an entity to which we want to attribute liability for non-performance or improper performance of an obligation, or for

[773] Frank Bold Foundation
[774] J. Smętek, *Ochrona sygnalistów (whistleblowers) ujawniających nadużycia w biznesie* [in:] A. Ploszka [ed.], *Biznes a prawa człowieka – współczesny stan dyskusji,* p. 22, available at: http://www.hfhr.pl/wp-content/uploads/2017/03/Biznes_a_prawa_cz%C5%82owieka-FINAL-2017-03-20.pdf;
[775] OECD Guidelines for Multinational Enterprises and sectoral guidance on the website of the Ministry of Investment and Development: https://www.gov.pl/web/inwestycje-rozwoj/wytyczne-oecd. Information regarding UN Guidelines NAP: https://www.gov.pl/web/dyplomacja/krajowy-plan-dzialania-na-rzecz-wdrazania-wytycznych-onz-dotyczacych-biznesu-i-praw-czlowieka-2017-2020 and the documents included there.
[776] The database containing CSR reports may be found here: http://raportyspoleczne.pl/biblioteka-raportow/. The database of Polish companies' non-financial reports published in connection with NFR Directive 2014/95/UE is available here: https://standardy.org.pl/raporty-spolek/.
[777] *The Association of Stock Exchange Issuers (Stowarzyszenie Emitentów Giełdowych), EY and GES as part of the 6th edition of the "ESG Analysis of Companies in Poland" project checked the level of reporting of non-financial data of the largest 140 companies listed on the WSE Main Market. The results of the analysis show that the companies in the second half of the year were not even in "starting blocks"* (https://www.rp.pl/Rachunkowosc/301179991-Czy-firmy-sa-gotowe-na-ujawnianie-danych-niefinansowych.html).
[778] Original Polish term is *należyta staranność* which is translated as *due care*, *proper diligence* or *due diligence*. In order to avoid misunderstandings, the Author of the report will use the term "due care".
[779] the Act of 23 April 1964 – the Civil Code (Ustawa z dnia 23 kwietnia 1964 roku - Kodeks cywilny, Dz.U.2018.1025, hereinafter: the Civil Code) http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf;

tort or delict[780]. The due care benchmark shall be objective. Its application in practice consists first of all in choosing a model that determines the optimal course of action in a given manner, appropriately concretised and socially approved, and then comparing the behaviour of the debtor with such a model of proceeding. It is not only the inconsistency of his behaviour with the model but also the opportunity and the obligation to predict the appropriate consequences of behaviour that determines whether the obligated person may be accused of not having due care in fulfilling his duties. A measure of a debtor's conduct, the essence of which lies in the failure to exercise due care, cannot be formulated at the level of unenforceable obligations, detached from experience and specific circumstances.[781] The mentioned model must take into account the special ability to predict, pre-emptiveness and reliability (conscientiousness) in the way a professional works, and the large requirements in terms of his knowledge and practical skills (professionalism). It should be emphasized that it is also about the knowledge that goes beyond the scope of specialist information in a given field, but is essential for professional activity[782].

At first glance the content of this provision might be surprising in the context of human rights and environmental law, however, other branches of law and jurisprudence use the doctrine and judicial conclusions made in relation to it. Although, the due care regulations do not introduce any obligations to perform a due diligence kind of process (including especially risk assessment, mitigation or prevention of negative impacts, monitoring a given area, or introducing grievance mechanisms), a proper due care conduct - according to what was stated above - may and shall include these elements. As will be described below the concept of due care is further developed especially in the area of environmental law.

Taking above into account in this report a brief description of elements of due diligence regulatory framework in Poland will be presented, focusing mostly on the environmental law, but covering to some extent also issues connected with non-financial reporting, employment law, entrepreneurs' law, health and safety regulations, AML, personal data protection, public procurement law and VAT tax law.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

A. Environmental law

1. Area of Regulatory Framework

Environmental law (including on climate change)

- Constitution of the Republic of Poland of April 1997 (Dz.U.1997.78.483, hereinafter: ***Constitution***)[783];
- The Act of 27 April 2001 *Environmental Protection Law* (Dz.U.2018.799, hereinafter: ***EPL***)[784];
- The Act of 14 December 2012 *on Waste* (Dz.U.2018.992, hereinafter: ***Waste Act***)[785];
- The Act of 13 April 2007 *on prevention and repair of environmental damage* (Dz.U. 2018.954, hereinafter: ***Environmental Damage Act***)[786];

[780] Olejniczak A., *Art. 355*. [in:] *Kodeks cywilny. Komentarz. Tom III. Zobowiązania - część ogólna*, Kidyba A. (ed.)., 2nd edition, LEX, 2014.
[781] Judgment of the Supreme Court of 23 October 2003, V CK 311/02
[782] Olejniczak A., *op. cit.*
[783] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf;
[784] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010620627/U/D20010627Lj.pdf;
[785] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20130000021/U/D20130021Lj.pdf;
[786] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20070750493/U/D20070493Lj.pdf;

- The Act of 10 July 2008 *on mining waste* (Dz.U.2017.1849, hereinafter: ***Mining Waste Act***)[787];

2. Scope

Description of the scope of regulation cannot be deprived of the necessary introduction, which requires a brief presentation of the main assumptions on which the Polish system of environmental law is based. The starting point is the provisions of the Constitution of the Republic of Poland, including the key Article 5 concerning the political principles of the state, emphasizing that the Republic of Poland ensures the protection of the environment, guided by the principle of sustainable development. This concept has been defined in the Environmental Protection Law Act stating that: sustainable development is understood as *such social and economic development in which the process of integrating political, economic and social activities takes place, while maintaining the natural balance and durability of basic natural processes, in order to guarantee the possibility of satisfying the basic needs of individual communities or citizens of both the present and future generations[788].*

The basic regulations at the statutory level are contained in the EPL, which includes general provisions describing a comprehensive approach to environmental protection. It should be emphasized that on the one hand, those provisions should be fundamental to the whole environmental law system but on the other hand, legislative practice, judicial (common and administrative) or law enforcement practice do not pay special attention to this role[789]. Therefore, the EPL is only one of many environmental law acts, in which the most important – from a practical point of view – are detailed provisions regulating the issues of protection against pollution, including issuing emission permits, or the functioning of the system of fees and administrative financial sanctions. The lack of a concept of the effective organization of the state bodies performing tasks related to environmental protection does not have a positive impact on the functioning of the Act.

The EPL regulates the issues of air protection, protection of land surface or protection against noise, whereas the issues related to e.g. water resources protection[790], waste management[791], access to information on the environment and its protection, public participation in environmental protection and environmental impact assessments[792] have been regulated in separate legal acts.

In the EPL the important regulations concerning due diligence can be found, starting with the precautionary principle, which can be treated as a principle of due care on the basis of the Supreme Court's jurisprudence which states: *Pursuant to Article 6(1) of the Environmental Protection Act, whoever undertakes activities that may have a negative impact on the environment is obliged to prevent such impact (the so-called preventive principle). In turn, according to Article 6(2) of the Act, whoever undertakes an activity whose negative impact on the environment has not yet been fully recognized is obliged, guided by caution, to take all possible preventive measures (the so-called precautionary principle). The precautionary principle, therefore, applies to activities undertaken in situations where the effects of such activities have not yet been fully recognized. The provision of Article 6(2) of the Act contains an exonerative premise, which is "guided by caution". The legislator does not define what it understands by the notion of foresight, although this circumstance is connected with the exclusion of liability. Per analogy iuris, the notion of caution may be identified with the "due care" formula used in Article 355 of the Civil Code. It is understood as the performance of the obligation "in a diligent manner", observing the required level of diligence (due care)[793]*.

[787] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20081380865/U/D20080865Lj.pdf.
[788] Article 3 point 50 of EPL.
[789] M. Górski *Prawo ochrony środowiska. Komentarz (Environmental Protection Law. Commentary,* CH. Beck, 2014.
[790] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20170001566/U/D20171566Lj.pdf.
[791] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20130000021/U/D20130021Lj.pdf.
[792] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20081991227/U/D20081227Lj.pdf.
[793] Judgment of the Supreme Court of 2 April 2014, IV CSK 404/13.

In practice, it [due care – BK] should be applied in such a way that all operators undertaking activities whose effects are not fully verified and which may have a negative impact on the environment should make a comprehensive analysis of how the risks can be eliminated. If the studies carried out indicate that, even if the state of the art is applied, the risks to the environment arising from the planned activity cannot be eliminated, the entity interested in undertaking the activity should resign from it or the results will be one of the grounds for refusal by the administrative authority to grant an authorisation to carry out such activity. The precautionary principle is also implemented by the obligation to take into account the hazards, resulting from the planning principle, as the outlining of hazards at the stage of project planning and then following the precautionary principle allows taking possible preventive measures. […]

Speaking of the precautionary principle, it should also be borne in mind that the obligation to use it can be concretised in various areas. Therefore, the doctrine emphasizes that activities aimed at implementing this directive may in practice be divided into three groups. The first of these should be the prevention of damage at their source. Legal regulations and [internal/sector – BK] standards can be used for this purpose. The second group should include activities aimed at neutralizing the side effects of human interference in the environment. In the third, there would be legal and social control of activities that carry with them the risk of damage to the environment[794].

3. Content of Regulation

EPL

The necessity to implement the precautionary principle at each stage of using the environment obliges entities to apply elements of environmental due diligence in those cases where there is a higher possibility of threats resulting from the functioning of a specific entity. Therefore, a plant posing a serious industrial accident hazard, depending on the type, category and quantity of hazardous substances present in the plant, are considered as plants with an increased risk of occurrence of an accident[795]. The same conditions shall be applied to plants where the possibility of hazardous substances occurring is foreseen[796].

The operator who runs a plant with a high or increased risk shall draw up, as part of the overall management system, a major-accident prevention programme and implement it - commensurate to the risks - by means of a safety management system, guaranteeing an adequate level of protection for people and the environment. The programme shall take into account the risks of industrial accidents and the complexity of the organization at the plant[797].

The accident prevention programme shall be revised where the need for it is justified on grounds of safety arising from changes in facts, scientific and technical progress or analysis of existing industrial accidents.

The operator who runs a plant with a high or increased risk is required to develop and implement - commensurate with the risks - a safety management system to guarantee an adequate level of protection of people and the environment, as part of the overall management system of the establishment[798]. The safety management system, based on a risk assessment, shall take into account the risks of industrial accidents and the complexity of the organization of the plant and include the organizational structure, responsibilities, procedures, processes, and resources necessary to define and implement the failure prevention programme.

If there are any circumstances indicating that the installation may have a negative impact on the environment, the environmental authority may, by way of decision, oblige

[794] Gruszecki K., *Art. 6.* [in:] *Prawo ochrony środowiska. Komentarz*,4th edition, Wolters Kluwer, 2016.
[795] Article 248 sec 1 of EPL.
[796] Article 248 sec 2 of EPL
[797] Article 251 of EPL.
[798] Article 252 of EPL.

the plant operator to prepare and submit an environmental review[799]. The environmental review includes:

- determination of the environmental impact of the installation, including in the case of a serious industrial accident;
- description of activities aimed at preventing and limiting the impact on the environment;
- comparison of the technology used with the technology meeting the requirements.

Additionally, EPL incorporates a series of provisions related to monitoring, reporting to the environmental authorities, controlling and limiting the amount of emissions to the environment[800].

Environmental Damage Act

The Environmental Damage Act is a transposition of Directive 2004/35/EC[801], which aims to ensure the full implementation of the "polluter pays" principle, as well as to eliminate barriers to the competitiveness of businesses operating in different EU countries, whose activities may become a source of a direct threat of environmental damage or harm.

The Act imposes an obligation to undertake preventive and corrective actions[802]: *In the event of a direct threat of environmental damage, the entity using the environment is obliged to take preventive actions immediately. In the case of environmental damage, the entity using the environment is obliged to:*

1) *take action to limit environmental damage, prevent further damage and negative consequences for human health or further weakening of the functions of natural elements, including immediate control, containment, removal or other limitation of pollution or other harmful factors;*
2) *take corrective action.*

If the direct threat of environmental damage has not been eliminated, despite preventive actions, or if environmental damage has occurred, the entity using the environment is obliged to immediately report this fact to the environmental protection authority and the provincial environmental inspector[803]. The report shall include *inter alia* a description of the preventive and corrective actions taken up to the moment of notification. Moreover, the entity using the environment, at each request of the environmental protection authority, is obliged to immediately provide information on the direct threat of environmental damage or environmental damage, also if there is a justified suspicion that such a threat or damage has occurred[804].

The entity using the environment is obliged to carry out preventive or remedial actions and inform the environmental protection authority about their termination[805].

Mining Waste Act

The waste holder operating a mining waste facility shall prepare a risk assessment of the mining waste facility, which has to determine the impact on the environment, with particular emphasis on the impact on the condition of air, groundwater and surface water, soil and landscape and include an indication of possible threats to a serious accident[806].

Waste Act

[799] Article 237 of EPL.
[800] E.g. article 148 of EPL.
[801] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Official Journal L 143 , 30/04/2004 P. 0056 - 0075
[802] Article 9 of environmental damage act.
[803] Article 11 sec 1 of environmental damage act.
[804] Article 11 sec 2 of environmental damage act.
[805] Article 19 of environmental damage act.
[806] Article 10 of mining waste act.

The Waste Act transposes the provisions of the EU Directive *on waste*[807].

It is worth noting that in connection with the latest amendment to the provisions of the analyzed Waste Act (the so-called 'waste package' of July 2018[808]), legal solutions appeared which impose additional significant obligations on entities participating in waste management. The introduced changes are related, among others, to the scourge of fires that have occurred in 2018 in landfills throughout Poland.

Presently, detailed requirements for waste storage include among others:

- the maximum permissible weight of waste stored at the same time and during the year;
- limitation of the permissible period of waste storage from 3 years to 1 year;
- an obligation to install a visual control system of the place of storage of waste, which will facilitate the supervision of the area and the handling of waste and, in the event of a fire, will help to identify the cause and possible arson perpetrators;
- an obligatory opinion of the State Fire Service on fire risks prepared prior to commencing waste management activities;
- an obligation to have collateral for claims, aimed at securing funds in case of necessity to cover the authorities' costs of alternative disposal and management of abandoned waste.
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4. Procedural Framework

Competent Court or other body

Environmental Damage Act

The body competent in matters of liability connected with (a threat of) environmental damage is the regional director for environmental protection[809].

A complaint against the decision of the administrative body may be lodged with the administrative court.

EPL

The catalogue of environmental protection authorities includes[810]:

- commune head, mayor or city president;
- staroste;
- regional council;
- the marshal of the voivodship;
- voivode;
- the minister responsible for environmental affairs;
- General Director of Environmental Protection;
- the regional director of environmental protection.

Mining Waste Act

The authority competent in matters related to mining waste is regional director of environmental protection, the marshal of the voivodship or staroste.

5. Impact of the Regulation

a. Impact of the national regulation on behaviour/policy of businesses (both direct and indirect)

[807] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), Official Journal L 312, 22.11.2008, p. 3–30
[808] The Act of 20 July 2018 amending the act on waste and some other acts (Dz.U.2018.1592)
[809] Article 7 of environmental damage act.
[810] Article 376 of environmental damage act.

Environmental Damage Act

The discussed regulation requires that entrepreneurs who want to avoid incurring additional costs will have to raise the standard of environmental management in the enterprise in the form of, among others, the introduction of appropriate environmental policies including due diligence for environmental impacts.

Waste Act

The introduced changes have a direct impact on the enterprises involved in waste management and will force them to take measures to improve the functioning of the enterprise, including sustainability and environmental due care.

b. Impact of the national regulation on victims and potential victims (both direct and indirect)

Environmental Damage Act

The provisions of the Act provide legal tools for intervention against entrepreneurs whose activities affect the state of the natural environment. Nevertheless, the administrative authorities competent in these matters are not provided with the necessary financial resources to commission the necessary expertise or studies[811]. This is particularly important in situations where the entrepreneur cannot be clearly identified for environmental damage and where appropriate evidence has to be taken.

Waste Act

According to the justification of the bill, the changes introduced in it shall have a positive impact on the natural environment and human health and life. The proposed legal and administrative instruments aim to contribute to reduce the occurrence of the problem of abandonment of waste and other irregularities (including the occurrence of fires at waste storage). The changes should have an indirect positive impact on the situation and regional development. The legal and administrative instruments contained in the provisions are aimed at limiting irregularities in waste management, which, in particular in the case of hazardous and municipal waste management, have a specific impact on the environment and health and life of people, both those employed in this sector and those adjacent to the areas where waste management activities are carried out. These instruments should facilitate the performance of the tasks by the administration (environmental authorities and the Inspection for Environment Protection) and thus contribute to the improvement of the supervision of waste holders carrying out waste management activities[812].

Additionally, it is worth noting that improper waste management, especially in cases where improper handling of waste took place on a large scale, may adversely affect the image of a certain region as well as the image of companies operating in its area.

c. Overall Review of Regulatory framework

Currently, despite the non-financial reporting obligations, there are no provisions that would require mandatory preparation and implementation of environmental policies among ordinary entrepreneurs using the environment. The environmental policy containing e.g. ways of reducing the carbon footprint of the enterprise or introduction of the Zero Waste philosophy should be drawn up by every entrepreneur regardless of the scale of the conducted activity. However, the content of the policy should be adequate to the type, character, and scale of the conducted activity.

[811]Cf. Justification of the draft act *amending the Act on Access to Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments and certain other acts*, p. 8 – 10, https://legislacja.rcl.gov.pl/docs//2/12302204/12454864/12454865/dokument305453.pdf

[812] Justification for the draft of waste act https://legislacja.rcl.gov.pl/docs//2/12312419/12514885/12514886/dokument344644.pdf

B. Non-Financial Reporting[813]

2. Scope

Rationale given by the State for the regulation

The Accounting Act (AA) was amended in 2016 by the Act of 15th December 2016 amending the Accounting Act (Ustawa z dnia 15 grudnia 2016 r. o zmianie ustawy o rachunkowości) and introduced primarily new article 49b of AA, describing the duty to draw non-financial statements. As the Justification for the draft Act amending the Accounting Act indicated [814], the obligation of extended reporting of non-financial information for specific units transposes the basic provisions of art. 19a of Directive 2013/34/EU introduced by Article 1 of Directive 2014/95/EU. Article 49b is the basic provision of the Accounting Act, specifying the scope of units and rules for reporting non-financial information. According to the draft Act, the statement will be created by the largest catalogue of huge public interest entities[815].

Size and type of business covered

Article 49b of AA applies to entities defined in article 3, paragraph 1e, subparagraphs 1 to 6 of AA (being organizational entities operating under the Banking Law, the provisions on trading in securities, the provisions on investment funds and on the management of alternative investment funds, the provisions on insurance and reinsurance activity, the provisions on cooperative savings and credit funds or the provisions on organization and operation of retirement pension funds, regardless of their level of revenues; entities intending to apply or applying for a permit to pursue activity under the provisions referred above, or for an entry into the register of the parties managing an alternative investment company (ASI) in accordance with the provisions on investment funds and the management of alternative investment funds; alternative investment companies within the meaning of the provisions on investment funds and the management of alternative investment funds, including those entitled to use the name "EuVECA" or "EuSEF"; issuers of the securities admitted to trading on one of the regulated markets of the European Economic Area and issuers intending to apply or applying for such admission; issuers of securities admitted to trading in the alternative trading system; domestic payment institutions; electronic money institutions) if they are companies, joint-stock limited partnerships, or such registered partnership or limited partnership in which all the partners or shareholders bearing unlimited liability are companies, limited joint-stock partnerships or companies or partnerships from other countries of a similar legal form to those companies or partnerships, provided that in the financial year for which financial statements are drawn up and in the year preceding this year such a company or partnership exceeds the following values:

1) 500 persons - in the case of average annual full-time employment;
2) 85 000 000 PLN – in the case of balance-sheet assets total at the end of the financial year, or 170 000 000 PLN in the case of net revenues from sales of goods and products for the financial year.

3. Extent of human rights, environmental, climate change, sustainability and governance matters covered

According to AA, the description of policies applied by the entity shall be included, with respect to social issues, employees' issues, environmental issues, respect for human rights and corruption prevention[816].

[813] According to Accounting Act (Ustawa o rachunkowości z dnia 29 września 1994 roku, Dz.U.2019.351); hereinafter: AA;
[814] The justification for the draft Act amending the Accounting Act, p. 1 http://orka.sejm.gov.pl/Druki8ka.nsf/0/9A9AE12E5EE6DFBAC125806F004DD80E/%24File/1045-uzasadnienie.docx;
[815] *Ibidem*, p. 4, 17.
[816] Article 49b paragraph 2 point 3 of AA;

Jurisdictional extent of business covered

As mentioned above, the obligation set in article 49b affects also companies from other countries than Poland of a similar legal form to the above-mentioned type of companies.

4. Content of Regulation

Overview and description of the required measures for business, and risk assessment requirements and risk mitigation measures

The AA bound the abovementioned entities to include in the report on activities – as a separated part – a statement on non-financial information. This statement at least needs to contain[817]:

1) a concise description of the entity's business model;
2) non-financial key performance indicators connected with the entity's activity;
3) description of policies applied by the entity with respect to social issues, employees' issues, **environmental issues, respect for human rights** and corruption prevention, as well as a description of results of applying these policies[818];
4) description of **due diligence** procedures – where the entity applies the same as part of the policies referred to in point 3;
5) description of significant risks connected with the entity's activities which may have an adverse impact on the issues referred to in point 3, including risks linked with the entity's products or its relations with the external environment, including with contracting parties, as well as a description of managing these risks.

a. Key legal elements of the obligation, and transparency and disclosure requirements

While drawing up the statement on non-financial information, as AA allows, the entity may apply any rules, including own rules, national, EU or international norms, standards or guidelines. The entity, however, shall include in the statement the information on the rules, norms, standards, and guidelines applied[819]. The entity shall present non-financial information to the extent it is necessary for assessing the entity's development, results and standing as well as the impact of the entity's activities on the issues such as social issues, employees' issues, environmental issues, respect for human rights and corruption prevention[820]. Where there is a link between the values shown in the annual financial statements and the information included in the statement on non-financial information, the statement shall include references to amounts shown in the financial statements as well as additional explanations regarding these amounts[821].

If the entity does not apply policy as regards one or several issues referred to above, the entity shall include in the statement on non-financial information the reasons for not applying the policy[822]. This provision is important as it indicated that the company is obliged to state the functioning of a policy if one exists, however, the entity is not obliged to have such a policy.

In exceptional cases, the entity may omit in the statement on non-financial information the information on expected events or cases being the subject of pending negotiations if – in accordance with a justified opinion of the entity's manager or members of the supervisory board or another body supervising the entity – disclosure of such information has a significant adverse impact on the market situation of the entity. The entity may not omit this information if it prevents the due and objective assessment of

[817] Article 49b paragraph 2 of AA;
[818] It has to be underlined that this regulation cannot be treated as a source of obligation for enterprises to prepare and implement such policies.
[819] Article 49b paragraph 8 of AA;
[820] Article 49b paragraph 3 of AA;
[821] Article 49b paragraph 4 of AA;
[822] Article 49b paragraph 5 of AA;

the entity's development, results and standing as well as the impact of the entity's activities on the social issues, employees' issues, environmental issues, respect for human rights and corruption prevention. If this occurs, the entity should indicate it in the non-financial information[823].

It is important to note that the entity is permitted not to draw up the statement on non-financial information if it separately prepares, together with the report on activities, a report on non-financial information and publishes it on its website within 6 months from the balance-sheet date. The entity shall contain in the report on activities the information on drawing up a separate report on non-financial information in accordance with the requirements specified above[824].

Article 55 of AA states that in case of the controlling entity which is the entity referred to in Article 3, paragraph 1e, points 1 to 6 if AA and a company, a limited joint-stock partnership, or such a registered partnership or limited partnership in which all the partners or shareholders bearing unlimited liability are companies, limited joint-stock partnerships or companies or partnerships from other countries of a similar legal form to those companies or partnerships; and a controlling entity of a capital group if aggregate data of the controlling unit and all subsidiary entities of every level as on the balance-sheet date of the financial year and the balance-sheet date of the preceding financial year:

- having made the consolidation exclusions referred to in Article 60, paragraphs 2 and 6, exceed the values referred to in Article 49b, paragraph 1 of AA and prior to making the consolidation exclusions exceed the following values: 500 persons – in the case of average annual full-time employment and 102,000,000 PLN – in the case of balance-sheet assets total at the end of the financial year or 170,000,000 PLN in the case of net revenues from sales of goods and products for the financial year;
- also includes in the report on the capital group's activities – as a separated part – a statement of a capital group on non-financial information properly drawn up in accordance with the requirements specified in the article 49b of AA[825].

Also, AA enables, the controlling entity is permitted not to draw up the statement of a capital group on non-financial information, provided that it separately prepares, together with the report on the capital group's activities, a report of a capital group on non-financial information and publishes it on its website within 6 months from the balance-sheet date. The entity shall contain in the report on the entity's activities the information on drawing up a separate report of a capital group. It is assumed that the controlling entity drawing up the statement of a capital group on non-financial information or the report of a capital group on non-financial information in accordance with the requirements of the AA fulfils the obligation to disclose the indicators and information on social issues, employees' issues, environmental issues, respect for human rights and corruption prevention[826].

An entity which is a lower-level controlling entity is permitted not to draw up the statement of a capital group on non-financial information or the report of a capital group on non-financial information if its higher-level controlling entity having its seat or head office on the territory of the European Economic Area draws up a statement of a capital group on non-financial information or a report of a capital group on non-financial information in accordance with the provisions of law of the European Economic Area state by which it is governed, which statement or report shall cover this entity and its subsidiary entities of every level. In this case, the entity shall disclose in the report on activities the name and seat of its higher-level controlling entity which draws up the statement or report of a capital group on non-financial information, which statement or report shall cover this entity and its subsidiary entities of every level. In this case,

[823] Article 49b paragraph 6 and 7 of AA;
[824] Article 49b paragraph 9 of AA.
[825] Article 55 paragraph 2b of AA;
[826] Article 55 paragraph 2c and 2d of AA;

according to the article 69 of AA, the manager of an entity shall place on the website of such entity a capital group statement on non-financial information or a capital group report on non-financial information drawn up by the higher-level controlling entity, within 30 days of the day of its approval but no later than within 12 months of the balance sheet date of such controlling entity, each of them translated into the Polish language by a sworn translator[827].

b. Obligations in relation to subsidiaries and business relationships in the supply chain

According to AA, the entity which is a subsidiary entity, including a lower-level controlling entity, is permitted not to draw up the statement on non-financial information or the report on non-financial information if its higher-level controlling entity having its seat or head office on the territory of the European Economic Area draws up a statement of a capital group on non-financial information or a report of a capital group on non-financial information in accordance with the provisions of law of the European Economic Area state by which it is governed, which statement or report shall cover this entity and its subsidiary entities of every level. In this case, the entity shall disclose in the report on activities the name and seat of its higher-level controlling entity which draws up the statement or report of a capital group on non-financial information, which statement or report shall cover this entity and its subsidiary entities of every level[828]. If this occurs, pursuant to the article 69 of AA, the manager of an entity shall place on the website of such entity a capital group statement on non-financial information or a capital group report on non-financial information drawn up by the higher-level controlling entity, within 30 days of the day of its approval but no later than within 12 months of the balance sheet date of such controlling entity, each of them translated into the Polish language by a sworn translator[829].

5. Monitoring, sanction, and enforcement

Form of sanction

According to the article 79 of AA, constituting the rules of criminal liability, whoever, against the provisions of the AA, fails to place the documents on an entity's website (in a situation when the entity is permitted not to draw up the statement on non-financial information if it separately prepares, together with the report on activities, a report on non-financial information and publishes it on its website within 6 months from the balance-sheet date and instead contains in the report on activities the information on drawing up a separate report on non-financial information in accordance with the requirements specified), shall be liable to a fine or a penalty of restriction of liberty[830].

What is more, as it is stated above, the statement on non-financial information is a separate part of the report on activities. This decides on applying article 4a of AA, according to which the manager of an entity and members of the supervisory board or of another body supervising the entity shall ensure that the report on activity of a capital group, in particular, are in compliance with the requirements set forth in AA – therefore also in compliance with the provisions of AA concerning the obligation of stating non-financial information. In case of breach of this duty, the manager of an entity and members of the supervisory board or of another body supervising the entity shall be jointly and severally liable to the company (partnership) for any damage caused by acts or omissions constituting this breach[831].

It is relevant as well that pursuant to AA, that whoever allows the following: the case when the report on activities is not prepared, prepared against the provisions of AA (therefore including those concerning the obligation to include in the report of activities

[827] Article 55 paragraph 2e of AA.
[828] Article 49b paragraph 11 of AA;
[829] Article 69 paragraph 5 of AA;
[830] Article 79 point 4a of AA;
[831] Article 4a paragraph 1 and 2 of AA;

the statement of non-financial information) or presentation of untrue data therein - shall be liable to a fine or a penalty of deprivation of liberty of up to 2 years, or both penalties together[832]. Moreover, whoever fails to file the report on activities or report on activities of a capital group shall be liable to a fine or a penalty of restriction of liberty[833].

C. Entrepreneurs' Law[834]

2. Scope

Rationale given by the State for the regulation, and extent of human rights, environmental, climate change, sustainability and governance matters covered

In the Justification of the draft of Entrepreneurs' Law (EL) in 2018 indicates that the constitutional obligation to protect freedom of economic activity from the unlawful interference of other entities, EL shall be fulfilled by explicit commitment of the entrepreneurs to perform their economic activity in compliance with the rules included in article 9 of EL, which also include the issue of human rights and freedoms.

The principle of fair competition (one of the rules included in article 9 EL) as a legal determinant of the performance of entrepreneurs' business activity has not only strictly juridical dimension, but also includes elements of a more universal meaning, including matters in the scope of ethics, morality, culture, organizational rules and the essence of the market economy. In the practical sense – as justification describes - fair competition can be defined in a negative sense as entrepreneurs abstaining from acts of unfair competition, understood as actions contrary to the law or good practices that threaten or violate the interest of another entrepreneur or client.

Therefore, the legislator decided that the content of the principle specified in article 9 EL cannot be reconstructed by solely following the content of legal provisions, but it is necessary to reach for various non-legal points of reference. Moreover, as it is mentioned in the justification of the draft, the above rule *was also rooted in the UN Guiding Principles on Business and Human Rights, which were adopted in 2011 by the UN Human Rights Council*, which takes into consideration the duties of states concerning the protection of the rights of individuals when it comes to their infringement by the companies. In justification of the draft of EL, it is further amplified that the EU Member States – on the basis of commitments made in the document *EU Action Plan on Human Rights and Democracy 2015-2019* and in the conclusions to the Action Plan – were bound to adopt national action plans implementing the UN Guidelines. By the time that EL was drafted, the Polish Ministry of Foreign Affairs had coordinated the process of implementation; meanwhile, the inter-ministerial and public consultations concerning the National Action Plan on Implementing the UN Guidelines came to an end.

Considering the above, the legislator indicated that EL contains direct referral to the obligation to respect and protect human rights and liberties. It does not, however, explicitly relate to HRDD except for stressing out the role of enterprises in the protection of human rights and the need of securing by the state the access to remedies for the entrepreneurs' victims[835]. Despite the reference to the necessity of ensuring the possibility of claiming remedies to the harmed individuals, the EL itself does not contain any regulation enabling such actions.

[832] Article 77 point 2 of AA;
[833] Article 79 point 4 of AA:
[834] Entrepreneurs' Law (Ustawa z dnia 6 marca 2018 roku Prawo przedsiębiorców, Dz.U.2018.64.; hereinafter: „EL"); http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000646/U/D20180646Lj.pdf;
[835] [835] Justification of the draft of Entrepreneurs' Law, p. 31 - 32, http://orka.sejm.gov.pl/Druki8ka.nsf/0/9E761CF9B6B03CBCC12581E10059DD88/%24File/2051.pdf.

3. Content of Regulation

Overview and description of the required measures for business

The preamble of EL recalls principles as the constitutional principle of freedom of economic activity, the rule of law, legal certainty, non-discrimination, and sustainable development. In addition, EL states that an entrepreneur may take any actions, except for those prohibited by law[836]. Moreover, EL obliges the entrepreneur to pursue economic activity according to the principles of fair competition and with respect to good customs and legitimate interests of other entrepreneurs and consumers, and **to respect and protect the human rights and freedoms[837].** Nevertheless, despite the explanation for constituting the article 9, EL does not develop this obligation or actions that the entrepreneur is bound to perform to be in compliance with this duty[838]. Moreover, there is a lack of provision that would address this principle in the case of infringing it by the entrepreneur, nor there are objectives of the entity's liability or responsibilities to the victims.

4. Monitoring, sanction, and enforcement

According to the provisions of EL, the general rule concerning the control of the economic activity of entrepreneurs is that it is planned and performed upon preparing a previous analysis of the probability of law infringement when performing the economic activity. This analysis should identify the scope of the subject areas in which the risk of violation is the greatest[839].

As EL states, in the event of becoming aware of the economic activity contrary to the provisions of EL, as well as in the event of a threat to life or health, the risk of property damage in large sizes or imminent environmental risk as a result of this activity, the village mayor, mayor or city president immediately notifies competent authorities. Moreover, the competent authorities cannot immediately inform the above bodies about the actions taken, the village mayor, mayor or city president might impose, through the decision, stopping the business activity for the necessary period, though not longer than 3 days[840].

D. Labour Code[841]

2. Scope

Rationale given by the State for the regulation

The introduction of the obligation to assess and document occupational risks related to work performed in the Labour Code (LC) results from the provisions of Directive 89/391 and occurred through the Act of November 14, 2003, amending the Labour Code and changing other Acts[842]. In its justification, it is stated that the need for the amendment of LC arises from the necessity of adapting into Polish legislation European Union laws[843].

[836] Article 8 of EL;
[837] Article 9 of EL;
[838] Justification of the draft of Entrepreneurs' Law, p. 32, http://orka.sejm.gov.pl/Druki8ka.nsf/0/9E761CF9B6B03CBCC12581E10059DD88/%24File/2051.pdf.
[839] Article 47 paragraph 1 of EL;
[840] Article 60 paragraph 1, 2 and 3 of EL;
[841] Labour Code (Ustawa z dnia 26 czerwca 1974 roku Kodeks pracy, tekst jednolity: Dz.U.2018.917); hereinafter: LC, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf;
[842] http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20032132081/T/D20032081L.pdf;
[843] Justification of the Act of November 14, 2003, on amending the act - Labour Code and changing other acts, p. 3 http://orka.sejm.gov.pl/Druki4ka.nsf/($vAllByUnid)/2C5F50B0FEEEA959C1256C850057A9AA/$file/1162.PDF

Extent of human rights, environmental, climate change, sustainability and governance matters covered

LC defines the rights and obligations of employers and employees[844]. Its chapters concern e.g. basic rules of labour law[845], equal treatment in employment[846], employment of young adults[847], work safety and hygiene[848], consideration of claims arising from employment relationships and labour courts[849] or responsibility for offences in cases of violation of employee's rights[850]. The provisions describe employers' duties (e.g. to prevent mobbing[851], to provide equal treatment in employment[852], to have respect for dignity and other personal rights of the employee[853]) and constitutes several prohibitions (e.g. inadmissibility of any discrimination in employment, direct or indirect[854] or general prohibition to employ a person who is not over 15-years-old[855]). There is no general obligation to perform due diligence in the matters of human rights or environmental aspects in supply chains, nevertheless some of the companies create appropriate policies, e.g. Polish LPP joint-stock company created documentation regulating the cooperation with suppliers - a Code of Conduct for the suppliers, LPP Quality Guidebook or LPP Sustainable Development Strategy[856]; also CCC joint-stock company provides the Code of Conduct for the suppliers[857].

In the context of this analysis, it is crucial that one of the principles is that the employer is obliged to ensure for the employees safe and hygienic work conditions[858] (and therefore refers to human rights such as health, life or security), and as for due diligence duty of the employer, it is embodied in particular in Section VI of Chapter 10 - Preventive health protection of LC.

3. Content of Regulation

Overview and description of the required measures for business; obligations in relation to subsidiaries and business relationships in the supply chain; and risk assessment requirements and risk mitigation measures

Due to provisions of LC describing the employer's duties in the matters connected with protecting the employees' life and health through ensuring safe and hygienic working conditions to his/her employees by an appropriate use and application of the achievements of science and technology[859]. In particular, the employer is obliged to ensure **the development of a coherent policy preventing accidents at work and occupational diseases** which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment[860].

The employer is obliged to assess and document the occupational risk connected with the work performed and apply the necessary preventive measures to reduce such risk as well as inform the employees of any occupational risk connected with the work performed and of the rules for protection against hazards[861].

[844] Article 1 of LC;
[845] Section I Chapter II of LC;
[846] Section I Chapter IIa of LC;
[847] Section IX Chapters I-VI of LC;
[848] Section X Chapters I-XIII of LC;
[849] Section XII Chapters I-III of LC.
[850] Section XIII of LC;
[851] Article 94^3 paragraph 1 of LC;
[852] Article 94 point 2b of LC;
[853] Article 11^1 of LC;
[854] Article 11^3 of LC;
[855] Article 190 paragraph 2 of LC;
[856] As stated in LPP non-financial report https://www.lppsa.com/wp-content/uploads/2018/06/Niefinansowy-raport-LPP-za-2017.pdf;
[857] CCC Code of Conduct for the Suppliers https://firma.ccc.eu/Media/download/814/kodeks-postepowania-ccc-pl.pdf;
[858] Article 15 of LC;
[859] Article 207 paragraph 2 of LC;
[860] *Ibidem.*
[861] Article 226 of LC.

Moreover, pursuant to LC, an employer is obliged to apply measures preventing occupational diseases and other diseases connected with the work. This duty is fulfilled particularly through:

- ensuring permanent efficiency of facilities limiting or eliminating factors in the working environment which are harmful to health and of facilities for measurement of such factors;
- conducting, at the employer's cost, tests and measurements of factors harmful to health as well as records and keeps the results of such researches and measurements and make them accessible to employees[862].

LC contains a reference that the Minister of Labour and Social Policy in agreement with the Minister of Health and Social Welfare shall establish through an ordinance, general health and safety regulations regarding work performed in various branches of work[863].

4. Monitoring, sanction, and enforcement

Monitoring body

According to the provisions of LC, the supervision and control of compliance with labour law, including the provisions and the principles of work safety and hygiene are enforced by the State Labour Inspection. The State Sanitary Inspectorate is responsible for supervision and control of compliance with the principles and provisions on work hygiene and the conditions of the working environment. The procedures and organization of that inspection are regulated in different laws[864].

Social control of compliance with labour law, including the provisions and rules of work safety and hygiene is to be enforced by the social labour inspectorate, which organization, tasks, and rights, as well as the principles of cooperation thereof with the State Labour Inspectorate and other authorities of supervision and control, are regulated in different laws[865].

An employer employing more than 100 employees is obliged to create the service of safety and hygiene of work, which is advising and controlling body for the matters of safety and hygiene of work. An employer with less than 100 employers entrusts the above responsibilities to the employee who performs different work[866].

An employer employing more than 250 employees has to create a commission of work safety and hygiene as the advising body[867].

Form of monitoring/evaluation, timelines for investigating complaints, procedures for review

Supervising bodies when controlling, for example, enterprises, are obliged to take precautions aimed at creating safe and hygienic work conditions, in particular by[868]**:**

- providing their assistance to enterprises and organizational units in carrying out the tasks related to work safety and hygiene;
- performing a yearly assessment on the state of safety and hygiene in enterprises and to determine the directions of improvement of this condition;
- to initiate and conduct scientific research on health and safety at work when such need or opportunity occurs.

[862] Article 227 of LC;
[863] Article 237^{15} of LC;
[864] Art. 18^{4} paragraph 1-3 of LC;
[865] Art. 18^{5} paragraph 1 and 2 of LC;
[866] Article 237^{11} of LC;
[867] Article 237^{12} of LC.
[868] Article 237^{14} of LC;

The doctrine indicates that the obligations and the wording of duties are very general, what poses a danger that in reality the above-mentioned duties are not performed and enforced[869].

Form of sanction

An employer shall be responsible for the level of work safety and hygiene in the employing establishment[870].

The provisions of LC describing offences connected with work safety and hygiene in employment, constitute that any person responsible for the level of work safety and hygiene in an employing establishment or otherwise managing employees or other natural persons, who fails to observe the provisions or principles of work safety and hygiene, shall be liable to a fine from 1,000 up to 30,000 PLN[871].

What is more, LC states that an employee may also terminate a contract of employment without a notice in a situation when the employer has committed serious violations of basic duties towards the employee[872]. Such violation[873] is - among others - a breach of occupational health and safety conditions in accordance with the applicable provisions of LC. In such a case, the employee shall have **the right to compensation equal to an amount of remuneration for the period of notice**. In the case of termination of the contract of employment concluded for a definite period, the compensation shall be equal to an amount of the remuneration for the period of intended validity of the contract, but for not more than the notice period[874].

E. Health and safety[875]

2Scope

Extent of human rights, environmental, climate change, sustainability and governance matters covered

The provisions of the Ordinance on general health and safety at work (GHS) concern human life, health, and safety at work. The laws concerning, in particular the assessment risk, were introduced through the amendments to the GHS in 2007 and 2008.

3. Content of Regulation

Overview and description of the required measures for business, and key legal elements of the obligation

The employer fulfils the obligation to provide the employees with health and safety at work, in particular by preventing work-related hazards, proper organization of work, application of necessary preventive measures and information and training of employees[876]. The above duty should be implemented on the basis of general rules on the prevention of work-related accidents and diseases, in particular by:

- risk prevention;
- **conducting a risk assessment related to threats that cannot be excluded;**
- elimination of threats at the source of their occurrence;

[869] Cf. Wyka T., *Art. 237[14]* [in:] *Kodeks Pracy. Komentarz,* Baran K. (ed.),, WKP 2018.
[870] Article 207 of LC;
[871] Article 283 paragraph 1 of LC;
[872] Article 55 § 1^1 of LC;
[873] Cf. the judgment of the District Court in Toruń. October 27, 2017, act signature IV P 63/17, https://orzeczenia.ms.gov.pl/content/$N/151025200002021_IV_P_000063_2017_Uz_2017-11-13_001;
[874] Article 55 § 1^1 of LC;
[875] According to the Ordinance of the Minister of Labour and Social Policy of September 26, 1997 on general health and safety at work (tekst jednolity: Dz.U.2003.169.1650.); hereinafter: GHS, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19971290844/O/D19970844.pdf.
[876] § 39 paragraph 1 of GHS;

- adaptation of work conditions and processes to the employee's capabilities, in particular through appropriate design and organization of workplaces, selection of machines and other technical equipment and tools, as well as production methods and work - taking into account the reduction of workload, especially monotonous work and work in the pre-determined rate, and limit the negative impact of such work on the health of employees;
- application of new technical solutions;
- replacing dangerous technological processes, devices, substances and other materials - safe or less dangerous;
- giving priority to collective protection measures against personal protective equipment;
- instructing employees in the field of occupational health and safety[877].

GHS also concerns **occupational risk assessment** and preventive measures. The employer assesses the occupational risk occurring in the performed work, in particular, when: selecting equipment for workstations and workplaces, used chemical, biological, carcinogenic or mutagenic substances and preparations as well as changing work organization. While performing occupational risk assessment, all of the factors of the work environment occurring during the performed works and ways of performing works should be taken into account[878].

The preventive measures and methods used as well as, following the occupational risk assessment, work organization should ensure an increase in the level of safety and health protection of employees and be integrated with the activity carried out by the employer at all levels of the organizational structure of the workplace[879].

GSH decides that the employer keeps the record of the occupational risk assessment and necessary preventive measures. This provision also describes the content of the documentation confirming the performance of the assessment, which should include:

- the description of the worksite assessed, including the description of machines, tools, and materials used, performed tasks, hazardous, harmful and burdensome work environment factors, the means of collective and individual protection used and people working in this position;
- the results of the occupational risk assessment carried out for each of the work environment factors and the necessary preventive measures to reduce the risk;
- the date of the assessment and the persons making the assessment[880].

