Core Elements of an EU Regulation on Mandatory Human Rights and Environmental Due Diligence

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1. Introduction

This contribution is made in relation to the announcement by the European Commissioner for Justice, Didier Reynders, that the European Commission will develop legislation, to be introduced in 2021, which would require companies in the European Union to carry out human rights and environmental due diligence.[1] The aim of the contribution is to assist the European Commission in its drafting of appropriate and effective legislation in this area.

Mandatory Human Rights and Environmental Due Diligence (mHREDD) may have advantages in helping to secure a level playing field, enhance leverage with suppliers and generate more legal certainty. However, it should be noted this instrument in itself is not sufficient to address all business human rights and environment related issues. It should be part of a smart mix of mandatory and voluntary (such as participation in multi-stakeholder initiatives) measures to address these issues and make use of existing market and reputational drivers. It should also be commensurate with the regulatory landscape of other EU and member state legislation, which is connected to these issues, for example in the area of labour law, liability, public procurement, corporate and contract law and competition law. Furthermore, many ways exist to shape mHREDD.[2] In order to generate a so-called "level playing field" as far as possible, it is preferable to also take into account existing and intended legislation outside the EU which address business human rights and environment related issues. It would also be important to consult stakeholders outside the EU.

The authors of this contribution have each been working in this area for over 20 years as both academics and legal practitioners. They have each been involved in drafting comprehensive studies on the area and other relevant publications. They bring their experience of working

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[1] The commitment was made during a Webinar hosted by the Responsible Business Conduct Working Group of the European Union, 29 April 2020, available at: https://vimeo.com/413525229.

[2] See also UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies, June 2020, p. 1 and 20, which can be accessed at https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf; ; Connecting the business and human rights and the anti-corruption agendas, A/HRC/44/43 of 17 June 2020, p. 13 and 14, which can be accessed at https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf.

with companies, governments, international organisations and civil society, in common law and civil law jurisdictions, to bear in this contribution.

2. Justifications for EU Legislation

The decision to draft EU legislation on mandatory human rights and environmental due diligence (mHREDD) for companies has been widely praised by many governments, companies and civil society organisations. In our view, this legislation would be an additional aspect of existing EU legislation in related areas, such as the EU Conflict Minerals Regulation, the EU Non-Financial Reporting Directive, the EU Ship Recycling Regulation, the EU Timber Regulation, and the EU and the Unfair Trade Practices Directive in Agricultural Supply Chains. The proposed EU legislation will enable extension of these existing EU legislation to other areas, such as garment supply chains, production facilities, consumer goods and services, subcontractors and subsidiaries. Such EU legislation on mHREDD would also be consistent with, and supportive of, other EU initiatives such as the EU Green Taxonomy (which includes a minimum standard compliance with the OECD Guidelines and UNGPs (see below)) and the EU Green Deal.

It would build on the international standards on this area, such as the OECD Guidelines on Multinational Enterprises (OECD Guidelines), the UN Guiding Principles on Business and Human Rights (UNGPs), the International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Declaration), and other international instruments.[3] There are also the existing national legislation and national legislative proposals on mHREDD by EU member States, such as the French Duty of Vigilance Law 2017 and the Dutch Child Labour Due Diligence Law 2019, and many legislative proposals in other European states. Such EU legislation may also assist in indicating a path to a global model in this area, including clarifications of the provisions being considered for a potential draft treaty on business and human rights.[4]

Compliance with EU legislation would also benefit from a global model regarding mHREDD. Many companies operating in the EU have global operations and compete with other globally operating companies. It is a burden for them if they have to implement different types of HREDD depending on the state in which they operate (although some of them tend to implement the highest standard worldwide if feasible). Thus, globally comparable HREDD requirements support and facilitate compliance with EU legislation, and such global models may incentivize many states to improve the situation in their state.