Another obligation of the employer is to inform the employees about existing threats, in particular about threats that they will be protected against by personal protective equipment, and to provide information about these measures and the rules for their use[881].

Moreover, the employer is obliged to determine and to bring up to date the inventory of particularly dangerous works occurring in the workplace and designates detailed requirements for occupational health and safety in the performance of particularly dangerous work[882].

Additionally, the employer is obliged to inform employees about the physical, chemical and biological properties of materials, semi-finished products, and finished products used in the workplace, and about the risks to health and safety of employees related to their use, as well as the methods of their safe use and handling in emergency situations[883].

[877] § 39 paragraph 2 points 1-8 of GHS;
[878] § 39a paragraph 1 of GHS;
[879] § 39a paragraph 2 of GHS;
[880] § 39a paragraph 3 of GHS;
[881] § 39c of GHS;
[882] § 80 paragraph 1 and 2 of GHS;
[883] § 92 paragraph 1 of GHS;

F. Public Procurement Law[884]

2. Scope

Rationale given by the State for the regulation

Some of the significant changes to the Public Procurement Law (PPL) were introduced in 2016 (and came into force in July that year) as a result of transposition[885] to the Polish legal order the Directive 2014/24/EU[886] as well as the Directive 2014/25/EU[887].

The Act amending PPL included also all of the provisions of the directives concerning the mandatory exclusion of the contractors who e.g. committed crimes recognized as particularly detrimental to the public interest. The contractors are obliged to attach the statement that they do not fall for the scope of the exclusion. Moreover, contractors who refer to the resources of other entities also need to demonstrate the absence of a basis for their exclusion.

3. Content of Regulation

Overview and description of the required measures for business

According to PPL, the contractor willing to be awarded the order by the contracting authority needs to prove through the statement that neither of the subcontractors on whose resources he/she relies, does not fall within the scope of obligatory exclusion from the contract award proceedings[888].

The subcontractor being a natural person cannot participate in the contract award proceeding if he or she had committed crimes and have been validly convicted for, e.g.: various corruption crimes, crimes against the environment, human trafficking, crimes against the rights of the people pursuing gainful employment, crimes concerning entrusting work to foreigners illegally staying in Poland or minor foreigners, and crimes concerning entrusting, under conditions of special use, work to foreigners illegally staying in Poland. Special use shall be understood as the situation when: the conditions of work that has been entrusted with the violation of law and human dignity, which are glaringly different (especially on the basis of sex) in comparison with the working conditions of persons entrusted with the performance of work in accordance with the law; particularly affecting the health or safety of persons doing work[889].

4. Monitoring, sanction, and enforcement

Monitoring body

The President of the Public Procurement Office (PPPO) is the monitoring body in the scope of e.g. ensuring the functioning of the system of legal protection measures or supervising the compliance with the rules of the procurement system, in particular controlling the process of awarding contracts within the scope provided by law[890]. The PPPO also controls awarding contracts by checking the compliance of the procedure with the provisions of PPL[891].

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[884] Public Procurement Law (ustawa z dnia 29 stycznia 2004 roku Prawo zamówień publicznych, tekst jednolity: Dz.U.2018.1986); hereinafter: PPL, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20040190177/U/D20040177Lj.pdf;
[885] The transposition occurred through the Act of June 22, 2016 amending the Act of 29 January 2004 - Public Procurement Law, Dz.U.2016.1020, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20160001020/U/D20161020Lj.pdf
[886] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal L 94, 28.3.2014, p. 65–242
[887] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, Official Journal L 94, 28.3.2014, p. 243–374
[888] Article 25a of PPL in connection with the article 24 of PPL;
[889] *Ibidem*.
[890] Article 152 of PPL in connection with the article 154 point 6 and 11;
[891] Article 161 paragraph 1 and 2 of PPL;

Form of sanction

If PPPO discovers that the regulations set in PPL have been infringed, he might apply to the court for the annulment of the contract - wholly or partially[892].

III. COMPARATIVE ANALYSIS

9.. Comparisons between different regulations within the Member State

a. Corporate and directors' liability regime in case of violations or damage caused by operators in the EU parent company's supply chain, including relevant jurisprudence, even in the absence of legislation on due diligence

Under the Polish Code of Commercial Companies[893] piercing the corporate veil is limited. In case of a limited liability company, members of the management board are liable if execution against the company proved ineffective. However, they may extricate themselves from liability by filing a bankruptcy request in due time[894]. In joint stock companies even such limited liability of the managing board members is not stipulated by law. However, board members may be subject to tortious liability based on the general rules of the Civil Code[895]. It has to be pointed out that as a general rule *a legal person is obliged to repair damage caused by the fault of its body*[896], nonetheless, *it does not exclude the personal responsibility of a natural person as a member of the body. The responsibility of these entities is then joint and several*[897]. In a situation when damage is caused by members of the body who overstepped their duties responsibility can only be attributed to the members of the body.

Presently, there are no statutory grounds to assign liability of parent companies for violation of contracts by their subsidiaries since "in essence, a parent company is not responsible towards third parties for liabilities of its subsidiary; creditors of the subsidiary are third parties in relation to the parent company", which is associated, inter alia, with the "fundamental rule of commercial law, pursuant to which a partner (shareholder) of a capital company (in this case – the parent company) is not liable with its assets for liabilities of the capital company in which it participates (in this case – the subsidiary)[898]". What is important is that liability of the parent company for liabilities of its daughter company is not uncommon in the legal order of other European countries[899]. However, the mentioned rule does not apply to non-contract liability. Therefore, it is possible – by using general Civil Code provisions (art. 405 et seq. [unjust enrichment] and art. 415 et seq. [tort liability]) to make a parent company liable for a delict committed by its subsidiary, especially in situation of abuse of the formal separation of companies within a single capital group[900].

Nonetheless, it has to be underlined that in many cases using a described general framework of civil responsibility may be hard or even impossible, mainly due to evidence

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[892] Article 168 point 3 of PPL.
[893] Ustawa z dnia 15 września 2000 roku Kodeks spółek handlowych (tekst jednolity: Dz.U.2019.505., hereinafter: the Code of Commercial Companies) http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20000941037/U/D20001037Lj.pdf.
[894] Article 299 paragraph 1 and 2 of the Code of Commercial Companies;
[895] Article 300 of the Code of Commercial Companies which refers to Article 415 et seq. of the Civil Code (*Anyone who by a fault on his part causes damage to another person is obliged to remedy it*);
[896] Art. 416 of the Civil Code.
[897] Wałachowska M., *Art. 416* [in:] *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353-534)*, Fras M., Habdas M. (ed.). Wolters Kluwer Polska, 2018.
[898] M. Rodzynkiewicz, *Kodeks spółek handlowych. Komentarz (Code of Commercial Companies. Commentary)*, LexisNexis, 2014;
[899] Verdict of the Court of Justice (Ninth Chamber) of 20 June 2013 in Case C-186/12, http://curia.europa.eu/juris/liste.jsf?num=C-186/12&language=EN;
[900] Cf. Judgment of the Supreme Court of 24 November 2009, V CSK 169/09, where the Supreme Court stated that: *However, there are no obstacles to pursuing a claim for unjust enrichment, provided that all the conditions provided for in Article 405 et seq. of the Civil Code are met, against a person who is outside the existing and improperly performed - by another person - relationship of obligation. As indicated by the Supreme Court in the judgment of 22 November 2006. (V CSK 289/06,) the same event, the effect of which is impoverishment and enrichment, may mean one factual or legal act, but it may also include interrelated factual or legal acts, performed not only by the impoverished and enriched, but also by third parties.*

difficulties. Because of that, there is an ongoing discussion about changing the current regulations to introduce the broader idea of piercing the corporate veil – connected with the liability of members of bodies, as well as parent companies. In April 2019 press publication appeared referring to the unpublished draft of the Act on Specific Responsibility of Parent Companies for Damages to the Dominated Company, its Partners and Creditors[901]. According to the publication, *a parent company will be obliged to repair the damage resulting from the abuse of a dominant position unless it proves the lack of guilt*. As the draft was not published it is impossible to make any further comments on this topic.

b. Whether the concept of due diligence is used in the domestic regulation of other areas of corporate governance

i. Anti-money laundering

Due diligence demands and risk analysis are visible in anti-money laundering regulations[902], however, the General Inspector of Financial Information (GIFI) – who has a position of a secretary or an undersecretary of state in the Ministry of Finance – is obliged to prepare and update every two years a national assessment of money laundering and terrorist financing risk, within which he is supported by obliged institutions (a group of corporate entities to which AML/CTF obligations were imposed[903]). The national assessment includes: a description of the risk assessment methodology; a description of phenomena related to money laundering and terrorism financing; a description of the applicable regulations; an indication of the level of risk of money laundering and terrorist financing in Poland and its substantiation; conclusions resulting from the assessment; identification of issues related to the protection of personal data related to AML/CTF. The national assessment is the basis for the preparing of the AML/CTF strategy containing an action plan to mitigate the risks of money laundering and terrorist financing[904].

Obliged entities at the same time must individually identify and assess the risks associated with money laundering and terrorist financing related to their activities, taking into account risk factors for customers, countries or geographic areas, products, services, transactions or their supply channels. These activities should be proportional to the nature and size of the obligated institution. Individual assessments should be updated at least every two years[905]. Additionally, obliged institutions apply financial security measures to their clients, including identification of the client and verification of his identity; identification of the beneficial owner, evaluation of economic relations and, if appropriate, obtaining information on their purpose and intended nature; ongoing monitoring of the client's business relationships. Application of the mentioned measures must be preceded by a risk recognition of money laundering which includes type of customer; geographical area; the destination of the invoice; the type of products, services and methods of their distribution; the level of property values deposited by the client or the value of transactions carried out; the purpose, regularity or duration of business relationships[906]. Among other obligations these entities must moreover introduce the internal procedure regarding AML and CTF which has to cover actions or steps taken to reduce the risk of money laundering and terrorist financing and to

[901] *Podmiot dominujący będzie musiał naprawić szkodę firmie zależnej lub jej pracownikowi*, Rzeczpospolita, 25th April 2019, https://www.rp.pl/Firma/304259988-Spolki-matki-zaplaca-za-corki---o-projekcie-ws-odpowiedzialnosci-za-szkody-w-spolce-kapitalowej.html

[902] The act of 1 March 2018 on the prevention of money laundering and terrorist financing (Dz.U. 2018.723, hereinafter: AML act) http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000723/U/D20180723Lj.pdf, which is implementing to Polish legal system the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

[903] Art. 2.1 of the AML act.

[904] Art. 25, 26, 29 – 32 of the AML act.

[905] Art. 27 of the AML act.

[906] Art. 33 – 54 of the AML act.

manage properly the identified risk; rules for identifying and assessing the risks of money laundering and terrorist financing, including rules for verifying and updating the prior assessment of the risks; measures in place to adequately manage the identified risk of money laundering or terrorist financing associated with the economic relationship or occasional transaction in question[907].

The AML/CTF system is supervised, as a general rule, by GIFI who can impose administrative penalties on entities which do not fulfil AML due diligence obligations or managers liable for infringements. Those penalties include publication of information about violation on the Ministry of Finance website; an order to cease taking certain actions by an obliged institution; withdrawal of a concession or permit or removal from the register of regulated activities; a ban on performing duties in a managerial position by a person responsible for an infringement for a period not exceeding one year; financial penalty[908].

ii. Data privacy

As in every EU country Polish enterprises are obliged to use General Data Protection Regulation [909] which introduced a risk-based approach in the area of processing of personal data. One of the most important obligations of the entities processing personal data is – under certain conditions - carrying out an assessment of the impact of the envisaged processing operations on the protection of personal data. According to art. 35 of the GDPR such assessment includes:

- a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;
- an assessment of the necessity and proportionality of the processing operations in relation to the purposes;
- an assessment of the risks to the rights and freedoms of data subjects; and
- the measures envisaged to address the risks, including safeguards, security measures, and mechanisms to ensure the protection of personal data and to demonstrate compliance with GDPR taking into account the rights and legitimate interests of data subjects and other persons concerned.

Where necessary, the controller shall carry out a review to assess if the processing is performed in accordance with the data protection impact assessment at least when there is a change of the risk represented by processing operations[910].

Infringement of this obligation shall be subject to administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher[911].

iii. Cybersecurity

Due diligence obligations are also present in the Act on a National Cybersecurity System[912]. In accordance with this regulation, the key service operator shall implement a security management system in the information system used to provide the key service, within which it is inter alia obliged to:

1) conduct a systematic estimation of the incident risk and manage this risk;

[907] Art. 50 of the AML act.
[908] Art. 147, 150, 151 of the AML act.
[909] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter: GDPR) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN.
[910] Article 35 paragraph 11 of GDPR.
[911] Article 83 paragraph 11 of GDPR.
[912] The act of 5 July 2018 on a national cybersecurity system (Dz.U.2018.1560, hereinafter: NCS) http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001560/T/D20181560L.pdf, which is implementing to Polish legal system the Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union;

2) implement, by taking into account the state of the art, appropriate technical and organisational measures commensurate with the assessed risk, including
3) collect information on cyber-security threats and vulnerabilities of the information system used to provide the critical service;
4) manage incidents;
5) use of measures to prevent and mitigate the impact of incidents on the security of the information system used for the provision of the key service[913].

If the operator infringes regulations concerning security management system, it may be fined up to 150 000 PLN[914]. Additionally, a financial penalty (up to 200% of monthly salary) may be imposed also on the head of the operator where he has failed to exercise due diligence in order to fulfil his obligations to conduct a systematic estimation of the incident risk and manage this risk[915].

iv. VAT tax

The Minister of Finance introduced in 2018 *the Methodology for assessing the due care of purchasers of goods in domestic transactions*[916] which identifies the most relevant circumstances and risks that should be taken into account when assessing the behaviour of taxable persons who have not themselves committed VAT fraud and who were not aware that the transaction from which they acquired the goods is a VAT fraudulent transaction. Although the VAT Act does not directly impose an obligation to analyze the risk of tax fraud in transactions, the application of the principles set out in the methodology allows minimizing the likelihood of refusing the right to deduct input tax. The assessment shall be done at two stages - at the stage of starting cooperation with the contractor and at the stage of continuing cooperation with the contractor. Both stages should include formal (connected with the contractor and its status) and transactional criteria.

c. Liability of collective entities[917]

The Act on Liability of Collective Entities for Actions Prohibited Under the Threat of the Penalties (ALCE) sets out the rules of liability for **acts prohibited by penalties as crimes (so also some crimes against the environment or concerning human rights)** or tax crimes and the rules of conduct for such liability[918]. The above applies to the collective entities understood as legal persons and an organizational units without legal personality whose separate provisions accord legal capacity (excluding the State Treasury, local government units and their unions), as well as commercial companies with the participation of the State Treasury, local government units or a union of such entities, a company in the organization, an entity in liquidation, and an entrepreneur who is not a natural person, and a foreign organizational unit[919].

d. Content of Regulation

The collective entity is liable for the prohibited act committed by the natural person if this behaviour brought or could have brought the profit (also non-monetary) to this entity. Additional condition for entities' responsibility is that one of the following must occur[920]:

[913] Article 8 of NCS;
[914] Article 73 paragraph 1 point 1 NCS in connection with article 73 paragraph 3 point 1 NCS;
[915] Article 75 of NCS;
[916] https://www.podatki.gov.pl/media/4522/metodyka.pdf;
[917] Act on Liability of Collective Entities for Actions Prohibited Under the Threat of the Penalties (Ustawa z dnia 28 października 2002 roku o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, tekst jednolity: Dz.U. z 2019 roku poz. 628); further as: „ALCE".
[918] Article 1 of ALCE;
[919] Article 2 paragraph 1 and 2 of ALCE;
[920] Article 3 of ALCE;

- the natural person acted on behalf of or in the interest of a collective entity under the power or obligation to represent it, to take decisions on its behalf or to carry out internal controls either when exceeding this power or failing to do so;
- the natural person admitted to operate as a result of exceeding the authority or failure to fulfil obligations by the person referred to above;
- the natural person acted on behalf or in the interest of a collective entity with the consent or knowledge of the person referred to in point 1;
- the natural person is an entrepreneur who directly cooperates with a collective entity in achieving the legally acceptable goal.

Moreover, an additional principle for the entity's liability is that the natural person's responsibility has to be confirmed by the binding judgment convicting this person, or a sentence conditionally discontinuing criminal proceedings, or a decision to grant the person permission to voluntarily submit to liability or a court order to discontinue the proceedings against him on account of circumstances excluding punishment of the perpetrator[921].

Last but not least, the most crucial in the context of this analysis is the principle that the collective entity is liable **if the offence has been committed as a result of**:

- **at least the lack of due care[922] in the selection of a natural person** (admitted to operate as a result of exceeding the authority or failure to fulfil obligations or the natural person acting on behalf or in the interest of a collective entity with the consent or knowledge of the person by the person acting on behalf of or in the interest of a collective entity under the power or obligation to represent it, to take decisions on its behalf or to carry out internal controls either when exceeding this power or failing to do so), or at least the lack of proper supervision over that person - by the body or representative of a collective entity[923];
- the organization of the activity of a collective entity did not ensure that an offence committed by a person referred to above, **while it could have been ensured by due care**, required in given circumstances, by the body or a representative of a collective entity[924].

The collective entity can be liable if a natural person indicated above, committed the crime in particular **against sexual freedom and decency, against the environment, against humanity or against family and care[925].**

Liability or lack of liability of a collective entity on the basis specified in ALCE does not exclude civil liability for damage caused, administrative liability or individual legal liability of the perpetrator of a prohibited act[926].

e. Monitoring, sanction and enforcement, and available remedies

According to article 6 of ALCE, the liability or lack of liability of a collective entity under the terms set out in ALCE shall not exclude civil liability for damage caused, administrative liability or individual legal liability of the perpetrator of a prohibited act.

In the case of a collective entity, **the court** decides a fine in the amount of 1000 to 5,000,000 PLN, however, not higher than 3% of the revenue achieved in the financial year in which the prohibited act was made, which is the basis of the collective entity's liability[927].

The forfeiture of a collective entity is decided towards:

[921] Article 4 of ALCE.
[922] See remarks connected with the "due care" term included in the Overview of the Report above.
[923] Article 5 point 1 of ALCE.
[924] Article 5 point 2 of ALCE.
[925] Article 16 paragraph 1 point 7-9a of ALCE.
[926] Article 6 of ALCE.
[927] Article 7 of ALCE;

- objects coming even indirectly from a prohibited act or which served or were intended to commit a prohibited act;
- property benefits derived even indirectly from a forbidden act;
- the equivalent of objects or property benefits derived even indirectly from a forbidden act[928].

What is more, if a prohibited act, which was the basis of liability of a collective entity, is again carried out within 5 years, the entity may be subject to a fine of up to the upper limit of the statutory threat increased by half[929].

What is more, on the collective entity might be imposed:

- a ban on the promotion or advertising of activities carried out, products manufactured or sold, services provided, or services provided; ban on the use of subsidies, subsidies or other forms of financial support by public funds;
- a ban on the access to funds (in certain cases);
- the prohibition of using the assistance of international organizations, of which the Republic of Poland is a member;
- a ban on applying for public contracts[930].

Also, the judgment concerning the collective entity might be made public[931].

f. Procedural Framework

Competent Court or other body

The court competent in the first instance is a district court in whose district a prohibited act was committed, and if such an act was committed in a district of several courts, on a Polish water or airship or abroad - a district court in whose district there is a seat of a collective entity, and in the case of a foreign organizational unit - its seat representative in the Republic of Poland[932]. However, the court of appeal, at the request of the district court, may refer the case to the regional court, as the court of the first instance, for consideration because of its special weight or complexity[933].

Jurisdictional restrictions

The proceedings against a collective entity are initiated by the motion of the prosecutor or the aggrieved party, or upon the request of the President of the Office for Competition and Consumer Protection in cases in which the collective entity's liability is based on a prohibited act recognized as the act as an act of unfair competition, the proceedings may also be initiated[934].

The motion of the aggrieved party shall be prepared and signed by attorney-at-law[935].

The burden of proof lies on the entity claiming the evidence[936]. Moreover, the evidence is allowed at the request of the parties, as well as ex officio in justified cases. The evidence that is obviously intending to extend the proceedings is inadmissible[937].

The draft Act on Liability of Collective Entities for Actions Prohibited Under the Threat of the Penalties (DALCE)[938]

In August 2018 the government presented a draft of the new Act on Liability of Collective Entities for Actions Prohibited Under the Threat of the Penalties. It was sent to

[928] Article 8 paragraph 1 of ALCE;
[929] Article 13 of ALCE;
[930] Article 9 paragraph 1 point 1-4 of ALCE;
[931] Article 9 paragraph 1 point 6 of ALCE.
[932] Article 24 of ALCE; On the OECD National Contact Points, see https://www.gov.pl/web/inwestycje-rozwoj/krajowy-punkt-kontaktowy-oecd. On the Grupa OLX Case, see https://complaints.oecdwatch.org/cases/Case_523/1763/at_download/file.
[933] Article 25 of ALCE;
[934] Article 27 of ALCE;
[935] Article 28 of ALCE;
[936] Article 23 of ALCE;
[937] Article 35 of ALCE.
[938] Hereinafter: DALCE, http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf;

the Parliament on 11th January 2019; according to the Parliament's website nothing significant has happened with it yet and there is no information when – and if – is it going to be enacted[939].

The draft proposes significant changes in the model of liability of collective entities. According to it, a collective entity will be responsible for a prohibited act (covering acts or omissions of its body and wilful act or omission of a member of the body) the elements of which have been fulfilled by an act or omission directly related to the activity conducted by that entity[940].

Additionally, a collective entity shall also be liable for a prohibited act when it is committed by[941]:

1. a natural person authorised to represent the entity, make decisions on its behalf or exercise supervision in connection with its activity in the interest or for the benefit of the entity;
2. a natural person authorised to act by its body, a member of its body or a person referred to in point 1 as a result of abuse of rights or failure to perform obligations;
3. a person employed by him/her in connection with the performance of labour for his/her benefit.

Furthermore, a collective entity is responsible for a prohibited act, from which it indirectly obtained a financial benefit, committed by[942]:

1. a subcontractor or another entrepreneur who is a natural person, if his prohibited act was related to the performance of an agreement concluded with a collective entity;
2. an employee or a person authorised to act in the interest or for the benefit of an entrepreneur who is not a natural person if his act was related to the performance of an agreement concluded by that entrepreneur with a collective entity

if the authority, member of the authority or person referred to in article 6 section 1 of DALCE knew or could have known, while maintaining the prudence required in the given circumstances, that the persons referred to in points 1 and 2 will attempt to commit or committed a prohibited act or that the entrepreneur referred to in point 2 has irregularities.

The condition of this additional liability described above and included in article 6 section 1 and 2 of DALCE is the fulfilment of the elements of the prohibited act as a result of[943]:

1. at least a lack of due care[944] in the selection of the person referred to in Sec. 1 or 2 or the person referred to in Article 5 Sec. 2 Item 2 or in their supervision by a collective entity;
2. such an irregularity in the organisation of activity of the collective entity that facilitated or enabled the commission of the prohibited act, although another organisation of activity could have prevented the commission of the act.

The irregularities mentioned above consist, in particular, in the following[945]:

1. lack of the rules of procedure in the event of a threat to commit a prohibited act or the consequences of failure to observe the rules of prudence; this does not apply to an entity which is a microentrepreneur within the meaning of EL;
2. lack of the specified scope of responsibility of the authorities of the collective entity, its other organisational units, its employees or persons authorised to act on its

[939] http://www.sejm.gov.pl/sejm8.nsf/agent.xsp?symbol=RPL&Id=RM-10-190-18
[940] Article 5 of DALCE.
[941] Article 6 section 1 of DALCE.
[942] Article 6 section 2 of DALCE.
[943] Article 6 section 3 of DALCE.
[944] "Due care" term – according to the justification of DALCE – should be understood as in the art. 355 of the Civil Code. Cf. Justification of DALCE, p. 12 – 13, http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf
[945] Article 6 section 4 of DALCE.

behalf or in its interest has not been specified; this does not apply to an entity which is a microentrepreneur within the meaning of EL;

3. lack of no person or organizational unit supervising compliance with the regulations and rules governing the activity of an entity which is at least a medium-sized enterprise within the meaning of EL;

4. the body of a collective entity or a natural person authorised to represent it, make decisions on its behalf or exercise supervision, in connection with its activity in the interest of or on behalf of that entity, was aware of irregularities in the organisation which facilitated or enabled the commission of a prohibited act.

A collective entity shall not be liable for irregularities referred to in point 2 above if it demonstrates that all authorities and persons authorised to act on its behalf or in its interest have exercised the due care required under the circumstances in the organisation of the entity's activities and in the supervision of such activities[946].

The draft proposes to introduce to main penalties for collective entities:

1. a financial penalty, which may be imposed in the amount from 30 000 PLN to 30 000 000 PLN;
2. dissolution of the collective entity.

Last but not least, DALCE resigns from the additional condition of the dependence of collective entity liability on a prior determination of the criminal liability of the individual person. At the same time, DALCE does not include – in opposition to ALCE – a catalogue of crimes for which a collective entity may be found liable, what leads to the conclusion that all crimes and fiscal crimes may be a subject of such proceedings.

IV. ADDITIONAL ISSUES

Whistleblower protection

It needs to be stated that in Polish legal order there do not exist effective and functioning regulation describing the institution of whistleblowers. Therefore, the following actions should be implemented[947]:

- the adoption of a comprehensive legal act covering the protection of whistleblowers in a manner that takes into account their specific situation, which would, inter alia:
- comprise all currently existing legal regulations which may serve for the protection of whistleblowers, i.e. labour law, criminal law, civil law, and administrative law;
- introduce the definition of a whistleblower;
- indicate hallmarks of whistleblowing, as well as define cases when a whistleblower is subject to protection;
- fulfil a preventive function by encouraging employers to create relevant procedures or policies protecting whistleblowers;
- establish the framework for whistleblowers' protection allowing for anonymizing their data, which would require synchronizing, mainly with the provisions on personal data protection and regulations on access to public information;
- outline minimum standards of whistleblowing systems which should be implemented in organizations;
- specify main whistleblowers' rights at a workplace (for example, protection against sudden dismissal, conditions of reinstatement), under the conditions of a court

[946] Article 6 section 6 of DALCE.
[947] Cf. B. Kwiatkowski (ed.) *Basic analysis of the current situation in Poland regarding access to remedy in cases of business-related abuse*, PIHRB RS, January 2017, p. 18 – 20 and literature quoted there.

dispute (for example, shifting the burden of proof to the employer whenever it dismisses a whistleblower in revenge) or compensation in case they were subject to retaliation;

- cover the widest possible group of employees, including those working under employment contracts for a definite period, civil law agreements and self-employed.

In recent years several draft laws aimed at introducing regulations protecting whistleblowers were proposed. These include:

1. the draft Act on Transparency of Public Life (**ATPL**) [948] (governmental, discontinued);
2. the draft Act on Liability of Collective Entities for Actions Prohibited Under the Threat of the Penalties (**DALCE**);
3. the draft Act on whistleblowers protection[949] (civic; sent to the government in November 2017; no official proceedings taking place)

ATPL was widely criticized, also in the area connected with whistleblowers protection. The most important arguments were connected with[950]:

- a prosecutor right to arbitrarily grant/take protection;
- lack of sufficient guarantees regarding the principle of confidentiality;
- lack of protection in case of disclosing information to the public;
- insufficient regulation of internal signalling systems;
- insufficient scope of protection measures;
- limited range of issues that signalling may apply to – only crimes a corrupt, financial or accounting character;
- insufficient subject range, not covering all forms of employment.

The definition of a whistleblower included in ATPL states that a whistleblower is a natural person or entrepreneur whose cooperation with law enforcement authorities, relying on reporting information about the possibility of committing a crime by the entity with which he is bound by a contract of employment or another contractual relationship, may adversely affect her life, professional and material situation [951]. The status of a whistleblower would be given to the person providing reliable information on certain crimes[952].

The status of a whistleblower would provide the person with the reimbursement from the State Treasury of legal representation costs needed in connection with the negative consequences of his filing of reliable information about the committed crimes[953].

Moreover, the employer of the whistleblower could not terminate with her/him the employment contract, to change the terms of the employment contract for less favourable, in particular in terms of changing the place or time of work or conditions of remuneration (unless the prosecutor gives the consent to do so)[954]. If it occurs that without the prosecutor's consent the employment contract is terminated – the whistleblower is entitled to the compensation from the dissolving party equal to twice the annual remuneration obtained by the whistleblower at the last position held[955].

The above rules apply accordingly in case of changing the terms of the contract or the employment contract[956].

[948] Hereinafter: ATPL; https://legislacja.rcl.gov.pl/docs//2/12304351/12465401/12465402/dokument313363.pdf
[949] The bill prepared by the Batory Foundation, Helsinki Foundation for Human Rights, Forum of Trade Unions and Institute of Public Affairs is available at http://www.sygnalista.pl/projekt-ustawy/
[950] Cf. Uwagi do projektu ustawy o jawności życia publicznego w zakresie ochrony sygnalistów, Fundacja Batorego, http://www.batory.org.pl/aktualnosci/uwagi_do_projektu_ustawy_o_jawnosci_zycia_publicznego_w_zakresie_ochrony_sygnalistow
[951] Proposed article 2 point 14 of ATPL;
[952] Proposed article 65 paragraph 1 and 2 of ATPL;
[953] Proposed article 66 of ATPL;
[954] Proposed article 67 paragraph 1 point 1 in connection with article 67 paragraph 2 point 1 of ATPL;
[955] Proposed article 69 paragraph 1 point 1 of ATPL;
[956] Proposed article 69 paragraph 2 of ATPL.

Finally, if the perpetrator of certain crimes described by the Act is convicted the court may grant the discretionary damages to the whistleblower[957].

DALCE contains some provisions regarding whistleblowers protection, however, their quality is questionable. The provisions do not comply with international standards (including the draft of new regulations adopted by the European Parliament on 16th April 2019[958]) and are fragmentary. They do not cover all forms of employment, neither guarantee sufficient protection or assistance in the case when employers use retaliation against whistleblowers[959].

According to the DALCE, the bodies of the collective entity, in particular the designated body of the collective entity supervising compliance with the rules and regulations governing the entity's activities, or the persons carrying out internal supervision, would be obliged to take actions, within their powers, to explain the information coming from the collective entity's employee, member of the body, a person acting on behalf of or in the interests of a collective entity on the basis of a legal transaction – if such information consists of:

- suspicion of preparation, attempt or committing a prohibited act;
- failure to fulfil obligations or abuse of rights by entities described in the Act;
- failure to observe due care required in given circumstances in the activities of collective body bodies or persons;
- irregularities in the organization of the collective entity's activities that could lead to committing the prohibited act[960].

Moreover, the bodies of the collective entity, and in particular the designated body of the collective entity supervising compliance, or the persons in charge of internal supervision, strive to provide protection (at least against the acts of repressive nature, discrimination or other types of unfair treatment) to employees who report abovementioned information[961].

Additionally, in case when the notification of the above-indicated information resulted in violation of employment rights of a person reporting information or in termination of the contract with that person, the court, upon application of the person, may decide to bring him/her back to work, or award the compensation – if the information reported was justified and could have led to the prevention of a prohibited act or faster detection of an offence. This rule, however, does not apply to a person who performed the infringing action, unless he or she revealed all of the salient details (circumstances) of the action to the collective entity and to the law enforcement body. The compensation is awarded in compliance with the provisions of the LC and might be granted for the whole period of being unemployed by the person reporting the information[962].

Equal Treatment Act[963]

Scope

The Equal Treatment Act (EQA), as its title indicates, implements the certain EU directives concerning equal treatment[964]. It applies to natural and legal persons and

[957] Proposed article 87 of ATPL;
[958] http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved
[959] Cf. G. Makowski, Drakońskie kary dla firm i organizacji społecznych, http://www.batory.org.pl/forum_idei/blog_idei/grzegorz_makowski_drakonskie_kary_dla_firm_i_organizacji_spolecznych
[960] Proposed article 11 paragraph 1 of DALCE;
[961] Proposed article 11 paragraph 3 of DALCE;
[962] Proposed article 13 paragraph 3 of DALCE;
[963] Act on implementing certain European Union regulations in the field of equal treatment (Ustawa z dnia 3 grudnia 2010 roku o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania, Dz.U.2016.1219, further as: EQA, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20102541700/U/D20101700Lj.pdf)
[964] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2006/54/EC of the

organizational units that are not legal persons to whom the act grants legal capacity[965]. Provisions of chapter I and II of EQA are not applied to employees in the areas regulated by LC[966].

EQA is applied to the following:

- undertaking vocational education, including further education, improvement, retraining, and apprenticeships;
- the conditions for taking up and pursuing a business or professional activity, in particular within the framework of an employment contract or a civil law contract which is a basis of employment;
- joining and acting in trade unions, employers' organizations and professional self-governments, as well as exercising the rights of members of these organizations;
- access and conditions for the use of labour market and labour market services instruments offered by labour market institutions and instruments labour market and labour market services offered by other entities acting for employment, human resources development and counteracting unemployment; social security; health care; education and higher education; services, including housing services, things and the acquisition of rights and energy, if they are offered to the public[967].

EQA defines the terms such as direct discrimination, indirect discrimination, molestation, sexual molestation, unequal treatment and the principle of equal treatment[968].

Content of Regulation

According to the EQA it is forbidden to treat unequally natural persons based on sex, race, ethnicity or nationality regarding access to and conditions of using social security, services, including housing services, property and the acquisition of rights or energy, if they are offered to the public, as well as in the field of health care, education and higher education[969].

It is also forbidden to treat unequally natural persons based on sex, race, ethnicity, nationality, religion, religious beliefs, disability, age or sexual orientation in the area of undertaking vocational education, including further education, improvement, retraining, and apprenticeship; the conditions for taking up and pursuing a business or professional activity; joining and acting in trade unions, employers' organizations and professional self-governments, as well as exercising the rights of members of these organizations; access and conditions of using labour market instruments and labour market services[970]. It is also prohibited to encourage or require unequal treatment[971].

The above prohibitions are not violated in the scope of taking necessary measures in a democratic state for its public safety and order, protecting the health or protecting the freedom and rights of others and preventing actions subject to criminal sanctions, within the scope specified in other regulations[972].

It is also forbidden to treat unequally legal persons and organizational units that are not legal entities to which the law grants legal capacity if the violation of the principle of equal treatment takes place on the basis of race, ethnic origin or nationality of their members[973].

European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

[965] Article 2 paragraph 1 of EQA;
[966] Article 2 paragraph 2 of EQA;
[967] Article 4 of EQA;
[968] Article 3 point 1-6 of EQA;
[969] Article 6 and 7 of EQA.
[970] Article 8 paragraph 1 of EQA;
[971] Article 9 of EQA;
[972] Article 8 paragraph 2 of EQA;
[973] Article 10 of EQA;

Monitoring, sanction and enforcement

Bodies performing tasks in the field of implementation of the principle of equal treatment are Ombudsman and Government Plenipotentiary for Equal Treatment[974]. The task of the second body is the implementation of the government's policy regarding the principle of equal treatment, including counteracting discrimination, in particular on grounds of sex, race, ethnic origin, nationality, religion, religious beliefs, age, disability, and sexual orientation[975].

Procedural Framework and available remedies

In case of violation of the provisions of EQA, civil procedure is applicable. The burden of proof to substantiate the violation of the principle of equal treatment lies on the claimant. If this occurs, then the accused of violating this principle is obliged to prove the lack of violation[976].

In case of violation of the principle of equal treatment described in EQA, in relation to a natural person, including pregnancy, maternity leave, leave on conditions of maternity leave, paternity leave, parental leave or extended post-maternity leave, natural persons are granted the compensation claim, demanded on the basis of provisions of the Civil Code[977]. In case that the infringements referred above occur, the legal persons and organizational units that are not legal persons to whom the act grants legal capacity are entitled to the claim referred above, if the violation occurred against them [978]. Furthermore, everyone with respect to whom the principle of equal treatment has been violated has the right to compensation[979].

[974] Article 18 of EQA;
[975] Article 21 paragraph 1 of EQA;
[976] Article 14 paragraph 2 and 3 of EQA;
[977] Article 12 paragraph 1 EQA in connection with article 13 paragraph 1 and 2 EQA;
[978] Article 12 paragraph 2 EQA;
[979] Article 13 paragraph 1 of EQA.

SPAIN COUNTRY REPORT

Maria Prandi* and Daniel Iglesias Márquez**

I. OVERVIEW

The composition of the business sector in Spain includes a large portion of companies operating in sensitive sectors including telecommunications, energy, oil and gas, building, industrial goods and services and banking and insurance. Spanish companies operate around the world through networks of subsidiary companies and complex supply chains. Through their transnational business activities, Spanish companies have been involved in human rights abuses and environmental damages in third countries, particularly in Latin America.[980]

The Spanish government has mainly relied on corporate social responsibility (CSR) as a mechanism to integrate social and environmental concerns in the Spanish business operations.[981] Thus, there has been a gradual evolution of CSR initiatives and institutions in Spain. In 2008, the Spanish government created the State Council on CSR to advise the government on policy and regulation regarding sustainability. This Council integrates national and regional administrations, employer federations, trade unions, and sustainability experts. In 2014, following the recommendations of the European Union in the document entitled "A renewed EU strategy 2011-2014 for CSR", the Spanish government approved on October 24, 2014 the initiative called "Spanish strategy on companies' corporate social responsibility practices 2014-2020".

The Spanish Strategy on CSR aims to promote actions that support the development of responsible practices in both companies (including SMEs) and Public Administrations in order that they become a significant driver of the country's competitiveness and its transformation to a more sustainable society. However, the Strategy relies on the voluntary integration by companies into their governance and management, strategy, policies and procedures, of societal, labour, environmental and human rights concerns.

Meanwhile, the business and human rights agenda develops at a slower rate in Spain. After more than five years of the adoption of the Guiding Principles on Business and Human Rights by the UN Human Rights Council in 2011, the National Action Plan on Business and Human Rights (NAP) for Spain was endorsed by the Council of Ministers on 28 July 2017 and published in the Official State Gazette on 14 September 2017. The Human Rights Office of the Ministry of Foreign Affairs and Cooperation was responsible for instigating the drawing up of the NAP combined with a participatory process open to various actors. A first draft of the NAP was released on 17 June 2013, which was followed by a second draft on 26 June 2014 that was to be approved by the Council of Ministers. Civil society organisations disassociated themselves from the proposed second draft because their contributions were ignored, in particular because of the fact that the requirements for effectively controlling the practices of transnational companies in relation to human rights had been relaxed, and there was an absence of transparency and real participation on the part of the social actors throughout the process. The Council of

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980 Iglesias Márquez, D. and Felipe Pérez, B. (2015). Corporate Social Responsibility: The Role of Codes of Conduct in Fostering Environmental Sustainability in Latin America. In: Vrdoljak Raguž, Ivona y Krželj-Čolović, Zorica (ed.) Innovation, Leadership & Entrepreneurship –Challenges of Modern Economy. Dubrovnik: Universidad de Dubrovnik, pp. 113-126.
981 Cantó-Milà, N., and Lozano, J. M. (2008). The Spanish Discourse on Corporate Social Responsibility. Journal of Business Ethics, 87(S1), 157-171.

Ministers finally took three years to approve a new text, which was very different from the second draft and much shorter.[982]

The Spanish NAP does not include any specific policy or measure addressed to implement the second pillar of the Guiding Principles. In this regard, there is not any clear commitment for public and private enterprises to set in place human rights due diligence procedures in accordance with the Guiding Principles. Therefore, there is a marked absence of legislative reforms and proposals to regulate business behaviour to ensure compliance and thereby respect of human rights. The only measures envisaged are awareness-raising, information, training and promotion of business respect for human rights. Under the Spanish NAP, the corporate responsibility to respect human rights maintains a voluntary approach, which has been repeatedly proven to be insufficient to prevent and remedy negative impacts on human rights of the Spanish business activities within their territory and abroad.

Against this background, the UN Committee on Economic, Social and Cultural Rights welcomes the adoption of the Spanish NAP. However, it is concerned that there are a number of legal gaps in terms of guarantees to ensure that companies comply with their obligation to perform human rights due diligence. It is also concerned that the State party's legislation does not adequately define the legal responsibility of companies, whether those operating in the State party or domiciled within its jurisdiction but operating abroad. Thus, the Committee recommends that, in implementing the NAP, Spain should establish effective mechanisms to ensure that companies perform human rights due diligence, in order to identify, prevent and minimize the risk of violations.[983]

Under the current Spanish regulatory framework there are no regulations, which require companies, in a binding manner, to adopt and conduct human rights due diligence measures in relation to their own activities and its business relationship with another entity, such as the adoption of a human rights policy in accordance with international standards; the establishment of a human rights due diligence framework; an impact assessment analysis from a human rights perspective and the adoption of an action plan on how the risks identified will be addressed and managed and human rights harm will be prevented. Nor does it therefore impose any sanctions in the absence thereof. Accordingly, the NAP is a missed opportunity to address these gaps in the Spanish legal system.[984]

However, there are some legislations and regulations that impose certain due diligence and transparency requirements to companies in line with the human rights due diligence included in the Guiding Principles. As noted below, there is an important fragmentation of human rights due diligence in several legislations and regulations. Accordingly, there is significant divergence on how Spanish companies identify, prevent, mitigate and account for any adverse impacts on human rights and the environment in their own operations or supply chain.

It is also important to emphasise that Spain has a civil law and statute based legal system. Therefore, the sources of Spanish law are statutes, custom and general legal principles. Court decisions are not a source of law but are of interpretative value. The 1978 Spanish Constitution is the current supreme law. Human rights are protected under this Constitution. Spain is a parliamentary monarchy, based on parliamentary representation. Spanish state power is divided between the

[982] Pigrau Solé, A. (2018). "The Spanish National Action Plan on Business and Human Rights. An appraisal and imminent challenges", available at: http://icip.gencat.cat/web/.content/continguts/publicacions/policypapers/2018/Policy_Paper_17_EN.pdf.
[983] Committee on Economic, Social and Cultural Rights (2018)." Concluding observations on the sixth periodic report of Spain", available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/ESP/CO/6&Lang=En.
[984] Amnesty International (2018). "Spain. Submission to the United Nations Committee on Economic, Social and Cultural Rights. 63rd Session, 12 – 29 MARCH 2018", available at: https://www.amnesty.org/download/Documents/EUR4179202018ENGLISH.pdf.

legislative, executive and judiciary powers. The territory is organised into municipalities, circuits (*partidos*), provinces and autonomous communities. Basic commercial, corporate and intellectual property law is enacted by the central government while autonomous community governments enact their own legislation for matters such as health, education, the environment and consumer affairs. In this regard, this report is mainly based on the legislations and regulations enacted by the central government, which lay down minimum requirements that can be regulated by the autonomous community governments. Additionally, the report describes the sanctions and the legal avenues to hold companies and/or directors liable for failure to comply with their due diligence and transparency duties.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

A. Corporations Law

- **Law 2/2011, of 4 March 2011, on Sustainable Economy[985]**

2. Scope

The aim of the law 2/2011 is to introduce the structural reforms needed to create conditions that favour sustainable economic development into the legal system (Article 1). The term 'sustainable economy' is understood to mean a growth pattern that reconciles economic, social and environmental development in a productive and competitive economy that is capable of favouring quality employment, equal opportunities and social cohesion and that can guarantee respect for the environment and the rational use of natural resources in such a way as to enable the needs of present generations to be met without compromising the options for future generations to service their own requirements (Article 2).

The Law has four sections. The first is dedicated to improving the economic environment (Articles 4-39). The second addresses competitiveness (Articles 40-76) and the third focuses on environmental sustainability (Articles 77-111). Finally, the fourth deals with how to implement and evaluate the Law (Articles 112-114).

The Law 2/2011 states some provisions to influence on corporate behaviour. In relation to *transparency and corporate governance*, the Law encourages listed companies to increase transparency in relation to the remuneration of their directors and senior managers, as well as their remuneration policies. Similarly, credit institutions and investment services companies should increase transparency in their remuneration policies, and their coherence with the promotion of solid and effective risk management (Article 27).

Regarding the *environmental sustainability*, the major applicable principles in this issue are the guarantee of a secure supply, economic efficiency and the respect for the environment, as well as the national objectives for 2020 on energy saving and efficiency and on the use of renewable energies. Energy policy should promote renewable energy, strengthen predictability and efficiency in energy policy decisions and cut back the contribution of energies with higher CO_2 emission potential. The law establishes a national target of 20% of energy consumption to come from renewable energy by 2020 for both homes and commercial buildings (Article 78). This implies that companies should meet sustainability criteria a view to optimising their energy consumption. It also creates the Carbon Fund for a Sustainable Economy (FES – CO_2), which will help to reduce GHG emissions by buying carbon credits (Article 91).

[985] See Ley 2/2011, de 4 de marzo, de Economía Sostenible, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2011-4117.

3. Content of Regulation

The Law 2/2011 requires corporations to produce annual sustainability reports.

Article 35 establishes the obligation to submit annual sustainability reports for state-owned companies in accordance with commonly accepted standards, with special attention to effective equality between women and men and the full integration of people with disabilities (Article 35.2.a). Additionally, state-owned companies should review its production processes of goods and services applying environmental management criteria aimed at compliance with the rules of the European management system and environmental audit (Article 35.2.b). Moreover, they should include in its contracting processes conditions related to the emission level of greenhouse gases and maintenance or improvement of environmental values that may be affected by the execution of the contract (Article 35.2.d). In this regard, they should optimize the energy consumption of its offices and facilities by signing energy service contracts that reduce energy consumption, paying the contractor with savings obtained in the energy bill (Article 35.2.e).

On the other hand, the Law 2/2011 establishes that private corporations may publish annually report to make public their policies and results on Corporate Social Responsibility (CSR). Article 39.3 recommends corporations with more than 1,000 employees to elaborate an annual CSR report which should be submitted to the State Council on CSR.

The minimum content of the sustainability and CSR reports is established in the Order ESS/1554/2016, of September 29, which regulates the procedure for the registration and publication of the reports of social responsibility and sustainability of companies, organizations and public administrations.[986] According to Article 3.1 of the Order ESS/1554/2016, companies, organizations and public administrations must present reports of social responsibility and sustainability based on any of the existing national and international models, expressing the commitment of the entity with the social responsibility and sustainability policies, as well as the implementation in its organization of this type of policies, and showing the results obtained.

The reports must include information on at least some of the following topics (Article 3.2):

- Transparency in management.
- Good corporate governance
- Fight against corruption and bribery.
- Commitment to the local and the environment.
- Improvement of labour relations.
- Policies of universal accessibility and inclusion of groups at risk of social exclusion.
- Diversity and equality policies.
- Responsible and sustainable consumption.
- Information on environmental, social and good governance aspects.
- Respect, protection and defence of human rights, throughout the supply chain of the proposing entity.
- Opinions of the interest groups.
- Any other issues that show a commitment to the values and principles of corporate social responsibility and sustainability.

Some academics studies have shown that the Law 2/2011 has limited effects on the reporting practices. This was because, after the Spanish law was enacted, the state

[986] See, Orden ESS/1554/2016, de 29 de septiembre, por la que se regula el procedimiento para el registro y publicación de las memorias de responsabilidad social y de sostenibilidad de las empresas, organizaciones y administraciones públicas, available at: https://www.boe.es/boe/dias/2016/10/01/pdfs/BOE-A-2016-8964.pdf.

failed to implement enforcement mechanisms such as the guidelines for reporting metrics and the system for the submission of CSR reports. In this regard, Luque-Vílchez and Larrinaga argue that governmental regulation of CSR reporting does not guarantee alone better disclosing levels and that a normative climate is necessary to accompany changes in the law. Additionally, the multiplicity of actors, pulling in different directions and with different levels of power, participated in the production of normativity and, eventually, molded the corporate response to the Law 2/2011. Their findings have provided insight to understand why Law 2/2011 approval has not produced any significant increase in CSR disclosure in Spanish businesses.[987]

4. Monitoring, sanction and enforcement

The Law 2/2011 omits the consequences of non-compliance with the publication of sustainability and CRS reports.

According to Article 2 of the Order ESS/1554/2016, the publication of the reports will be done through the website of the Ministry of Labour, Migrations and Social Security (former Ministry of Employment and Social Security), in accordance with the provisions of the *Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno*.[988]

- **Law 11/2018, of December 28, 2018 amending the Commercial Code, the revised Capital Companies Law approved by Legislative Royal Decree 1/2010, of July 2, 2010 and Audit Law 22/2015, of July 20, 2015, as regards non-financial information and diversity[989]**

2. Scope

The Law 11/2018 stems from Royal Decree-Law 18/2017, of November 24, which modified the Commercial Code, the revised text of the Capital Companies Act approved by Royal Decree Legislative 1/2010, of July 2, and Law 22/2015, of July 20, on Audit of Accounts, regarding non-financial information and diversity.[990] The Royal Decree-Law 18/2017 imposed obligations to certain entities of public interest (which include banks, insurance companies, listed companies, investment fund managers and pension funds, as well as, in general, all the large companies) to disclose non-financial and diversity information, in the terms defined by Directive 2013/34, of non-financial information of a social and environmental nature.

The Law 11/2018 increased the number of companies required to file the non-financial information statement, in comparison with Royal Decree-Law 18/2007, which only applied to public-interest entities meeting a number of requirements. From the entry into force of Law 11/2018,[991] companies will be required to file the non-financial information statement, individually or on a consolidated basis, if they meet the following requirements:[992]

a) The average number of workers employed by the company or the group, as applicable, during the year is greater than 500.

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[987] See Luque-Vílchez, M. and Larrinaga, C. (2016). "Reporting Models do not Translate Well: Failing to Regulate CSR Reporting in Spain". *Social and Environmental Accountability Journal*, vol. 36, núm. 1, pp. 56-75.
[988] The reports are available at: https://expinterweb.empleo.gob.es/memrse/entrada/listadoMemoriasPublicadas.action.
[989] See Ley 11/2018, de 28 de diciembre, por la que se modifica el Código de Comercio, el texto refundido de la Ley de Sociedades de Capital aprobado por el Real Decreto Legislativo 1/2010, de 2 de julio, y la Ley 22/2015, de 20 de julio, de Auditoría de Cuentas, en materia de información no financiera y diversidad, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2018-17989.
[990] See Real Decreto-ley 18/2017, de 24 de noviembre, por el que se modifican el Código de Comercio, el texto refundido de la Ley de Sociedades de Capital aprobado por el Real Decreto Legislativo 1/2010, de 2 de julio, y la Ley 22/2015, de 20 de julio, de Auditoría de Cuentas, en materia de información no financiera y diversidad, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2017-13643.
[991] According to the transitional provision of Law 11/2018, the amendments it introduces will be applicable in the fiscal years beginning on or after January 1, 2018, and the two fiscal years to be taken for the purposes mentioned above will be that beginning on or after January 1, 2018 and the immediately preceding year.
[992] See Article 49.5 of *Código de Comercio, aprobado por Real Decreto de 22 de agosto de 1885*, available at: https://www.boe.es/buscar/act.php?id=BOE-A-1885-6627.

b) They are either deemed to be public-interest entities in accordance with the audit legislation, or meet, for two consecutive years, at each of their year-end dates, at least two of the following tests:

- Total asset items must amount to more than €20,000,000.
- Annual net revenues must exceed €40,000,000.
- The average number of workers employed during the year must be greater than 250.

3. Content of Regulation

Non-Financial Information Statement

The Law 11/2018 specifies the content of the non-financial information statement to be included in the management report in order to understand the evolution, the results and the situation of the group, and the impact of its activity, at least, on environmental and social issues, respect for human rights and the fight against corruption and bribery, as well as on the personnel, including measures that have been taken, if any, to promote the principle of equal treatment and opportunities between women and men, non-discrimination and inclusion of persons with disabilities and universal accessibility.[993]

The following information regarding the company (in case of individual accounts) or the group (in case of consolidated accounts) must be included:

- A brief description of the business model.
- A description of the policies pursued in relation to the matters set out above, including the due diligence processes implemented to identify and assess the risks and those regarding verification and control, including the measures adopted.
- The outcome of those policies, including relevant non-financial key performance indicators allowing for monitoring and evaluation of progress and facilitating comparability between companies and sectors, in accordance with the national, European and international benchmark frameworks used for each matter.
- The main risks relating to those matters arising in connection with the operations including, where relevant and proportionate, its business relationships, products and/or services which are likely to cause adverse impact in those areas of risk, and how it manages those risks.
- Non-financial key performance indicators relevant to the particular business. Generally applied standards of non-financial key performance indicators that fulfil the European Commission guidelines in these matters can be used.

Moreover, as an addition with respect to Royal Decree-Law 18/2017, Law 11/2018 details the significant information that the non-financial information statement must include on: (i) environmental matters,[994] (ii) social and employee-related matters (taking in factors such as the pay gap and the implementation of policies promoting disconnection from work),[995] (iii) respect for human rights,[996] (iv) anti-corruption

[993] See Article 49.6 of *Código de Comercio*.

[994] Detailed information on the current and foreseeable effects of the company's activities on the environment and, where applicable, health and safety, environmental assessment or certification procedures; the resources dedicated to the prevention of environmental risks; the application of the precautionary principle, the amount of provisions and guarantees for environmental risks. In this regard, the non-financial information statement should include the important elements of greenhouse gas emissions generated as a result of the company's activities, including the use of the goods and services it produces; the measures adopted to adapt to the consequences of climate change; the reduction goals established voluntarily in the medium and long term to reduce greenhouse gas emissions and the means implemented for that purpose (Article 49.6.I of *Código de Comercio*).

[995] Total number and distribution of employees by sex, age, country and professional classification; total number and distribution of work contract modalities, annual average of permanent contracts, temporary contracts and part-time contracts by sex, age and professional classification, number of dismissals by sex, age and professional classification; the average remunerations and their evolution disaggregated by sex, age and professional classification or equal value; salary gap, the remuneration of equal or average positions in the company, the average remuneration of directors and

and bribery matters,[997] and (v) information about the company (taking in the company's sustainable development commitments, subcontractors and suppliers, consumers, and tax information).

In the event that the group of companies does not apply any policy in any of the non-financial matters, the consolidated non-financial information statement will offer a clear and motivated explanation in this regard.

When a company that is dependent on a group is, in turn, dominant of a subgroup, it will be exempt from the obligation to disclose non-financial information if the company and its subsidiaries are included in the consolidated management report of another company in which the obligation is fulfilled. If an entity accepts this option, it must include in the management report a reference to the identity of the parent company and the Mercantile Registry or other public office where its accounts must be deposited together with the consolidated management report or, in the assumptions of not being forced to deposit their accounts in any public office, or having opted for the preparation of a separate report.

Without prejudice to the disclosure requirements applicable to the consolidated non-financial information statement, the report should be made available to the public free of charge and be easily accessible on the company's website within six months at the end of the financial year and for a period of five years.

Annual Corporate Governance Report

The Law 11/2018 also broaden the content of the annual corporate governance report of listed companies in order to include a description of the applicable diversity policy applied to the board of directors, including its objectives, the measures adopted, the way in which they have been implemented and the results for the reporting period, as well as the measures that, if applicable, the appointment committee has agreed accordingly. If no diversity policy is applied, an explanation should be included in this respect. However, listed companies that meet the conditions to be qualified as "small entity" or "medium-sized entity" in accordance with Spanish accounts auditing legislation shall only be required to include information about the measures adopted on gender, if any.

Good Governance Code of Listed Companies[998]

In 2006, a new Corporate Governance Code is adopted: the Unified Code, which was approved by the Board of the *Comisión Nacional del Mercado de Valores* (CNMV) as a single document incorporating the corporate governance recommendations pursuant to section 1. f) of the first provision of Order ECO/3722/2003 of 26 December. Therefore, the Unified Code is a harmonisation and review of the recommendations and principles previously stated by both the Olivencia and the Aldama Committees. It included modern trends in corporate governance, stated by different entities and institutions such as the OECD, the Basel Committee on Banking Supervision and the European Commission, and it takes into account the comments and proposals put forward by economic operators

executives, including variable remuneration, allowances, indemnities, payment to long-term savings forecast systems and any other perception disaggregated by sex, implementation of employment disconnection policies (Article 49.6.II of *Código de Comercio*).

[996] Application of due diligence procedures in the field of human rights; prevention of the risks of violation of human rights and, where appropriate, measures to mitigate, manage and repair possible abuses; complaints about cases of violation of human rights; promotion and compliance with the provisions of the fundamental conventions of the International Labour Organization related to respect for freedom of association and the right to collective bargaining; the elimination of discrimination in employment and occupation; the elimination of forced or compulsory labour; the effective abolition of child labour (Article 49.6.III of *Código de Comercio*).

[997] Information related to the fight against corruption and bribery: measures taken to prevent corruption and bribery; measures to combat money laundering, contributions to foundations and non-profit entities (Article 49.6.IV of *Código de Comercio*).

[998] See Código de buen gobierno de las sociedades cotizadas, available at: https://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf.

and institutions.[999] Since its approval, a series of intervening legal texts have affected various of its recommendations. In order to adapt or eliminate recommendations affected by new legislation, in June 2013 the CNMV Board approved a partial update of the Unified Code.

In 2015, the Unified Code was replaced by the 2015 Corporate Governance Code, which presents the following main novelties in comparison with the Unified Code:

- The Good Governance Code employs a new format based on selecting and identifying the principles informing each set of specific recommendations.
- A significant number of the Unified Code recommendations have since been written into legislation, so do not form part of this Good Governance Code.
- A new set of recommendations deals specifically with corporate social responsibility.

2. Scope

The 2015 Corporate Governance Code is strictly voluntary in nature, though the terms considered basic and indispensable have been written into legislation. It includes the 64 voluntary good governance recommendations directed at all listed companies, whatever their size and market capitalisation (except where expressly indicated that a recommendation is applicable only to large cap firms). This is not to deny that some recommendations may be unsuitable or excessively burdensome for smaller sized firms. In such cases, however, all they need do is state their reasons for non-compliance and any alternatives chosen. The relevant arrangements include:

- When various listed companies belong to the same group, they should take appropriate steps to safeguard the legitimate interests of all interested parties and to resolve conflicts of interest should they arise.
- Companies should give clear information to the general meeting concerning their degree of compliance with Good Governance Code recommendations.
- Listed companies should maintain a publicly disclosed policy for communication and contacts with shareholders, institutional investors and proxy advisors.

3. Content of Code

The risk control and management function

According to Principle 21, the company should maintain a risk control and management function in the charge of an internal unit or department, supervised directly by the audit committee or, where appropriate, another dedicated board committee. This Principle contributes to implement Company legislation which includes the approval of a risk control and management policy among the board's non-delegable powers.[1000] The Code goes a step further, in view of its importance, and recommends that listed companies establish a risk control and management function in the charge of an internal unit and under the supervision of a dedicated board committee.

In this regard, the Code recommends:

- Risk control and management policy should identify at least: a) the different types of financial and non-financial risk the company is exposed to (including operational, technological, financial, legal, social, environmental, political and

[999] Paredes, C. and Núñez-Lagos R. (2015). "Spain", in: Calkoen, W.J.L (ed.). *The Corporate Governance Review*. UK: Law Business Research. Available at: https://www.uria.com/documentos/publicaciones/4566/colaboraciones/1564/documento/Spain.pdf?id=5725.
[1000] See Article 529 ter of the Spanish Company Law, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2010-10544.

reputational risks), with the inclusion under financial or economic risks of contingent liabilities and other off-balance-sheet risks; b) the determination of the risk level the company sees as acceptable; c) the measures in place to mitigate the impact of identified risk events should they occur; d) the internal control and reporting systems to be used to control and manage the above risks, including contingent liabilities and off-balance sheet risks (Recommendation 45).

- Companies should establish a risk control and management function in the charge of one of the company's internal department or units and under the direct supervision of the audit committee or some other dedicated board committee. This function should be expressly charged with the following responsibilities: a) ensure that risk control and management systems are functioning correctly and, specifically, that major risks the company is exposed to are correctly identified, managed and quantified; b) participate actively in the preparation of risk strategies and in key decisions about their management; c) ensure that risk control and management systems are mitigating risks effectively in the frame of the policy drawn up by the board of directors.

Corporate Social Responsibility

The Code states that companies should accordingly take time to analyse how their business impacts on society and vice versa. In this way, taking as reference their own value chain, they can identify social issues that lend themselves to shared value creation. In this regard, Principle 24 points out that companies should accordingly take time to analyse how their business impacts on society and vice versa. In this way, taking as reference their own value chain, they can identify social issues that lend themselves to shared value creation.

The Code sets out what should be the minimum content of the corporate social responsibility policy whose approval falls to the board of directors and provides guidance on how to implement the principle of transparent communication with disclosure of non-financial as well as financial information on the company's business. The Code recommends:

- The corporate social responsibility policy should state the principles or commitments the company will voluntarily adhere to in its dealings with stakeholder groups, specifying at least: a) the goals of its corporate social responsibility policy and the support instruments to be deployed; b) the corporate strategy with regard to sustainability, the environment and social issues; c) concrete practices in matters relative to: shareholders, employees, clients, suppliers, social welfare issues, the environment, diversity, fiscal responsibility, respect for human rights and the prevention of illegal conducts; d) the methods or systems for monitoring the results of the practices referred to above, and identifying and managing related risks. e) the mechanisms for supervising non-financial risk, ethics and business conduct; f) channels for stakeholder communication, participation and dialogue; g) responsible communication practices that prevent the manipulation of information and protect the company's honour and integrity.
- The company should report on corporate social responsibility developments in its directors' report or in a separate document, using an internationally accepted methodology.

4. Monitoring, sanction and enforcement

Spanish legislation leaves it up to companies to decide whether or not to follow these corporate governance recommendations, but requires them to give a

reasoned explanation for any deviation, so that shareholders, investors and the markets in general can arrive at an informed judgement. According to Article 540 of the Royal Legislative Decree 1/2010, of 2 July, Approving the Consolidated Text of the Capital Companies Act,[1001] the "comply or explain" principle in requiring listed firms to specify their degree of compliance with corporate governance recommendations, justifying any failure to comply in the pages of their annual corporate governance reports.

B. Employment Law

- Law 31/1995, of 8 November, on Prevention of Occupational Risks[1002]

Article 40.2 of the Spanish Constitution entrusts to the public powers the responsibility for safeguard health and safety at work. This constitutional mandate implies the need to develop a policy and a normative framework for the protection of health of workers by means of risks prevention derived from work in accordance with the European standards and international commitments. There are a number of ILO Conventions on Occupational Safety and Health which has been ratified by Spain (Conventions Nos. 013, 062, 115, 119, 120, 127, 136, 148, 155, 162, 176 and 187).[1003]

2. Scope

The general Occupational Health and Safety legislation in Spain, transposing Directive 89/391/EEC (Framework Directive), is mainly covered by Law 31/1995 on the Prevention of Work-Related Risks. It establishes the general principles for health monitoring of all workers (except domestic ones and self-employed). This Law does not apply – in line with European legislation – to those activities whose characteristics do not permit it in the field of public service, e.g. police, security, armed forces and military activities, as well as civil protection. Separate Resolutions and Royal Decrees have been prepared to cover these latter types of workers.[1004] The Law is executed by the authorities in the autonomous communities. The Law is further complemented by various Royal Decrees and some more general laws on e.g. equality and free access to services.[1005]

3. Content of Regulation

From the recognition of the workers' rights at the workplace to the protection of their health and integrity, the Law 31/1995 establishes the various duties, which shall guarantee those rights. The provisions of labour character contained in the Law and its regulations shall be in all case considered as the minimum compulsory essential requirements.

Duty to Protect

[1001] See, Royal Legislative Decree 1/2010, of 2 July, Approving the Consolidated Text of the Capital Companies Act, available at: https://www.mjusticia.gob.es/cs/Satellite/Portal/1292428455808?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DCorporate_Enterprises_Act_2015_-_Ley_de_Sociedades_de_Capital.PDF.

[1002] See Ley 31/1995, de 8 de noviembre, de prevención de Riesgos Laborales, available at: https://www.boe.es/buscar/pdf/1995/BOE-A-1995-24292-consolidado.pdf.

[1003] ILO (2015). "Spain", available at: https://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO:1100:P1100_ISO_CODE3,P1100_SUBCODE_CODE,P1100_YEAR:ESP,,2015:NO.

[1004] Boronat, J. and González, S. (2015) Evaluation of the EU Occupational Safety and Health Directives Country Summary Report for Spain. Brussels: COWI-Milieu.

[1005] Additionally to the Law 31/1995, there is a specific Occupational Health and Safety decree for the National Police professionals; a decree establishing minimum Occupational Health and Safety provisions for the mines sector; a specific Occupational Health and Safety decree establishing minimum provisions for people working on fishing vessels; a decree regulation the transportation of dangerous substances; a decree requiring a minimal crew for fishing vessels to ensure safety; a decree regulating safety and health of workers against electrical risks; a specific decree on Occupational Health and Safety requirements for recruitment agencies. See: https://www.boe.es/legislacion/codigos/codigo.php?id=93&modo=1&nota=0&tab=2.

Pursuant to the duty to protect, employers shall guarantee the health and safety of their workers in all work-related matters. To this end, employers shall, within the framework of their own responsibilities, prevent occupational risks by integrating preventive actions into the company and by adopting all necessary measures to protect the health and safety of workers. These measures are related to occupational risk prevention plans, risk assessment, information, consultation and participation and training of workers, actions in the face of an emergency and in case of a serious and imminent risk, health surveillance, and by setting up an organization and the resources. Employers shall permanently monitor preventive actions for the continued improvement of the activities related to the identification, assessment and control of risks that could not have been avoided and of the existing levels of protection, and shall make all necessary arrangements to adapt the prevention measures referred to in the previous paragraph to those changing circumstances that may affect work performance (Article 14.2).

The employers must apply the measures, which are part of the general obligation to prevention in accordance with the following principles (Article 15.1):

a) Avoiding risks.
b) Evaluating the risks which cannot be avoided.
c) Combating the risks at source.
d) Adapting the work to the individual, especially as regards the design of the work stations, the choice of work equipment and the choice of working and production methods, with a purpose, in particular, to diminish monotonous and repetitive work and to reduce their effect on health.
e) Take into account the technical progress.
f) Replacing the dangerous by the non-dangerous or the less dangerous.
g) Planning the prevention activities, developing a coherent overall prevention policy which covers technology, work organisation, working conditions, social relationships and the influence of the environmental factors related to the work.
h) Giving priority to collective protective measures over the personal ones.
i) Giving appropriate instructions to the workers.

Occupational risk prevention plan, risk assessment and planning of preventive actions (Article 16)

Occupational risk prevention shall be incorporated into the company's general management system, both into all its activities and into all the levels of its hierarchy. This occupational risk prevention plan shall include the organizational structure, responsibilities, duties, practices, procedures, processes and resources needed to carry out risk preventive actions in the company, as set forth in the regulations.

The basic tools for managing and applying risk prevention plans, which may be implemented in stages on a scheduled basis, are the occupational risk assessment and the planning of preventive actions:

a) Employers shall carry out an initial assessment of the risks to the health and safety of workers, taking into account, in general, the nature of the activities of the company, the characteristics of the existing jobs and the workers who shall perform them. A similar assessment shall be made when choosing work equipment, chemical substances or preparations used and the fitting-out of workplaces. The initial assessment shall take into account all other actions that shall be implemented in accordance with the regulation on the protection against specific risks and particularly dangerous activities. The assessment

shall be updated where the working conditions change and shall, in any event, be reconsidered and reviewed, if necessary, where health damage has occurred.

Should the results of the assessment make it necessary, employers shall periodically monitor the employees' working conditions and the activities they carry out, in order to identify potentially dangerous situations.

b) Where the results of the assessment reveal situations of risk, employers shall take all necessary preventive actions to eliminate or reduce and control said risk. Such preventive actions shall be planned by the employer, indicating for each of the activities the implementation deadline, the designated officers and the human and material resources needed to implement them. Employers shall ensure that the preventive actions included in the planning are effectively implemented and, to that end, shall continuously monitor them.

Preventive actions shall be modified where the employer, as a result of the periodic monitoring, appreciates that they fail to provide the intended protection.

Regarding the general content of the occupational risk assessment, the Royal Decree 39/1997, of 17th January, by virtue of which the Regulations for Prevention services are approved,[1006] states that the initial assessment of the risks which have not been possible to avoid must be applied to each one of the posts within the company in which such risks exist. For this purpose, the following must be taken into account (Article 4.1 of the Royal Decree 39/1997):

- Existing and forecast working conditions, as defined in the Law 31/1995.
- The possibility that the worker who occupies such a post or is going to occupy it is particularly sensitive to one or other of such conditions, by virtue of his/her personal characteristics or known biological state.

On the basis of this initial assessment, reassessment must be made of those posts that could be affected by (Article 4.2 of the Royal Decree 39/1997):

- The choice of working equipment, chemical substances or preparations, the introduction of new technologies and the modification of the conditions in the work place.
- A change of working conditions.
- The hiring of a worker whose personal characteristics or known biological state make him/her particularly sensitive to the conditions of the post.
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Obligations on manufacturers, importers and providers (Article 41)

Manufacturers, importers and providers of machinery, equipments, tools and other means of production, are obliged to ensure that these are not a source of danger to the worker, provided that they are installed and used in accordance with the instructions given by the former. Manufacturers, importers and providers of products and chemical substances for use at work are obliged to pack and label them in such a way that allows their preservation and handling in safety conditions and their content can be clearly identified and also the risks whose storage or use may entail on the safety or health of workers.

2.3. Information, consultation and participation of workers (Article 18)

The employer shall consult workers, and allow them to take part in discussions on all questions relating to safety and health at work. In this regard, the workers shall be entitled to put forward proposals to the employer in order to improve the levels of protection of safety and health at work.

[1006] See Real Decreto 39/1997, de 17 de enero, por el que se aprueba el Reglamento de los servicios de prevención, available at: https://www.boe.es/buscar/act.php?id=BOE-A-1997-1853.

According to Article 38, workers have the right to take part in discussions in the enterprise on questions relating to the risks prevention at work. In enterprises or establishments with six or more workers, their participation shall be channelled through their representatives and the specialised representation regulated in this chapter.

4. Monitoring, sanction and enforcement

Labour and Social Security Inspectorate

It concerns to the Labour and Social Security Inspectorate the activity of surveillance and control of the legislation on the risks prevention at work. In compliance with this role, it shall carry out the relevant following functions:

a) To notify to the labour authority about fatal, very serious and serious accidents at work, and about those others which, because of their characteristics or affected persons, it is considered necessary such a notification, and also about occupational diseases which meet those qualifications and, in general, whenever the said authority asks for it in relation to the fulfilment of the legislation on the risks prevention at work.
b) To control and to promote the fulfilment of the obligations taken on by the prevention services set up by the Law 31/1995.
c) To order the immediate stoppage of work where, according to the inspector's opinion, it has been noticed the existence of a serious and imminent risk to the safety or health of workers.

Liabilities and Sanctions

The failure to comply with their obligations in the prevention of occupational risks area by employers gives rise to administrative liabilities, and so, where appropriate, to criminal and civil liabilities for damages which can be derived from such non-fulfilment. The administrative liabilities derived from the disciplinary procedure shall be compatible with the compensation for damages and the surcharge of the economic benefits of the Social Security System which can be established by the competent body in accordance with the rules and regulations of the said system (Article 42).

Under the Spanish legislation, the duty of care has been further developed with the addition of the EU directives on work safety. The labour risk prevention legislation emphasizes the liability of employers for any lack of preventive safety measures. It is compulsory law which establishes sanctions in response to non-compliance. For example, when employers fail to take due protective measures or fail to provide works with training and information.

Civil liability of employers can arise for omitting to take preventive measure. When a worker has an accident due to the lack of compulsory risk prevention measures, the employer has to compensate the worker. The damages suffered by the employee has to be compensated. Additionally, even in cases where preventive measures are taken as required, if the accident occurs, the employer is considered liable because of the ineffectiveness of the preventive measures. In these cases, it is sufficient for the claimant to establish that the breach of duty contributed substantially to the injury. Employers can be exempted from liability in cases where the fault is attributed to the employee.[1007]

[1007] Infantino, M. and Zervogianni, E. (2017). *Causation in European Tort Law*. Cambridge: CUP, pp. 444-445. Moreover, The Labor Risk Prevention Law is the primary Spanish legislation that emphasizes the employers' Duty of Care through special risk assessment and training measures. The penal code provides criminal penalties for a breach of the Labor Risk Prevention Law. Workers´ statutes define jurisdiction using conflicts of law principles for Spanish citizens working abroad. The law on the judiciary also sets out rules regarding jurisdiction in employment contract disputes.

According to the Spanish Supreme Court, when an accident at workplace occurs, the liability of the employer arises if: a) the defendant company has no taken general o specific prevention measures. Since there are infinite type for non-compliance, there was no need for the legislator to draw up a list. All that is requires is a breach of duty by the employer to care for his employees; b) an effective link has to exist between the injury and the action or omission. The link is broke if the injury is the result of the exclusive fault of the victim.[1008]

In this sense, the Spanish Supreme Court held that as long as employees are subject to company decisions, an accident while on a mission abroad is an "occupational" accident as defined in the Labour Risk Prevention Law and the employer has a duty of security to the employee.[1009]

Sanctioning procedure (Article 45)

According to Article 43, where the Labour and Social Security Inspector establishes the existence of a breach of the legislation on the prevention of occupational risks, the Inspector shall request the employer to correct the faults observed, unless due to the seriousness and imminence of the risks he decided to proceed with the stoppage. The request made by Inspector shall be notified in writing to the supposedly responsible employer pointing out the anomalies and deficiencies observed with information of the deadline to correct them. If the request is not complied with, and the deficiencies continue the Labour and Social Security Inspector, should he have not done it before, shall draw up a formal statement of breach of statutory duty.

5. Other relevant legislation:

- Royal Decree 1311/2005, of November 4, on the Protection of the Health and Safety of Workers against Risks derived or that may arise from Exposure to Mechanical Vibrations[1010]
- Royal Decree 374/2001, of April 6, on the Protection of the Health and Safety of Workers against the Risks related to Chemical Agents during Work[1011]
- Organic Law 3/2007, of 22 March, for Effective Equality between Women and Men[1012]

C. Environmental Law

Article 45 of the Spanish Constitution sets out that everyone has the right to enjoy an environment suitable for personal development, and the duty to preserve it. The public authorities must safeguard the rational use of all natural resources with a view to protect and improve the quality of life and to preserve and restore the environment, through reliance on collective solidarity.[1013] Persons who violate these

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Spanish case law extends the rights to workers on a mission abroad, but restricts it to injuries sustained at work." See, Claus, L. (2009). "Duty of Care of Employers for Protecting International Assignees, their Dependents, and International Business Travelers", available at: https://higherlogicdownload.s3.amazonaws.com/RIMS/b69e0893-271d-4b2a-9c81-df3986421bbe/UploadedImages/ISOS%20Duty_of_Care_whitepaper.pdf.

[1008] See, STS de 2 de octubre de 2000; STS 26 de marzo de 1999.

[1009] STS de 4 de marzo 1998.

[1010] See, Real Decreto 1311/2005, de 4 de noviembre, sobre la protección de la salud y la seguridad de los trabajadores frente a los riesgos derivados o que puedan derivarse de la exposición a vibraciones mecánicas, available at: https://www.boe.es/buscar/pdf/2005/BOE-A-2005-18262-consolidado.pdf.

[1011] See, Real Decreto 374/2001, de 6 de abril, sobre la protección de la salud y seguridad de los trabajadores contra los riesgos relacionados con los agentes químicos durante el trabajo, available at: https://www.boe.es/buscar/pdf/2001/BOE-A-2001-8436-consolidado.pdf.

[1012] See, Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, available at: https://www.boe.es/buscar/pdf/2007/BOE-A-2007-6115-consolidado.pdf.

[1013] The central state, the autonomous communities and municipalities share legislative and enforcement powers (Articles 148 and 149 of the Spanish Constitution). The central state has exclusive competence over: "… Legislation, regulation and concession of hydraulic resources and development where the water-streams flow through more than one Self-governing Community, and authorization for hydro-electrical power plants whenever their operation affects other Communities or the lines of energy transportation are extended over other Communities. 23. Basic legislation on environmental protection, without prejudice to powers of the Self-governing Communities to take additional protective measures; basic legislation on woodlands, forestry and cattle trails" (Articles 149.22 and 149.23 of the Spanish Constitution). The autonomous communities are responsible for the legislative and regulatory implementation and enforcement of primary legislation in their territory. They can also establish additional rules on environmental

principles are liable to criminal or administrative sanctions, and must repair the damage caused in accordance with the applicable legal provisions.[1014]

Following the constitutional provisions and the framework developed by the EU legislation, environmental laws and regulations include due diligence requirements for adverse impacts on the environment.

- **Law 21/2013, of 9 December 2013, on Environmental Assessment[1015]**

The basic legislation on the matter of the environmental assessment of plans, programmes and projects is contained in the Law 21/2013 on Environmental Assessment, which ensures that environmental assessment legislation is homogenous around the whole country and guarantees citizen participation in these procedures, designed to analyse the environmental impact of said plans, programmes and projects.

2. Scope

The Law 21/2013 aims at raising the level of environmental protection, in order to promote sustainable development (Article 1), through:

- the integration of environmental aspects in the preparation and adoption, approval and authorization of plans, programs and projects;
- the analysis and selection of alternatives that are environmentally viable;
- the establishment of measures that must prevent, correct and, where appropriate, compensate for adverse effects on the environment;
- the establishment of the monitoring, sanction and enforcement measures to comply with the purposes of this law.

This basic legislation and its subsequent regional regulations [1016] set a list of activities and conditions that governs the administrative procedure for evaluating:

- Plans and programmes, which are subjects to a strategic environmental evaluation (*evaluación ambiental estratégica*), and
- Projects, which are subjects to an environmental impact assessment (*evaluación de impacto ambiental*).

A strategic environmental assessment shall be carried out for all plans and programmes, which are prepared for agriculture, livestock, forestry, livestock, forestry, aquaculture, fisheries, energy, mining, industry, transport, waste

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protection (article 148 of the Spanish Constitution). Municipalities hold environmental competences in certain matters such as urban waste prevention and management, atmospheric and noise pollution, granting local licenses authorizing construction and the operation of certain activities, and use of the local public domain.

[1014] See Constitución Española, «BOE» núm. 311, de 29 de diciembre de 1978, páginas 29313 a 29424 (112 págs.), available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1978-31229. On the constitutional protection of the environment see Jordano Fraga, J. (1995). *La protección del derecho a un medio ambiente adecuado*. Barcelona: J. M. Bosch.

[1015] See Ley 21/2013, de 9 de diciembre, de evaluación ambiental, available at: https://www.miteco.gob.es/es/calidad-y-evaluacion-ambiental/temas/evaluacion-ambiental/ley212013textoconsolidado_tcm30-190698.pdf. For critical analysis of the Law 21/2013, see de la Varga Pastor, A. (2017). "Análisis jurídico de la Ley 21/2013, de 9 de diciembre, de evaluación ambiental y de las competencias autonómicas en materia de EIA de proyectos". R*evista d'estudis autonòmics i federals*, num. 25, pp. 11-50.

[1016] The autonomous communities that have passed regulations on the matter of the environmental assessment of plans, programmes and projects are: Andalucía - Ley 7/2007, de 9 de julio, de gestión integrada de la calidad ambiental; Aragón - Ley 11/2014, de 4 de diciembre, de prevención y protección ambiental de Aragón; Canarias - Ley 14/2014, de 26 de diciembre, de armonización y simplificación en materia de protección del territorio y de los recursos naturales; Cantabria - Ley 17/2006, de 11 de diciembre, de control ambiental integrado; Castilla y León - Decreto Legislativo 1/2015, de 12 de noviembre, por el que se aprueba el texto refundido de la Ley de prevención ambiental de Castilla y León, Cataluña - Ley 20/2009, de 4 de diciembre, de prevención y control ambiental de las actividades; Castilla-La Mancha - Ley 4/2007, de 8 de marzo, de evaluación ambiental en Castilla-La Mancha; Extremadura - Ley 16/2015, de 23 de abril, de protección ambiental de la Comunidad Autónoma de Extremadura; Galicia - Ley 1/1995, de 2 de enero, de protección ambiental de Galicia; Islas Baleares - Ley 11/2006, de 14 de septiembre, de evaluaciones de impacto ambiental y evaluaciones ambientales estratégicas en las Islas Baleares; Madrid - Ley 2/2002 de evaluación ambiental de Madrid; Región de Murcia - Ley 4/2009, de 14 de mayo, de protección ambiental integrada; Comunidad Foral de Navarra - Ley 4/2005, de 22 de marzo, de intervención para la protección ambiental; País Vasco - Ley 3/1998, de 27 de febrero, de protección del medio ambiente del País Vasco; La Rioja —Ley 5/2002, de 8 de octubre, de protección del medio ambiente de La Rioja; Comunidad Valenciana - Ley 2/1989, de 3 de marzo, de impacto ambiental. See: Código de Evaluación y Control Ambiental, available at: https://www.boe.es/legislacion/codigos/codigo.php?id=111&modo=1&nota=0&tab=2.

management, water resources management, maritime terrestrial public domain, use of the marine environment, telecommunications, tourism, urban and rural territory planning, or the use of ground (Article 8 of the Law 21/2013 on Environmental Assessment).

The business activities and sectors subject to an environmental impact assessment are listed in Annex I to the Law 21/2013:[1017]

- Intensive livestock installations
- Extractive industry
- Mineral and steel industries. Production and processing of metals
- Chemical, petrochemical, textile, paper industries industry
- Infrastructure projects
- Hydraulic engineering and water management projects
- Waste disposal and recovery projects
- Other projects developed in sites protected under the Natura 2000 Network and in protected areas by international instruments

According to the Law 21/2013, the requests for strategic environmental evaluations and environmental impact assessments should take into account the likely significant effects of the project on the environment resulting from, including the impact of the project on climate.[1018] Spain has one of the most advanced laws in terms of the obligation to incorporate climate change in the environmental assessment. However, in practice, only a few projects submitted for environmental impact assessments include references to climate change, and in many cases, the topic is merely cited.[1019]

The Law 21/2013 do not delimit the territorial scope of "environmental impacts" to be assessed. However, Article 49 states that when the execution in Spain of a plan, a program or a project may have significant effects on the environment of another Member State of the European Union or of another State to which Spain has an obligation to consult under international instruments, Spain, through the Ministry of Foreign Affairs and Cooperation (*Ministerio de Asuntos Exteriores y de Cooperación*), will notify the State of the existence of the plan, program or project, and the procedure of adoption, approval or authorization to which it is subject, giving it a period of thirty days to decide on its intention to participate in the environmental assessment procedure. This implies the assessment of extraterritorial environmental impact in third countries outside the European Union.

3. Content of regulation

The Law 21/2013 is an administrative regulation to prevent environmental impacts through assessing in advance the likely environmental effects of certain projects and activities carried out by private entities. The Law establishes two types of processes, ordinary (Annex I) and simplified (Annex II). Each annex has a list of projects and thresholds, using a mixed model of thresholds and case-by-case consultation in Annex II projects, as with most EU Member States. It also indicates that projects that may be presented in segmented form but that jointly reach the thresholds of Annexes I or II, must be submitted to environmental impact assessments, but there is no mechanism for detecting this situation.[1020]

The stages of the ordinary EIA process are as follows:

[1017] Article 7 of the Law 21/2013 on Environmental Assessment.
[1018] See Articles 18, 29, 35 and 45 of the Law 21/2013 on Environmental Assessment.
[1019] Enríquez-de-Salamanca A, Martín-Aranda R.M., Díaz-Sierra, R. (2016.). "Consideration of climate change on environmental impact assessment in Spain". *Environmental Impact Assessment Review*, núm. 57, pp. 31-39.
[1020] See Enríquez-de-Salamanca, A. (2016). "Project splitting in environmental impact assessment", *Impact Assessment and Project Appraisal*, vol. 34, núm. 2, pp. 152-159.

1. The developer requests the substantive body to determine the scope of the environmental impact study, and submit the initial documents on the project. Once it has verified the adequacy and conformity of the documents submitted, the substantive body sends them to the environmental body (Article 34.1).
   The initial documents on the project should contain, as a minimum, the following information (Article 34.2):

- A description and specific characteristics of the project, including its location, technical feasibility and its probable impact on the environment, as well as a preliminary analysis of the foreseeable effects on the environmental factors derived from the vulnerability of the project in the event of serious accidents or catastrophes.
- The main alternatives considered and an analysis of the potential impacts of each of them.
- A diagnosis of the territorial and environmental affected by the project.

2. The environmental body determines the scope of the environmental impact study, after consulting the public administrations concerned and interested parties (Articles 34.3 and 34.4).
3. The project developer submits its environmental impact study to the substantive body (Article 35 and Annex VI).
   The environmental impact study that will contain, at least, the following information:

- A description of the project that includes information about its location, design, dimensions and other relevant characteristics of the project; and forecasts over time on the use of land and other natural resources. Estimation of the types and amounts of waste generated and emissions of matter or energy resulting.
- Description of the various reasonable alternatives studied that are related to the project and its specific characteristics, including the zero alternative, or non-implementation of the project, and a justification of the main reasons for the choice adopted, taking into account the effects of the project on environment.
- Identification, description, analysis and, if applicable, quantification of possible direct or indirect, secondary, cumulative and synergistic effects of the project on the following factors: population, human health, flora, fauna, biodiversity, geodiversity , soil, subsoil, air, water, the marine environment, climate, climate change, landscape, material goods, cultural heritage, and the interaction between all the factors mentioned, during the execution phases, exploitation and, where appropriate, during the demolition or abandonment of the project.
  - The description of the possible significant effects should cover the direct effects and indirect secondary, cumulative, transboundary, short, medium and long term, permanent and temporary, positive and negative effects of the project. This description must take into account environmental protection objectives established at Union or Member State level, and significant for the project (Annex VI).
- A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects on the environment and landscape.
  - In particular, the measures will be defined to alleviate the adverse effects on the state or potential of the water masses affected. The compensatory measures shall consist, whenever possible, of restoration actions, or of the same nature and effect contrary to that of the action taken. The project budget will include these measures with the same level of detail as the rest of the

project, in a specific section, which will be included in the environmental impact stud (Annex VI).

- Environmental monitoring program.
  - The environmental monitoring program should establish a system that guarantees compliance with the indications and the measures envisaged to prevent, correct and, where appropriate, compensate, contained in the environmental impact study, both in the execution phase and in the implementation exploitation, dismantling or demolition phase. The aims of the program are environmental monitoring during the construction phase and during the exploitation phase (Annex VI).
- Non-technical summary of the environmental impact study and conclusions in easily understandable terms.

4. The substantive body carries out public information and consultations procedures with the relevant public administrations and interested persons. Both procedures can be performed simultaneously (Article 37):

- the public information procedure consists of disclosing the environmental impact study and the project to the public for a period of at least 30 days;
- the consultation procedure involves the administrations and interested parties that have been consulted in relation to the scope of the environmental impact study.

5. The substantive body submits the results of the public information and consultation procedure to the promoter (Articles 39 and 40).
6. The substantive body requests an environmental impact statement from the environmental body (Article 41).
7. The environmental body issues an environmental impact statement (Article 42).

4. Monitoring, sanction and enforcement

Monitoring

Two regulatory authorities take part in this administrative procedure, the substantive competent body (for example, the mining regional authority in the case of a mining project) and the environmental body. The substantive body grants the authorisation for the activity, while the environmental authority sets out environmental conditions (which are incorporated in the authorisation). The substantive body or the bodies designated by the autonomous communities follow-up of the compliance with the environmental impact statement or the environmental impact report (Article 52.1).

The environmental impact statement or the environmental impact report may define, if necessary, the monitoring requirements for compliance with the conditions established therein, as well as the type of parameters that must be monitored and the duration of the monitoring, which will be proportionate to the nature, location and size of the project and the significance of its effects on the environment.

Sanction and enforcement

The substantive body can exercise its sanctioning power in private projects that must be authorized by the General State Administration as well as the bodies designated by the autonomous communities in their area of competence (Article 53).