[3] See OECD Guidelines, accessed at http://www.oecd.org/daf/inv/mne/48004323.pdf, UNGPs, accessed at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, and ILO Declaration, accessed at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

[4] Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, July 2019, accessible at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

There are many additional justifications for why an EU-level legislation on this area is required. A core reason why there is considerable corporate support for EU legislation on mHREDD is that it could provide for legal certainty, coherence and consistency, and what is often called a "level playing field".[5] Indeed, the survey in the Study commissioned by the European Commission on mHREDD in supply chains showed that a large majority (75.37 per cent) of business respondents indicated that any EU-level regulation would benefit business through providing a 'single, harmonised EU-level standard (as opposed to a mosaic of different measures at domestic and industry level)'[6]. Interestingly, that Study also showed that the majority of businesses considered that the new regulation would improve or facilitate leverage with third parties by introducing a non-negotiable standard, without reducing competitiveness or innovation. Further, EU legislation in this area may also improve trade and human rights practices worldwide, which may be seen in the support given to the drafting of EU legislation on mHREDD by the Commissioner for Trade. However, without such EU legislation on mHREDD, there is the likelihood that existing practices may continue where companies are allowed to compete using unsustainable human rights and environmental behaviour - such as using child labour and causing air, water and land pollution - and with significant consequences to the human rights of victims and damage to the environment. For example, contractual models in supply chains are often affected by severe price pressure, use short-term modifications and long payment terms, and include a reduction of payment if not all of the procured goods are sold, may exacerbate human rights violations. Thus, EU legislation on mHREDD would enable the root causes of human rights violations and environmental damage by companies to be addressed in a coherent and consistent manner.

3. Scope of EU Legislation

A key issue for any EU mHREDD legislation is the scope of the legislation. This includes what human rights and environmental matters it covers, which companies it includes, and the jurisdictional area to which it extends.

3.1 Human Rights

The scope as to which human rights are included in any EU legislation is important, as there has been criticism of the scope of human rights included in the UNGPs,[7] and some states like the Netherlands, the UK and the US have adopted legislation which only addresses specific human rights like modern slavery, human trafficking or child labour. It is also possible not to

[5] See the Report by the UN WGBHR, *Connecting the Business and Human Rights and the Anti-Corruption Agendas*, A/HRC/44/43 of 17 June 2020, p. 14, accessed at https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf.
[6] *Study on Due Diligence Requirements Through the Supply Chain*, 24 February 2020, (EC Study) at p.142, accessible at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/%20language-en. Only 9.7 per cent of business respondents disagreed with this proposition. Note that one of the authors of this contribution was a co-author for this Study.
[7] See UNGPs, Commentary to GP 12.

include any specific definition of human rights, as is done in the French Duty of Vigilance Act, so a general reference "internationally recognised human rights" may be sufficient.

In our view, the human rights to be included could be expressly set out to include those human rights accepted as part of EU values. This includes the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), both of which are treaties of the Council of Europe, and both of which every Member State is a party. The human rights within these treaties include a wide range of civil, cultural, economic, political and social rights, including almost all human rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Right (ICCPR). It also includes human rights found in some other major international treaties, such as the rights of women, the child, the elderly and of persons with disabilities, and rights relating to housing, poverty and social exclusion, although these are often expressed very briefly and without reference to those treaties. In addition, the EU Charter of Fundamental Rights, though limited to apply to the EU institutions, includes most of these same human rights.

This breadth of definition would include more human rights than those specifically included in the UNGPs and OECD Guidelines, and be much clearer than the French Duty of Vigilance Act. It is a matter for the Member States to determine whether the application of these rights would be limited by the reservations made by Member States to the human rights protected in these treaties. However, there should be no restriction made on coverage to being only those human rights considered to be "serious" or "severe", as all breaches of human rights are serious for the persons concerned, and there is no such restriction in the UNGPs and OECD Guidelines. Thus, the EU legislation should not include this restriction.