Developers of projects that have the status of a private individual or legal entity may be sanctioned for the administrative infractions provided for in the Law

21/2013. In the case that the fulfilment of a legal obligation corresponds to several persons jointly, they will respond in a joint manner of the infractions that are committed and of the sanctions that are imposed (Article 54).

- Fines: the developers that fail to meet their obligations can be fined (very serious infringements: 240,401-2,404,000 euros; serious infringements: 24,000-240,400 euros; minor infringements: 24,000 euros) (Article 56.1).
- Exclusion from public procurement: the imposition of a sanction for the commission of very serious infringement will entail the prohibition of contracting in accordance with the Law of the Public Sector Contracts (Article 56.3).
- Damages: if the infringements have caused damages or harm to the Public Administration or the environment, the developer should return to its original state the situation altered by the infringement or compensate for the damages and losses caused (article 53.4).

1) Sanctioning procedures are always initiated ex officio, by agreement of the competent body, either on their own initiative or as a consequence of higher order of other bodies or complaint (Article 58).
2) The competent body for the investigation of the sanctioning procedure, in cases of urgency and for the provisional protection of the interests involved, may adopt provisional measures prior to the initiation of the sanctioned procedure (Article 59).
3) Interested parties have a period of fifteen days to provide as allegations, documents or information as they deem appropriate and, where appropriate, propose evidence specifying the means of which they intend to use (Article 60).
4) The investigating body will formulate a resolution proposal in which describe the facts that are considered proven and their exact legal qualification and the infraction, specifying the sanction proposed to be imposed and the provisional measures that have been adopted, where appropriate, by the competent body to initiate the procedure or by the instructor thereof (Article 62).
5) The resolution proposal notified to the interested parties, indicating the clarification of the procedure (Article 63).
6) The competent body issue a resolution that decide all the questions raised by the interested parties and those derived from the procedure. The resolution is adopted within one month from the reception of the resolution proposal and the documents, allegations and information contained in the procedure (Article 64).

5.Other Legislation

- Royal Legislative Decree 1/2016, of December 16, approving the revised text of the Law on Integrated Pollution Prevention and Control[1021]

- **Law 26/2007, of October 23, on Environmental Liability**

2. Scope

Law 26/2007 transposes the European Directive 2004/35/EC, of the European Parliament and of the Council, of April 21, on environmental responsibility in relation to the prevention and repair of environmental damage, establishing an administrative regime of objective and unlimited environmental liability based on the prevention and "polluter pays" principles. In this regard, Article 1 states that

[1021] See Real Decreto Legislativo 1/2016, de 16 de diciembre, por el que se aprueba el texto refundido de la Ley de prevención y control integrados de la contaminación, available at: https://www.boe.es/buscar/pdf/2016/BOE-A-2016-12601-consolidado.pdf.

Law 26/2007 This law regulates the responsibility of operators to prevent, avoid and repair environmental damage, in accordance with Article 45 of the Constitution and with prevention and "polluter pays" principles.

Thus, the Law establishes a whole set of administrative powers for public authorities to guarantee compliance with its provisions. It is therefore separated from civil liability in which conflicts between the party causing the damage and the injured party are settled in the courts.

For the purposes of Law 26/2007, 'operators' means any natural or legal person, public or private, who carries out an economic or professional activity or who, by virtue of any title, controls over such activity or has a determining economic power over its technical operation. For its determination will be taken into account what sectoral, state or autonomous legislation, for each activity on the holders of permits or authorizations, registration or communications to the Administration (Article 2.10).

The Law applies to environmental damage and the imminent threat of such damage occurring when it is caused by economic or professional activities listed in Annex III, even if there is no intent, fault or negligence (Article 3.1). The activities listed in Annex III are:

The Law also applies to environmental damage and the imminent threat of such damage occurring caused by other economic or professional activities than those listed in Annex III, when there is misconduct, fault or negligence, preventive, avoidance and reparation measures will be required; or when there is no fraud, fault or negligence, preventive and avoidance measures will be required (Article 3.2).

The Law does not apply to damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.

3. Content of regulation

The operators of the economic or professional activities included in this law are obliged to adopt and execute the measures of prevention, avoidance and repair of environmental damage and to defray their costs, whatever their amount, when they are responsible for them (Article 9).

Obligations of prevention and avoidance of new damages

In the face of an imminent threat of environmental damage caused by any economic or professional activity, the operator has the duty to adopt without delay and without the need for a warning, request or prior administrative act, the appropriate preventive measures. Likewise, when environmental damage has been caused by any economic or professional activity, the operator has the duty to adopt in the same terms the appropriate measures to avoid new damages, regardless of whether or not it is subject to the obligation to adopt reparation measures by application of the provisions of this law (Article 17).

Obligations of reparation

The operator of any of the economic or professional activities listed in Annex III that causes environmental damage is obliged to inform the competent authority immediately and to take the necessary reparation, even if there has been no fraud, fault or negligence (Article 18):

- Adopt all provisional measures necessary to immediately repair, restore or replace natural resources and damaged natural resource services.
- Submit to the approval of the competent authority a proposal for remedial measures for environmental damage caused.

Environmental Risk Assessment

Annex III operators are obliged to carry out an Environmental Risk Assessment in order to (Article 24):

- Determine if are under the obligation to have a financial guarantee or are exempted, and calculate its amount
- It is a prevention tool (risk management decision-making tool).

According to Article 34 of the Royal Decree 2090/2008, of December 22, which approves the Regulation of partial development of Law 26/2007, of October 23, on Environmental Responsibility,[1022] the environmental risk assessment should be carried out by the operator or a third party contracted by it, following the scheme established by the UNE 150.008 norm[1023] or other equivalent standards. Likewise, with a degree of detail appropriate to the hypothetical nature of the damage, in the preparation of the risk assessment the criteria set out in Royal Decree 2090/2008 must be used with respect to the following parameters:

- The characterization of the environment where the installation is located.
- The identification of the agent causing the damage and the resources and services affected.
- The extent, intensity and time scale of the damage, for the scenario with the highest environmental damage index.
- An evaluation of the significance of the damage.

The risk analysis will take into account to what extent the prevention and risk management systems adopted by the operator, in a permanent and continuous manner, reduce the potential environmental damage that may arise from the activity.

Financial Guarantee

Annex III operators must ensure they have the financial guarantee to cover the environmental liability inherent in their intended activities (Article 24.1). The financial guarantee forms are insurance policy or contracts, guarantee or adhoc technical reserves (Article 26). The coverage of the financial guarantee will never exceed 20,000,000 euros (Article 30).

According to Article 33 of the Royal Decree 2090/2008, the calculation of the amount of the financial guarantee is calculated by the environmental risks assessment of the activity that will contain the following operations:

- Identify the accidental scenarios and establish the probability of occurrence of each scenario.
- Estimate an environmental damage index associated with each accidental scenario following the steps established in Annex III.
- Calculate the risk associated with each accidental scenario as the product between the probability of occurrence of the scenario and the environmental damage index.
- Select the scenarios with the lowest associated environmental damage index that group 95 percent of the total risk.
- Establish the amount of the financial guarantee, such as the environmental damage value of the scenario with the highest environmental damage index among the selected accidental scenarios.

4. Monitoring, sanction and enforcement

[1022] See Real Decreto 2090/2008, de 22 de diciembre, por el que se aprueba el Reglamento de desarrollo parcial de la Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2008-20680.
[1023] See Norma UNE 150008:2008. Análisis y evaluación del riesgo ambiental, available at: https://www.une.org/encuentra-tu-norma/busca-tu-norma/norma?c=N0040747.

Enforcement

The competent authority shall ensure that the operator adopts the measures of prevention, avoidance or repair of environmental damage, as well as to observe the other obligations established in the Law 26/2007:

- Legislative development and implementation of the Law 26/2007: autonomous communities in whose territory damage or harm-threats are located.
- Central Government executive competence: Law application of executive competence in terms of state owned public property (water and coasts) and mandatory report in case of damage or the imminent threat of damage affects state-managed water basins or state-owned public property
- Where the territories of more than one autonomous community are affected or where autonomous communities must act in cooperation with the Central Government, the Administrations concerned shall establish the cooperation mechanisms considered appropriate for the effective exercise of the powers set out in the Law 26/2007.

Sanctions

The liability established in the Law 26/2007 shall be compatible with penal or administrative penalties imposed for the actions giving rise to the liability (Article 6.1). According to Article 35, natural and legal persons who are operators of economic or professional activities and who are responsible for them may be sanctioned for the facts constituting the administrative infractions regulated in Law 26/2007. The infractions typified in the Law 26/2007 are classified as very serious and serious (Article 37) and, in the case of infractions, the following sanctions can be imposed (Article 38):

- Fine
- Termination of the authorization
- Suspension of the authorization

If the same act or omission was constitutive of two or more infractions, only the one that carries the greatest sanction will be taken into consideration. The facts that have been sanctioned criminally or administratively will not be sanctioned, in the cases in which the identity of the subject, fact and foundation is appreciated. In the cases in which the infractions could constitute an offense or a fault, the competent authority will pass the fault to the competent jurisdiction and refrain from proceeding with the sanctioning procedure while the judicial authority has not ruled (Article 36).

Types of Liability for Environmental Damage

In Spain, there are three types of liabilities linked to environmental incidents or damage: civil, criminal and administrative liability. Civil liability is limited to the damages caused to another individual in tort or in contract. However, Law 26/2007 limits the rights of third parties to seek compensation (or imposes the obligation to return such compensation) as far as the damages caused have been remedied through the actions taken under the environmental liability regulation. Thus, civil liability is in fact limited to monetary damages arising from loss of profit or other damages directly linked to the individual.[1024]

Regarding criminal liability, the proper defence regarding criminal offences would normally involve the lack of negligence or participation in the commission of the crime, the lack of evidence against the operator, the measures taken to repair the

[1024] Baño León, J. M. (2018). "Environmental Law 2019", available at: https://practiceguides.chambers.com/practice-guides/comparison/376/2038/3945-3966-3976-3984-3986-3990-3993-3996-3999-4004-4007-4015-4020-4026-4030-4034-4042-.

damage or the statute of limitations. Criminal offences are limited in time depending on the seriousness of the infringement. In short, the statute of limitations will range from five to ten years.[1025]

Regarding administrative liability, it is important to bear in mind that administrative liability for restoring the environment must be differentiated from the applicable administrative sanctioning regime. Therefore, the obligation to restore and compensate for all damages caused to the environment is perfectly compatible with the imposition of administrative penalties upon breach of the relevant environmental regulation.

The obligation to restore the environment expires after 30 years of the completion of the 'incident', whereas liability for each specific infringement depends on the sectoral norm, but in general very serious infringements are subject to a three-year limitation period, serious infringements to a two-year limitation and minor to a six-month limitation.

Similar to any other administrative proceeding, the defences are both substantive and procedural. The parties will challenge the conclusions of the administration and try to demonstrate (through expert reports or other mechanisms) the lack of harm to the environment or the fulfilment of the administrative requirements. However, given the inquisitorial nature of the proceeding, it is difficult to overcome the initial finding of the administration, which is why procedural arguments regarding the way in which the proceeding was carried out tend to gain more importance, particularly as the decision reaches judicial review.[1026]

In the cases of concurrence of environmental responsibility with criminal or sanctioning procedures, the following rules will apply (Article 6.2):

a) The Law 26/2007 shall apply, in any case, to the repair of environmental damage caused by the operators of economic or professional activities listed in Annex III, regardless of the processing of the remaining procedures.

b) The Law 26/2007 shall apply, in any case, to the adoption of preventive measures and avoidance of new damages, by all operators of economic or professional activities, regardless of the processing of the remaining procedures.

c) The adoption of measures to repair environmental damage caused by economic or professional activities other than those listed in Annex III shall be enforceable only when the fraud or negligence has been determined in the corresponding administrative or criminal procedure.

In any case, the compensatory measures that are necessary to avoid double recovery of costs will be adopted.

Corporate Environmental Liability

There are particular rules concerning liability of a corporate entity for environmental damage or breaches of environmental law in administrative and criminal law. According to Law 26/2007, if the harm is caused by a subsidiary of a parent company under the instructions of such parent company or using the subsidiary fraudulently to limit liability, the parent company will be vicariously liable (Article 10).

Likewise, the Law expands corporate liability to managers and directors whose conduct has been determinant of the responsibility of the company in that they will be responsible for their obligations and liabilities. This is without prejudice to potential corporate liability claims against managers and directors for failure to meet their fiduciary duties or civil liability arising from a criminal sentence. Therefore, directors or managers of a corporation whose conduct has been a driving

[1025] Idem.
[1026] Idem.

factor in the damage caused, as well as liquidators in the case of bankruptcy, can be held personally liable (Article 13).

According to the Spanish Criminal Code, corporations can be held guilty of committing a crime to the environment and sanctioned accordingly. There are six possible measures that the Criminal Code allows to be imposed on a corporation:

- dissolution of the legal entity, which will produce the definitive loss of its legal personality, as well as its capacity to act in any way in the legal traffic, or carry out any kind of activity, even if it is lawful;
- suspension of its activities for a term that may not exceed five years;
- closure of its premises and establishments for a period that may not exceed five years;
- prohibition to carry out in the future the activities within the field where the offence was committed or covered up, which may be temporary or definitive, but if it is temporary, the term may not exceed 15 years;
- inability to obtain subsidies and public aid, to contract with the public sector and to enjoy benefits and tax incentives or social security, for a period that may not exceed 15 years; and
- judicial intervention to safeguard the rights of workers or creditors for as long as deemed necessary, which may not exceed five years.

Some cases regarding environmental law application in Spain are the 'Prestige' case and the Aznalcollar case. The 'Prestige' case was one of the most serious environmental disasters in European history. The oil tanker accident caused more than 63,000 tonnes of fuel oil to spill along the north coast of Spain and southwest coast of France. The amount of oil was more than the 'Exxon Valdez' and the toxicity considered higher, because of the higher water temperatures. On 14 January 2016, the Spanish Supreme Court delivered its judgment. This was a criminal case where the Supreme Court sentenced the captain of the ship to a two-year imprisonment for negligence and neglect of duties. The ruling held that the captain of the 'Prestige' vessel and the insurance company were directly liable, declaring also the secondary liability of the owners of the vessel. Moreover, the International Fund for Compensation for Oil Damage was also held liable within the terms of the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention).[1027]

The Aznalcollar case concerns the accident that occurred in the natural park of Doñana on 25 April 1998, when a dam burst at the Los Frailes mine, releasing heavy metals into the Guadiamar river. As a result, there were 37 tonnes of dead fish and heavy metals found in the liver and muscle tissue of species throughout the food chain. The criminal judicial proceeding finished in 2002 without any individuals being found guilty. Since then, the Spanish central government and the Andalusian government have been litigating in civil courts against the company that ran the mining operations, which closed its Spanish subsidiary shortly afterwards.[1028]

Sanctioning procedure under Law 26/2007

The procedures for the requirement of environmental responsibility regulated in the Law 26/2007 shall be initiate: a) *ex officio* by reasoned agreement of the competent body, either on its own initiative, or as a consequence of a higher order, or at the reasoned request of other bodies or by means of a complaint that transfers facts that, in the opinion of the competent body, be enough to agree on the start; b) at the request of the operator or any other interested person (Article 41).

[1027] Idem.
[1028] Idem.

When the initiation of environmental liability procedures is initiated by an interested party[1029] other than the operator, the request shall be formalized in writing and shall specify in any case the damage or threat of environmental damage for the purposes provided in the Law 26/2007. The request should specify the following aspects:

- The action or omission of the alleged perpetrator.
- The identification of the alleged perpetrator.
- The date on which the action or omission took place.
- The place where the damage or the threat of damage has occurred.
- The causal relationship between the action or the omission of the presumed responsible party and the damage or threat of harm.

The competent body will decide on the admission of the request for the initiation of the environmental liability procedure and will inform the applicant within 10 working days of receiving the request. In the procedures that are initiated at the request of the interested party other than the operator, if the competent body verifies that the request for initiation does not include the elements indicated above, it will require the applicant to accompany the required documents within a period of If the competent body verifies that the request for initiation does not include the elements indicated in the previous section, it will require the applicant to accompany the required documents within a period of ten working days. In cases where such a correction does not occur, your application will be considered as abandoned. In cases where such a correction does not occur, the application will be considered as abandoned.

The competent body may refuse to grant the request, by means of a reasoned decision, in the cases of those applications that manifestly lack of foundation or have been rejected on the merits by previous firm resolution other substantially identical requests. Faced with this resolution of inadmissibility, the legally appropriate remedies may be filed through the administrative and judicial avenues, as the case may be.

- **Draft Bill on Climate Change and Energy Transition[1030]**

2. Scope

In February 2019, the Spanish the Council of Ministers has approved the Draft Bill on Climate Change and Energy Transition at the proposal of the Ministry for Ecological Transition. This regulation provides for the decarbonisation of the Spanish economy by 2050 and gives a decisive boost to renewable energies (Article 1).

The Draft Bill establishes the following national objectives by 2030 in order to comply with the international commitments:

- Reduce by 2030 the greenhouse gas emissions of the Spanish economy as a whole by at least 20% compared to 1990.
- Reach by 2030 an energy penetration of energy from renewable sources in the final energy consumption of at least 35%.
- Achieve by 2030 an electrical system with at least 70% generation from energies from renewable sources.

[1029] According to Article 42 of the Law 26/2007, the interested parties are any individual or legal entity in which any of the circumstances set forth in article 31 of Law 30/1992, of November 26, or any non-profit legal entities that prove compliance with the following requirements: a) that they have among the purposes accredited in their statutes the protection of the environment in general or that of any of its elements in particular; b) that they were legally constituted at least two years before the exercise of the action and that they have been actively exercising the activities necessary to achieve the purposes set forth in their bylaws; c) that according to its statutes they develop their activity in a territorial area that is affected by the environmental damage or the threat of damage.

[1030] See, Anteproyecto de Ley de Cambio Climático y Transición Energética, available at: https://elperiodicodelaenergia.com/wp-content/uploads/2019/02/Anteproyecto-Ley-CC-y-TE-.pdf.

- Improve energy efficiency by reducing the consumption of primary energy by at least 35%, with respect to the baseline according to community regulations.

3.Content of regulation

The companies that formulate consolidated accounts and the companies that are not part of a consolidated group shall publish, within their management report, an annual report that assesses the financial impact on society of the risks associated with climate change, including risks of the transition to a sustainable economy and the measures that are adopted to deal with those risks. The report will be published on the corporate website of the companies (Article 26.4).

The content of the reports will be determined by regulation, within two years from the approval of the Law, and will include the following aspects (Article 26.5):

- The governance structure of the organization, including the role that its different bodies play, in relation to the identification, evaluation and management of risks and opportunities related to climate change.
- The strategic approach, both in terms of adaptation and mitigation, of the entities to manage the financial risks associated with climate change, taking into account the risks already existing at the time of writing the report, and those that may arise in the future, identifying the actions required at that time to mitigate such risks.
- The actual and potential impacts of the risks and opportunities associated with climate change in the activities of the organization and its strategy, as well as in its financial planning.
- The processes of identification, evaluation, control and management of risks related to the climate and how they are integrated in their analysis of global business risk and their integration in the global management of risk by the organization.
- The metrics, scenarios and objectives used to assess and manage the relevant risks and opportunities related to climate change.

D. Administrative Law

- **Law 9/2017, of November 8, on Contracts of the Public Sector, by which the European Directives of the Parliament and Council 2014/23/EU and 2014/24/EU, of February 26, 2014 are transposed into the Spanish legal system[1031]**

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2. Scope

This Law applies to procurement proceedings that are commenced after it has come into effect, commencement being understood as the publication of the call for competition. Contracts awarded before the entry into force of the Law 9/2017 are governed by the previous regulation with regard to their effects, compliance and termination, duration and regime for extensions.

The Law 9/2017 introduces stricter rules for the benefit of companies and their workers, so that the new rules tighten the provisions on this matter in the so-called "abnormally low" offers. This establishes that the contracting authorities will reject the offers if they prove that they are abnormally low because they do not comply with the applicable environmental, social or labour obligations. In this regard, considerations of a social, environmental and innovation and development nature

[1031] See, Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014, available at: https://www.boe.es/buscar/pdf/2017/BOE-A-2017-12902-consolidado.pdf.

are included in public contracts. These considerations may be included both when designing the award criteria, as qualitative criteria to evaluate the best value for money, or as special execution conditions, although their introduction is subject to their being related to the object of the contract to be executed.[1032]

In the environmental field, environmental management certificates are required from bidding companies, as a condition of technical solvency, that is, to accredit the experience or "good work" of that company in the field of environmental protection In addition, with the aim of promoting respect for human rights, and especially the basic labour rights of working people and small producers in developing countries, the possibility is introduced that both the award criteria and the special execution conditions incorporate social aspects of the production and marketing process referring to the works, supplies or services to be provided under the contract in question, and in particular may require that said process comply with the principles of fair trade establishes the European Parliament Resolution on Fair Trade and Development (2005/2245 (INI)).

It also introduces a special rule regarding the fight against corruption and the prevention of conflicts of interest, whereby the contracting bodies are obliged to take the appropriate measures to fight against fraud, favouritism and corruption, and to prevent, detect and effectively resolve conflicts of interest that may arise in the bidding procedures. In line with measures to fight against corruption, a new regulation of hiring prohibitions is made that increases the cases of prohibition modifying the competence, the procedure and the effects of a declaration of this type. At the same time, it transposes those referred to by the Community Directives as "self-correcting measures", so that certain prohibitions of contracting either will not be declared or will not be applied, as the case may be, when the company has adopted compliance measures aimed at repairing the damages caused by their unlawful conduct, under the conditions that are regulated in this Law.

According to Article 1 of the Law 9/2017, the purpose of this Law is to regulate the public procurement, in order to guarantee that it complies with the principles of freedom of access to bids, publicity and transparency of procedures, and non-discrimination and equal treatment among bidders; and to ensure, in connection with the objective of budgetary stability and expenditure control, and the principle of integrity, an efficient use of the funds destined to the execution of works, the acquisition of goods and the contracting of services by means of the requirement of prior definition of the needs to be met, the safeguarding of free competition and the selection of the most economically advantageous offer. In this regard, public procurement should incorporate social and environmental criteria in a transversal and mandatory manner, provided that it is related to the object of the contract, in the conviction that their inclusion provides a better quality-price ratio in the contractual provision, as well as a greater and better efficiency in the use of public funds.

The Law 9/2017 has slightly extended the scope of application of the rules. Included within its subjective scope are political parties, trade union and business organisations, and foundations and associations related to any of these entities where they fulfil the requirements to be considered a contracting authority (Article 3). As regards the objective scope of application, excluded contracts and legal transactions have been structured in a more organised and defined manner. In

[1032] In Catalonia, civil society organizations published the document entitled "Guide for the protection and promotion of human rights in public procurement" as a tool to Catalan public administrations so that they can incorporate instruments for protection and development of human rights. The Guide seeks to facilitate the incorporation of social clauses for the guarantee of human rights by business contractors in all stages of the tender procedure. These clauses may be introduced as admission criteria, award criteria or special mandatory execution conditions. Tornos, J., Fernández, A., Calvete, A. and Ambrós, J. (2017). "Guide for the protection and promotion of human rights in public procurement", available at: http://993responsable.org/en/.

addition to expressly excluding circumstances such as contracts for political campaign services (Article 2).[1033]

3.Content of regulation

Public sector can only contract with natural or legal persons, Spanish or foreign, who have full capacity to act, are not subject to any prohibition to hire, and prove their economic and financial and technical or professional solvency or, in cases where that this Law so requires, are properly classified (Article 65).

Legal persons may only be awarded contracts whose benefits are included within the purposes, object or scope of activity according to their statutes or foundational rules (Article 66). Regarding foreign legal persons, without prejudice to the application of Spain's obligations deriving from international agreements, legal persons of States not belonging to the European Union or of signatory States of the Agreement on the European Economic Area must justify by means of a report that the State of origin of the foreign company admits the participation of Spanish companies in contracting with public sector entities. In addition, the list of specific administrative clauses may require non-EU companies that are awarded contracts to open a branch in Spain, with the delegation of agents or representatives for their operations, and that are registered in the Commercial Registry (Article 68).

However, public sector entities cannot contract legal persons in whom any of the following circumstances concur (Article 71):

- They have been convicted by a final judgment for terrorism offenses, constitution or integration of a criminal organization or group, illegal association, illegal financing of political parties, trafficking in human beings, corruption in business, influence peddling, bribery, fraud, crimes against the Public Treasury and Social Security, crimes against the rights of workers, prevarication, embezzlement, negotiations prohibited to officials, money laundering, crimes related to the planning of the territory and urban planning, the protection of historical heritage and the environment, or the penalty of special disqualification for the exercise of profession, trade, industry or commerce. In the case of legal persons, the prohibition reaches administrators or representatives that are declared criminally responsible.
- They have been sanctioned for serious infringement in professional matters that jeopardizes their integrity, market discipline, distortion of competition, labour integration and equal opportunities and non-discrimination of persons with disabilities, or aliens, in accordance with what is established in the current regulations; or for very serious infringement in environmental matters in accordance with the established in the current regulations, or for very serious infringement in labour or social matters.
- The have requested the voluntary bankruptcy declaration, have been declared insolvent in any proceeding, have been declared bankrupt, unless an agreement has been effective or a file of extrajudicial payment agreement has been initiated, or have been disabled.
- They have not complied with the tax or Social Security obligations imposed by the provisions in force, in the terms that are statutorily determined; or in the case of companies with 50 or more workers, not meet the requirement that at least 2 percent of their employees are workers with disabilities; or in the case of companies with more than 250 workers, not complying with the obligation to have an equality plan.

[1033] Uria Mendez (2017). "The main innovations of Law 9/2017 of 8 November on public sector contracts", available at: https://www.uria.com/documentos/circulares/955/documento/7259/UMBriefing.pdf.

- They are affected by a prohibition to hire imposed by an administrative sanction.

The prohibitions to contract will also affect those companies from which, by reason of the persons that govern them or of other circumstances, it can be presumed that they are continuation or that derive, by transformation, merger or succession, of other companies in which they had attended those.

In order to enter into contracts with the public sector, legal persons must prove that they are in possession of the minimum economic and financial and professional or technical solvency conditions determined by the contracting authority (Article 74). Moreover, the capacity to act of legal persons shall be evidenced by means of the deed or constitution document or the founding charter, in which the norms by which their activity is regulated are duly registered, as the case may be, in the corresponding Public Registry, according to the type of legal entity in question (Article 84).

In contracts subject to harmonized regulation, when contracting bodies require the presentation of certificates issued by independent bodies that prove that the bidder meets certain environmental management standards as a means of proving technical or professional solvency, they shall make reference to the Community system of environmental management and auditing (EMAS) of the European Union, or other environmental management systems recognized in the European Regulation (EC) No. 1221/2009 of 25 November 2009, or other environmental management standards based on European standards or relevant international organizations accredited (Article 94).

Regarding Law 9/2017, Amnesty International considers that "[a]*though the progress of the enactment of this regulation is noteworthy, the* [Law 9/2017] *does not consider an obstacle to public procurement that a company has failed or is failing to comply with its responsibility to respect human rights. Neither is this made a selection criterion nor a condition for contracting. It is necessary that public administrations contracting with private companies, giving permits or awarding grants or other benefits or special regimes, or assuming public activities or services should be subject to criteria/conditions and terms of performance that ensure respect for human rights."*[1034]

Public Administration Contracts

The Law 9/2017 reinforces the importance of social and environmental considerations in public contracts. Contracting bodies may establish these considerations as qualitative award criteria for evaluating the best price-quality ratio or as special performance conditions, provided that these are linked to the object of the contract, are not discriminatory, are compatible with EU law and are established in the procurement documents or in the contract notice.

In the specifications of particular administrative clauses, the social, labour and environmental considerations should be included as criteria of solvency, adjudication or as special conditions of execution. Thus, the contracting body may indicate in the document the body or bodies from which the candidates or tenderers can obtain the pertinent information on the obligations related to taxation, environmental protection, and the current provisions on employment protection, equality of gender, working conditions and prevention of occupational risks and socio-occupational insertion of people with disabilities, and the obligation to hire a specific number or percentage of people with disabilities that will be applicable to the work carried out on the site or to the services provided during the execution of the contract (Article 129).

[1034] Amnesty International (2018). "Spain. Submission to the United Nations Committee on Economic, Social and Cultural Rights. 63rd Session, 12 – 29 MARCH 2018", available at: https://www.amnesty.org/download/Documents/EUR4179202018ENGLISH.pdf.

4. Sanctions

The contracts will be terminated by their compliance or by resolution (Article 209). The breach of the main obligation of the contract is cause of resolution as well as the breach of the remaining essential obligations provided that the latter had been classified as such in the specifications or in the corresponding descriptive document (Article 211).

The specifications or the descriptive document may provide for penalties for the case of defective performance of the benefit subject to it or for the case of non-compliance with the commitments or the special conditions of execution of the contract that had been established. These penalties must be proportional to the gravity of the non-compliance and the amounts of each of them may not exceed 10 percent of the contract price, VAT excluded, nor the total of them exceed 50 percent of the contract price (Article 192). When the contractor, for reasons attributable to it, has partially breached the execution of the benefits defined in the contract, the Administration may opt, depending on the circumstances of the case, for its resolution or for the imposition of the penalties that, for such cases, they are determined in the particular administrative clauses document or in the descriptive document.

Additionally, the specifications may establish penalties in case of non-compliance with the special execution conditions. When the breach of these conditions is not defined as a cause of termination of the contract, it may be considered in the specifications, in the terms established by regulation (Article 202).

In the event of partial noncompliance or defective performance or delay in the execution in which no penalty is foreseen or in which it is not cover the damage caused to the Administration, this will require the contractor compensation for damages (Article 194).

E. Stock Exchange Listing

- **Royal Legislative Decree 4/2015, of October 23, whereby Approving the Consolidated Text of the Law of the Stock Market[1035]**

2. Scope

The Royal Legislative Decree 4/2015 covers, among others, any investment company that, in an organized, frequent and systematic way, negotiates on its own account when executing customer orders outside of a regulated market, a Multilateral Negotiation System (*Sistema Multilateral de Negociación*) or an Organized Contracting System (*Sistema Organizado de Contratación*) (Article 2.5). According to Article 132, investment companies are those whose main activity is to provide investment services, on a professional basis, to third parties on financial instruments. The investment companies are securities companies, securities agencies, portfolio management companies and financial advisory companies (Article 143).

Thus, the provisions of the Royal Legislative Decree 4/2015 apply to investment companies domiciled in Spain. Additionally, they apply to companies from third countries that provide investment services and activities or carry out investment activities through the establishment of a branch or under the freedom to provide services without a branch (Article 4).

3.Content of regulation

[1035] See Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11435.

Corporate Governance Obligations

Investment companies must have strong corporate governance procedures, including a clear organizational structure that is adequate and proportionate to the nature, scale and complexity of their activities and with well-defined, transparent and coherent lines of responsibility (Article 182). For this purpose, the administration body of any investment company shall define a corporate governance system that guarantees an efficient and prudent management of the entity, and that includes the proper distribution of functions in the organization and the prevention of conflicts of interest, promoting the integrity of the market and the interest of the clients.

The corporate governance system will be governed by the principles of responsibility and supervision of the administrative body, and the integrity of the accounting and financial information systems. The administrative body periodically monitors and evaluates the adequacy and application of the effectiveness of the corporate governance system. The investment companies should have a website where they disseminate the public information on how they comply with corporate governance obligations (Article 183).

Diligence and Transparency Obligations

The investment companies should act with honesty, impartiality and professionalism, in the best interest of their clients (Article 208). In this regard, companies that provide investment services and activities must organize and adopt measures to prevent, detect and manage potential conflicts of interest between their clients and the company or its group (Article 208 bis). Moreover, they must keep their clients adequately informed at all times. All information addressed to clients, including advertising, must be impartial, clear and not misleading (Article 209). Additionally, investment companies must ensure at all times that they have all the necessary information about their clients (Article 212). Finally, companies must create a register that includes the agreements that establish, in writing and on paper or any other durable medium, the essential rights and obligations of the company and the client (Article 218).

4.Monitoring, sanction and enforcement

Investment companies are subject to the supervision, inspection and sanction regime of the National Securities Market Commission (Article 233), which has some of the following powers of supervision and inspection:

- Adopt any type of measure to ensure that the persons and entities subject to its supervision comply with the applicable rules and regulations, or with the correction or correction requirements made, and may require such persons and entities, individually or collectively and for that purpose, the contribution of reports from independent experts, auditors or their internal control bodies or regulatory compliance.
- Agree the suspension or limitation of the type or volume of operations or activities that individuals or legal entities can do in the stock market.
- Agree the suspension or exclusion of the negotiation of a financial instrument, whether in a regulated market or in other trading systems.
- Request any person to take measures to reduce the volume of a position or exposure.
- Submit issues for criminal prosecution.
- Limit the capacity of any person to sign a derivative contract on raw materials.
- Publish notices.
- Suspend the marketing or sale of financial instruments or structured deposits.

- Suspend the commercialization or sale of financial instruments or structured deposits when an investment company has not developed or applied an effective product approval process.
- Authorize auditors or experts to carry out verifications or investigations.

The investment companies that infringe the rules of order or discipline of the Securities Market incur in administrative responsibility (Article 271), which shall be independent of the possible occurrence of crimes or offenses of a penal nature (Article 272).

The following types of sanctions can be imposed (amongst others):

- Fines
- Suspension or limitation of the type or volume of operations or activities that the offender may carry out in the securities markets for a term not exceeding five years.
- Suspension of membership of the official secondary market or the corresponding multilateral trading system for a term not exceeding five years.
- Exclusion of trading a financial instrument in a secondary market or in a multilateral trading system.
- Revocation of the authorization in the case of investment companies. In the case of investment companies authorized in another Member State of the European Union, this sanction of revocation shall be replaced by the prohibition to initiate new operations in Spanish territory.
- Suspension in the exercise of the administration or management position occupied by the offender in a financial institution for a term not exceeding five years.
- Separation of the position of administration or address occupied by the offender in a financial institution, with disqualification from holding administrative or management positions in the same entity for a term not exceeding five years.
- Separation of the position of administration or address occupied by the offender in any financial institution, with disqualification to exercise administrative or management positions in any other entity for a term not exceeding ten years.
- Restitution of the benefits obtained or of the losses avoided with the commission of the infraction, in case it can be determined.
- Suspension not exceeding ten years of the authorization to a company of investment services and activities or of other entities registered in the records of the National Securities Market Commission.
- Prohibition of negotiating on own account for a term not exceeding ten years any person with management responsibilities in an investment company or any other natural person who is considered responsible for the infraction.
- Inability to exercise management positions in investment companies for a term not exceeding ten years or permanently in case of infractions committed repeatedly.
- Public warning in the "Official State Gazette" that will indicate the responsible person and the nature of the infraction.

F. Third State, EU and International Regulation

- Law 2/2014, of 25 March, on External Action and Service of the State

2. Scope

The Law 2/2014 is designed to make foreign policy ties more coherent, coordinating its activity with the European Union and the new European External Action Service,

and, at an internal level, with the regional governments. The application of the Law is designed through the Foreign Action Strategy. Thus, the Law is conceived as a flexible instrument that pays special attention to five fundamental requirements.

Firstly, the Law affirms and promotes the values and interests of Spain with the aim of strengthening its international presence and reinforcing its image in the world. Secondly, it consolidates and strengthens the credibility of Spain abroad since, as a consequence of globalization and the exponential growth of international economic relations, this credibility is undoubtedly important to increase the export of goods and services, attract capital with which to finance Spanish economy and *facilitate the implantation and expansion of Spanish companies*. Thirdly, it strengthens the participation in the European integration process and coordinates an External Action that is in harmony with the Common Foreign and Security Policy of the European Union, as well as with the aims of the European External Action Service. Fourth, it coordinates the External Action of Spain with that of the States that make up the Ibero-American Community of Nations. This genuine dimension of Spain, derived from history and cultural and linguistic affinity, of which Spanish is a substantive part as a common language, constitutes an unwavering commitment for Spain. And, finally, it guarantees adequate assistance and protection for Spaniards and to support Spanish citizens and companies abroad.

3. Content of regulation

State Companies

State companies should act abroad, in the exercise of their respective functions and competencies, in accordance with the principles established in the Law 2/2014 and subject to the guidelines, the aims and objectives of Foreign Policy set by the Government and the planning instruments of the External Action prepared and approved in accordance with the provisions of this law. Additionally, they should provide information to the ministerial department on which they depend or to which they are attached, on their actions abroad, purposes and objectives thereof, adequacy to the guidelines and planning documents and results obtained, which will be incorporated into the reports that are periodically prepared on External Action of the State, in accordance with current regulations.

External Action in the field of human rights.

The External Action in the field of human rights should promote the extension, recognition and effective compliance with the fundamental principles defended by the international community of democratic States and recognized in the Spanish Constitution itself, in the Universal Declaration of Human Rights and in others pacts and treaties ratified by Spain in this matter, especially the Human Rights Guidelines of the European Union. Likewise, it should promote international cooperation in the defence and guarantee of human rights and will have the work of external projection of the constitutional bodies.

According to the Spanish Ministry of Foreign Affairs and Cooperation, Spanish external policy reflects the evolution of the concept of human rights and, together with the promotion and protection of basic rights, sets as a priority the topic of Business and Human Rights: business activity generates wealth, creates jobs and is an element of social progress. But to fully implement this role, companies must also be socially responsible, particularly in transnational business.[1036]

Additionally, Spanish external policy sets as a priority the topic of human rights defenders: these individuals, groups or institutions protect and defend universally recognised human rights. They often face threats and attacks and deserve our

[1036] Ibid, p. 14.

respect, admiration and solidarity. Accordingly, Spain manages a programme to assist them when threats are made or situations of high risk encountered.[1037]

G. Criminal Law

- Organic Law 10/1995, of November 23, on the Criminal Code[1038]

In 2010, corporate criminal liability was introduced in the Spanish Criminal Code (Article 31 bis).[1039] In 2015, the Criminal Code was amended by a reform which defined more accurately the liability of companies for criminal offences.[1040] In addition, in 2016 the Crown Prosecution Service (*Fiscalía General del Estado*) issued an instruction addressed to public prosecutors, providing details on the practical application of this liability regime.[1041]

All legal entities are subject to criminal liability. However, according to Article 31 quinquies of the Criminal Code, this liability will not apply to the state, local and institutional public authorities, regulatory authorities, public entrepreneurial agencies and entities, international public organizations, and entities that exercise sovereignty or administrative privileges.

The Spanish Criminal Code sets out the specific offences for which a company can be held criminally liable. These include, among others, illegal trafficking of human organs (Article 156 bis.3), trafficking in human beings (Article 177 bis.7), Prostitution / sexual exploitation / corruption of minors (Article 189 bis), discovery and disclosure of secrets (Article 197 quinquies), fraud (Article 251 bis), crimes related to intellectual and industrial property, the market and consumers (Article 288), money laundering (Article 302.2), crimes against the environment (Article 328), bribery/corruption offences (Article 427 bis). It is required that the offences are committed for the benefit of the company.

A company can be held criminally liable for crimes committed by either: (i) the members of its managing body, its legal representatives or those members of a body within the company that are authorised to take decisions on behalf of the company or that have organisational or control powers within the company; or (ii) its employees while carrying out corporate activities and provided that the offence was committed as a result of a gross lack of due supervision and control of such employees (Article 31.1 bis).

As a general rule, provided that part of the conduct constituting the offence takes place in Spain or the perpetrator of the offence is a Spanish national (or a company registered in Spain, the Spanish courts will have jurisdiction over the conduct. However, in cases where the conduct takes place outside Spain, such conduct must also be an offence in the country where it took place; the perpetrator must have not been acquitted or already served the relevant sentence; and either the affected person or the Public Prosecutor must bring a criminal action against the perpetrator before the Spanish courts.

In relation to certain criminal offences, Spanish courts will have jurisdiction, provided that either the affected person or the Public Prosecutor brings a criminal

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[1037] Idem.
[1038] See Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, available at: https://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf.
[1039] See Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2010-9953.
[1040] See Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-3439.
[1041] See Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015, available at: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Circular_1-2016.pdf?idFile=81b3c940-9b4c-4edf-afe0-c56ce911c7af.

action against the perpetrator before the Spanish courts and where at least one of the following conditions is met:

- the proceedings must be against a Spanish national or a foreign national with permanent residence in Spain; or
- the offence must have been committed by: (i) the officer, manager, employee or an associate of an entity with its registered office, or based, in Spain; or (ii) a legal entity based or having its registered office in Spain.

The Spanish Criminal Code does not contain rules extending the criminal liability of the subsidiary to its parent company. Therefore, the general rule is that criminal offenses committed by the representatives, directors, managers or employees of a company should not result in criminal liability for the parent company. However, according to the memo ("*circular*"[1042]) of the Crown Prosecution Service (Fiscal General del Estado) dated 1 June 2011, corporate criminal liability may be attributed to a parent company when it is the representative or manager of the subsidiary and when it would also benefit from the offense. This extension of liability would apply to Spanish and foreign companies alike. Moreover, a parent company could also be held criminally liable as author of crimes (that trigger corporate criminal liability) committed by the directors, managers or representatives of its subsidiary if the parent company has breached a contractual or legal duty of preventing the commission of such crimes.[1043]

In this sense, the Supreme Court ruling number 274/96 applied the doctrine of lifting the veil to charge a tax offense to a natural person who was not the obliged, but who from a factual perspective had used the legal personality, abusing it to avoid him/her obligations and hide him/her status as an administrator in fact. The ruling highlights that neither the tax regime nor any other tax or commercial instrument prevent the criminal courts from lifting the corporate veil to have knowledge of the underlying economic reality.[1044] Moreover, the Supreme Court ruling number 952/2006 applied the doctrine of lifting in case of a front company.

The following types of sanctions can be ordered against a company:

- fines
- winding up of the legal entity
- suspension of activities of up to five years
- closure of the company's premises and establishments for a period of up to five years
- prohibition from carrying out in the future any activities during whose performance the crime was committed, favoured or concealed. This prohibition may be temporary or definitive. If it were temporary, the term cannot exceed 15 years
- disqualification from obtaining subsidies and public aid, from entering into contracts with the public sector and from enjoying tax or social security benefits and incentives for a period of up to 15 years
- judicial intervention

Compliance System (modelos de organización y gestión)

[1042] The "*Circular*" can be defined as a set of guidelines on evaluation and interpretation of substantive and procedural provisions to which the members of the Public Prosecutor's Office must meet. It is not binding and is motivated by the publication of a transcendent legislative reform.
[1043] See Circular 1/2011, de 1 de junio, relativa a la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica número 5/2010, available at: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/memoria2012_vol1_circu_01.pdf?idFile=7ed535ae-8bf0-4aa5-b219-618b3ac7420f, pp. 1294-1295.
[1044] "*ni el régimen de transparencia fiscal ni ningún otro instituto fiscal o mercantil impiden a los tribunales penales levantar el velo societario para tener conocimiento de la realidad económica subyacente*". See STS 274/1996, 20 de Mayo de 1996, available at: https://supremo.vlex.es/vid/53585866#section_6.

Since 2015, the existence of an effective compliance system may serve to mitigate or exclude criminal corporate liability. The Criminal Code includes a defence of adopting and effectively having in place, before the offence was committed, an adequate organisational and management system to prevent offences of the kind committed or to significantly reduce the risk of such offences (Article 31 bis.2.1). The systems must be clear, precise and effective and, of course, written up. It is not enough the existence of a system, whichever it is, but it must be accredited its suitability to prevent the specific crime that has been committed, for which purpose a suitability judgment must be made between the content of the system and the infraction. Therefore, the organisational and management systems must be perfectly adapted to the company and its specific risks.[1045]

The supervision of the functioning and compliance of the organisational and management system should be entrusted to a body of the legal entity with autonomous powers of initiative and control or that has the legal responsibility to supervise the effectiveness of the internal controls of the legal person (Article 31 bis.2.2). The Spanish Criminal Code does not refer to a "Compliance Officer", but rather to an in-house body which supervises and controls the accomplishment of the organisational and management system. This corporate structure is differentiated from other foreigner models which give to internal managers (Compliance Officer) the responsibility to supervise and control the activities of the company on a global or local level.[1046] Small companies could relay the monitoring task to the management of the company. It is essential that the body develop proactive tasks consisting of:[1047]

- Receiving notices of infringement of the compliance "model" and other incidents
- Establishing monitoring protocols and periodic controls
- Informing periodically on compliance
- Updating all the models and protocols with view to new laws or changes in the activity or corporate structure and organization

  The organisational and management system should meet the following requirements (Article 31 bis.5):

- Identify activities within the scope of which crimes may be committed.[1048]
- Establish procedures to define the decision-making process of the corporate will.[1049]
- Have appropriate financial resources to prevent the commission of crimes.
- Impose the obligation of reporting potential risks and breaches to the body entrusted with monitoring the observance of the compliance "model".[1050]

[1045] See Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015, available at: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Circular_1-2016.pdf?idFile=81b3c940-9b4c-4edf-afe0-c56ce911c7af, p. 43.

[1046] Interlegal (2017). "Corporate Criminal Compliance in Spain", available at: http://www.escura.com/archivos/pdf/Corporate_Criminal_Compliance-Interlegal-News-Spain.pdf.

[1047] Pastor, C. (2016). "Corporate Liability in Spain", available at: https://globalcompliancenews.com/white-collar-crime/corporate-liability-in-spain/.

[1048] The legal entity must establish, apply and maintain effective risk management procedures to identify, manage, control and communicate the real and potential risks arising from its activities in accordance with the level of global risk approved by the top management of the entities, and with the specific risk levels established. For this the analysis will identify and evaluate the risk by types of clients, countries or geographic areas, products, services, operations, etc., taking into account variables such as the purpose of the business relationship, its duration or the volume of operations. See Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015, available at: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Circular_1-2016.pdf?idFile=81b3c940-9b4c-4edf-afe0-c56ce911c7af, pp. 43-44.

[1049] Procedures must guarantee high ethical standards, particularly in the hiring and promotion of managers and in the appointment of members of the administrative bodies. In addition to the obligation to meet the eligibility criteria set by the sectoral regulations and, in the absence of such criteria, the legal entity must take into consideration the professional career of the applicant and reject those who, due to their background, lack the required qualifications. Ibid., p. 44.

- Establish disciplinary measures to penalize the infringement of the compliance "model".[1051]
- Verify the effectiveness and efficiency of the compliance "model" periodically and amend it when important infringements of the model arise or when the organization or the company's control structure or its activity changes.[1052]

There is no specific offense with regards to directors or managers who fail to implement controls or compliance programs that could prevent the commission of an offense. However, individuals could be held civilly liable for damages caused to the company due to negligence in their duties.

In addition to that, individuals within the company could be held criminally liable as perpetrators, accomplices or instigators of a criminal offense when, with their actions (intentionally or negligently), they commit a crime.

- **Law 10/2010, of 28 April 2010, on the Prevention of Money Laundering and Terrorist Financing[1053]**

In Spain, the money laundering prevention policy emerged in the late 1980s in response to growing concerns raised by the financial crime resulting from drug trafficking. The Spanish anti-money laundering and counter-terrorist financing legislation is the result of the transposition of EU legislation on the subject.

In September 2018, the Spanish Official Gazette published the Royal Decree-Law 11/2018,[1054] which implement Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. The Royal Decree-Law 11/2018 amended the Law 10/2010.

2. Scope

According to article 1, the Law 10/2010 aims at safeguarding the integrity of the financial system and other economic sectors by establishing obligations in respect of the prevention of money laundering and terrorist financing.

Moreover, the Law 10/2010 covers entities that, through branches or agents or the provision of services without permanent establishment, carry out activities in Spain (Article 2.1). Moreover, it covers natural persons that act as employees of a legal person, or provide permanent or occasional services for the latter, the obligations imposed under the Law shall correspond to such legal person in respect of the services rendered (Article 2.2).

3.Content of regulation
Due diligence

[1050] The existence of channels for reporting internal breaches or illicit activities of the company is one of the key elements of prevention models. However, However, in order for the obligation imposed on employees to be required, it is essential for the entity to have a specific protective regulation for the complainant (whistleblower), which allows reporting on several breaches, facilitating confidentiality through systems that guarantee it in communications (telephone calls, emails ...) without risk of retaliation. Ibid., p. 45.

[1051] The obligation to establish an adequate disciplinary system that sanctions non-compliance with the measures adopted in the model presupposes the existence of a code of conduct in which the obligations of managers and employees are clearly established. The most serious infractions, logically, will be those constituting a crime, and those behaviours that contribute to preventing or hindering their discovery must also be contemplated, as well as the violation of the specific duty to inform the control body of detected breaches. Idem.

[1052] Although the Criminal Code does not establish any term or procedure for revision, an adequate model of organization must contemplate them expressly. In addition, the model must be reviewed immediately if certain circumstances that may influence the risk analysis occur, which must be detailed and that will include, in addition to those indicated in this requirement, other situations that significantly alter the risk profile of the legal entity. Idem.

[1053] See Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo, available at: https://www.boe.es/buscar/pdf/2010/BOE-A-2010-6737-consolidado.pdf.

[1054] See Real Decreto-ley 11/2018, de 31 de agosto, de transposición de directivas en materia de protección de los compromisos por pensiones con los trabajadores, prevención del blanqueo de capitales y requisitos de entrada y residencia de nacionales de países terceros y por el que se modifica la Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas, available at: https://www.boe.es/boe/dias/2018/09/04/pdfs/BOE-A-2018-12131.pdf.

The Law 10/2010 provides, depending on the risk, different levels of application of due diligence measures: *normal due diligence*, *simplified due diligence* and *enhanced due diligence measures*.[1055]

Normal due diligence

The entities covered by the Law 10/2010 shall identify the natural or legal persons intending to enter into business relations or to act in any transaction (Article 3.1.) and the identity of the participants using reliable and irrefutable documentary evidence (Article 3.2). Additionally, they shall identify the beneficial owner, understood as: a) natural person or persons on whose behalf a transaction or activity is being conducted or intervene in any transaction; b) Natural person or persons who ultimately owns or controls,[1056] directly or indirectly, a percentage of more than 25 percent of the capital or voting rights of a legal person, or who otherwise exercises control, directly or indirectly, over the management of a legal person; c) In the case of trusts, such as the Anglo-Saxon trust, all the following persons will be considered as real owners: the settlor, the trustee(s), the protector (if any), the beneficiaries and any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means (Article 4.2).

According to the Law 10/2010, the entities shall gather information on clients to determine whether they are acting on their own or for third parties. Where there are indications or certainty that clients are not acting on their own, the entities shall gather the information required in order to find out the identity of the persons on whose behalf they are acting (Articles 4.3). The entities covered by the Law 10/2010 shall take appropriate steps to identify the structure of ownership and control of legal persons. In cases that the ownership or control structure has not been possible to ascertain within a legal person, the obliged entities should not establish or maintain business relationships with these legal persons (Article 4.4).

The obliged entities shall obtain information on the purpose and intended nature of the business relationship. In particular, information from their clients in order to find out the nature of their professional or business activities and shall take reasonable steps to verify the accuracy of this information (Article 5).

The obliged entities shall conduct ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with their knowledge of the customer, the business and risk profile, including the source of funds and to ensure that the documents, data and information held are kept up-to-date (Article 6).

Application of due diligence measures (Article 7).

The obliged entities shall apply due diligence measures, but may determine the degree of application of the measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction. However, the obliged entities hall be able to demonstrate to the competent authorities that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing through a prior risk analysis which must, in any event, be set down in writing. The obliged entities shall apply the due diligence measures not only to all new customers but also to existing customers, on a risk-sensitive basis.

[1055] The legislation uses the term "diligencie debida"= due diligence (See Capitulo II de la dedida diligencia: https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737.

[1056] According to Article 42 of the Spanish Commercial Code, it is presumed that there is control when a company, which will be classified as dominant, is in relation to another company, which will be classified as a dependent, in any of the following situations: a) holds a majority of voting rights; b) has the power to appoint or dismiss the majority of the members of the administrative body; c) may have, by virtue of agreements entered into with third parties, the majority of voting rights; d) has appointed with its votes the majority of the members of the administrative body, who hold office at the time the consolidated accounts are to be formulated and during the two immediately preceding fiscal years.

The obliged entities shall not enter into business relationships or execute transactions when they cannot apply the due diligence measures required in the Law 10/2010. The refusal to enter into business relations or execute transactions or the termination of the business relationship due to the impossibility of applying the due diligence measures hereunder shall not entail any liability for the obliged persons, except if this should involve unfair enrichment.

The obliged entities may rely on third parties to apply the due diligence measures provided in the Law 10/2010. Nonetheless, they shall maintain full responsibility for the business relationship or transaction, even when the breach is attributable to the third party, without prejudice, where applicable, to the liability of the latter. The obliged entities may also rely on third parties covered by the legislation on prevention of money laundering and terrorist financing of other Member States of the European Union or equivalent third countries, even if the documents or data required by the latter are different to those under the Law 10/2010.

Simplified due diligence

Obliged entities may apply, in the terms established in Articles 9 and 10 of the Law 10/2010, simplified due diligence measures with respect to those customers, products or transactions that involve a low risk of money laundering or terrorist financing.

The application of simplified due diligence measures shall be graduated in line with the risk, according to the following criteria:

- Prior to the application of simplified due diligence measures with respect to a particular customer, product or transaction, defined in the relevant regulations, obliged persons shall verify that such customer, product or transaction effectively involves a low risk of money laundering or terrorist financing.
- In any case, the application of simplified due diligence measures shall be consistent with the risk. Obliged entities shall refrain from applying or shall cease to apply simplified due diligence as soon as they perceive that a customer, product or transaction does not involve a low risk of money laundering or terrorist financing.
- In any case, obliged persons shall maintain a continuous level of monitoring which is sufficient in order to detect transactions warranting special reviewing.

According to the Article 17 of the Regulation of the Law 10/2010,[1057] the obliged entities may apply, according to the risk, one or more of the following simplified measures of due diligence:

a) Check the identity of the client or the real owner only when a quantitative threshold is exceeded after the establishment of the business relationship.
b) Reduce the periodicity of the document review process.
c) Reduce the monitoring of the business relationship and the scrutiny of operations that do not exceed a quantitative threshold.
d) Not collect information on the professional or business activity of the client, inferring the purpose and nature of the type of operations or business relationship established.

Enhanced due diligence measures

In addition to the normal due diligence measures, obliged entities must apply enhanced measures in those cases provided in Section 3 of Chapter II of Law

[1057] See Real Decreto 304/2014, de 5 de mayo, por el que se aprueba el Reglamento de la Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo, available at: https://www.boe.es/boe/dias/2014/05/06/pdfs/BOE-A-2014-4742.pdf.

10/2010. In general terms, enhanced due diligence measures must be applied in relation to countries with strategic deficiencies in their systems for combating money laundering and terrorist financing and that are included in the decision adopted by the European Commission in accordance with the provisions of article 9 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015.

Likewise, obliged entities shall apply enhanced due diligence measures in those areas of business, activities, products, services, distribution or marketing channels, business relationships, clients and transactions with a high risk of money laundering or terrorist financing.

According to the Article 20 of the Regulation of the Law 10/2010,[1058] obliged entities shall apply, in addition to the normal measures of due diligence, enhanced measures of due diligence in the areas of business, activities, products, services, distribution or commercialization channels, business relations and operations that present a higher risk of money laundering or financing of terrorism:

a) Update the data obtained in the customer acceptance process.
b) Obtain documentation or additional information about the purpose and nature of the business relationship.
c) Obtain documentation or additional information about the origin of the funds.
d) Obtain documentation or additional information about the origin of the client's assets.
e) Obtain documentation or information about the purpose of the operations.
f) Obtain managerial authorization to establish or maintain the business relationship or execute the operation.
g) To carry out a reinforced monitoring of the business relationship, increasing the number and frequency of the applied controls and selecting patterns of operations for examination.
h) Examine and document the congruence of the business relationship or operations with the documentation and information available about the client.
i) Examine and document the economic logic of operations.
j) Require that payments or income made in an account in the name of the client, opened in a credit institution domiciled in the European Union or in equivalent third countries.
k) Limit the nature or amount of the operations or means of payment used.

Reporting obligations

The Law 10/2010 imposes certain reporting obligations to obliged entities. Obliged entities shall pay special attention to any event or transaction, regardless of its size, which, by its nature, could be related to money laundering or terrorist financing, and record the results of their analysis in writing and shall report to the *Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias* (Executive Service) those transactions revealing an obvious inconsistency with the nature, volume of activity or customer operating history, provided that after the special review, have no economic, professional or business appreciable justification for the execution of those transactions (Article 17).

In accordance with Article 18 of the Law 10/2010, suspicious transactions reporting shall be made with no delay. The communications will contain, in any case, the following information:

[1058] See Real Decreto 304/2014, de 5 de mayo, por el que se aprueba el Reglamento de la Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo, available at: https://www.boe.es/boe/dias/2014/05/06/pdfs/BOE-A-2014-4742.pdf.

a) List and identification of the natural or legal persons taking part in the transaction and the nature of their participation.
b) The activity which the natural or legal persons participating in transactions are known to engage in, and the congruence between this activity and the transactions made.
c) A list of transactions and their dates stating their nature, the currency in which they were transacted, the amounts and place or places involved, their purpose and the means of payment or collection used.
d) The steps taken by the entity to investigate the transactions being notified.
e) A statement of all the circumstances of whatever kind giving rise to the suspicion or certainty of a link with money laundering, or evidencing the lack of economic, professional or business justification for the activities carried out.
f) Any other data relevant to the prevention of money laundering or terrorist financing determined in the regulations.

In all events, the obliged entities shall report the Executive Service at the established frequency on the transactions determined in the regulations (Article 20).

Obliged entities must supply the documentation and information required of them by the Commission for the Prevention of Money Laundering and Monetary Offences and its support bodies in the exercise of their powers. The aforementioned requirements shall specify the documentation to be supplied or the circumstances that have to be reported, and shall expressly state the term in which these should be presented (Article 21).

Internal control measures

The obliged entities must apply the following measures on internal control:

- Policies and procedures: the obliged entities must adopt in writing and implement adequate policies and procedures of customer due diligence, information, record keeping, internal control, risk assessment and management, compliance ensuring, reporting and customer acceptance in order to prevent and forestall transactions related to money laundering or terrorist financing. The policies and procedures will be applicable to the branches and subsidiaries of the group located in third countries, without prejudice to the necessary adaptations for compliance with the specific rules of the host country, with the specifications that are determined by regulation. In the case of branches and subsidiaries of the group in other Member States of the European Union, the obligated parties shall comply with the obligations contained in the host country (Articles 26.1 and 26.3).
- Prevention Handbook: the obligated entities must approve an adequate handbook for the prevention of money laundering and the financing of terrorism, which will be kept up to date, with complete information on the internal control measures referred to in the previous sections. In order to exercise its supervisory and inspection function, the manual will be available to the Executive Service of the Commission and, in the case of an agreement, to the supervisory bodies of financial entities (Article 26.5).
- Internal procedures for reporting potential breaches: the obliged entities shall establish internal procedures so that their employees, managers or agents can communicate, even anonymously, relevant information about possible breaches of the Law 10/2010 (Article 26 bis.1). In this regard, the obliged entities must adopt measures to guarantee that the employees, managers or agents who

inform of the infractions committed in the entity are protected against reprisals, discriminations and any other type of unfair treatment (Article 26 bis.3).

- Representative to the Executive Service: the obliged entities must appoint a director or senior manager residing in Spain to act as a representative to Executive Service (Article 26 ter.1). The representative is responsible for the fulfilment of the reporting obligations set out in Law 10/2010 (Article 26 ter.2). The obliged entities carrying out activities in Spain through agents or ways of establishment other than branches must appoint a representative residing in Spain who shall be considered central contact point. In this sense, the obliged subjects carrying out activities in Spain through the provision of services without a permanent establishment must appoint a representative to Executive Service who may be non-resident in Spain. In groups integrating several obliged entities, the representative shall be unique and hold an administration or management position in the parent company of the group (Article 26 ter.3).
- Internal Compliance Committee: the obliged entities shall establish an Internal Compliance Committee consisting of representatives from the different business areas of the obliged entity that will be responsible for implementing the policies and procedures on the prevention of money laundering and terrorist financing (Article 26 ter.4). For the exercise of its functions, the Committee must have the necessary material, human and technical resources (Article 26 ter.5).
- External examination: the internal controls adopted by obliged entities shall be subject to an annual examination by an external expert. The results of the examination shall be documented in a report detailing the internal control measures in place, assessing their operational efficiency and, eventually proposing changes or improvements as required. However, in the two years following the issue of this report, it may be replaced by a monitoring report issued by the external expert, dealing only with the appropriateness of the measures taken by obliged person to remedy the deficiencies detected (Article 28).
- Employee training: the obliged entities shall take appropriate measures to ensure that their employees are aware of the requirements of Law 10/2010 (Article 29). For this purpose, obliged entities shall approve an annual training plan in prevention of money laundering and terrorist financing in accordance with article 39 of the Regulation of Law 10/2010.
- Whistleblower protection: the obliged entities shall adopt the appropriate measures to maintain the confidentiality of the identity of the employees, managers or agents who have made an operational communication that shows signs or certainty of being linked to money laundering or the financing of terrorism to the organs of internal control (Article 30).
- Subsidiaries in third countries: the obliged entities shall apply in their branches and subsidiaries with majority participation located in third countries measures to prevent money laundering and financing of terrorism at least equivalent to those established by European law. When the law of the third country does not allow the application of measures equivalent to those established by Community law, the obliged entities shall adopt in respect of their branches and subsidiaries with majority participation additional measures to effectively deal with the risk of money laundering or financing of the terrorism, and inform the Executive Service of the Commission, which may propose to the Standing

Committee of the Commission for the Prevention of Money Laundering and Monetary Offenses the formulation of requirements for the adoption of mandatory measures (Article 31).

4. Sanction and enforcement

In addition to the liability corresponding to the obliged person even by way of simple failure to comply, those holding administrative or management positions in the latter, whether sole administrators or collegiate bodies, shall be liable for any breach should this be attributable to the latter's wilful misconduct or negligence (Article 54).

For the commission of offences, the following sanctions may be imposed:

- Public and private reprimand
- Fines
- Withdrawal of this authorisations
- Temporary suspension

The Council of Ministers, on a proposal from the Minister of Economy and Finance, shall have competence to impose penalties for very serious breaches. The Minister of Economy and Finance, on a proposal from the Commission for the Prevention of Money Laundering and Monetary Offences, shall have competence to impose penalties for serious breaches. The Director-General for the Treasury and Financial Policy, on a proposal from the instructor, shall have competence to impose penalties for minor breaches.

The offences and sanctions provided in the Law 10/2010 shall be interpreted without prejudice to those laid down in other laws and the acts and omissions described as crimes and the penalties laid down in the Criminal Code and special criminal laws (Article 62.). Sanctioning procedure is:

1) The Standing Committee, on a proposal from the Commission Secretariat, shall initiate and, where applicable, dismiss the sanction proceedings as may be appropriate for the commission of offences under the Law 10/2010.
2) The Commission Secretariat shall carry out the preliminary investigation of the sanction proceedings as may be appropriate for the commission of offences under the Law 10/2010. The competent body for initiating sanction proceedings may agree, when beginning the proceedings or during the latter, to the provision of a sufficient guarantee to deal with the potential liabilities incurred. The sanction proceedings applicable to failures to comply with the obligations under the Law 10/2010 shall be those set down, in general, in the exercise of punitive powers by the Public Administration.
3) In the sanction proceedings initiated by the Commission Secretariat, the deadline for ruling on proceedings and reporting the decision shall be one year from the date of notification of the commencement of proceedings.
4) The implementation of final penalty rulings in sanction proceedings shall correspond to the Commission Secretariat. The penalty of public reprimand, once it has become final in sanction proceedings, shall be enforced in the manner established in the decision and, in any event, shall be published in the *Boletín Oficial del Estado*.

- **Law 5/2014, of 4 April 2014, on Private Security[1059]**

In Spain, there has been remarkable progress in the citizens' esteem and in the rethinking of the security private sector role. It has been recognized the efficiency,

[1059] See Ley 5/2014, de 4 de abril, de Seguridad Privada, available at: https://www.boe.es/buscar/pdf/2014/BOE-A-2014-3649-consolidado.pdf.

importance and effectiveness of public-private partnerships as a means to face and solve the pressing and diverse problems of security and safety that are taking place in our society. The private security industry has been increasingly considered as a part of the array of measures aimed at protecting the society and defending the legitimate rights and interests of citizens.

2. Scope

The Law 5/2014 and its regulation depict a comprehensive and total approach of private security as a whole, and aims to encompass all the sector reality existing in Spain. The Law envisages, among other aims, the improvement of efficiency in the provision of private security services concerning organization and planning, training and private staff motivation, elimination of terms that facilitate both companies and staff intrusiveness; provision of the needed legal support to exert their legal duties, and also the cooperation tools between the private and public security.

The Regulation of the Law 5/2014[1060] establishes requirements and characteristics of security companies; the conditions that must be fulfilled in the provision of their services and in the development of their activities, and the functions, duties and responsibilities of private security personnel.

3. Content of Regulation

Private security companies must fulfil at least the following general obligations (Article 21):

- To develop the private security activities under this Act terms and following the conditions established by the granted authorization or by the submitted liability declaration.
- To guarantee training and refreshment professional courses of their private security staff and of the company's staff who is in need of private security training. Keeping its skills in the use of fire guns will be made with the participation of qualified shooting instructors.
- To submit yearly to the Minister of the Interior or to the competent autonomic body a report on their activities and a summary dully audited of their annual accounts when it is required including the information and statutory required data. In no case that account summary will have personal data. Yearly, the Ministry of the Interior and relevant autonomic bodies will inform, on this business to the *Cortes Generales* (national Spanish legislature) and to the corresponding autonomic Parliaments, respectively.

4. Monitoring, sanction and enforcement

Infringements to the Law 5/2014 can be minor, serious or very serious. The following sanctions may be imposed:

- Fines
- Extinction of the license or close of the company or office
- A ban for holding legal representation job positions in private security companies ranging from one to two years
- Temporal suspension of the authorization

H. Other Initiatives

- **AECID Protocol for Managing Public-Private Partnerships for Development (PPPD)[1061]**

[1060] See Real Decreto 2364/1994, de 9 de diciembre, por el que se aprueba el Reglamento de Seguridad Privada, available at: https://www.boe.es/buscar/pdf/1995/BOE-A-1995-608-consolidado.pdf.
[1061] Agencia Española de Cooperación Internacional para el Desarrollo (2013). "AECID Protocol for Managing Public-Private Partnerships for Development", available at: http://www.aecid.es/Centro-

In 2013, the Spanish Agency for International Development Cooperation (AECID), which is attached to the Ministry of Foreign Affairs and Cooperation (MAEC), published the Protocol for the management of public-private partnerships for development. This instrument includes a series of exclusion criteria and other assessment criteria in relation to partner or participant companies in public-private partnerships for development, establishing one common objective and having a demonstrable impact on development. In this partnership responsibilities are defined jointly, and resources, risks and achievements are shared.

The minimum requirements regarding companies are divided into exclusionary and evaluation-based criteria.

Exclusionary criteria Entities which carry out procedures or practices listed below will be excluded, from the start, and it will be impossible for them to form any partnership or alliance with AECID.

- Manufacture, purchase or sale of weapons as well as financing of related activities
- Direct or indirect use of child labour, forced labour or slave labour
- Anti-union practices
- Acts classified as bribery and corruption
- Acts against the environment
  Although not of compulsory compliance, the AECID evaluator will look on very favourably the respect of the following practices:
- Adoption or adhesion to the following internationally recognised principles and guidelines for businesses:

- Fundamental ILO conventions
- OECD Guidelines for Multinational Enterprises
- 10 Principles of the United Nations Global Compact
- ISO 26000 Standards on Corporate Social Responsibility
- ILO Tripartite Declaration on Multinational Enterprises and Social Policy
- UN Guiding Principles on Business and Human Rights

- Presentation by the firm of both a sustainability report and Corporate Social Responsibility reports.

- **Strategy 2014-2020 for businesses, public administrations and other organisations to advance towards a more competitive, productive, sustainable and inclusive society and economy[1062]**

The Spanish CRS Strategy was adopted in 2014. It is a non-binding public policy instrument that establishes a common framework to harmonize the different practices of social responsibility undertaken by the private and public sectors. One of the principles of the Spanish CRS Strategy is that social responsibility policies are adopted voluntarily.

The document has been drawn up by the State Council for Corporate Social Responsibility (CERSE) and coordinated by the General Department for Self-Employment, the Social Economy and Corporate Social Responsibility, which belongs to the Ministry of Employment and Social Security. It aims to promote social responsibility among the largest possible number of organisations, so that they all include initiatives in this area within their own culture and values. It should

Documentacion/Documentos/Informes%20y%20gu%C3%ADas/Protocolo%20AECID_Todos%20los%20actores_Ingles.pdf.

[1062] Ministerio de Empleo y Seguridad Social (2014). "Strategy 2014-2020 for businesses, public administrations and other organisations to advance towards a more competitive, productive, sustainable and inclusive society and economy", available at: http://www.mitramiss.gob.es/ficheros/rse/documentos/eerse/EERSE-Ingles-web.pdf.

also serve as an effective tool for compliance with the principles of Act 20/2013 of 9 December on the Guarantee of Market Unity in this area. The Strategy is not limited to businesses. It also aims to promote the adoption of responsible policies by Public Administrations and by public and private organisations so that they can become a driver for transformation of the country into a more competitive, productive, sustainable and inclusive society and economy.

This document includes 60 measures aims to promote actions to achieve the following objectives:

- To strengthen the commitment of businesses and of the Public Administrations to meet the needs and concerns of Spanish society, including job creation.
- To strengthen the sustainable management models that help companies to be more competitive and help make Public Administrations more efficient.
- To promote corporate responsibility programmes that will foster international credibility and the competitiveness of the Spanish economy, as well as sustainability and social cohesion.

The 10 lines of action covering all the measures are the following: 1. Promotion of CSR as a driver for more sustainable organisations. 2. Inclusion of CSR in education, training and research. 3. Good governance and transparency as tools for boosting confidence. 4. Responsible management of human resources and employment. 5. Socially responsible investment in R&D+i. 6. Relations with suppliers. 7. Responsible consumption. 8. Respect for the environment. 9. Development cooperation. 10. Coordination and participation.

The Strategy refers to respect for and protection of human rights throughout the value chain. Especially at the international level, companies must cooperate to ensure respect for human rights within their sphere of influence, paying particular attention to environments in which there are insufficient guarantees regarding the respect and protection of human rights. Some of the measures to achieve this goal are:

Measure 15. To guarantee that public sector enterprises draw up corporate governance and sustainability reports.

As prescribed in Act 2/2011, of 4 March, on the Sustainable Economy, state-owned companies must submit annual reports both on corporate governance and sustainability. The objective is to promote this exercise both among State-owned companies and public enterprises attached to the General State Administration, following the model established within the CERSE. This practice will also be promoted at every level of the Public Administration, the aim being that such reports will be submitted to their highest management bodies, to express the support and effective adoption of social responsibility policies in Public Administrations.

Measure 20. To promote the drafting of annual reports including transparent information on social and environmental aspects and good governance.

These reports should also include policies for creating and maintaining jobs; for gender equality; their environmental impact; and the human resources programmes that do most to promote worker employability through, for example, training, workforce diversity and the inclusion of persons at risk of social exclusion and persons with disabilities. The opinions of interest groups should also be included in such reports, especially that of workers' legal representatives. Actions in this field will pay special attention to the Directive of the European Parliament and Council as regards the disclosure of nonfinancial and diversity information which is to be transposed to Spanish legislation.

Measure 35. To ensure compliance with the principles of CSR throughout the value chain.

The aim is to promote a commitment by socially responsible enterprises to ensure compliance with the principles and values of CSR also among enterprises that form part of their supply chain, taking into account the proportionality of the different models in response to the size and resources of the company. Tools will be developed and venues arranged in which large enterprises can share their socially responsible practices with other actors in the production fabric.

Measure 38. To promote the inclusion of social, environmental, human rights and ethical criteria in tenders and public procurement in line with the object of the contract.

The aim is that at every level of the Public Administration, all the possibilities offered by the current legal framework, both national and international, for public procurement should be known and used. Also criteria covering social, environmental and good governance aspects should be promoted, in line with the object of the contract, ensuring that SME's, self-employed and entrepreneurs were not disadvantaged by these criteria against big enterprises. The Public Administrations should be involved in extending CSR practices to their suppliers. In addition, as required by the current legislation, it may be reserved the participation in public procurement to special employment centres, or the implementation in the context of sheltered employment programs where at least 70% of the workers concerned were people with disabilities who, because of the nature or severity of their disabilities, cannot carry on occupations under normal conditions.

Measure 44. To reduce the environmental impact of organisations.

In enterprises and public administrations, actions should be taken to adopt sustainability criteria, to achieve energy efficiency, to guarantee controlled consumption of natural resources and to minimise the environmental impact of their activities.

Measure 45. To increase information on the responsible control and consumption of natural resources.

Environmental awareness should be promoted and training provided among interest groups and enterprises.

Measure 46. To continue supporting measures to protect the environment, minimising environmental impact and to introduce programmes to prevent and mitigate environmental pollution.

This may cover programmes to protect biodiversity, to achieve re-equilibrium in order to avoid the loss of population and business relocation and to guarantee environmental quality. Special emphasis will also be placed on programmes for the prevention and management of environmental aspects – the fight against atmospheric pollution, water contamination, contamination of the soil and ground water, noise contamination, the prevention and proper management of waste, etc.

Measure 47. To monitor and strengthen programmes for the prevention and management of waste through the use of appropriate technologies.

The aim is that both public administrations and enterprises and organisations should contribute to sustainability by adopting appropriate waste management policies in line with their specific characteristics and with the aim of preventing and minimising the generation of waste and fostering re-cycling and separating.

Measure 48. To adopt programmes to reduce and minimise direct and indirect emissions.

Specific measures should be adopted to act on greenhouse gas emissions.

- **Catalan strategy for business and human rights of the Generalitat of Catalonia**

The Catalan strategy for business and human rights of the Generalitat of Catalonia is based on the United Nations Guiding Principles on Business and Human Rights. It is non-binding a public policy instrument that describes a series of measures for the Generalitat of Catalonia, as well as Catalan business enterprises and organisations, to assume their respective obligations to protect and respect human rights.

The goal of the Strategy is to put Catalonia and its business network in a leading position regarding the development of business activities respecting human rights, provide clarifications to and supporting Catalan enterprises and organisations on this issue as well as on how to reduce the risks linked to their activities.

On the other hand, the Strategy establishes the basis for drafting a future action plan on business and human rights in Catalonia.

The Strategy has a similar structure to that of the Guiding Principles and includes four parts.

1. The first part introduces the context, main themes, time frame and objectives of the Strategy.
2. The second part presents additional measures, regarding the principles relative to the States' obligation to protect human rights.
3. The third part explains in detail the expectations of the Generalitat of Catalonia on the responsibility of business enterprises and other organisations to respect human rights.
4. Finally, the fourth part describes the additional measures the Generalitat of Catalonia adopts to facilitate access to judicial and extrajudicial remedy mechanisms for persons potentially affected by negative business impacts, as set out in the third pillar of the Guiding Principles on access to remedy mechanisms.

Regarding the responsibility of business enterprises to respect human rights, the Generalitat of Catalonia establishes that all enterprises and organisations, regardless of their size, sector, operational context and structure, must be aware of the responsibilities, reflected in the second pillar of the Guiding Principles.

One of the innovative aspects of the strategy is the fact that it not only refers to businesses but also to any other type of organisation with an economic activity including NGOs or universities.

I. Directors Duties and Liabilities

Director's Due Diligence Duties

According to Article 225 of the Royal Legislative Decree 1/2010, of 2 July, Approving the Consolidated Text of the Capital Companies Act,[1063] directors must carry out their role and fulfil their tasks in accordance with the laws and by-laws, with the diligence of an orderly business person, taking into account the nature of the role and the duties inherent in each one. Moreover, they must possess the appropriate dedication and adopt the necessary measures for good management and control of the company.

[1063] See, Royal Legislative Decree 1/2010, of 2 July, Approving the Consolidated Text of the Capital Companies Act, available at: https://www.mjusticia.gob.es/cs/Satellite/Portal/1292428455808?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DCorporate_Enterprises_Act_2015_-_Ley_de_Sociedades_de_Capital.PDF.

Director's Liability

Therefore, directors shall answer to the company and its partners and creditors for any damage caused by their acts or omissions contrary to the law or the by-laws, or for having failed to complete any duties inherent to their roles, assuming there has been misconduct or negligence. When the act is contrary to the law or the company by-laws, guilt shall be presumed, until proven otherwise.[1064]

Joint and Several Liability

All members of the governing body adopting the detrimental decision or performing the respective act shall answer jointly and severally, unless they prove that having taken no part in its adoption or implementation, they were unaware of its existence or, if aware, took all reasonable measures to prevent the damage or at least voice their objection thereto.

Director's Liability under Specific Rules

Under the Criminal Code, a complete breach of the duties of supervision and control can result in criminal responsibility for directors for crimes committed by the individuals who were under their authority. The Criminal Code regulates specific crimes that may be apply to directors, including:

- Misrepresenting annual accounts or other documents that should reflect the legal or financial position of the company.
- Imposing damaging resolutions.
- Imposing damaging resolutions approved by a fictitious majority.
- Refusing to allow a shareholder to exercise his/her rights.
- Refusing access to inspecting or supervisory persons, bodies or entities.

Director's civil liability may be of two types:

- Internal: directors are liable for a breach of their duties, vis-à-vis the shareholders and the company itself; and
- External: directors are liable to any third party whose interests have been directly harmed, and particularly the company's creditors.

Thus, directors are civilly liable if they intentionally or negligently carry out an illegal act which directly harms the company, or indirectly harms its shareholders or third parties, or if this act is directly detrimental to the interests of shareholders or third parties.

For a director to be held civilly liable, the following conditions must to be met in addition to the general rules on civil liability:

- An act or omission by the director.
- The act or omission is contrary to applicable regulations or the company's articles of association, or constitutes a breach of director duties.
- The act or omission causes actual damage that can be quantified economically, either to the company or to the interests of its shareholders or third parties; the damage caused includes both actual damage (an actual and effective decrease in equity) and lost profit (the profit that in all likelihood, or almost certainly, the damaged party would have no longer obtained).
- The director's conduct is intentional or negligent (it is presumed, unless there is evidence to the contrary, that negligence exists if the act or omission is contrary to applicable legislation or the company's articles of association).

[1064] See, Article 236 of the Royal Legislative Decree 1/2010.

- The damage caused is a consequence of the director's act or omission, in such a way that a causal link exists with his/her conduct (excluding any damage caused by unforeseeable events or which, although foreseeable, were unavoidable).[1065]

The Credit Institutions Law,[1066] Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act,[1067] and Law 20/2015 of 14 July, regarding the ordinance, supervision and solvency of insurers,[1068] all have similar provisions regulating the liability of directors of entities regulated under each of these laws. They state that the directors of these entities will be liable for infringements when such infringements were as a result of the directors' wilful or negligent conduct.

According to Article 5 of the Law 22/2003, of 9 July, on Insolvency Proceedings,[1069] The debtor company is legally required to petition for insolvency proceedings within two months of the date on which it became aware, or should have become aware, of its state of insolvency. However, Article 5 bis of the Insolvency Act also provides the possibility of notifying the court of the initiation of negotiations with creditors to reach a refinancing agreement or obtain sufficient approval for an early composition. Failure to comply with this obligation entails a rebuttable presumption of intent or gross negligence in the creation or aggravation of the insolvency, which can lead to the insolvency being classified as at-fault.

An at-fault insolvency finding may lead to the directors being disqualified from administering third party assets, the loss of any rights they may have as creditors, an order for the return of assets or rights wrongfully obtained, as well as the obligation to compensate the company for any damage or loss caused. In addition, when consideration of the separate insolvency classification issue is initiated, the judge may order the de facto or de jure directors to pay any of the company's debts that could not be satisfied from the company's available assets

Law 26/2007 of 23 October on environmental responsibility sets out the vicarious liability of directors for their company's non-compliance with environmental duties, particularly any possible monetary obligations the company may have. The directors of companies that have ceased to carry out business can also be liable for outstanding environmental duties and obligations.

Directors' liability for conduct contrary to competition legislation is regulated in Law 15/2007, of 3 July, on the Defence of Competition. According to the Competition Act, the actions or omissions of a company that are classified as infringements by the Competition Law can also be attributed to the persons who control the company.[1070]

Under Article 43 of Law 58/2003, of 17 December, on General Taxation, the de jure or the de facto directors will be vicariously liable for:[1071]

- Tax infringements (including penalties).
- Outstanding tax debts (excluding penalties).

[1065] Uria Mendez (2015). *op. cit.*, p. 18.
[1066] See, Article 104 of the Ley 10/2014, de 26 de junio, de ordenación, supervisión y solvencia de entidades de crédito, available at: https://www.boe.es/buscar/pdf/2014/BOE-A-2014-6726-consolidado.pdf.
[1067] See, Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores, https://www.boe.es/buscar/doc.php?id=BOE-A-2015-11435.
[1068] See, Ley 20/2015, de 14 de julio, de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-7897.
[1069] See, Ley 22/2003, de 9 de julio, Concursal, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2003-13813.
[1070] See, Article 61 of the Ley Ley 15/2007, de 3 de julio, de Defensa de la Competencia, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12946.
[1071] See, Ley 58/2003, de 17 de diciembre, General Tributaria, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186

- Tax debts derived from taxes that must be levied on, or amounts that must be withheld from, employees, professionals or other businessmen in certain circumstances.

Social security laws do not expressly set out directors' liabilities for infringements of these laws, but liability could be inferred from Article 18.3 of Royal Decree 8/2015 of 30 October approving the recast text of the Social Security Act, under which the liability for the payment of social security contributions can be extended to those persons who may be jointly, severally liable or vicariously liable with the Company.[1072]

Law 10/2010, of 28 April, on the Prevention of Money laundering and Terrorist Financing sets out that, in case a company commits an infringement, in addition to the company's liability, the directors may also be liable if the infringements were due to their wilful or negligent conduct (Article 54).

J. Corporate Veil Piercing

Under Spanish law, there are no specific legal provisions regarding "corporate veil piercing". However, there is case law based on "judicial creation" by the Spanish courts influenced by judgments issued by foreign courts basically in the US and UK. Case law sets out that a corporation cannot be treated as a separate legal person from its shareholders when said "separation of legal entity" is a mere fiction used for fraudulent or illegal purposes. This principle may be used in cases of fraud: when the incorporation of a company is simulated in order to avoid the fulfilment of a contract; when the company is used to conceal an immoral objective; or as an instrument of deviation or distortion in the application of legal rules. There are four scenarios in which the doctrine can be applied:

- Identity of subjects or confusion of assets: this is the case when it is impossible for third parties to distinguish between the legal personality of a company and the personality of the shareholders; or between the assets of the company and the assets of the shareholders. For example, when two or more companies share the same shareholders and/or directors; or when the company has a sole shareholder (or even a main shareholder and one or several minor shareholders acting as figureheads for the main shareholder).
- When the shareholders provide the company with insufficient funds to carry out the corporate business: there are very few judgments on this circumstance and such cases usually turn on additional grounds further to provision of insufficient funds.
- Group companies: this is the case when a company effectively controls another related company, without the latter having its own will, separated from the will of the dominant company. This is applicable in labour disputes; for example, where an employee works for a subsidiary which only provides services for the parent company.
- Contravention of law or fraud: this is the case when a corporation is wilfully used to elude the fulfilment of legal, contractual or even non-contractual liabilities, thus obtaining a result contrary to the law, which is unfair or harmful to third parties.

The corporate veil in Spanish company law is pierced very rarely. However, Spanish courts have lifted the corporate veil in some cases to curb and stop the use of companies for illicit purposes and the abusive use of corporate structures.

[1072] See, Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, avaialble at: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

For example, Uto Ibérica, S.A., filed a claim for damages to a number of apartments due to water damage after a water main burst in Palma de Mallorca in June 1977. The city had hired a company, Empresa Municipal de Aguas y Alcantarillado, S.A., to provide the city's public water service. At first, Uto Ibérica, S.A., claimed compensation from the city of Palma de Mallorca. The city alleged that it had no standing to be sued and the claim should have been lodged directly against the company. Although in this case the city's allegation was quite proper, the Supreme Court established for the first time the requirements for piercing the corporate veil in Spain: - a conflict between legal certainty and justice, - fairness and adherence to the rule of bona fides and - evasion of the law. Based on these requirements, Spanish case law has defined a few circumstances under which the corporate veil can be pierced[1073]:

- abuse of legal forms or use to evade the law,
- identity of persons or spheres of action, or confusion of assets (Identity, or identicalness, is evidenced by a joint or shared scheme of management, interests and profits),
- effective external control or management,
- undercapitalisation or decapitalisation and - any other circumstance showing that the company's creation was plotted to evade the law or abuse a right.

III. COMPARATIVE ANALYSIS

Under the Spanish regulatory framework there is an increasingly expectation that businesses respect human rights and protect the environment in all their operations and supply chains. Spain has adopted legislative initiatives that have human rights and environmental requirements for businesses by imposing on them certain legally binding due diligence and transparency obligations. Therefore, among the Spanish legislations and regulations, it is possible to distinguish between those laws that focus on disclosure of non-financial information and those that include some due diligence requirements.

The first laws, such as the Law 2/2011 on Sustainable Economy or the Law 11/2018 that implements the EU Directive on Non-financial and Diversity Information, are aimed at improving transparency and corporate governance of some business that meet specific features. These laws create a reporting requirement for public business policies and actions to prevent adverse human rights and environmental impacts. Under the Spanish regulatory framework, businesses should disclose information at least on the following topics: human rights, corruption and bribery, improvement of labour relations, diversity and equality policies, environmental issues. If businesses do not disclose this information in the corresponding reports, they should offer a clear explanation in this regard. The rationale behind these laws seems to be that transparency will incentivize businesses to address human rights and environmental risks. Compliance depends largely on the pressure exerted by external parties since the Spanish regulatory framework do not specify sanctions for non-compliance with these requirements. Undoubtedly, this may affect the effectiveness of these types of laws.

On the other hand, although not all legislation and regulations use the term due diligence in line with the UN Guiding Principles on Business and Human Rights or the OCDE Guidelines for Multinational Enterprises, they require businesses to develop a coherent prevention policy. Moreover, businesses should identify and assess adverse human rights and environmental impacts, such as the Law 31/1995 on Prevention of Occupational Risks or the Law 21/2013 on Environmental Assessment. In some cases, these impact assessments are a prerequisite for obtaining an authorization of programs and projects. Additionally, according to

[1073] See, Spanish Supreme Court, judgment of 28 May 1984, Civil Division (RJ 1984/2800).

these laws, businesses should integrate the findings from the impact assessments for relevant internal functions within their activities and take appropriate preventative and mitigating actions. Businesses should also carry out consultation with all stakeholders regarding the findings from the impact assessments. These obligations only apply to certain types of activities and businesses. In case of non-compliance, these laws include a sanctioning framework.

The only legal instrument that uses the term due diligence is the Law 10/2010 on the Prevention of Money Laundering and Terrorist Financing. However, it does not make any reference to the UN Guiding Principles on Business and Human Rights or the OCDE Guidelines. The due diligence contemplated in this legislation is closer to the traditional corporate due diligence that focuses on the risks to the company. However, the obliged entities must also adopt in writing and implement adequate policies and procedures of customer due diligence, information, record keeping, internal control, risk assessment and management, compliance ensuring, reporting and customer acceptance in order to prevent and forestall transactions related to money laundering or terrorist financing. These policies and procedures will be applicable to the branches and subsidiaries of the group located in third countries, without prejudice to the necessary adaptations for compliance with the specific rules of the host country.

What is less clear is whether such transparency and due diligence requirements under the Spanish regulatory framework are capable of effectively influencing Spanish corporate behaviour. That is why civil society organizations propose (see below) a comprehensive due diligence legislation that obligates businesses to ensure that internationally recognised human rights are respected in their own activities and in the supply chain.

IV. REGULATORY FRAMEWORK

In Spain there are no regulations which require companies, in a binding manner, to adopt and conduct human rights due diligence measures in relation to their own activities and its business relationship, such as the adoption of a human rights policy in accordance with international standards; the establishment of a human rights due diligence framework; and an impact assessment analysis from a human rights perspective and the adoption of an action plan on how the risks identified will be addressed and managed and human rights harm will be prevented and repaired. There is no imposition of any sanctions in the absence of these actions.

There is a need to reform the Spanish regulatory and political framework to address the adverse human rights and environmental impacts caused by business activities within the Spanish territory and abroad. In this regard, Spain must take into account the regulatory proposal and legal developments adopted in other European countries, such as in France, the United Kingdom or the Netherlands, which establish an obligation on companies, in a way that is proportional to their size and according to the nature of their activities, to activate procedures of human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights. In order to fill this gap, Spanish NGOs have proposed a national binding legislation aligned with the national developments in other countries. In this regard, they propose an ordinary administrative law that imposes human rights due diligence obligations on Spanish parent companies. Under this law, Spanish parent companies should adopt appropriate prevention and remedial measures to protect people against human rights violations caused by their own activities o throughout their business relationships. The type of companies covered by this law has not yet been defined. The main aspects of the Spanish due diligence law proposed by NGOs are:

- It establishes an obligation to conduct due diligence in order to avoid human rights violations.
- It creates a link between the parent company and the supply chain through the human rights due diligence obligations.
- It includes a catalogue of infractions and sanctions for the case of non-compliance with the human rights due diligence obligations, without the need for damage to occur.

The proposed law would include a system of sanctions in case of non-compliance with the human rights due diligence obligations. In cases of damages, the law contemplates a new idea of extra-contractual civil liability for "culpa in vigilando" or indirect responsibility of the parent company for damages caused by entities of the corporate group or its supply chain. This would imply reforms within the civil code.

The law would apply in extraterritorial cases when the obligated companies are based in Spain. Thus, Spanish courts have jurisdiction when damages occurred abroad resulted from the non-compliance of human rights due diligence obligations.

Other issues that should be covered by the law are:

Prescription: The law would modify the general limitation period of one year and establish an exception for business and human rights cases.

Applicable law: To ensure application of the law, it is expected that the law formulates the due diligence obligations as a so-called overriding mandatory rule. Overriding mandatory rules are provisions of law applying in the jurisdiction of the competent court that govern the facts of a case regardless of the law otherwise applicable to non-contractual obligations.

Legal standing of victim associations: In this way it would be easier for organizations based in Spain to act in civil proceedings on behalf of the victims.

Access to free legal assistance: The law should provide for the possibility that, in judicial proceedings related to human rights violations caused by companies, victims have the right to access free justice.

Collective actions: The law would include the possibility of accumulating the actions of several injured parties in the same process with the aim of ensuring procedural economy and avoiding contradictory judgments.

In cases of damages occurred in a country outside the EU, Spanish courts have jurisdiction to hear the case.

Beyond the due diligence legislation, Spain should also adopt measures to eliminate the barriers that prevent victims to access remedy by means of a reform of the Civil Code, the Criminal Code and the Organic Law of the Judiciary. With regard to civil liability, Spain should guarantee the jurisdiction of the Spanish courts over inter-connected claims where one of various defendants is domiciled in Spain and give as wide an acceptance as is possible to *forum necessitates*. With regard to criminal liability, it should set up a special prosecutor's office dealing with corporate crimes against human rights and the environment overseas, reassess the reform of the criminal liability of legal persons, reverse the reform of universal jurisdiction to prioritise the prosecution of more serious international crimes and include more serious environmental offences and articulate free legal aid for alleged victims in third countries.[1074]

[1074] Pigrau Solé, A. (2018). *op. cit.*, p. 5.

SWEDEN COUNTRY REPORT

Lia Heasman[1075]

I. OVERVIEW

Swedish regulation does not include human rights due diligence requirements. Due diligence related to other matters does exist as a concept in various laws and a mandatory requirement for companies. Sustainability related efforts focus mainly on reporting and state-owned entities. The aim of the Annual Account Act is to facilitate better, for example, the EU Directive on Non-Financial Information. The government has been particularly active in enforcing human rights and environmental topics on state-owned companies. Unlike many other countries, Sweden specifically mentions some international standards, such as the UN Guiding Principles on Business and Human Rights. Even more importantly, sustainability reporting is required not only in the scope of non-financial information, but referenced to GRI or another international standard.

Sweden does not currently have any proposals or publicly advocated campaigns related to mandatory human rights due diligence. However, the current movement related to human rights due diligence in Denmark and Finland can affect Swedish stakeholders.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

1. Area of Regulatory Framework

A. Corporations law

- **Annual Account Act** Chapter 6 Section 6

Corporate Governance Report

The management report for a limited liability company whose transferable securities are admitted to trading on a regulated market shall contain a corporate governance report, unless the company has chosen to draw up a corporate governance report that is separate from the annual report on the basis of section 8.

The corporate governance report shall contain information about

1. what corporate governance principles apply, in addition to the principles of law or regulation, and where such information is available;

2. the most important elements in the company's systems for internal control and risk management in connection with the financial reporting,

3. direct or indirect shareholdings in the company representing at least one tenth of the number of votes for all shares in the company,

4. limitations on how many votes each shareholder can cast at a general meeting,

5. provisions in the Articles of Association on the appointment and dismissal of Board members and on amendments to the Articles of Association,

6. the General Meeting's authorizations to the Board of Directors to decide that the company shall issue new shares or acquire own shares,

7. how the general meeting works, the general meeting's decision-making power, the rights of the shareholders and how these rights are exercised, to the extent that these circumstances are not stated in law or other statutes,

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8. how the board and, where applicable, committees established within the company are composed and how they function, to the extent that these conditions are not stated in law or other statutes, and

9. the diversity policy that, unless the company meets more than one of the conditions of section 10, first paragraph, paragraph 1, applies to the board and the purpose of the policy, how the policy has been applied during the financial year and the result thereof.

If the company does not apply a code for corporate governance, the reasons for this must be stated. If the company applies a code for corporate governance, it shall, where applicable, state which parts of the code the company deviates from and the reasons for this. If a company referred to in the second paragraph 9 does not apply any diversity policy, the reasons for this must be stated. Team (2016: 947).

- **Annual Account Act** Section 7

A limited liability company that has only other transferable securities than shares admitted to trading on a regulated market need not provide the information specified in section 6, second paragraphs 1 and 7-9, and in the third paragraph of the same paragraph in the corporate governance report. However, this does not apply if the company's shares are traded on an MTF platform in accordance with Chapter 1. § 4 b of the Securities Market Act (2007: 528).

- **Annual Account Act** Section 8

Instead of preparing the corporate governance report as part of the administrative report pursuant to section 6, the company may choose to prepare the report as a separate document from the annual report. The report shall also in such a case have the content stated in sections 6 and 7. It must be submitted to the company's auditor within the same time as the annual report.

If the company has chosen to prepare the corporate governance report as a document separate from the annual report and such information as referred to in section 6, second paragraph 3-6, is included in the administration report, these information need not be provided in the report. If the information is not included in the corporate governance report, it shall instead contain an indication of the place in the administration report where the information is provided.

If the company has chosen to draw up a corporate governance report according to this section, this shall be stated in the administration report.

- **Annual Account Act** Section 9

If the administration report contains such a task as referred to in section 8, third paragraph, the company's auditor shall, in a written, signed opinion, state whether or not such a report refers to it. In the case of information referred to in section 6, second paragraph 2-6, the opinion shall also contain a statement on whether the information is consistent with the annual report and in accordance with this law. Has it been included in the report with such information as referred to in Chapter 7 Section 31, second paragraph, the opinion shall also contain a statement as to whether these information are consistent with the consolidated accounts and in accordance with this Act.

If the information contains material errors, the auditor must state this and point out what kind of errors it is.

The auditor's opinion shall be submitted to the company's Board of Directors within the same time as the auditor's report and then be appended to the corporate governance report.

- **Annual Account Act** Section 10

The administration report for a company shall contain a sustainability report if the company meets more than one of the following conditions:

1. The average number of employees in the company during each of the last two financial years has been more than 250,

2. The company's reported total assets for each of the last two financial years amounted to more than SEK 175 million,

3. The company's reported net sales for each of the last two financial years have amounted to more than SEK 350 million.

The first paragraph does not apply to a company that is a subsidiary if it and all its subsidiaries are covered by a sustainability report for the Group.

Anyone who, according to the second paragraph, does not draw up a sustainability report shall disclose this in a note to the annual report and provide information on the name, organizational or personal number and the registered office of the parent company that prepares the sustainability report for the group. Team (2016: 947).

- **Annual Account Act** Section 11

Instead of establishing the sustainability report as part of the administrative report pursuant to section 10, the company may choose to draw up the report as a document that is separate from the annual report. It must be submitted to the company's auditor within the same time as the annual report

If the company has chosen to draw up a sustainability report in accordance with this section, this shall be stated in the administration report.

- **Annual Account Act** Section 12

The sustainability report shall contain the sustainability information needed for understanding the company's development, position and results and the consequences of the business, including information on issues relating to the environment, social conditions, personnel, respect for human rights and counteracting corruption. The report should state

1. the company's business model,

2. the policy that the company applies to the issues, including the audit procedures that have been carried out;

3. the result of the policy,

4. the material risks related to the issues and are related to the company's business including, where relevant, the company's business relationships, products or services that are likely to have adverse consequences;

5. how the company manages the risks, and

6. key performance indicators that are relevant to the business.

The report shall also, where appropriate, contain references to and further explanations of the amounts that are included in the annual report. If specific guidelines have been applied in the preparation of the report, it must state which these guidelines are.

If the company does not apply any policy in one or more of the questions in the first paragraph, the reasons for this must be clearly stated.

- **Annual Account Act** Section 13

Information on impending development or on issues that are under negotiation need not be included in the sustainability report if it is judged that disclosure would seriously damage the company's market position and the omission does not impede understanding of the company's development, position or results or the consequences of the business.

- **Annual Account Act** Section 14

If the administration report contains such a task as referred to in section 11, second paragraph, the company's auditor shall, in a written, signed opinion, state whether or not such a report refers to it.

The auditor's opinion shall be submitted to the company's management within the same time as the auditor's report and then be appended to the sustainability report

- **Annual Account Act** Chapter 7 Section 31

31 a If the parent company of a group is a company referred to in Chapter 6 Section 10, the management report for the Group shall contain a sustainability report for the Group. The same applies if the parent company is a company whose transferable securities are admitted to trading on a regulated market or a similar market outside the European Economic Area and the group meets more than one of the following conditions:

1. The average number of employees in the Group has been more than 250 during each of the last two financial years,

2. The consolidated companies' reported total assets for each of the last two financial years amounted to more than SEK 175 million,

3. The consolidated companies' reported net sales for each of the last two financial years amounted to more than SEK 350 million.

The first paragraph does not apply to a parent company that is a subsidiary if it and all its subsidiaries are covered by a sustainability report for the Group that has been prepared by a parent company.

Anyone who, according to the second paragraph, does not draw up a sustainability report shall disclose this in a note to the annual report and provide information on the name, organizational or personal number and the registered office of the parent that establishes the sustainability report for the group.

§ 31 b Instead of establishing the sustainability report as part of the administration report according to § 31 a, the parent company may choose to prepare the report as a document separate from the consolidated accounts. In such case, Chapter 6 applies.

§ 31 c The Sustainability Report shall be prepared with the application of Chapter 6. Sections 12 and 13. If the administration report for the Group contains such a task as referred to in Chapter 6, Section 11, second paragraph, also applies Chapter 6. § 14.

What is said in chapter 6, §§ 11-14 about the annual report shall instead relate to the consolidated accounts and what is said about the company should instead refer to the group.

- **Companies Act** Chapter 9 Section 31 (annex)

- **The Swedish Corporate Governance Code** Section 5 and 10 (annex)

- **The State's Ownership Policy and Guidelines for State-Owned Enterprises 2017** Section 3.4 and 4.2 (annex)

- **Code on Gifts, Rewards and Other Benefits in Business** Section 10 (annex)

- **The Money Laundering and Terrorist Financing (Prevention) Act** Section 10

When simplified measures for customer due diligence according to Chapter 3, section 15 of the Act on Measures against Money Laundering and Terrorist Financing (2017:630) are applied to a legal person, the undertaking must

1. identify and verify the identity of the legal person's representative by

a) obtaining information regarding the representative's name, address, personal identity number or equivalent, and

b) confirming the representative's authority and the conditions on which this authority is based, by checking the information in point a) against the legal person's certificate of

registration, external register or equivalent or an identity document for the representative according to section 2, and

2. to a limited extent, take other steps as described in Chapter 3, sections 8 and 10- 13 of the Act on Measures against Money Laundering and Terrorist Financing.

B. Health, safety and regulatory law

- **Discriminaton Act** Section 3

If an employer becomes aware that an employee considers that he or she has been subjected in connection with work to harassment or sexual harassment by someone performing work or carrying out a traineeship at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future.

- **Criminal Code** Chapter 36 Section 7 (annex)

-**Criminal Code** Chapter 36 Section 9 (annex)

-**Criminal Code** Chapter 10 Section 5 (annex)

2. Scope

a. Rationale given by the State for the regulation (or lack of regulation)

According to the Platform for Swedish Action on Corporate Social Responsibility, the Swedish government has adopted the term 'sustainable business' in preference to corporate social responsibility[1076]. Enterprises operating in or from Sweden are expected to act in accordance with the principles set out in the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the UN Guiding Principles on Business and Human Rights and the work of developing sustainable business should be undertaken by the enterprises themselves according to the Platform. [1077] However, the Swedish government wishes to have a proactive and supportive role in this.

Swedish regulation does not include human rights due diligence requirements. Due diligence related to other matters does exist as a concept in various laws and a mandatory requirement for companies. Sustainability related efforts focus mainly on reporting and state-owned entities. The aim of the Annual Account Act is to better facilitate for example the directive on non-financial information.

b. Size and type of business covered, including level of turnover, particular industry sectors and type of supply chain, and whether public procurement is included

Sustainability reporting requirements apply to companies that meet one or more of the criteria: average number of employees in the company during each of the last two financial years has been more than 250; the company's reported total assets for each of the last two financial years amounted to more than SEK 175 million; or the company's reported net sales for each of the last two financial years have amounted to more than SEK 350 million.[1078]

[1076] Regeringskansliet, Platform for Swedish Action on Corporate Social Responsibility (2013) 6 at https://www.government.se/49b750/contentassets/539615aa3b334f3cbedb80a2b56a22cb/sustainable-business---a-platform-for-swedish-action.
[1077] Ibid.
[1078] Annual Account Act (1995:1554) Chapter 6 Section 10-14

State-owned enterprises are subject by their owner to special requirements and expectations with respect to sustainable business, as stipulated in the Government's corporate governance policy for companies under state ownership.[1079]

The Swedish Code on Corporate Governance applies to all Swedish companies officially listed on the OMX Nordic Exchange Stockholm and other Swedish listed companies with a market capitalisation exceeding SEK3 billion.

c. Extent of human rights, environmental, climate change, sustainability and governance matters covered, and whether the regulation uses the terminology of human rights

Human rights, environmental and sustainability terminology is used in the Annual Account Act.[1080]

The state's ownership policy and guidelines for state-owned enterprises specifically uses terminology, such as climate and environmental impact, human rights and gender equality.[1081]

d. Jurisdictional extent of business covered, including whether it includes activity by subsidiaries or business relations of corporate nationals located in a different State and operating outside the State of the regulation

Subsidiaries of a particular Group in which that company and all the subsidiaries are subject to a sustainability report for the Group are not in the scope of the sustainability reporting requirements.[1082]

3. Content of Regulation

a. Overview and description of the required measures for business (such as requirement to adopt human rights due diligence or a vigilance plan)

Swedish regulation does not include human rights due diligence requirements. Due diligence related to other matters does exist as a concept in various laws and a mandatory requirement for companies. Sustainability related efforts focus mainly on reporting.

b. Key legal elements of the obligation

Producers have a responsibility to ensure that their products meet certain safety requirements in accordance with the Product Liability Act.[1083] Companies must continuously act with duty of care to ensure that consumer products meet the legal requirements set for them.

The Money Laundering and Terrorist Financing (Prevention) Act requires companies to conduct due diligence.[1084] The Money Laundering Act requires that financial actors covered by the legislation hold a risk-based approach towards money laundering. Financial operators must analyze the risk related to customers using them for money laundering or terrorist financing and continuously review transactions through a risk-based approach, which based on gathered customer information.[1085] The companies must have procedures in place to identify these risks. Suspicious transactions are reported to the National Police Board.

[1079] Government offices of Sweden, The state's ownership policy and guidelines for state-owned enterprises 2017 (2017)
[1080] Annual Account Act (1995:1554) Chapter 6 Section 12.
[1081] Government offices of Sweden, The state's ownership policy and guidelines for state-owned enterprises 2017 (2017) at https://www.government.se/reports/2017/06/the-states-ownership-policy-and-guidelines-for-state-owned-enterprises-2017/
[1082] Annual Account Act (1995:1554) 10.
[1083] Product Liability Act (SFS 1992:18) Section 3.
[1084] The Money Laundering and Terrorist Financing (Prevention) Act (2009:62)
[1085] ibid Chapter 2 and Chapter 5.

Swedish Criminal Code requires that companies undertake sufficient due diligence reviews of people and companies that will represent the company. The Swedish Criminal Code notes that must act with caution when providing cash or other assets to its representatives, agents, cooperation partners and other representatives to ensure that the funds are not used as bribes.[1086] The Code on Gifts, Rewards and other Benefits in Business, which is not legally binding, acts as a supplement to relevant legislation and the code complements and clarifies relevant criminal provisions[1087]. The Code on the other hand notes that companies shall have knowledge of, and when needed, perform a due diligence review and verify the integrity of agents and other cooperation partners before agreements are executed or other forms of cooperation commenced.[1088] Criminal liability can arise if the reviews are not sufficiently thorough considering the situation's circumstances. According to the Code, a risk assessment indicates the thoroughness of the review and in the risk assessment factors such as the nature and size of the transaction, the level of corruption in the relevant sector and geographical area, the partner's interactions with public entities and publicly owned companies, are considered.[1089]

The state's ownership policy and guidelines for state-owned enterprises requires state-owned companies' boards of directors to define and adopt sustainability targets and integrate sustainable business into their business strategies.[1090] Targets should also be long term, challenging and trackable, distinct and easy to communicate. Specifically the policy notes reducing climate and environmental impact, respecting human rights and promoting gender equality.[1091] Fully owned state enterprise are required under the corporate ownership policy to observe the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the UN Guiding Principles on Business and Human Rights.[1092] State-owned enterprises are required to identify and manage risks and business opportunities in the area of sustainability. State-owned companies must submit sustainability reports in accordance with the international reporting standard the Global Reporting Initiative (GRI) or another international framework for sustainability reporting, and publish them on the company's website in conjunction with the of the company's annual report.[1093] The sustainability report may be a separate report or an integrated part of the annual report. State-owned company boards and senior management should serve as models for promoting gender equality. The sustainability report must be quality assured through independent review and assurance by the auditor appointed by the general meeting as part of the company's statutory auditor.[1094] A business analysis tool that sheds light on relevant areas of CSR, including human rights, has been developed for state-owned companies by the Government Offices corporate management organisation.

Companies are required to take active measures to combat discrimination in all official and work systematically to combat all these forms of discrimination and document this work on an annual basis.[1095]

c. Risk assessment requirements and risk mitigation measures

No risks assessments are enforced relating to human rights.

The Money Laundering and Terrorist Financing (Prevention) Act requires companies to conduct due diligence and have a risk-based approach towards money laundering.[1096]

[1086] Swedish Criminal Code (1962:700) Chapter 10 Sections 5e
[1087] The Swedish Anti-Corruption Institute, Code on Gifts, Rewards and other Benefits in Business (2014) at www.institutetmotmutor.se/wp-content/uploads/2015/11/141120-IMM_Code_of_Business_Conduct_.pdf
[1088] Swedish Criminal Code (1962:700) Chapter 10 Sections 5a – 5e
[1089] The Swedish Anti-Corruption Institute, Code on Gifts, Rewards and other Benefits in Business (2014) 14.
[1090] Government offices of Sweden, The state's ownership policy and guidelines for state-owned enterprises 2017 (2017) 5.
[1091] Ibid 4.
[1092] Ibid.
[1093] Ibid 9.
[1094] Ibid.
[1095] Discrimination Act (2008:567) Chapter 3 Section 1-3.
[1096] The Money Laundering and Terrorist Financing (Prevention) Act (SFS 2016:1029) Chapter 5.

The Act requires that companies must have procedures in place to identify these risks.[1097] There is no specification to what exactly this entails.

d. Obligations in relation to subsidiaries and business relationships in the supply chain, including the legal test and its factors used to ascribe liability to parent companies for the impacts of subsidiaries and suppliers (if any)

Swedish law does not indicate such requirements related to human rights.

e. Requirements for an external control or evaluation of the human rights or environmental due diligence exercise, including key elements of a grievance mechanism or whistle blower mechanism

Swedish law does not indicate such requirements.

f. Transparency and disclosure requirements

The requirements to publish a sustainability report and to produce a corporate governance report is in the Annual Accounts Act. A limited liability company or partnership must provide a sustainability report if it meets at least two of the following criteria: the average number of employees is more than 250, the balance sheet total exceeds SEK 175 million or net sales exceed SEK 350 million.[1098] The criteria must be met during each of the last two financial years, which are based on the company's annual report. The sustainability report is part of the annual audit in this case and under the auditor's responsibility.

The corporate governance report in accordance with the Annual Accounts Act is required of companies whose transferable securities are admitted to trading on a regulated market.[1099] This includes reporting on the company's the diversity policy and how that policy has been applied in the last fiscal year. An auditor review is required if the report is included in the director's report or of the information that is otherwise found in the company or group's director's report. [1100] The Swedish Corporate Governance Code details further requirements for companies in its scope .[1101]

g. Implementation of internal processes by business, including operational-level grievance mechanisms

Swedish law does not indicate such requirements related to human rights.

4. Monitoring, sanction and enforcement

a. Monitoring body

Swedish law does not indicate a monitoring body related to human rights or sustainability. Swedish courts handle violations of Swedish legislation, which includes the Annual Accounts Act.

b. Form of sanction(s), if any (In particular, whether monetary or other sanctions)

Legal persons cannot perpetrate a crime under Swedish criminal law and legal persons cannot be held liable for damages. However, a company may be liable to pay damages for property damage, personal injury, and in economic loss in accordance with the Tort Liability Act. [1102] Natural persons can commit a crime within the framework of the activities of a company. Any criminal act, which is the Swedish Criminal Code and committed during a company's business activities may lead to a liability to pay corporate

[1097] ibid Chapter 5 Section 1.
[1098] Annual Account Act (1995) Chapter 6 Section 10.
[1099] Annual Account Act (1995:1554) Chapter 6 Section 6.
[1100] Ibid Chapter 6 Section 9.
[1101] The Swedish Corporate Governance Code (2016) at http://www.corporategovernanceboard.se/UserFiles/Archive/496/The_Swedish_Corporate_Governance_Code_1_December_2016.pdf
[1102] Tort Liability Act (1972:207) Chapter 3 Section 1

fine.[1103] Negligence in stopping or preventing a crime from occurring when reasonably and during the company's business activities.[1104] There are no explicit legal provisions allocating criminal liability among the representatives of a corporation. According to the Companies Act founders, board members and managing directors can be held liable for damages in relation to the performance of his or her duties, which was caused intentionally or negligently.[1105]

Natural people or employers are liable for compensation in relation to the discrimination act if they violate the prohibitions of discrimination or reprisals and fail to fulfil their obligations to investigate and take measures against harassment or sexual harassment under.[1106] There exists liability in accordance with the Working Environment Act and criminal liability in accordance with the Criminal Code related to work environment when someone has died, been injured or ill or has been subjected to serious danger because the employer has not followed the regulations of the working environment.[1107]

If companies do not comply with consumer regulation, criminal and civil liability exists for affected parties. There exists liability in the Product Liability Act for producers related to product safety, which do not follow the general principles of the compensation laws[1108].

c. Incentives or implications, such as link to procurement, licensing or export credit

The Public Procurement Act regulates public procurement. The actors covered by the legislation are contracting authorities and publicly controlled bodies in public procurement the contracting authority has the possibility consider social and environmental matters. Public Procurement Act is a procurement law, which does not enforce which factors decide the procurement. Contracting authorities should consider environmental considerations and social considerations in public procurement if the nature of the procurement justifies it.[1109] Human rights or environmental matters therefore do not have to be a deciding factor in public procurement.

The Swedish Export Credits Guarantee Board (EKN) and Business Sweden (formerly the Swedish Trade Council and Invest Sweden respectively) provide information on sustainable business. The SEK has signed onto the UN Global Compact. EKN follows the OECD Recommendations on Common Approaches on Official Export Credits and the Environment, Human Rights, Due Diligence, and the OECD's rules on anti-corruption.[1110] The Swedish Export Credit Corporation (SEK) observes the common Approaches and the OECD's anti-corruption rules. SEK has taken steps when granting credit towards increasing consideration in relation to human rights with certain audits conducted with a focus on business and assessment on compliance with the UN Guiding Principles on Business and Human Rights.[1111] Ownership instructions issued to SEK by the Government in April 2012 included the requirement to take account in their credit assessments of factors such as the environment, corruption, human rights, work requirements and other relevant considerations.[1112]

[1103] Swedish Criminal Code (1962:700) Chapter 36 Section 7
[1104] Ibid.
[1105] Companies Act (2005:551) Chapter 29 Section 1.
[1106] Discrimination Act (2008:567) Chapter 5 Section 1
[1107] Work Environment Act (1977:1160) Chapter 8; Criminal Code (1962:700) Chapter 20 Section 3
[1108] Product Liability Act (1992:18) Section 6-8.
[1109] The Public Procurement Act (2016:1145) Chapter 4 Section 3
[1110] Government Offices Sweden, National Action Plan (2015) at 24 https://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf
[1111] Swedish Export Credit Corporation, Policy on Sustainable Financing (2014) at https://www.sek.se/en/wp-content/uploads/sites/2/2014/01/sustainable_financing_policy.pdf
[1112] Regeringskansliet, Platform for Swedish Action on Corporate Social Responsibility (2013) 16 at https://www.government.se/49b750/contentassets/539615aa3b334f3cbedb80a2b56a22cb/sustainable-business---a-platform-for-swedish-action

d. Enforcement methods

Swedish law does not indicate an enforcement body related to human rights or sustainability.

e. Examples of enforcement and how the requirement is applied in practice

A case against a Swedish company for damage that had arisen abroad was recently in the court system. The lawsuit was against Swedish company Boliden Mineral AB, which in the years 1984-85 sent 20,000 tonnes of mining waste to the Chilean city of Arica for the treatment of the Chilean company Promel. The claimants, who were citizens from the city of Arica, illustrated serious health injuries claimed to be related to Boliden acting negligently, because the mining waste contained high levels of heavy metals, such as arsenic and lead. Claimants claimed that Boliden would have known of the significant health impacts. The lawsuit filed clearly shows the difficulties with a claim for damages of this kind. Boliden filed its defence on 20 January 2014 and denied the claim in its entirety. On 8 March 2018, the Court ruled in favour of Boliden, dismissing the plaintiffs' compensation claim and action being dismissed without approval. [1113] One of the reasons was that the court noted that Boliden had complied with the provisions that applied in the mid-1980s and there was not seen any correlation between the wetworks sludge and alleged damages.

5. Procedural Framework

a. Competent Court or other body

Swedish national courts are competent bodies in relation to Swedish law.

b. Jurisdictional restrictions (including forum non conveniens, place of business incorporation)

The general prerequisite for claims with extraterritorial effect is that there must be a connection or connection to Sweden.[1114]

c. Main procedural rules and challenges (formalities, deadlines, expediency, in court settlement options, evidence/discovery rules, multi-stage process, etc.)

Legal persons cannot perpetrate a crime under Swedish criminal law.

6. Available Remedies

a. Civil, criminal and administrative remedies

Swedish law stipulates that legal persons cannot be punished for crimes, but companies can be imposed with a company fine according to the Criminal Code.[1115] business activity and the company has not done what could reasonably be required to prevent crime.

b. Remedies that are only available to certain categories of claimants, such as workers or consumers

Sweden offers ombudsman related to certain topics. For example, the Office of the Equality Ombudsman is a government agency responsible for monitoring compliance with the Discrimination Act.[1116] The Ombudsman for Children in Sweden is a government agency whose main task is to represent the rights and interests of children and young people.[1117]

[1113] Skellefteå Tingsrätt, T 1012-12 (March 3, 2018) at https://www.aktuellhallbarhet.se/wp-content/uploads/2018/03/20180308domt1012-132c-kl-11.00.pdf
[1114] Criminal Code (1962:700) Chapter 2 Section 2
[1115] Criminal Code (1962:700) Chapter 36 Section 7
[1116] the Office of the Equality Ombudsman official website (visited on April 29, 2019) at https://www.government.se/government-agencies/equality-ombudsman-do/
[1117] Ombudsman for Children official website (visited on April 29, 2019) at https://www.barnombudsmannen.se/om-webbplatsen/english/

The Parliamentary Ombudsmen supervise the application of laws and other statutes in public activities. [1118] The ombudsmen mandate includes other individuals whose employment or assignment involves the exercise of public authority, insofar as this aspect of their activities is concerned, and officials and those employed by public enterprises, while carrying out, on behalf of such an enterprise, activities in which through the agency of the enterprise the Government exercises decisive influence.

c. Existence and use of judicial and non-judicial grievance mechanisms

Sweden has an OECD National Contact Point, which works with tripartite collaboration between the State, the business sector and trade unions. The Confederation of Swedish Enterprise and the Swedish Trade Federation represent the business sector with the Swedish Trade Union Confederation, the Swedish Confederation of Professional Associations, the Confederation of Professional Employees, Unionen and IF Metall represent the trade unions.[1119] The Ministry for Foreign Affairs acts as the NCP Chair. The amount of cases reviewed by the NCP has been very limited with the latest case from 2015. Lumière Synergie pour le Développement and Takkom Jerry Polyvalence Culturelle et Environnementale filed a complaint against Nykomb Synergetics Development AB in 2015 in relation to construction of a coal power plant in Senegal and that the project will have adverse social and environmental impacts, and the NCP gave an initial statement concluding the case would be recommended for further consideration.[1120]

7. Costs of enforcement of regulation of standards per annum (a) to State and b) to companies, either individually or collectively) (public information, estimated opinion)

The cost of mandatory sustainability reporting may be higher in Sweden than other countries as sustainability reporting is considered part of an audit for companies under the scope of law. The Swedish sustainability reporting requirements apply to around 2,000 companies in Sweden.

8. Impact of the Regulation

a. Impact of the national regulation on behaviour/ policy of businesses (both direct and indirect)

Sustainability reporting requirements apply to roughly 2,000 companies in Sweden. Companies must actively formulate, report and publish sustainability reports in accordance with the Annual Accounting Act whilst state-owned companies report in accordance with the state's ownership policy and guidelines for state-owned enterprises.

Money laundering requirements require companies to develop risk-based approaches for unveiling money laundering and gather client information adequately to be able to make such judgments. Bribery related requirements require act with caution in relation to providing cash or other assets to its representatives, agents, cooperation partners and other representatives. This includes companies to conduct thorough review and risk-assessments on the matter.

b. Public responses of stakeholders to regulation

The Swedish stakeholder response has not focused on developing mandatory due diligence requirements.

[1118] Parliamentary Ombudsmen official website (visited on April 29, 2019) at https://www.jo.se/en/
[1119] Government Offices Sweden official website, National Contact Points (visited on April 29, 2019) at https://www.government.se/government-policy/enterprise-and-industry/national-contact-points/
[1120] Swedish National Contact Point, Swedish National Contact Point initial statement – Takkom Jerry and Lumiere Synergie Developpement's complaint against Nykomb Synergetics Development AB (December 3, 2015) https://www.regeringen.se/491b35/contentassets/24305bc0b5634340a4eb5234063be05a/utlatande-sveriges-nationella-kontaktpunkt-nkp

c. Degree of overcoming of obstacles for victims to bring claims in Member State

Swedish courts can handle all cases related to violations of national laws, which include human rights stands implemented to national regulation. Sweden offers remedies in the forms of courts. However, this may not be sufficient for victims, because many abuses occur abroad and national law does not articulate human rights obligations for companies. Obstacles related to remedies are related to extraterritorial application requirements and the lack of judicial organs related to human rights matters. In Sweden, corporate actors cannot be held criminally liable.

III. COMPARATIVE ANALYSIS

9. Comparisons between different regulations within the Member State

a. The extent to which the legal regime translates a corporate duty to respect human rights and abstain from other abuse(s) and from causing damage into a civil law obligation by requiring a standard of reasonable care from the directors;

The current duty of care obligations do not entail respect for human rights.[1121]

b. The level of "duty of care"/"due diligence" required of the business or its administrative organs, in order to fulfil their obligations, and the key elements of this legal "duty of care"

The company's management have a duty of care, which means that they must act for the company's best interests.[1122] Corruption crimes have a basis for damages against company management in a limited liability company related taking and giving bribe and careless financing of bribery.

c. How directors' responsibility can be engaged

A natural person who has a leading position or is otherwise responsible for the company's operations can be sentenced for an offence committed within the framework of the company's activities when it is otherwise against the Criminal Code. A founder, board member or managing director who when fulfilling his or her assignment, deliberately or through negligence damages the company shall compensate the damage.[1123]

d. Whether the concept of due diligence is used in the domestic regulation of other areas of corporate governance, and if so, what the legal elements are to establish a duty and/or liability (including, if any, for subsidiaries and in the supply chain).

i. Anti-corruption and bribery

Swedish Criminal Code requires that companies undertake sufficient due diligence reviews of people and companies that will represent the company. The Swedish Criminal Code notes that must act with caution when providing cash or other assets to its representatives, agents, cooperation partners and other representatives to ensure that the funds are not used as bribes.[1124] The Code on Gifts, Rewards and other Benefits in Business acts as a supplement to relevant legislation and the code complements and

[1121] Companies Act (2005:551) Chapter 29 Section 1
[1122] The Companies Act (2005:551) Chapter 8 Section 4
[1123] Companies Act (2005:551) Chapter 29 Section 1
[1124] Swedish Criminal Code (1962:700) Chapter 10 Sections 5e

clarifies relevant criminal provisions. The Code on the other hand notes that companies shall have knowledge of, and when needed, perform a due diligence review and verify the integrity of agents and other cooperation partners before agreements are executed or other forms of cooperation commenced.[1125]

Criminal liability can arise if the reviews are not sufficiently thorough considering the situation's circumstances. According to the Code, a risk assessment indicates the thoroughness of the review and in the risk assessment factors such as the nature and size of the transaction, the level of corruption in the relevant sector and geographical area, the partner's interactions with public entities and publicly owned companies, are considered.[1126]

ii. Anti-money laundering

The Money Laundering and Terrorist Financing (Prevention) Act requires companies to conduct due diligence.[1127] The Money Laundering Act requires that financial actors covered by the legislation hold a risk-based approach towards money laundering. Financial operators must analyze the risk related to customers using them for money laundering or terrorist financing and continuously review transactions through a risk-based approach, which based on gathered customer information.[1128] The companies must have procedures in place to identify these risks. Suspicious transactions are reported to the National Police Board

e. How companies in Member State can be held liable for the impacts of their supply chain, including non-EU based suppliers, and including suppliers beyond the first tier of the supply chain[1129]

Liability exists in a contractual relationship.

IV. REGULATORY FRAMEWORK

10. Overall Review of Regulatory Framework

a. To what extent the regulations are effective in terms of a) providing individuals whose rights are affected access remedy and b) adherence by Member States to their fundamental human rights obligations

The possibility to hold companies accountable for violations in the supply-chain are extremely restricted. The only possibility for judicial remedies is in the court system, which does not extend extraterritorial reach for most Swedish national laws. No law is in force that requires companies to conduct due diligence, assess their impacts or risks or be held liable for violations in the company's supply-chain. As noted in the Boliden Mineral AB case however international victims can bring forth claims against Swedish companies if the company itself has possibly violated national laws related to behaviour abroad.

Victims can contact the NCP in Sweden, but this does not serve as a judicial remedy for victims.

b. Under which conditions and how victims can hold the Member State parent companies or their subsidiaries liable in case of human rights violations or other relevant damage caused within the supply chains

The possibility to hold companies accountable for violations in the supply-chain are extremely restricted. The only possibility for judicial remedies is in the court system,

[1125] The Swedish Anti-Corruption Institute, Code on Gifts, Rewards and other Benefits in Business (2014) at www.institutetmotmutor.se/wp-content/uploads/2015/11/141120-IMM_Code_of_Business_Conduct_.pdf
[1126] The Swedish Anti-Corruption Institute, Code on Gifts, Rewards and other Benefits in Business (2014) 14.
[1127] The Money Laundering and Terrorist Financing (Prevention) Act (2016:1029)
[1128] ibid Chapter 2 and Chapter 5.
[1129] First tier suppliers are understood as those suppliers with which the company does not have a direct contractual relationship.

which does not extend extraterritorial reach for most Swedish national laws. No law is in force that requires companies to conduct due diligence, assess their impacts or risks or be held liable for violations in the company's supply-chain. As noted in the Boliden Mineral AB case however international victims can bring forth claims against Swedish companies if the company itself has possibly violated national laws related to behaviour abroad.

c. What are the main obstacles and difficulties

The main obstacle is the lack of human rights due diligence requirements. Even though Swedish law does recognize due diligence requirements, none of them can be widely extended to human rights due diligence. Sweden has been very slow to include human rights due diligence in any legal measures or to offer clear guidance on the issue.

Swedish measures focus on reporting on various aspects of ethical behaviour. This is the case related to human rights, governance and other topics. State-owned companies have been given reporting requirements related to human rights. Obviously, companies face reputational and brand risk in terms of reporting, but it does not support the current concept of human rights due diligence.

d. Which regulatory model is most effective in achieving corporate implementation of adequate due diligence

The main obstacle is the lack of human rights due diligence requirements. Even though Swedish law does recognize due diligence requirements, none of them can be widely extended to human rights due diligence.

It is apparent that even the existing due diligence requirements can be difficult to translate into practical steps and measures required. Therefore, for example, the Swedish government has released practical codes to explain further requirements of specific due diligence requirements.

e. Which regulatory model is most effective in providing victims with access to remedy

Sweden chose to include more companies in the scope of mandatory sustainability reporting than required. This has meant that the amount of companies obligated to report on non-financial information is much higher than in some other countries. Importantly the inclusion of sustainability reporting in auditing does give the statements credibility as they are part of the audit and auditor's responsibility.

The government has been particularly active in enforcing human rights and environmental topics on state-owned companies. Unlike many other countries, Sweden specifically mentions some international standards, such as the UN Guiding Principles on Business and Human Rights.[1130] Even more importantly, sustainability reporting is required not only in the scope of non-financial information, but referenced to GRI or another international standard.[1131] State-owned companies are required to report with a higher standard in relation to ethical behaviour than other companies are, but this not mean that they have more strict actual human rights obligations as the requirement focuses on reporting.

f. An overall assessment of the main strengths and weaknesses (risks and opportunities) of the examined legislative regimes, providing a detailed comparative analysis, including whether they are effective to address the most

[1130] Government offices of Sweden, The state's ownership policy and guidelines for state-owned enterprises 2017 (2017) 4 at https://www.government.se/reports/2017/06/the-states-ownership-policy-and-guidelines-for-state-owned-enterprises-2017/
[1131] Ibid 9.

important potential harms and negative impact of companies in their operation and in their supply chain

Sweden has introduced new initiatives and rules to ensure companies' respect for human rights and the environment. The government offers information on corporate social responsibility. The government has, however, not been effective in developing mandatory due diligence requirements and has largely focused on further developing reporting requirements.

One key finding is that requirements related to due diligence are not foreign in the Swedish legal tradition. Therefore, companies should not have difficulty in complying its general concept. These concepts do not automatically support the concept of human rights due diligence. It is also apparent that it is difficult to explain in practical, distinct and clear manner what due diligence specifically requires. Similarly, various codes further clarify money laundering and bribery regulation to further explain required actions.

Swedish companies have actively adopted the Swedish reporting requirements. The requirements are clear for companies to follow and a number of companies were publishing sustainability reports prior to the regulation. The validity of information is high as in Sweden the requirement is part of an audit and thus entails auditor responsibility. This approach has given human rights credibility as human rights information is verified by an independent auditor. The reporting requirement could be extended to include requirements to describe specifically due diligence processes if used by the company (as in Denmark). This would allow further consideration of human rights in mandatory reporting.
State-owned companies are regulated separately on the issue with a stricter obligation to report in accordance with GRI or another international standard This requirement however makes it difficult at the same time to include more companies in the scope of the requirement. Companies that are not state-owned or do not meet the criteria of the Annual Account Act are not in the scope of the requirement, which is problematic.

Through public procurement, there are great opportunities for governmental actors to influence the ethical standards of companies. However, there are clear problems related to the voluntary nature of including environmental and social considerations. The rationale given has been that a categorical obligation could lead to considerable monitoring being placed also on procurement with limited and small human rights impacts. It is, therefore, for each procurer to decided what is the most efficient and effective manner to take into account social factors. One key issue is that it is also nearly impossible to blame an authority that has not made social or environmental demands in a contract. Contracting authorities take their own initiatives to emphasize environmental and social considerations in public procurement.
It is apparent that current Swedish law does not adequately promote human rights protection or human rights due diligence and it does not actively offer effective remedies to victims. Specifically victims who may have suffered violations of their rights in the supply-chain are not able to seek remedies.

11. Review of Proposals for Regulation

Sweden does not currently have any proposals or publicly advocated campaigns related to mandatory human rights due diligence. The current movement related to human rights due diligence of Denmark and Finland can affect Swedish stakeholders.

UNITED KINGDOM COUNTRY REPORT

Stuart Neely[1132]

I. OVERVIEW

The notion of "due diligence" features prominently in a range of English criminal and civil laws.[1133] In some instances, statutes impose a specific obligation on relevant businesses to perform due diligence (or to otherwise implement risk mitigation measures which resemble due diligence, e.g. reasonably practicable steps to avoid a harm to a stakeholder). Perhaps more commonly, "due diligence" operates as a defence to the occurrence of a liability.

Increasingly, the United Kingdom (UK) Government has shown a willingness to pass legislation imposing liability on companies that cannot demonstrate they implemented due diligence measures sufficient to prevent the occurrence of a particular unwanted outcome. In criminal law, this avoids the need to establish that the company's directors were involved in the commission of the offence (traditionally a particular challenge in prosecutions against larger companies). The most commonly cited example of such a law is the failure to prevent bribery offence in the UK Bribery Act. Where an unwanted outcome does arise, the burden shifts to the company to show (on a balance of probabilities) that, notwithstanding the occurrence of the unwanted event, it nonetheless operated objectively sufficient risk mitigation measures.

A similar approach is imported into laws which impose civil liabilities on businesses, e.g. an employer can avoid vicarious liability for an employee's acts under the Equality Act 2010 if it can show that it took *"all reasonable steps"* to avoid the discriminatory conduct which arose. The standard of 'reasonableness' is also found in common law tort principles: a company will only be liable in negligence if it breached a duty of care owed to the claimant(s) by failing to take the precautionary steps a reasonable person would have taken to avoid the claimant(s) suffering harm. What amounts to 'reasonable' is an evolving concept, and the approach of the Courts to cases involving the liability of parent companies where harm is alleged to have resulted from the activities of subsidiaries suggests companies could in future face liability for harms caused by suppliers. Before the determination of 'reasonableness' in such a case, however, the claimant(s) would need to overcome the challenge of showing the company had through its conduct assumed certain duties pertaining to the welfare of the claimant(s).[1134]

A key feature of "due diligence" in all of these different contexts is the element of objectivity. In other words, in each case risk management steps taken by a company to avoid liability accruing under a law will not amount to "due" diligence unless it meets an objective standard. The precise characteristics of 'sufficient' due diligence remain relatively ill-defined, in part because the assessment of what is 'adequate' will be largely fact-dependent and a matter for the judge (or jury) in each case. However, case law and official Government legislative guidance clarifies certain principles and indicators as regards when due diligence will be deemed to be "sufficient" to discharge liability. It is apparent that any due diligence carried out by a company must be proportionate to the risks of the unwanted event occurring, taking into account the business' complexity, size and operating context.[1135]

[1132] Senior Associate, Business and Human Rights Group, Norton Rose Fulbright LLP, based in London.
[1133] There are different jurisdictions in the United Kingdom. This Report focusses on the largest one, being England, unless otherwise noted.
[1134] See Section II, sub-section (e), under the heading "Negligence at common law"
[1135] This is strongly reminiscent of the expectations of the UN Guiding Principles on Business and Human Rights as regards the performance of human rights due diligence by business enterprises. UN Guiding Principle 17(b) states that human rights due diligence will "*vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations*". See here: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf (Accessed: 1 May 2019)

With the exception of certain well-regulated areas of law such as data privacy, discrimination (and employment / labour rights more generally), health and safety (including corporate manslaughter), food standards, consumer protection and the environment,[1136] legislation which pertains to the responsibility of businesses to respect human rights is principally confined to transparency and disclosure obligations.[1137]

The most well-known example is the Modern Slavery Act 2015, which requires certain companies to prepare a slavery and human trafficking statement. The UK Government's overt objective in enacting this law was incentivising companies to take steps to eradicate modern slavery from their businesses and supply chains, on the basis that stakeholders' investment and purchasing decisions would be affected by the extent of a company's modern slavery risk mitigation steps, as described in its public statement. However, as discussed further in Section IV below, the effectiveness of the law has been the subject of criticism, in part due to the fact a high proportion of companies' statements are perceived by civil society as being of a low quality and lacking in detail, and because the consequences for non-compliance are principally reputational.

Non-compliance with the reporting requirements in the Companies Act 2006[1138] could have comparatively greater consequences, for example, if a company's annual strategic report fails to describe potential human rights issues which may constitute a "principal risk or uncertainty" to the business. This could in principle result in the company's directors being compelled by a court order to prepare a revised report, but to date regulator activity in seeking such orders has been minimal.[1139] This may change when the Government comes to implement the recommendations arising from the independent review of the Financial Reporting Council by Sir John Kingman.

Beyond these Companies Act reporting requirements, the Financial Conduct Authority has the power to impose large fines on listed companies that fail to publish information likely to have a significant effect on the price of financial instruments (e.g. shares) on a timely basis.[1140] Although no fines levied by the Financial Conduct Authority to date concern non-disclosure of information relating to a company's involvement in human rights issues, it follows that human rights issues which lead to losses or the impairment of assets (e.g. where community or labour protests halt production or operations) this would need to be publicly disclosed.

The Financial Conduct Authority can also impose fines on listed companies which fail to comply with the Disclosure Guidance and Transparency Rules when making statutory filings; e.g. the requirement to describe the company's "principal risks and uncertainties",[1141] which is not defined but presumed to have the same meaning as under the Companies Act 2006.

Complaints lodged by an NGO with the Financial Conduct Authority and the Financial Reporting Council in 2018 against certain listed companies for alleged failures to set out and particularise climate change related risks in their statutory filings may set an interesting precedent for similar human rights focussed complaints. This kind of activism may lead directors to apply greater attention to the identification and management of potential human rights issues by companies, although to some extent this may depend

[1136] See Section II below for a summary of relevant laws.
[1137] Note in particular the obligation on certain businesses to prepare a slavery and human trafficking statement under section 54 of the Modern Slavery Act 2015 (see Section II, sub-section (e)) and Companies Act 2006 reporting requirements (see Section II, sub-section (a)).
[1138] The Companies Act 2006 has been amended on various occasions, including to incorporate the requirements of the 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 (the EU Non-Financial Reporting Directive)
[1139] See Section IV, under the heading "Litigation Effectiveness"
[1140] Article 17, EU Market Abuse Regulation (Regulation 596/2014) (in force from 3 July 2016); see for example the fine imposed by Rio Tinto Plc: the company did not carry out an impairment test and recognise an impairment loss on the value of mining assets in its 2012 half-year financial report. As a result, Rio Tinto's financial reporting was inaccurate and misleading in breach inter alia of the Disclosure Guidance and Transparency Rules, Rule 1.3.4R (now replaced by the Market Abuse Regulation). Note: the fine concerned unforeseen challenges in transporting product from a mine (and did not concern human rights issues).
[1141] Disclosure Guidance and Transparency Rules, 4.1.8R

on the complainants successfully showing that specific human rights issues (e.g. labour welfare issues in the supply chain) are a material concern for shareholders (evidenced by shareholder resolutions, for example). Whilst directors are obliged under section 172 of the Companies Act 2006 to have regard to employees, the community and the environment in carrying out their functions, this is ultimately within the context of a broader fiduciary duty to promote the success of the company for the benefit of the members as a whole. In other words, the company's (and shareholders') interests have primacy. However, recognising that the more severe human rights issues can have "*reputational, financial or legal*" repercussions,[1142] a failure to carry out human rights due diligence (which is appropriate given the business' operating context and relevant severe human rights risks[1143]) may mean a company's directors are poorly positioned to report on material risks to the company.

II. GENERAL REGULATORY FRAMEWORK IN REGARD TO HUMAN RIGHTS DUE DILIGENCE AND ENVIRONMENTAL DUE DILIGENCE IN THE SUPPLY CHAIN

A. Corporate law

Directors of UK-incorporated companies are obliged to prepare strategic reports.[1144] Strategic reports form part of a company's annual filings. The purpose of the strategic report is to inform and help members of the company assess how the directors have performed their duties under section 172 of the Companies Act (**CA 2006**) to promote the success of the company for the benefit of the company's members as a whole, having regard to inter alia employees, the community and the environment.[1145]

The strategic report must contain a fair review[1146] of the company's business and a description of the "*principal risks and uncertainties*" facing the company.[1147] Parent companies must prepare a consolidated strategic report which speaks to all of the companies in the group.[1148]

According to guidance published by the UK Financial Reporting Council (**FRC**) in July 2018**[1149]** (the **FRC 2018 Guidance**), only material information should be included in the strategic report: "*immaterial information should be excluded as it can obscure the key messages*".[1150] For these purposes, "*materiality*" is "*entity specific based on the nature or magnitude (or both) of the actual or potential effect of the matter to which the information relates in the context of an entity's annual report. It requires directors to apply judgment based on their assessment of the relative importance of the matter to the entity's development, performance, position or future prospects*".[1151] Although the FRC 2018 Guidance is voluntary, it is intended to represent best practice.[1152]

Corporate reporting requirements

"Large" UK companies[1153] will, for financial years commencing 1 January 2019,[1154] be required to include in their strategic reports a "section 172 statement" describing *how*

[1142] UN Guiding Principles on Business and Human Rights, Commentary to Guiding Principle 19, page 22
[1143] Un Guiding Principles on Business and Human Rights, Guiding Principle 17(b), page 18
[1144] Section 414A(1), CA 2006; note the obligation does not apply if the company is entitled to the "small companies" exemption.
[1145] Section 172(1), CA 2006
[1146] There is no formal guidance on what *"fair review"* amounts to.
[1147] Section 414C(2), CA 2006
[1148] Section 414A(3), CA 2006
[1149] See here: https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf (Accessed: 1 May 2019), page 2
[1150] FRC 2018 Guidance, page 4
[1151] FRC 2018 Guidance, clause 5.3, page 18
[1152] FRC 2018 Guidance, clause 2.1, page 7; note that where the FRC 2018 Guidance notes that a company "must" comply with certain obligations, it refers to existing mandatory legislative or other regulatory requirements; i.e. these are not stand-alone new duties (see clause 1.4, page 6).
[1153] A "large company" is one which meets two of the following three criteria: (i) a global turnover in excess of £36 million; (ii) a balance sheet in excess of £18 million; and (iii) more than 250 employees. Note: It is clear from November 2018 guidance published by the Department for Business, Energy and Industrial Strategy (BEIS) that for the purposes of assessing whether a parent company meets these criteria, principles of consolidation apply (so a parent employing less than 250 employees would meet the relevant threshold if the corporate group does employ more than 250 employees on a consolidated basis). See here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755002/The_Companies__Miscellaneous_Reporting__Regulations_2018_QA_-_Publication_Version_2__1_.pdf (Accessed: 1 May 2019)

the directors have had regard to their duty under section 172 (see above).[1155] The FRC 2018 Guidance notes that the section 172 statement must be meaningful and informative for shareholders, recognising that the long term success of a business is dependent on maintaining relationships with stakeholders and considering the external impact of the company's activity.[1156]

Since 2013, "*quoted*" companies[1157] have been obliged under the CA 2006 to include in their strategic reports information regarding "*the main trends and factors likely to affect the future development, performance and position of [the] business*", including inter alia with respect to the environment, employees and social, community and human rights issues. In addition, such companies must report on any company policies relating to these matters, and their effectiveness.[1158]

Since the incorporation of the EU Non-Financial Reporting Directive[1159] into UK law in December 2016, "*traded companies*",[1160] banking companies, authorised insurance companies or companies carrying on insurance market activity employing over 500 employees[1161] need to disclose information "*to the extent necessary for an understanding of the company's development, performance and position and the impact of its activity, relating to, as a minimum environmental matters (including the impact of the company's business on the environment), the company's employees, social matters, respect for human rights, and anti-corruption and anti-bribery matters*".[1162] In relation to each of these matters, the strategic report should also cover inter alia a description of: (i) the company's business model (a "*brief*" description); (ii) policies and due diligence processes; (iii) the outcomes of those policies and due diligence processes; (iv) principal risks (relating to the non-financial matters); and (v) key performance indicators.[1163] Given the overlap with the above obligation (for quoted companies) organisations which are caught by both laws tend to take a consolidated approach when seeking to comply with their requirements.

None of the above three reporting requirements under the CA 2006 *require* the performance of due diligence. However, depending on the circumstances a company may find that it is unable to report accurately on its principal non-financial risks, policies and policy effectiveness without first carrying out human rights focussed due diligence as envisaged by the UN Guiding Principles on Business and Human Rights (**UN Guiding Principles**).[1164] Indeed, the FRC encourages companies to reference "*guidance or a voluntary framework*" (and in the human rights context the UN Guiding Principles are the most authoritative such framework).[1165] Furthermore, depending on the nature of a company's business it may not be able to fully comply with the reporting requirements

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[1154] This obligation will only apply to financial years commencing on or after 1 January 2019, so the first section 172 statements will be published in early 2020.
[1155] Section 414CZA, CA 2006, inserted by the Companies (Miscellaneous Reporting) Regulations 2018; the obligation will apply to financial years beginning on or after 1 January 2019
[1156] FRC 2018 Guidance, clause 8.10, page 58 See here: https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf
[1157] Under section 385(2), CA 2006, a "quoted company" is defined as a company with equity share capital: (i) included in the Official List in accordance with Part VI Financial Services and Markets Act 2000; (ii) officially listed in an European Economic Area (EEA) State; or (iii) admitted to dealing on either the New York Exchange or Nasdaq.
[1158] Section 414C(7) – (8), CA 2006, implemented by the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013
[1159] 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
[1160] Under section 474, CA 2006, a "traded company" means a "company any of whose transferable securities are admitted to trading on a regulated market. A "regulated market" is defined in section 1173 CA 2006, with reference to art. 4.1(4) of Directive 20004/39/EC, as a "multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its nondiscretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III [of Directive 20004/39/EC]". This includes regulated markets in the entire EEA (but not beyond).
[1161] Section 414CA(1) and (4), CA 2006
[1162] Section 414CB(1), CA 2006
[1163] Section 414CB(2), CA 2006
[1164] See here: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf (Accessed: 1 May 2019)
[1165] FRC, *Guidance on the Strategic Report* (Updated, July 2018), clause 7B.58, page 50

without describing its supply chain, particularly if the company's "business model" is heavily reliant on its supply chain.[1166]

The above CA 2006 reporting requirements have been the subject of arguments before the English courts in the context of tort claims brought against UK domiciled parent companies.[1167] As described further below, claimants are using public disclosures by companies (whether made voluntarily or pursuant to legislation such as the CA 2006) as evidence to support arguments that defendant parent companies assumed a duty of care towards those harmed by the acts of subsidiaries (when alleging the parent company's negligence at common law). For example, in January 2019, a coalition of NGOs[1168] submitted in intervention in *Vedanta Resources plc and another v Lungowe and others*[1169] that a UK parent company "*at least arguably owed a duty of care*" to the Zambian claimants inter alia because its annual strategic report (filed pursuant to section 414A of the CA 2006) made reference to environmental and sustainability matters, including in relation to the operations of its co-defendant Zambian subsidiary which the claimants allege caused them to suffer harm. In this regard, the interveners further noted that section 414A(3) of the CA 2006 provides that where a parent company prepares group consolidated financial accounts (as in this case), the strategic report must also relate to the corporate group.[1170]

Beyond these Companies Act reporting requirements, the Financial Conduct Authority has the power to impose large fines on listed companies that fail to publish information likely to have a significant effect on the price of financial instruments (e.g. shares) on a timely basis.[1171] Although no fines levied by the Financial Conduct Authority to date relate to non-disclosure of information relating to a company's involvement in human rights issues, it follows that human rights issues which lead to losses or the impairment of assets (e.g. where community or labour protests halt production or operations) this would need to be publicly disclosed.

Directors' duties / responsibilities

The CA 2006 sets out seven general duties which a director owes to a company: (i) the duty to act within powers; (ii) the duty to promote the success of the company for the benefit of the members as a whole (see the commentary above regarding section 172 of the CA 2006); (iii) the duty to exercise independent judgment; (iv) the duty to exercise reasonable care, skill and diligence;[1172] (v) the duty to avoid conflicts of interest; (vi) the duty not to accept benefits from third parties; and (v) the duty to declare interest in proposed transaction or arrangement.[1173]

A breach of these duties by a director may give rise to a civil claim by the company (or more rarely a shareholder or shareholders where the company does not enforce its rights[1174]) against the director (e.g. for damages or an account for any personal profit made by the director).[1175] However, note that unlike the other duties set out above, which are fiduciary in nature, the duty to act with reasonable care, skill and diligence[1176]

[1166] This is discussed further in Section III below under the heading "Requirements to report"
[1167] This is discussed in more detail below in sub-section (e) under the heading "Negligence at common law"
[1168] The International Commission of Jurists and The Corporate Responsibility (CORE) Coalition Ltd
[1169] *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20
[1170] See the draft statement of intervention here: https://corporate-responsibility.org/wp-content/uploads/2019/01/Statement-in-Intervention-ICJ-CORE-.pdf
[1171] Article 17, EU Market Abuse Regulation (Regulation 596/2014) (in force from 3 July 2016); see for example the fine imposed on Rio Tinto Plc: the company did not carry out an impairment test and recognise an impairment loss on the value of mining assets in its 2012 half-year financial report. As a result, Rio Tinto's financial reporting was inaccurate and misleading in breach inter alia of the Disclosure Guidance and Transparency Rules, Rule 1.3.4R (now replaced by the Market Abuse Regulation). Note: the fine concerned unforeseen challenges in transporting product from a mine (and did not concern human rights issues).
[1172] Note: This duty under section 174 of the CA 2006 contains an "objective" and "subjective" element, taking into account the care, skill and diligence that would be exercised by a reasonably diligent person with: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has.
[1173] Sections 170 – 181, CA 2006
[1174] E.g. under Section 260 to 264, CA 2006
[1175] Section 178, CA 2006
[1176] Section 174, CA 2006

codified a common law duty which (if breached) would only give rise to a claim in negligence (for compensatory damages). By contrast, a breach of the other (fiduciary) duties could also lead to the relevant director having to account for any profit. Determining "reasonableness" for the purposes of the duty to act with reasonable care, skill and diligence will often involve an assessment of whether the relevant director obtained or ought to have obtained professional advice.[1177] This is closely related to the concept of due diligence.

A recent case before the English High Court, *Antuzis v DJ Houghton*,[1178] highlights that a claim against a director for a breach of directors' duties may be easier to establish where the director deliberately caused the company to breach obligations owed to certain stakeholders where those obligations are underpinned by statute (e.g. a contractual obligation to pay employees the minimum wage). The Court concluded: "*the fact that the breach of contract has such a statutory element may point to there being a failure on the part of the director to comply with his or her duties to the company and, by extension, to the director's liability to a third party for inducing the breach of contract*".[1179]

It is worth adding that, in addition to the general duties, directors are subject to a range of other statutory duties and liabilities which could result in a director personally facing criminal sanction (e.g. imprisonment and / or a fine),[1180] compensation orders,[1181] civil claims[1182] or disqualification[1183] in the event of non-compliance. In some of these cases the director's liability will result from a breach of his / her own direct legal responsibilities, and in other circumstances it will be derivative of a company's failure to comply with applicable laws and obligations. A director can also be jointly liable for torts committed by a company where that director authorised, directed or procured those torts.[1184]

Corporate governance

The UK corporate governance framework comprises the UK Corporate Governance Code (**CGC**),[1185] the Listing Rules (**LR**), Prospectus Rules (**PR**) and the Disclosure Guidance and Transparency Rules (**DTR**) (together, the **LPDT Rules**). Although compliance with the CGC is voluntary, the LPDT Rules are binding on certain companies under the Financial Services and Markets Act 2000 (**FSMA**).[1186] DTR 7.2 obliges relevant companies to publish corporate governance statements which conform to various requirements which partly overlap with the CGC.[1187] Companies with a premium listing are also

[1177] *In re Duomatic Ltd,* [1969] 2 Ch 365; *Re DKG Contractors Ltd,* [1990] BCC 903
[1178] *Antuzis & Others v DJ Houghton Catching Services Ltd & Others,* [2019] EWHC 843 (QB)
[1179] *Antuzis & Others v DJ Houghton Catching Services Ltd & Others,* [2019] EWHC 843 (QB), paragraph 122
[1180] See for example section 37(1) of the UK Health and Safety at Work etc. Act 1974, which provides that where an offence is committed by a body corporate (e.g. if the company breaches section 2(1) by failing to ensure, as far as reasonably practicable, worker safety) a director will be guilty of the same offence provided it can be proved the offence was "committed with the consent or connivance of" the director, or was otherwise proved "to have been attributable to any neglect on the part of" that director. In *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr App Rep (S) 436, CA, the Court of Appeal (Criminal Division) upheld fines against two directors (and the company) in a case which concerned asbestos contamination and consequent breaches of the HSWA.
[1181] See for example sections 130 - 133 Powers of Criminal Courts (Sentencing) Act 2000 (giving criminal courts the power to impose compensation orders for any personal injury, loss or death arising from certain offences).
[1182] For example where a company makes false or misleading statements in listing particulars or a prospectus, contrary to section 90(1) of the Financial Services and Markets Act 2000; regulation 6 of the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 (2001/2956) lists directors amongst the persons responsible for such information. Under section 90(1)(7), a claim of this nature could only be brought by a person who acquired shares in the company (or an interest in the company's shares).
[1183] See for example director disqualification proceedings which may be initiated by the UK Insolvency Service / HMRC in the event of non-compliance with the National Minimum Wage Act 1998: https://www.gov.uk/government/news/director-banned-after-failing-to-pay-minimum-wage-to-farm-labourers
[1184] See *Rainham Chemical Works Limited v Belvedere Fish Guano Co Limited*, [1921] 2 AC 465
[1185] See here: https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf (Accessed: 1 May 2019)
[1186] Under s73A, FSMA, the FCA may impose rules on companies, as well as on their sponsors, which have an official listing or are applying to be listed in the UK. The application of these rules varies according to a number of factors, including but not limited to the type of listing, type of market, security listed or size of the company. In an event of non-compliance by a company with the LPDT Rules, the Financial Conduct Authority may take enforcement action, such as: censuring an issuer (section 89K, FSMA); suspending the issuer's securities from trading (section 89L, FSMA); suspending the issuer's securities from listing (section 77(2), FSMA); and suspending or prohibiting the offer to the public of the transferable securities (section 89K, FSMA).
[1187] DTR 7.2; see here: https://www.handbook.fca.org.uk/handbook/DTR/7/2.html (Accessed: 1 May 2019)

required to publish an annual statement confirming whether they have complied with the CGC (see below)[1188] and UK-incorporated companies must include a CGC compliance statement (or an explanation of non-compliance) in their prospectuses.[1189] In addition, non-listed companies with either: (i) 2,000 or more employees; or (ii) a turnover of at least £200 million and a balance sheet of at least £2 billion, are now required to produce a statement on the company's website detailing the corporate governance arrangements the company applies.[1190]

The CGC has developed since its first iteration in 1992, and has been amended over time to reflect various reports commissioned by the UK Government (beginning with the Cadbury Report in 1992).

Amongst the most significant reports which resulted in amendments to the CGC was the Turnbull Report, first published in 1999 and then reviewed in 2005.[1191] The Turnbull Guidance inter alia recommended: (i) that directors, rather than operational managers, be responsible for risk management, and maintaining and reviewing a sound system of internal controls; (ii) the adoption of a risk-based approach to the internal control process; and (iii) the embedding of controls in company operations and the adoption of procedures for identifying and reporting control weaknesses to allow for remedial action.

Reflecting these recommendations, the 2018 CGC[1192] sets out the board's responsibility in terms of corporate governance, including with respect to establishing "*culture*",[1193] effective "*risk management*" and "*effective controls*",[1194] and "*transparent policies and procedures*" which "identify" and "*manage*" risk.[1195] Implementing the relevant provisions and principles of the CGC requires due diligence on the part of the directors of the board, and the relevant committees appointed by the board (e.g. the audit committee).

As noted above, the annual reports of companies with a premium listing of equity shares in the UK must (under the LR) include: (i) a narrative statement of how the company has applied the main principles in the CGC (with a sufficient explanation to allow shareholders to evaluate how the principles have been applied); and (ii) a statement as to whether the company complied with the CGC's provisions throughout the financial year (on a "*comply or explain*" basis).[1196] Practically, the board will be unable to report that the CGC has been complied with unless the company has developed risk-based policies, procedures and controls (supported by adequately resourced internal committees, functions and employees with clear responsibilities for implementing and monitoring the controls) for which the directors will have ultimate oversight.

B. Health, safety and regulatory law

Health and safety

The Health and Safety at Work Act etc. 1974 (**HSWA**) is the principal UK law on health and safety. It inter alia places general duties on certain persons, including employers, e.g. to ensure as far as reasonably practical the health, safety and welfare at work of all employees and the health and safety of all non-employees.[1197] A failure to comply with these duties could result in the commission of an offence (which if prosecuted may result in imprisonment and / or an unlimited fine)[1198] subject to the defendant proving that "*it*

[1188] Paragraph 9.8.6R(6), LR, See here: https://www.handbook.fca.org.uk/handbook/LR/9/8.html (Accessed: 1 May 2019)
[1189] Item 16.4, App 3.1.1, Annex I, PR, See here: https://www.handbook.fca.org.uk/handbook/PR.pdf (Accessed: 1 May 2019)
[1190] See the Companies (Miscellaneous Reporting) Regulations 2018 (the 2018 Regulations), which insert Part 8 (Statement of Corporate Governance Arrangements) into the Large and Medium-sized Companies and Groups (Accounts and Report) Regulations 2008. This obligation will only apply to financial years commencing on or after 1 January 2019, so the first corporate governance statements will be published in early 2020.
[1191] http://frc.org.uk/Our-Work/Publications/Corporate-Governance/Turnbull-guidance-October-2005.aspx
[1192] See for example Principles B, C, E, M, N and O, and paragraph 29; https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF
[1193] Principle B and Provision 2, CGC 2018
[1194] Principles C, M, N, O and Provision 29, CGC 2018
[1195] Principles M, O and Provision 28, CGC 2018
[1196] LR 9.8.6R See here: https://www.handbook.fca.org.uk/handbook/LR/9/8.html (Accessed: 1 May 2019)
[1197] Sections 2 to 6, HSWA
[1198] Section 33(1)(a) and (3), HSWA

was not reasonably practicable to do more than was in fact done to satisfy" the relevant duty, or that there "*was no better practicable means than was in fact used to satisfy*" the duty.[1199] Although the HSWA does not expressly use the term "due diligence", the requirement to take practical steps to mitigate health and safety related risks (where the burden of proof is on the defendant to show sufficiency) resembles due diligence as a defence to offences under other statutes which expressly use the term: see for example the Food Safety Act 1990 and Consumer Protection Act 1987, discussed below.

Numerous specific regulations have also been issued under the HSWA, e.g. the Control of Noise at Work Regulations 2005 and the Control of Vibrations at Work Regulations 2005 require employers to minimise employees' exposure to noise and vibrations above certain levels. Dangerous Substances (Notification and Marking of Sites) Regulations 1990 require notification and marking of sites containing dangerous substances in quantities of 25 tonnes or more. Other regulations, e.g. the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 formalise the process for reporting health and safety incidents to the Health and Safety Executive (the principal enforcement authority in relation to health and safety matters).

Other key regulations made under the HSWA include the Provision and Use of Work Equipment Regulations 1998, Lifting Operations and Lifting Equipment Regulations 1998, Personal Protective Equipment Regulations 1998, Manual Handling Operations Regulations 1992, Work at Height Regulations 2005, Control of Noise at Work Regulations 2005, Confined Spaces Regulation 1997 and the Working Time Regulation 1998.

The Management of Health & Safety at Work Regulations 1999 (**MHSWR**) give effect to the EU Framework Directive on health and safety.[1200] The MHSWR impose an obligation on all employers to conduct a risk assessment of all operations and to keep such risk assessments under review on a periodic basis.[1201] A breach of the MHSWR could result in imprisonment and / or an unlimited fine.[1202]

Corporate manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 (**CMCHA**) abolished the common law offence of involuntary manslaughter by gross negligence for organisations to which the CMCHA applies. It creates a new statutory offence and framework for convicting an organisation where gross management failure results in a person's death. An organisation is guilty of the offence in circumstances where:

- the way in which its activities are managed or organised causes a person's death;
- this amounts to a gross breach of a "relevant duty of care" owed by the organisation to the deceased; and
- the way in which its activities are managed or organised by its "*senior management*" is a substantial element of the breach.[1203] For these purposes, "senior management" is defined as the persons who play "significant roles" in the making of decisions about how the whole or a substantial part of the company's activities are managed or organised, or the actual managing or organising of those activities.[1204]

"*Relevant duty of care*" includes duties owed: to employees or other workers (e.g. to provide a safe system of work); as occupier (e.g. to ensure that buildings are safe); in connection with supplying goods or services; in connection with commercial activities; in connection with construction or maintenance work; or in using plant and vehicles.[1205]

[1199] Section 37, HSWA
[1200] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work
[1201] Regulation 3(1), MHSWR
[1202] Sections 33(1)(c) and (3), HSWA
[1203] Sections 1(1) to (3), CMCHA
[1204] Section 1(4)(c), CMCHA
[1205] Section 2, CMCHA

The CMCHA did not create new duties of care; it simply lists existing duties of care (those listed above) to be regarded as "relevant" to the offence. An organisation convicted of corporate manslaughter faces an unlimited fine.[1206] In addition to fines, the Court can impose remedial orders[1207] and publicity orders,[1208] which have significant potential adverse reputational impact.

Consumer protection

The Consumer Protection Act 1987 (**CPA**) imposes strict liability on producers for harm caused by defective products. Any person injured by defective products can sue for compensation without having to prove negligence, provided that they can prove that the product was defective and the defect in the product caused the injury.[1209] A person can sue under Part 1 of the CPA for compensation for death, personal injury and damage to private property.[1210] Avoidance of such liability would (by its nature) require a business to put in place due diligence measures to ensure against defective product related-risk.

Separately, the CPA establishes certain strict liability offences[1211] (e.g. supplying or offering to supply goods contrary to a safety regulation prohibition[1212]) for which there is a specific due diligence defence: "*it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence*".[1213] However, a person shall not be entitled to rely on the defence "*by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information*", having regard to the steps taken "*for the purposes of verifying the information*" and "*whether he had any reason to disbelieve the information*".[1214] A breach of the CPA's safety regulations may be punishable with a prison term of up to two years and / or an unlimited fine.

The General Product Safety Regulations 2005 (**GPSR**),[1215] which implements the EU Directive on General Product Safety,[1216] places responsibility for product safety with the product supplier (whether producer or distributor). Under regulation 5(1), "*no producer shall [supply or] place a [consumer] product on the market unless the product is a safe product*". Producers are also obliged under regulation 7(1) to "*provide consumers with relevant information*" to enable them to "*assess the risks inherent in a product… and take precautions against those risks*". Further, under regulation 8(1), "*a distributor shall act with due care in order to help ensure compliance with the applicable safety requirements*".[1217] Any person that breaches these provisions shall commit and offence, and shall be liable to imprisonment and / or a fine.[1218]

Control of hazardous substances

The Control of Substances Hazardous to Health Regulations 2002 (**CSHHR**) prohibit employers from carrying out work liable to expose employees to substances potentially

[1206] Section 1(6), CMCHA
[1207] Section 9, CMCHA
[1208] Section 10, CMCHA
[1209] Sections 2(1), 2(2) and 2(3), CPA
[1210] Section 5(1), CPA
[1211] Note: the offence of supplying or offering to supply any consumer goods which fail to comply with the general safety requirement under section 10 of the CPA was omitted and replaced by the General Product Safety Regulations 2005 (S.I. 2005/1803, reg. 46(2))
[1212] Section 12(1), CPA
[1213] Section 39(1), CPA
[1214] Section 39(4), CPA
[1215] S.I. 2005/1803
[1216] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety
[1217] In particular, under regulation 8(1) the distributor "*(a) shall not expose or possess for supply or offer or agree to supply, or supply, a product to any person which he knows or should have presumed, on the basis of the information in his possession and as a professional, is a dangerous product; and (b) shall, within the limits of his activities, participate in monitoring the safety of a product placed on the market, in particular by— (i) passing on information on the risks posed by the product, (ii) keeping the documentation necessary for tracing the origin of the product, (iii) producing the documentation necessary for tracing the origin of the product, and cooperating in action taken by a producer or an enforcement authority to avoid the risks*."
[1218] Section 20(1) and (2), GPSR. In the case of a breach of regulations 5(1) or 8(1), imprisonment cannot exceed twelve months, and for a breach of regulation 7(1), imprisonment cannot exceed three months.

hazardous to health unless they have first adequately assessed the risks posed to employees in line with the criteria set out in the CSHHR.[1219]

This assessment must be updated as and when appropriate, and must record the steps taken to prevent or control exposure (e.g. through protecting equipment, ventilation equipment, appropriate systems, limiting duration of exposure).[1220] Control systems put in place must be regularly tested, and exposure or employee health adequately monitored where necessary. [1221] Where possible, hazardous substances should be substituted,[1222] and staff must receive sufficient instruction and training on risks and precautions.[1223]

Breach of the CSHHR by an employer constitutes an offence publishable on summary conviction or on indictment by an unlimited fine.[1224]

Food standards

The Food Safety Act 1990 (**FSA**) creates various offences, including the sale of food which does not comply with food safety requirements.[1225] A person guilty of this offence shall be liable on summary conviction or on indictment to an unlimited fine and / or imprisonment of up two years.[1226] Akin to the CPA offences described above, and the corporate offence in the UK Bribery Act (see below) the offence is strictly liability.

However, it is a "*defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence*."[1227] The defence will apply if the relevant person proves: (i) the commission of the offence was due to an act or default of another person who was not under his control, or to reliance on information supplied by such a person; (ii) he carried out all such checks of the food in question as was reasonable in all the circumstances, or that it was reasonable in all the circumstances for him to rely on checks carried out by the person who supplied the food to him; and (iii) he did not know and had no reason to suspect at the time of the commission of the alleged offence that his act or omission would amount to an offence under the relevant provision.[1228]

C. Employment law

Equality

The Equality Act 2010 (**EA 2010**) brought together and re-stated the previous discrimination legislation in the UK. The EA 2010 prohibits discrimination and harassment in respect of the following "protected characteristics": age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including colour, nationality and ethnic or national origin), religion or belief, sex and sexual orientation.[1229] There are various types of discrimination and other unlawful conduct set out in the EA 2010 that apply to most protected characteristics: (i) direct discrimination: when a person is treated less favourably than another person because of a protected characteristic;[1230] (ii) indirect discrimination: when an unjustifiable provision, criterion or practice is imposed which, although imposed equally on everyone, may adversely affect a

[1219] Regulation 6(1), CSHHR
[1220] Regulations 6(2) and (3), CSHHR
[1221] Regulations 8 to 10, CSHHR
[1222] Regulation 7, CSHHR
[1223] Regulation 12, CSHHR
[1224] Sections 33(1)(c) and (3), HSWA
[1225] Section 8, FSA (as amended by Regulation 10(b), General Food Regulations 2004, and Article 14(1), EU Regulation 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety: "*Food shall not be placed on the market if it is unsafe*". Regulation 4 of the General Food Regulations 2004 provides that a failure to comply with Article 14(1) of Regulation 178/2002 is an offence.
[1226] Section 35(2), FSA
[1227] Section 21(1), FSA
[1228] Section 21(3), FSA
[1229] Section 4, EA 2010
[1230] Section 13, EA 2010

protected group more than everyone else;[1231] (iii) harassment: unwanted conduct related to a protected characteristic with the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment also includes treating a person less favourably because they have rejected unwanted conduct of a sexual nature or that is related to gender reassignment or sex;[1232] and (iv) victimisation: when a person is subject to detriment because that person has, or is believed to have, made a complaint or allegation of unlawful discrimination or is assisting in any complaint or proceedings connected with a complaint for unlawful discrimination.[1233]
Significantly, an employer (as principal) is liable for the acts of an employee unless the employer can show they took "*all reasonable steps*" to prevent the employee from doing "*that thing*" or "*anything of that description*".[1234] In the event of a breach of the EA 2010, compensation is made up of financial loss (based on the tortious measure of damage[1235]) and non-financial loss (e.g. injury to feelings).[1236] There is no upper limit on the compensation for unlawful discrimination, harassment or victimisation.

Pay and working conditions

The National Minimum Wage Act 1998 (**NMWA**) provides the current national minimum wage rates for workers. The minimum hourly rate depends on the employee's age and status (e.g. whether he is an apprentice). An employer is required to keep records for workers who qualify for national minimum wage and these records must be sufficient to establish that workers are receiving the national minimum wage.[1237] If a worker is paid less than the national minimum wage for a certain period, he is entitled to be paid the difference in arrears at the rate of the national minimum wage in force on the date the arrears are calculated.[1238] The current maximum fine for a breach of the NMWA is £20,000, per worker.[1239]

Under the Working Time Regulations 1998 (**WTR**),[1240] employers are required to take all reasonable steps to ensure that workers do not work more than an average of 48 hours a week over a 17-week period.[1241] Employers who fail to comply with certain requirements in the Regulations may be guilty of a criminal offence and potentially liable to pay an unlimited fine (where the conviction is on indictment).[1242]

The Public Interest Disclosure Act 1998 (**PIDA**), which amended the Employment Rights Act 1996 (**ERA 1996**), provides protection for workers who blow the whistle on wrongdoing by their employers.[1243] Workers cannot be subjected to any detriment or dismissed as a result of having made a protected disclosure. The level of compensation awarded to a dismissed employee who has suffered detriment as a result of whistle blowing is uncapped.[1244] Whilst the PIDA does not require due diligence per se, a failure by a company to carry out due diligence (e.g. formulating a non-retaliation policy, embedding a strong culture, training employees etc.) increases the risk of non-compliance with the PIDA / ERA 1996. By contrast, regulated firms[1245] are obliged to

[1231] Section 19, EA 2010
[1232] Section 26, EA 2010
[1233] Section 27, EA 2010
[1234] Section 109(4), EA 2010
[1235] Sections 119(2), and 124(6), EA 2010
[1236] Section 119(4), EA 2010
[1237] Section 9, NMWA
[1238] Section 17, NMWA
[1239] Section 19A(5) of the NMWA (amended by section 152, Small Business, Enterprise and Employment Act 2015)
[1240] Working Time Regulations 1998 (SI 1998/1833) is the UK statutory instrument which implements the EU Working Time Directive 93/104/EC
[1241] Section 4(1) and 4(2), WTR
[1242] Section 29(3), WTR
[1243] See section 1, PIDA, and sections 43A and 43B, ERA 1996. The protection extends to "qualifying disclosures", which is a disclosure that, in the reasonable belief of the worker, shows one of the following: (a) the commission or likely commission of a criminal offence; (b) a failure or likely failure to comply with a legal obligation; (c) the occurrence or likely occurrence of a miscarriage of justice; (d) health and safety of any individual has been, is being or is likely to be endangered; (e) the environment has been, is being or is likely to be damaged; or (f) the information being disclosed has been or is likely to be deliberately concealed.
[1244] Section 4 of PIDA, and section 49 of the ERA 1996
[1245] Article 4(1), EU Markets in Financial Instruments Directive, 2004/39/EC

implement appropriate procedures for their employees to report a potential or actual breach of the EU Markets in Financial Instruments Directive (**MiFID**), the EU Markets in Financial Instruments Regulation (**MiFIR**) [1246] or any EU regulation under MiFIR or MiFID.[1247]

The Gangmasters (Licensing) Act 2004 (**GLA**) relates to workers who are engaged in agriculture, horticulture, shellfish gathering and any associated processing and packaging.[1248] For the purposes of the GLA, a "gangmaster" is someone who supplies a worker to do work for another person. [1249] A gangmaster must be licensed by the Gangmasters and Labour Abuse Authority (**GLAA**). [1250] The Gangmaster (Licensing Conditions) Rules 2009 (**GLA Rules**)[1251] require licence holders to act "*in a fit and proper manner*" at all times.[1252] For corporate licence holders, that obligation extends to "*every director, manager, secretary or other similar officer*".[1253] It is an offence for any person to enter into an arrangement with an unlicensed gangmaster (where that gangmaster provides the person with "*workers or services*"[1254]). A defence is available where the person can show "*he took all reasonable steps to satisfy himself that the gangmaster was acting under the authority of a valid licence, and did not know, and had no reasonable grounds for suspecting that the gangmaster was not the holder of a valid licence*".[1255] The penalty for committing the offence is a fine and/or imprisonment following summary conviction.[1256]

D. Environmental law

The UK has extensive environmental legislation, which is principally derived from EU law. Examples of relevant laws with due diligence requirements are set out below.

Environmental damage prevention

The Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (**EDPR**) apply to "environmental damage", defined as damage to: (i) species and habitats (covered by the Habitats Directive (92/43/EEC) and Council Directive 2009/147/EC) and the Birds Directive (92/43/EEC)) and sites designated as sites of special scientific interest; (ii) surface or ground water (covered by the Water Framework Directive (2000/60/EC)) or Groundwater Directive (2006/118/EC); (iii) marine waters, where there is a significant adverse effect to their environmental status; or (iv) land, where there is a significant risk of adverse effects on human health.[1257]

In addition to requiring remediation plans where damage occurs, the EDPR apply to imminent risk of damage, and places operators / organisations about to cause damage under an obligation to take "*all practicable steps*" to prevent the damage and report the threat to the "*enforcing authorities*".[1258] The enforcing authority may serve a notice on the operator specifying measures to prevent the damage and requiring those measures to be taken within a certain period.[1259]

Failure to take the necessary preventative steps (including following a notice) is an offence,[1260] and may carry an unlimited fine and a prison term of up to two years.[1261] Where a body corporate commits an offence under the EDPR, and that offence is proved

[1246] EU Markets in Financial Instruments Regulation; (EU) No 600/2014
[1247] Financial Conduct Authority Handbook, SYSC 18.6; see here https://www.handbook.fca.org.uk/handbook/SYSC/18/6.html
[1248] Section 3, GLA
[1249] Section 4, GLA
[1250] Section 6, GLA
[1251] https://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=61&crumb-action=replace&docguid=I6E839FD0031511DE8AECFE770DB0916C (Accessed: 1 May 2019)
[1252] Paragraph 4, Schedule 1, GLA Rules
[1253] *Antuzis & Others v DJ Houghton Catching Services Ltd & Others [2019] EWHC 843 (QB)*
[1254] Section 13(1), GLA
[1255] Section 13(2), GLA
[1256] Section 13(4), GLA
[1257] Section 4, EDPR
[1258] Section 13(1), EDPR
[1259] Section 13(2), EDPR
[1260] Section 13(3), EDPR
[1261] Section 34(1), EDPR

to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a "*director, manager…or other similar person*", that person shall also be guilty of the offence.[1262]

Waste management and collection

The Environmental Protection Act 1990 (**EPA**) makes it an offence to:

- deposit, knowingly cause or knowingly permit the disposal of controlled waste on land without an environmental permit;
- deposit, knowingly cause or knowingly permit controlled waste to be subject to a listed operation (under the EPA) or mobile plant not in accordance with an environmental permit;
- treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health.[1263]

A person/legal entity found guilty of the offence is liable (for more serious breaches where there is a conviction on indictment) by imprisonment up to five years and / or an unlimited fine.[1264]

The EPA also imposes a duty of care on any person who imports, produces, keeps, treats or disposes of controlled waste (which includes industrial and commercial waste).[1265] The duty requires such persons:

- to ensure there is no unauthorised or harmful deposit, treatment or disposal of the waste;
- to prevent the escape of the waste from their control or that of any other person; and
- on the transfer of the waste to ensure that the transfer is only to an authorised person or for authorised transport purposes and that a written description of the waste is also transferred.

Failure to comply is an offence, punishable (for more serious breaches where there is a conviction on indictment) by an unlimited fine.[1266]

E. Miscellaneous

Data privacy

The EU General Data Protection Regulation (**GDPR**)[1267] and UK Data Protection Act 2018 (**DPA**), implementing the GDPR, became law in May 2018. They govern the use of "*personal data*"[1268] (belonging to "*data subjects*"[1269]) by data "*controllers*"[1270] and data "*processors*".[1271]

Controllers must implement appropriate technical and organisational measures (reviewed and updated as necessary) to ensure, and to enable the data controller to demonstrate, that the processing of personal data complies with the GDPR.[1272] Where proportionate, this may include appropriate data retention policies.[1273] "*Technical and organisational*

[1262] Section 34(2), EDPR; note the similar provisions in section 14, UK Bribery Act (see sub-section (e) below) and
[1263] Section 33(1), EPA
[1264] Section 33(8), EPA
[1265] Section 34(1), EPA
[1266] Section 34(6), EPA
[1267] EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
[1268] Defined in article 4(1), GDPR as any information relating to an identified or identifiable living individual.
[1269] Defined in article 4(1), GDPR as the identified or identifiable living individual to whom personal data relates.
[1270] Defined in article 4(7), GDPR as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.
[1271] Defined in article 4(9), GDPR as a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.
[1272] Article 24(1), GDPR
[1273] Article 24(2), GDPR

measures" should be designed to implement the "*data protection principles*".[1274]

When processing data, controllers and processors are further obliged to "*implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk*" taking into account inter alia the severity of potential impacts on "*the rights and freedoms of natural persons*".[1275] Where a particular type of data processing "*is likely to result in a high risk to the rights and freedoms of natural persons*" the controller must (prior to the processing) perform a data protection impact assessment (i.e. an assessment of the processing activity on the protection of the personal data).[1276]

A controller must notify the Information Commissioner "*without undue delay"* where it "*becomes aware*" of a personal data breach.[1277] In terms of penalties, depending on the relevant provision breached, an infringement of GDPR can attract significant fines of up to 4% of the organisation's turnover in the previous financial year, or 20 million Euros, whichever is higher.[1278] There is also an express provision which allows a person to seek compensation from a data controller or processor where their GDPR rights are infringed.[1279]

Proceeds of crime / money-laundering

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (**MLR 2017**)[1280] provide the basis for anti-money laundering compliance programmes that businesses in the regulated sector[1281] must establish and maintain, to protect themselves from being used for financial crime. MLR 2017 emphasises a risk based approach. Key requirements of MLR 2017 include the following:

- the performance of a written risk assessment to identify and assess the risk of money laundering and terrorist financing that a firm faces,[1282] taking into account risk factors including factors relating to: (i) its customers; (ii) the countries or geographic areas in which it operates; (iii) its products or services; (iv) its transactions; and (v) its delivery channels;[1283] and
- the establishment and maintenance of policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified in any risk assessment,[1284] which inter alia include: (i) risk management practices; (ii) internal controls (including training);[1285] (iii) customer due diligence (including enhanced due diligence in higher risk scenarios such as when dealing with "politically exposed persons");[1286] (iv) reliance and record keeping;[1287] and (v) the monitoring and management of compliance with, and the internal communication of, such policies, controls and procedures.[1288] Where appropriate, a relevant person (i.e.

[1274] The "data protection principles" are set out in Article 5(1) of the GDPR: (i) requirement that processing be lawful and fair; (ii) requirement that purposes of processing be specified, explicit and legitimate; (iii) requirement that personal data be adequate, relevant and not excessive; (iv) requirement that personal data be accurate and kept up to date; (v) requirement that personal data be kept for no longer than is necessary and (vi) requirement that personal data be processed in a secure manner.
[1275] Article 32(1), GDPR
[1276] Article 35(1), GDPR
[1277] Article 33(1), GDPR
[1278] See articles 83(4) and (5), GDPR: for other infringements the penalty is set at a lower level: up to 2% of the organisation's turnover in the previous financial year, or 10 million Euros, whichever is higher.
[1279] Article 82(1), GDPR
[1280] Implementing the EU's 4th Directive (2015/849) on Money Laundering and replacing the Money Laundering Regulations 2007 and the Transfer of Funds (Information on the Payer) Regulations 2007
[1281] Regulation 8, MLR 2017: the "regulated sector" for these purposes constitutes relevant persons, defined to include inter alia credit institutions, financial institutions, auditors, insolvency practitioners, independent legal professionals, corporate service providers and estate agents (in each case acting in the course of a business carried on by them in the UK)
[1282] Regulation 18(1), MLR 2017
[1283] Regulation 18(2), MLR 2017
[1284] Regulation 19(1), MLR 2017
[1285] Regulations 21 to 24, MLR 2017
[1286] Regulations 27 to 38, MLR 2017
[1287] Regulations 39 to 40, MLR 2017
[1288] Regulation 19(3), MLR 2017

a regulation company, firm or institution) must appoint a member of its senior management as its officer responsible for ensuring compliance with MLR 2017.[1289]

Such policies, controls and procedures need to be proportionate with regard to the size and nature of the relevant person's business, and must be approved by its senior management.[1290] In assessing proportionality, regard must be had to guidance issued by the Financial Conduct Authority (**FCA**) and the risk assessment.[1291] The FCA maintains a set of rules for financial institutions which inter alia reflects the requirements of MLR 2017 – see the "systems and controls" rules in the FCA Handbook: SYSC 3 (S*ystems and Controls*) and SYSC 6 (*Compliance, Internal Audit and Financial Crime*).[1292]

A person who contravenes the above "relevant requirements" commits a criminal offence,[1293] and shall be liable to imprisonment for a term not exceeding two years, to a fine, or to both.[1294] Interestingly, in deciding whether an offence has been committed the Court must have regard to guidelines issued by the European Supervisory Authorities[1295] and the FCA, as well as supervisory authorities[1296] (e.g. Law Society; Institute of Chartered Accountants) or appropriate body approved by the UK Treasury (e.g. the Joint Money Laundering Steering Group (**JMLSG**)).[1297]

MLR 2017 gives "supervisory authorities" (e.g. the Law Society) certain powers to enforce the Regulations: (i) the power to require information from, and attendance of, relevant and connected persons without a warrant;[1298] (ii) the power to enter and inspect without a warrant;[1299] (iii) the power to enter premises under a warrant;[1300] and (iv) the power to retain documents.[1301] Supervisory authorities also inter alia have the power to impose a financial penalty on, or to publicly censure, a person, for a contravention of a relevant requirement applicable to them.[1302]

Facilitation of tax evasion

The Criminal Finances Act 2017 (**CFA**) introduced two new corporate criminal offences of failing to prevent the facilitation of UK tax evasion[1303] and failing to prevent foreign tax evasion[1304] by an associated person[1305] (i.e. a person who performs services for or on behalf of the relevant body; e.g. agents, sub-contractors and employees). Failure to prevent UK tax evasion can apply to any corporate, whereas the failure to prevent foreign tax evasion offence applies to UK corporates or those carrying on business, or part of a business, in the UK. The foreign tax evasion facilitation offence requires "dual criminality", meaning the actions of both the taxpayer (evading tax) and the associated person (the facilitator) must be an offence under both UK law and the overseas jurisdiction. The offences are both strict liability. There is a defence where at the time of the offence the relevant body had "reasonable" prevention procedures in place to prevent tax evasion facilitation offences or where it is unreasonable to expect such procedures.[1306] Potential fines for an offence of failing to prevent the facilitation of tax evasion are unlimited.

[1289] Regulation 21(a), MLR 2017
[1290] Regulation 19(2), MLR 2017
[1291] Regulation 19(5) and 21(10), MLR 2017
[1292] See here: https://www.handbook.fca.org.uk/handbook/SYSC/6/
[1293] Under section 402 of the Financial Services and Markets Act 2000, the FCA is a prosecuting authority under MLR 2017; the Crown Prosecution Service is also a prosecuting authority
[1294] Regulation 18(1), MLR 2017; see the definition of "relevant requirements" in Regulation 75 and Schedule 6
[1295] European Banking Authority, European Securities and Markets Authority and European Insurance and Occupational Pensions Authority
[1296] Schedule 1, MLR 2017
[1297] Regulation 86(2), MLR 2017
[1298] Regulation 66, MLR 2017
[1299] Regulation 69, MLR 2017
[1300] Regulation 70, MLR 2017
[1301] Regulation 71, MLR 2017
[1302] Regulation 76(2), MLR 2017. Note that the Sanctions and Anti-Money Laundering Act lists 'gross human rights abuses' as a reason for sanctions being imposed on a person. Whenever sanctions are imposed, financial institutions (in particular, but also other companies) need to put in place procedures to ensure compliance.
[1303] Section 45, CFA
[1304] Section 46, CFA
[1305] Section 44, CFA
[1306] Section 45(2) and 46(3), CFA

Bribery and corruption

There are several bribery offences that can be committed under the UK Bribery Act 2010 (**UKBA**): the general offences of bribing and being bribed;[1307] bribing a foreign public official (together "the principal offences"); and a corporate offence of failing to prevent bribery by persons associated with relevant commercial organisations[1308] (subject to the defence of having adequate procedures in place).[1309]

Whereas a corporate can only commit one of the above principal offences where some part of the offence involved acts or omissions by sufficiently senior officers or employees constituting 'the directing mind and will' of the organisation,[1310] the specific corporate offence is strict liability: a bribe paid anywhere in the world by an associated person with the intention of benefiting the corporate (even without the corporate's knowledge) will cause the corporate to commit an offence, unless it has adequate procedures in place to prevent bribery. "Associated person" is a widely defined term: any person who performs services for or on behalf of the organisation (and may include e.g. an employee, agent or subsidiary).[1311]

The 2011 UKBA Guidance (the **UKBA Guidance**)[1312] published by the Ministry of Justice lists six key principles which underpin an effective anti-bribery programme amounting to "adequate procedures": (i) proportionate procedures; (ii) top-level commitment; (iii) risk assessment; (iv) due diligence; (v) communication (including training); and (vi) monitoring and review.[1313]

If the general offences or the offence of bribing a foreign public official are committed by a company, any senior officer is guilty of the same offence if he consents to or connives in the commission of the offence, provided that, if the offence is committed outside the UK, he has a close connection to the UK.[1314]

Modern slavery

The Modern Slavery Act 2015 (**MSA**) consolidates and clarifies the existing offences of slavery, servitude and forced or compulsory labour, and human trafficking (the principal offences).[1315] A conviction for a principal offence can carry a penalty of up to life imprisonment and a fine.[1316]

The MSA also requires certain businesses to publish slavery and human trafficking statements on a prominent place on their websites describing the steps they have taken to prevent slavery and human trafficking in their businesses and supply chains during the relevant financial year.[1317] A company which carries on a business, or part of a business, in the UK, supplies goods or services and has an annual turnover of £36 million or more (globally) is obliged to prepare a slavery and human trafficking statement,[1318] which must be approved by the board and signed by a director.[1319] The statement must be published as soon as possible after the financial year end,[1320] and the UK Government's official guidance to the MSA, *Transparency in Supply Chains etc. A practical guide* (the

[1307] Sections 1 and 2, UKBA
[1308] Section 7(1), UKBA
[1309] Section 7(2), UKBA
[1310] Consistent with general principles of English criminal law
[1311] Section 8, UKBA
[1312] https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, Page 15
[1313] Pages 20 to 31, UKBA Guidance
[1314] Section 14, UKBA
[1315] NB: These offences do not purport to have extra-territorial application, save to the extent that the offence of human trafficking (section 2) extends to the conduct of UK nationals anywhere, as well as the conduct of non-UK nationals where some part of the offence concerns the UK. Consistent with general principles of English criminal law, a corporate can only commit one of these offences where some part of the offence involved acts or omissions by sufficiently senior officers or employees constituting 'the directing mind and will' of the organisation.
[1316] Section 5(1), MSA
[1317] Section 54, MSA
[1318] Section 54(2), MSA
[1319] Section 54(6), MSA
[1320] Section 54(7), MSA

MSA Guidance), indicates that this should be done within six months.[1321]

The discretionary information which businesses are recommended to include in the statement is as follows: (a) the organisation's structure, its business and its supply chains; (b) policies in relation to slavery and human trafficking; (c) due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of the business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps taken to assess and manage that risk; (e) the business' effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and (f) the training about slavery and human trafficking available to its staff.[1322]

A failure by a business to prepare a slavery and human trafficking statement after the Courts have (on the application of the Government) ordered the publication of such a statement, could lead to an order for contempt of court, punishable by an unlimited fine.[1323] Whilst it is unlikely many businesses would ignore such an order, the principal consequences of failing to prepare a statement (or otherwise publishing a statement which describes an anti-slavery programme which is less robust than those of any competitors) are reputational (and potentially financial) in nature, given the increased scrutiny being applied to such statements by investors and NGOs. A statement which is materially inaccurate could lead to potential civil litigation from shareholders or other stakeholders, and potential personal liability for the directors for negligence and / or breach of duty (e.g. the duty to act with reasonable care, skill and diligence[1324]).

Negligence at common law

Under English tort law, a company may be found liable in negligence if it is established the company owed a duty to the claimant(s),[1325] where it then breached that duty,[1326] causing[1327] the claimant(s) to suffer loss which is recoverable.[1328] Once a duty of care has been established, it falls to be considered whether the relevant duty has been breached. This involves an assessment of whether the defendant's conduct fell below an objective standard of care: "*Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do*".[1329]

A number of claims founded in negligence have been brought against UK companies in the English courts by claimants seeking damages for harm allegedly caused by subsidiaries. In 2012, the Court of Appeal in *Chandler v Cape Plc*,[1330] found that a parent company had assumed a duty of care towards the employees of its subsidiary (who had

[1321] Paragraph 7.4; *Transparency in Supply Chains etc. A practical guide*, first published on 29 October 2015 and updated on 22 October 2018; See here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf

[1322] Section 54(5), MSA

[1323] Section 54(11), MSA, empowers the Secretary of State to bring civil proceedings in the High Court for an injunction for specific performance under section 45, Court of Session Act 1988, which states: *"[t]he Court may, on application by summary petition …(b) order the specific performance of any statutory duty, under such conditions and penalties (including a fine and imprisonment, where consistent with the enactment concerned) in the event of the order not being implemented, as to the Court seem proper*."

[1324] Section 174, CA 2006

[1325] The English Courts have developed a number of tests which may be used to determine whether a duty of care is "owed". See *Caparo Industries v Dickman* [1990] 1 All ER 568 (which establishes a threefold test of whether: (1) the damage which occurs is foreseeable; (2) there is a sufficiently proximate relationship between the parties; and (3) it is fair, just and reasonable in all the circumstances to impose a duty of care); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (whether the defendant has assumed responsibility towards the claimant); and *Murphy v Brentwood District Council* [1991] UKHL 2 (where the duty is assessed by analogy to other cases where a duty of care was established).

[1326] A person who owes a duty to take care at common law will breach that duty if they fail to exercise reasonable care. The standard of care is that of the hypothetical "reasonable man"; see *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205

[1327] "Causation" is assessed by reference to a 'but for' test; i.e. would the claimant's damage have occurred but for the defendant's negligence? See for example: *South Australia Asset Management Corpn v York Montague Ltd* and *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1996] UKHL 10

[1328] In tortious claims, the loss must have been reasonably foreseeable to be recoverable; see: *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388

[1329] *Blyth v The Company of Proprietors of The Birmingham Waterworks* [1856] EWHC Exch J65

[1330] *Chandler v Cape Plc* [2012] EWCA (Civ) 525

been exposed to asbestos) because of the parent company's "state of knowledge" about the factory in which these employees worked and "*its superior knowledge about the nature and management of asbestos risks*"[1331] associated with its subsidiary's operations. Subsequently, in *Thompson v The Renwick Group Plc*,[1332] the Court of Appeal found no duty of care between the parent company and the employees of its subsidiary, as there was no evidence the parent carried on any business apart from holding shares in its subsidiaries, and so it was not "*better placed because of its superior knowledge or expertise, to protect the employees of subsidiary companies*".[1333]

Both cases proceeded on the basis of the three part test in *Caparo Industries v Dickman*[1334] as a basis for establishing the parent company's duty of care. However, in April 2019 the Supreme Court found in *Vedanta Resources plc and another v Lungowe and others*[1335] (referenced above) that the *Caparo* test and "*its three ingredients of foreseeability, proximity and reasonableness*"[1336] ought to be applied only when "*dealing with a novel category of common law negligence liability*".[1337] In the Court's view, "*there is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all*".[1338]

The Supreme Court's ruling concerned a jurisdictional challenge brought by Vedanta Resources Plc and its Zambian subsidiary; it remains to be seen how the lower courts will interpret the Court's reasoning in due course.[1339] In determining that there was a "*real issue to be tried*" against Vedanta (an important question given that the claimants relied on Vedanta's domicile in the UK as a basis for bringing the claim in England against both Vedanta and its Zambian subsidiary, notwithstanding the strong "*connecting factors*" between the facts of the dispute and the jurisdiction of the Zambian courts), the Court affirmed that the "*the critical question [was] whether Vedanta sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred… a common law duty of care*".[1340] In the substantive trial, this question will be one of Zambian law, as the law of the dispute.

For the purposes of the jurisdictional challenge and the "real issue" question, the Court was satisfied that the Court of Appeal applied the law correctly when assessing the facts and so refused to revisit the factual findings. However, the Court did comment that "*if conducting the analysis afresh*", it would have been "persuaded" by "*the published materials in which Vedanta…asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries… [which it]… laid down but also implemented…by training, monitoring and enforcement",* in concluding that a "*sufficient level of intervention by Vedanta*" was "*well arguable*".

III. COMPARATIVE ANALYSIS

The legislation referred to in Section II above can broadly be divided into various categories. Understanding the differences between these laws and regulations can help to explain the legislator's intentions in promulgating them, and facilitates an assessment of which types of laws requiring due diligence are generally regarded as having had the

[1331] *Chandler v Cape Plc* [2012] EWCA (Civ) 525, paragraph 78
[1332] *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635
[1333] Thompson v The Renwick Group Plc [2014] EWCA Civ 635, paragraph 37
[1334] *Caparo Industries v Dickman* [1990] 1 All ER 568
[1335] *Vedanta Resources plc v Lungowe and Others* [2019] UKSC 20; Residents of the Zambian city of Chingola brought proceedings in the English courts against Vedanta Resources Plc, a UK incorporated parent company, and Konkola Copper Mines Plc, its Zambian subsidiary, claiming that waste discharged from a Zambian copper mine (owned and operated by KCM) had polluted the local waterways, causing personal injury to the local residents, as well as damage to property and loss of income.
[1336] I.e. (1) the damage which occurs is foreseeable; (2) there is a sufficiently proximate relationship between the parties; and (3) it is fair, just and reasonable in all the circumstances to impose a duty of care
[1337] *Vedanta Resources plc v Lungowe and Others* [2019] UKSC 20, paragraph 56
[1338] *Vedanta Resources plc v Lungowe and Others* [2019] UKSC 20, paragraph 54
[1339] Although English law was applied to the jurisdictional challenge, the trial of the substantive issues will be a matter of Zambian law.
[1340] *Vedanta Resources plc v Lungowe and Others* [2019] UKSC 20, paragraph 44

most impact in terms of influencing corporate conduct. In that regard, please refer to Section IV below for further analysis on the perceived effectiveness of these laws and proposed areas of reform. In relation to non-judicial grievance mechanisms, the UK's OECD National Contact Point has sometimes referred to human rights due diligence being required by a company, though there have been no effective remedies provided directly to the victims.[1341]

Requirement vs defence

Due diligence as a defence: Certain laws provide for the possibility of strict liability for non-natural persons (e.g. body corporates) for criminal offences. In each case, the intention of the drafters was to avoid the relevant prosecuting authorities having to surmount a significant hurdle when prosecuting legal persons: ordinarily, under the 'identification principle', it is necessary to establish that sufficiently senior officers or employees constituting 'the directing mind and will' of the organisation were involved in the acts or omissions which gave rise to the offence.[1342] Strict liability offences (e.g. those described in the UKBA (bribery), CFA (tax evasion), FSA (food safety) and CPA (consumer protection)) dispense with this requirement. It is evident that the intention behind the creation of such offences is the "deterrent effect", and the promotion of good business conduct.[1343]

As a general rule, statutes which contain these sorts of strict liability offences contain due diligence style defences (e.g. "adequate procedures" in the UKBA, "reasonable prevention procedures" under the CFA, or the "all due diligence" defences in the FSA and CPA). This was well-highlighted by the Law Commission in its pre-UKBA legislative review, "Reforming Bribery", published in 2008. In proposing the defence to the UK Bribery Bill's corporate offence,[1344] the Law Commission noted several other criminal offences "*subject to a defence such as due diligence*", including section 21(1) of the FSA.[1345]

These "due diligence" defences ensure that defendants are afforded due process where they may otherwise have little knowledge of the events which gave rise to the offence. Indeed, strict liability offences without such defences are very rare under English law – e.g. driving without insurance.[1346] It is worth noting that although the relevant statutory defences in the UKBA and CFA respectively use the language of "adequate procedures" and "reasonable prevention procedures" rather than the term "due diligence", the official legislative guidance published by the Government pursuant to these statutes expressly use the term "due diligence" in various contexts (including when conducting risk assessments and engaging business partners). Note for example the following: "*Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework*".[1347]

That said, where (as in these examples) due diligence operates as a statutory defence, there is (generally) no *requirement* on a company to carry out that due diligence. Theoretically if a company wanted to 'run the gauntlet' (for the purposes of this offence)

[1341] For a discussion of the UK's National Contact Point, see the UK's Parliamentary Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 201-221, available at www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/human-rights-business-report-published-16-17, and Amnesty International, *Obstacle Course* (2018), https://www.amnesty.org.uk/files/uk_ncp_complaints_handling_full_report_lores_0.pdf?eHZjEXH9mk6pJMnaNhd33kDJ1A6K6xMo=.

[1342] https://www.cps.gov.uk/legal-guidance/corporate-prosecutions.

[1343] https://hansard.parliament.uk/Commons/2016-11-15/debates/bab33d05-5b0a-49c2-b6e9-1d13d6a02720/CriminalFinancesBill(FirstSitting) (Accessed: 1 May 2019)

[1344] Now enshrined in section 7(2), UKBA

[1345] Law Com No 313, *Reforming Bribery*, Law Commission, 19 November 2008, page 118: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231183/0928.pdf (Accessed: 1 May 2019)

[1346] Section 143, Road Traffic Act 1988

[1347] UKBA Guidance, page 27; see also *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*, HM Revenue & Customs, 1 September 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf (Accessed: 1 May 2019)

such that it performed no due diligence, it would be entitled to do so (on the basis that it would have no defence in the event of an offence). However, depending on the risks presented by the company's operating context, such an approach may put the company's directors in breach of their duties (e.g. to act with reasonable care, skill and diligence and to promote the success of the company).[1348]

Due diligence as a requirement: Other laws (a good proportion of which are derived from EU law) actively require the performance of due diligence as a matter of compliance. In other words, the failure to properly carry out the due diligence is (itself) the offence or basis for liability. Examples of such laws include the CSHHR (hazardous substances), the GDPR / DPA (data protection) and the MLR 2017 (money-laundering).

A particularly interesting aspect to MLR 2017 is the role played by supervisory bodies (e.g. the FCA) in defining the parameters of sufficiency and proportionately in terms of money-laundering risk mitigation procedures: in determining whether an offence has been committed the Court must have regard to guidelines issued by such bodies. On one view, applying such officially recognised guidance operates as a 'defence' to a possible offence of failing carry out due diligence.[1349]

Requirements to report

Many of the provisions relevant to due diligence do not require companies to publicly report on the outcomes of their due diligence processes. Rather, the emphasis is on the maintenance of a system of internal controls (e.g. health and safety laws, food standards or consumer protection) which mitigates the risk of an adverse outcome on an ongoing basis. (Certain laws, such as GDPR (data protection), require a company to report to a regulator where there has been a breach.)[1350]

Other laws, such as the MSA (modern slavery) are principally designed to promote transparency, to encourage companies to compete with each other in terms of the extent of the due diligence / risk mitigation they undertake, bearing in mind scrutiny from investors and other stakeholders. The MSA contains only discretionary reporting criteria, and a company would not strictly be required to implement objectively sufficient due diligence with respect to modern slavery, or indeed any due diligence (notwithstanding the reputational risks of repeatedly reporting meagre modern slavery measures on an annual basis). It is partly for this reason that reporting requirements such as the MSA have been the subject of some criticism, discussed further below in Section IV.

Responsibility to respect human rights

The majority of the laws set out above require relevant organisations to assess risks which pertain to specific issues which present risks to stakeholders / rightsholders (e.g. GDPR, with respect to the right to privacy) or the CMCHA (which raises issues in terms of the right to life in the corporate manslaughter context). An obvious difference between these laws and the requirements of the UN Guiding Principles is that the obligation / imperative to assess and manage risks under these laws relates only to the matters falling within the scope of each law (rather than the full spectrum of rights covered by the UN Guiding Principles). Subject to that important distinction, laws such as GDPR contain similar components in so far as assessed risks ought to be prioritised, managed and (albeit only in some cases) reported on, though principally to regulators rather than the broad spectrum of stakeholders.

The requirements in the CA 2006 are different, however, and worthy of particular note. Although none of the three reporting obligations under the CA 2006 described above *require* the performance of due diligence, as stated above a company may not be able to report accurately on its principal non-financial risks, policies and policy effectiveness regarding human rights issues without first carrying out human rights focussed due

[1348] Sections 172 and 174, CA 2006
[1349] Regulation 86(2), MLR 2017
[1350] Article 35(1), GDPR

diligence under the UN Guiding Principles. By way of example, in the supply chain context the commentary to UN Guiding Principle 19 recognises that an ongoing relationship with a supplier (where its activities raise sufficiently severe human rights issues) could have "*reputational, financial or legal*" repercussions.[1351] Equally, if the supplier concerned provides "*a product or service which is essential*", terminating the relationship may raise particular "*challenges*".[1352]

Depending on the circumstances, this sort of scenario may be sufficiently material to warrant inclusion in a company's strategic report, which the company would only be well-positioned to report on having carried out human rights due diligence as envisaged by Guiding Principles 17 to 21. In this regard, it is worth noting that the FRC encourages companies to reference "*guidance or a voluntary framework*" (and in the human rights context the UN Guiding Principles serve as the most authoritative such framework).[1353] To date there has been little enforcement action taken by the FRC against companies for failing to report on "non-financial" issues. However, in 2018 NGO Client Earth filed complaints with the FRC Conduct Committee and the FCA against prominent insurers and FTSE100 companies (as well as their auditors) alleging the companies' strategic reports included insufficient detail regarding principal risks and uncertainties to their businesses as a result of climate change.[1354] Greater enforcement activity may be reasonably anticipated in the coming years, and there is no reason in principle why a similar complaint could not relate to human rights issues.

Responsibility with respect to the acts of subsidiaries and supply chain actors

The majority of the laws described above require or expect due diligence with respect to a company's own activities, rather than subsidiaries or the supply chain. The CPA and FSA, however, incentivise due diligence by companies over the operations of their subsidiaries and suppliers by extending criminal liability to entities which simply sell or supply defective or harmful products (i.e. including where the offending product was developed or manufactured by another entity)[1355] subject to the due diligence defences.[1356]

The MSA and CA 2006 reporting / disclosure requirements also extend to the conduct of subsidiaries and suppliers:

- Section 54 of the MSA expressly references modern slavery in supply chains as being relevant to a company's statement published under the provision,[1357] and the MSA Guidance recognises that for these purposes subsidiaries can form part of a parent company's "*own business or supply chain*".[1358] The MSA Guidance also clarifies that a parent company may produce one statement on behalf of itself and its relevant subsidiaries caught by section 54 of the MSA.[1359]
- Recital 8 to the EU Non-Financial Reporting Directive (transposed into UK law through amendments to the CA 2006) notes that "*risks of adverse impact may stem from…business relationships, including [a company's] supply and subcontracting chains*".

The nature of these reporting / disclosure requirements means they do not (at least directly) create liability for companies where human rights issues do occur in the supply chain, although as noted above *failing to disclose* human rights related risks could lead a company to breach its duties under the CA 2006.

[1351] UN Guiding Principles on Business and Human Rights, page 22
[1352] UN Guiding Principles on Business and Human Rights, page 22
[1353] FRC 2018 Guidance, clause 7B.58, page 50
[1354] See here: https://www.documents.clientearth.org/library/download-category/company-reporting/ (Accessed: 1 May 2019)
[1355] Section 12(1), CPA and section 8, FSA (as amended by Regulation 10(b), General Food Regulations 2004, and Article 14(1), EU Regulation 178/2002)
[1356] Section 21(1), FSA and section 39(1), CPA
[1357] Section 54(5), MSA
[1358] MSA Guidance, page 23
[1359] MSA Guidance, paragraph 3.4, page 7

The position under the MSA and CA 2006 may be contrasted with "failure to prevent" style offences under the UKBA (failure to prevent bribery[1360]) and CFA (failure to prevent the facilitation of tax evasion[1361]). These offences do extend a company's potential liability to the acts of entities constituting "associated persons", where the company fails to prevent relevant improper conduct by such persons. Depending on the circumstances, "associated persons" could include suppliers, so long as they are providing services "*for or on behalf of*" the company.[1362] In this regard, the UKBA Guidance states that "*where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person*".[1363]

It is worth adding that if a company identifies (perhaps through due diligence enquiries carried out in response to the MSA's disclosure requirements) that its subsidiaries or supply chain actors are engaging in relevant criminal conduct for the purposes of the Proceeds of Crime Act 2002 (which would include slavery or human trafficking occurring outside the UK, on the basis that such conduct would be an offence under sections 1 to 4 of the MSA had it occurred in the UK[1364]) this could trigger criminal liability issues to the extent the company then deals in the proceeds of such crime (i.e. produce or profits from modern slavery), and potentially creates reporting obligations (to the extent the company is in the regulated sector).[1365]

Finally, the common law negligence cases described above[1366] demonstrate how a parent company may (through its own actions) assume a direct duty of care to individuals adversely affected by the acts of a subsidiary. Although the only successful claims to date have been brought by employees of subsidiaries, the Supreme Court's decision in *Vedanta* confirms that a claim may still succeed where there is no such underlying employment relationship. Indeed, the Court's conclusion that "*there is nothing special or conclusive about the bare parent/subsidiary relationship"*[1367] would suggest a case could (at least in theory) succeed against a defendant company where the company's supplier caused harm to the claimant(s), provided the claimant(s) could establish that the company "intervened *in the management of the supplier's activities*"[1368] in such a way as to assume a duty of care to the claimant(s).

IV. REGULATORY FRAMEWORK

Meaning of due diligence

Although "due diligence" is expressly used as a term in many of the laws described above, it has received relatively little judicial attention clarifying its meaning. This is well demonstrated by the court's approach in *Turtington v United Co-Operatives Limited*,[1369] a High Court case regarding the defendant's liability under the CPA. With respect to the due diligence defence in section 39(1) of the CPA, Leggatt LJ cited with approval the following analysis proffered by Lord Parker in *Sherratt v. Geralds the American Jewellers*,[1370] a case concerning the application of a similar defence under the Trade Descriptions Act 1968: "*Whatever 'all due diligence' may mean there is clearly an obligation to take reasonable precautions if there are any precautions which are reasonable that can be taken*" to avoid committing the offence being committed.

In *Turtington*, the defendant had instructed its employees not to accept furniture from manufacturers without batch labels (there was no check on the significance of the batch

[1360] Section 7(1), UKBA
[1361] Sections 45(1) and 46(1), CFA
[1362] Section 8(1), UKBA and section 44(4), CFA
[1363] UKBA Guidance, page 16
[1364] See sections 327 to 329, Proceeds of Crime Act 2002
[1365] Section 330, Proceeds of Crime Act 2002
[1366] See Section II, sub-section (e), under the heading "Negligence at common law"
[1367] *Vedanta Resources plc v Lungowe and Others* [2019] UKSC 20, paragraph 54
[1368] *Vedanta Resources plc v Lungowe and Others* [2019] UKSC 20, paragraph 44
[1369] *David Henry Turtington v United Co-Operatives Limited*, 1993 WL 963894
[1370] *Sherratt v. Geralds the American Jewellers* (1970) LGR 256

number for the purposes of assessing compliance with the Furniture and Furnishings (Fire) (Safety) Regulations 1988). The Court found that these instructions "*fell short of what was requisite or "due" [and accordingly the defendant] failed to make good the statutory defence*". As there was a "*reasonable step that was not taken, [the defendant] failed to show that they had taken all reasonable steps*". The emphasis on 'reasonableness' bears a similarity to the standard for 'breach of duty' in tort law: failing to do something (e.g. due diligence or taking reasonable precautions) which "*a reasonable man would do*" in the circumstances.[1371]

Useful precedent can also be found in employment cases interpreting equality legislation predating the EA 2010, which contained a similar "*all reasonable steps*" defence to an employer's potential vicarious liability.[1372] In *Croft v Royal Mail Group*, the Court of Appeal affirmed a two stage process when assessing whether the defence has been established. According to the Court, "*the proper approach is: (1) to identify whether the respondent took any steps at all to prevent the employee, for where it is vicariously liable, from doing the act or acts complained of in the course of his employment; (2) having identified what steps, if any, they took to consider whether there were any further acts, that they could have taken, which were reasonably practicable*".[1373] Applying this approach, the Employment Appeal Tribunal in *Caspersz v Ministry of Defence* deemed that the defence may be available where, for example, the employer "*had a good policy, which was not just paid lip service to but was observed*" (i.e. the mere existence of the policy would be insufficient).[1374]

This reasoning suggests that, where due diligence operates as a defence to a particular liability (whether civil or criminal), the "due" aspect introduces an element of objectivity, and that for the diligence to be "due" it must meet a certain standard. This objectivity is reflected in the UKBA Guidance on the defence of "adequate procedures" to prevent bribery, and the guidance published by HMRC (**HMRC Guidance**)[1375] with respect to the defence of "reasonable prevention procedures" to prevent facilitating tax evasion: both defences emphasise "*proportionality*",[1376] which inherently imports an objective standard. Both documents also note the "*size*", "*nature*" and "*complexity*" of a business will to some extent determine levels of risk and therefore what amounts to "*proportionate*" procedures.[1377] This risk-based approach can also be found in GDPR, which requires organisations to establish data protection "*measures [which] ensure a level of security appropriate to the risk*", taking into account the "*nature, scope, context and purposes of [data] processing"* and risks to the "*rights and freedoms of natural persons*".[1378] This language bears a strong resemblance to UN Guiding Principle 17(b), which states that human rights due diligence: "*Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations*".

It is clear that, where due diligence provides a statutory defence to an offence, the relevant defendant must exercise due diligence to avoid committing the specific offence. In *Balding v Lew-Ways Ltd,*[1379] the section 39(1) CPA defence was not available, as the defendant had relied on British Standard BS 5665 when testing product safety, and not the Toys (Safety) Regulations 1974. Such statutory due diligence defences effectively operate to disapply the principle of *res ipsa loquitur* (i.e. 'the accident is sufficient to establish the negligence'). In *Cow & Gate Nutricia Ltd v Westminster City Council*,[1380] for

[1371] *Blyth v The Company of Proprietors of The Birmingham Waterworks,* [1856] EWHC Exch J65
[1372] Section 109(4), EA 2010
[1373] *Croft v Royal Mail Group*, [2003] EWCA Civ 1045, paragraph 57
[1374] *Caspersz v Ministry of Defence,* UKEAT/0599/05
[1375] See here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf (Accessed: 1 May 2019)
[1376] UKBA Guidance, page 21 (and various); HMRC Guidance, page 21 (and various)
[1377] UKBA Guidance, page 21 (and various); HMRC Guidance, page 21 (and various)
[1378] Article 31(1), GDPR
[1379] *Balding v Lew-Ways Ltd*, [1995] 2 WLUK 441
[1380] *Cow & Gate Nutricia Ltd v Westminster City Council,* [1995] 3 WLUK 186

example, the High Court concluded that the magistrate had been wrong to assume that *res ipsa loquitur* applied where bone fragments were found in a jar of baby food: the presence of the bone fragments did not in itself mean a defence under section 21(1) of the FSA might be available.

In criminal cases, it is for the defendant to show that the defence is established on the balance of probabilities.[1381] In *R v Skansen Interiors Limited* (the only case to date where there was a contested prosecution of a company under section 7(1) of the UKBA) the judge directed the jury to consider (bribery having been established[1382]) whether the company had established "*on a balance of probabilities – i.e. that it is more likely than not – that it had adequate procedures in place designed to prevent persons associated with the company from engaging with bribery*".[1383] By contrast, in civil tort cases the burden is on the claimant to show that the defendant's conduct breached the requisite standard of care.[1384]

Legislation effectiveness

In policy terms, certain criminal laws described above were enacted to overcome a perceived major hurdle for prosecuting authorities in seeking to prove the commission of an offence by corporates (particularly larger ones). Absent such legislation, the principles established in the House of Lords case of *Tesco Supermarkets Limited v Nattrass*[1385] apply. The case is long-standing authority that a company's criminal liability will only attach to the acts of those who are sufficiently senior to constitute its "directing mind and will". According to Lord Reid in *Tesco*, the relevant individual must be: "*acting as the company… his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company*."[1386] The effect of this 'identification principle' is that "*it is far easier to fix small, owner-managed companies with the requisite knowledge and intent than large, multi-national corporations*".[1387]

Much of the key criminal legislation dispensing with the need to establish the identification principle only became law in the last ten to fifteen years, but these laws are generally regarded as effective. Following an extensive consultation process, a House of Lords Select Committee recently concluded in a March 2019 report, *The Bribery Act 2010: post-legislative scrutiny (**2019 UKBA Report**)*, that: "*the new offence of corporate failure to prevent bribery is regarded as particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not*".[1388] The CMCHA (corporate manslaughter), by contrast, has been the subject of some criticism as it has been suggested the "*linkage of 'senior management' to persons who play a significant role in the formulation and/or implementation of organisation policy appears… to continue the identification doctrine's preoccupation with individual rather than systemic fault*".[1389] Some commentators have deemed this partly a reason why only twelve convictions were secured under the CMCHA between 2008 and 2015.[1390]

[1381] *Coventry CC v Ackerman Group Plc*, [1994] 7 WLUK 138
[1382] For the purposes of section 7(1), UKBA
[1383] The case is unreported but discussed in detail in the report published by the House of Lords Select Committee on the Bribery Act 2010, published on 14 March 2019, available here: https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf, paragraph 203 (Accessed: 1 May 2019)
[1384] *Blyth v The Company of Proprietors of The Birmingham Waterworks,* [1856] EWHC Exch J65
[1385] *Tesco Supermarkets Limited v Nattrass,* [1971] UKHL 1
[1386] Tesco Supermarkets Limited v Nattrass, [1971] UKHL 1, page 3
[1387] Commentary provided by the Serious Fraud Office to the House of Lords Select Committee on the Bribery Act 2010, detailed in the Committee's report: *The Bribery Act 2010: post-legislative scrutiny* (**2019 UKBA Report**), published on 14 March 2019, available here: https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf, paragraph 105 (Accessed: 1 May 2019)
[1388] 2019 UKBA Report, page 3
[1389] Gobert, James, *The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?"*, Modern Law Review, 2008, Volume 71, Issue 3, page 413 – 433; see here: https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-2230.2008.00699.x#fn7 (Accessed: 1 May 2019)
[1390] Lim, Etsuko, *Piercing the Corporate Veil: Assessing the Effectiveness of the Corporate Manslaughter and Corporate Homicide Act 2007 Ten Years On*; see here: https://culs.org.uk/per-incuriam/legal-updates/piercing-corporate-veil-assessing-effectiveness-corporate-manslaughter-corporate-homicide-act-2007-ten-years/ (Accessed: 1 May 2019)

To date there have been relatively few corporate prosecutions under the UKBA (although it is worth bearing in mind that enforcement activity by the US Department of Justice and Securities and Exchange Commission under the US Foreign Corrupt Practices Act 1977 really only began in earnest around the year 2000.[1391]) Moreover, it is widely accepted that the new UKBA corporate offence has had a significant "*deterrent effect*".[1392] This will at least in part be attributable to the potential for significant penalties under the UKBA.[1393] Equally, the extent to which legislation serves as an ongoing deterrent will depend to some degree on whether it is proactively enforced, which will be contingent in part on, for example, the budget of the enforcing authority.[1394]

Enforcement, and relatedly the resourcing of enforcing authorities, is equally germane to the effectiveness of reporting requirements. Particular criticism has been reserved for the FRC: the FRC Conduct Committee is principally responsible for enforcing compliance with the CA 2006 reporting requirements.[1395] Following an independent review completed in December 2018 (the **Kingman Review**), Sir John Kingman concluded that: "*The FRC is still partly funded through a voluntary levy [which] is seriously inappropriate*".[1396] He recommended the replacement of the FRC with a body which inter alia "*Has the right powers and resources it needs to do its job*".[1397] (With respect to powers, the FRC only has the power, for example, to take regulatory action against individual directors who are also accounting professionals.[1398])

Kingman further noted that: "*The FRC has enforcement powers to support its corporate reporting function. Its ultimate power is to go to court for a declaration that the annual accounts, or the strategic or directors' report of a company do not comply with the legal requirements, and to obtain a court order requiring the directors to prepare revised accounts or a revised report. This power has never been used, although the FRC has begun legal proceedings on several occasions and settled before the case reached trial.*[1399] In other words, the FRC has not taken formal legal steps to enforce the reporting requirements in the CA 2006 which pertain to human rights and other non-financial issues.

In contrast to the FRC, the FCA does actively enforce compliance by listed companies with applicable market disclosure requirements (e.g. those imposed by the Market Abuse Regulation), as noted above in the Overview section. However to date the FCA has not imposed any fines on companies or directors for the non-disclosure (or late disclosure) of information which relates to human rights issues.[1400] A more proactive approach by the FCA on such issues going forward will likely depend on the degree to which the FCA recognises a growing consensus that an association with human rights issues can constitute a principal risk or uncertainty for a business,[1401] or may otherwise have a material impact on the price of financial instruments.[1402]

[1391] http://fcpa.stanford.edu/statistics-analytics.html (Accessed: 1 May 2019)
[1392] 2019 UKBA Report, page 14, paragraph 36
[1393] See for example the £497.25 million Deferred Prosecution Agreement agreed between the Serious Fraud Office and Rolls-Royce plc in January 2017: https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/ (Accessed: 1 May 2019)
[1394] 2019 UKBA Report, page 25, paragraph 79
[1395] Sections 456, UK Companies Act, and the Supervision of Accounts and Reports (Prescribed Body) and Companies (Defective Accounts and Directors' Reports) (Authorised Person) Order 2012/1439. Note that following the Kingman Review the FRC will be replaced by the Audit, Reporting and Governance Authority; see here: https://www.ft.com/content/d6580162-4416-11e9-b168-96a37d002cd3).
[1396] Independent Review of the Financial Reporting Council (the Kingman Review), page 7; see here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf (Accessed: 1 May 2019)
[1397] Kingman Review, page 5; note that following the Kingman Review the FRC will be replaced by the Audit, Reporting and Governance Authority: https://www.ft.com/content/d6580162-4416-11e9-b168-96a37d002cd3 (Accessed: 1 May 2019)
[1398] The Audit, Reporting and Governance Authority will have powers to enforce against all directors; see here: https://www.gov.uk/government/news/audit-regime-in-the-uk-to-be-transformed-with-new-regulator
[1399] King Review, page 34, paragraph 2.31
[1400] See Footnote 9 above
[1401] See Disclosure Guidance and Transparency Rules, 4.1.8R
[1402] See Article 17, EU Market Abuse Regulation

Criticism has also been directed at the MSA, and the quality of the statements published by companies under section 54. Various studies commissioned by civil society organisations noted high levels of non-compliance by businesses with the requirements of the MSA, as well as issues in terms of statement content (e.g. a high proportion of companies describing their slavery and human trafficking due diligence and risk assessment processes in only minimal detail).[1403] Recognising that the MSA only became law in October 2015, and that the sophistication of businesses' slavery and human trafficking statements may develop over time, annual studies suggest that the 'quality' of statements is not necessarily improving. For example, a report published by Ergon Associates in October 2018 concluded that, with the exception of some leading companies, "*detailed information on risk assessment processes continues to be rare*".[1404]

In July 2018, the Home Office commissioned an independent review of the MSA,[1405] which was scheduled to report on its findings by March 2019. A second interim report published as part of the independent review in February 2019 recommended inter alia that the (currently discretionary) reporting criteria in section 54(5) be made mandatory[1406] (so that businesses would be required to report on matters such as their due diligence) and that the statutory guidance be developed to include a template of the information businesses would be expected to provide in their statements.[1407]

If the Government adopts these recommendations, it may well prompt more businesses to perform modern slavery due diligence of a kind currently only practised by the "leading" companies (in line with the Government's aim of "*encouraging businesses to be transparent in what they are doing… increasing competition to drive up standards*"[1408]). However, even if such changes to the MSA were to be implemented, this would unlikely lead to a seismic shift in terms of, for example, businesses allocating resources to modern slavery programmes equivalent to that apportioned to the mitigation of bribery risk. That would require a shift in Government policy: "failure to prevent" style laws which impose heavy penalties for non-compliance are expressly intended to act as a "*deterrent*";[1409] reporting requirements such as the MSA principally rely on businesses recognising a commercial advantage in proactively developing more advanced modern slavery risk mitigation measures than their competitors. The overall effectiveness of such laws is naturally inhibited if, for example, there is little evidence that – in a particular sector – investors or customer are influenced by the 'quality' of a company's slavery and human trafficking statement.

[1403] E.g. a report published by Ergon Associates in April 2017, *Modern slavery statements: One year on*: https://ergonassociates.net/wp-content/uploads/2016/03/MSA_One_year_on_April_2017.pdf?x74739 (Accessed: 1 May 2019)
[1404] *Modern slavery reporting: Is there evidence of progress?*, October 2018: https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739 (Accessed: 1 May 2019)
[1405] Led by Frank Field MP, Maria Miller MP and Baroness Butler-Sloss.
[1406] This follows the approach adopted in the Australian Modern Slavery Act 2018, see here: https://www.legislation.gov.au/Details/C2018A00153 (Accessed: 1 May 2019)
[1407] Independent Review of the Modern Slavery Act, *Second Interim Report: Transparency in supply chains*, 22 January 2019; see here: https://www.gov.uk/government/publications/modern-slavery-act-2015-review-second-interim-report, paragraphs 2.2.3 and 2.2.4(Accessed: 1 May 2019)
[1408] MSA Guidance, paragraph 2.5, page 6
[1409] 2019 UKBA Report, page 14, paragraph 36

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