While this may appear to be a wide range of human rights for companies to ensure that they are not abusing, there has been clear clarification by the UN Global Compact of how these human rights are relevant to companies.[8] Where there is a real or apparent conflict between the company's human rights approach and that of a state in which they operate, the UNGPs make clear that:

> Where the domestic context renders it impossible to meet [the responsibility to respect human rights] fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.[9]

Hence, it could be acknowledged in the EU legislation that companies must still undertake HREDD even where a state's law does not support it being implemented fully. Any issue

[8] See UN Global Compact and Monash University, *Human Rights Translated 2.0*, accessible at: https://d306pr3pise04h.cloudfront.net/docs/publications%2FHRT_final_web.pdf.
[9] UNGPs, Commentary to Guiding Principle 23.

about the lack of implementation can be addressed by having a defence for companies in this regard (see below).

The ECHR and the ESC do not include collective rights, such as the right to self-determination (which is in the ICESCR and the ICCPR), the freedom from genocide and indigenous rights. The first two of these rights are generally considered customary international law and so are binding on all States, and indigenous rights have been considered to be important for Member States to uphold, as noted in various statements of the European Commission and resolutions of the European Parliament.[10] As well, customary international humanitarian and international criminal law should be included where the situations arise, such as human rights in armed conflict, for the application of these laws. Therefore, customary international human rights law and related customary international law, and indigenous rights, should be included in the EU legislation.

In addition, there would be a benefit in making clear that the human rights protected in the EU legislation on mHREDD should expressly integrate a gender perspective, as the Working Group on Business and Human Rights (WGBHR) has recommended that:

> States, in line with their international human rights obligations, should treat gender equality as a cross-cutting issue to be integrated in the strategies, policies, programmes and actions of all governmental ministries, departments, agencies and institutions that shape business practices.[11]

There should also be specific reference to the requirement that action is taken in relation to the distinctive and disproportionate impacts on, and structural obstacles to, vulnerable or marginalized individuals and groups.

If the approach is adopted of including all human rights protected by the ECHR and the ESC, and those human rights which are customary international law, as well as indigenous rights, then it would broaden the scope of the human rights within EU legislation on mHREDD beyond that understood in the UNGPs. It is necessary to include as many human rights as possible for the protection of human rights of those affected and to clarify the position for companies.

3.2 Environment

It is evident from the comments of the European Commissioner for Justice that the EU legislation on mHREDD must be consistent with the EU Green Deal.[12] The Green Deal

[10] See, for example, European Parliament Resolution of 3 July 2018 on violation of the rights of indigenous peoples in the world, including land grabbing (A8-0194/2018).
[11] WGBHR Report, *Integrating a Gender Lens into the UNGPs*, UN Doc A/HRC/41/43 (23 May 2019), (WGBHR Report), Annex, para 15, accessible at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/146/08/PDF/G1914608.pdf?OpenElement.
[12] EU Green Deal, 11 December, 2019: https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF

"resets the Commission's commitment to tackling climate and environmental-related challenges that is this generation's defining task".[13] In relation to enterprises, the Green Deal notes some specific actions relating to standards, prevention, remedy and monitoring, which are relevant to mHREDD, such as:

> Companies making 'green claims' should substantiate these against a standard methodology to assess their impact on the environment (...). To protect Europe's citizens and ecosystems, the EU needs to better monitor, report, prevent and remedy pollution from air, water, soil, and consumer products. [14]

Accordingly, the Green Deal requires standards and monitoring of environmental impacts. Similarly, the French Duty of Vigilance Act includes environmental matters, as do the OECD Guidelines. In contrast, the UNGPs do not include environmental impacts directly.

There is a variety of relevant EU legislation, such as the EU Environmental Liability Directive which covers environmental impacts, those which respond to the consequences of environmental impacts on resources, such as the EU Conflict Minerals Regulation, the EU Ship Recycling Regulation and the EU Timber Regulation, and those which seek to improve transparency, such as the EU Non-Financial Reporting Directive.[15] The EU Environmental Liability Directive has defined the relevant environmental damage as "[a] measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly".[16]

In terms of the relevant international environmental standards which support human rights obligations relating to the environment, these have been mapped by the UN Human Rights Special Rapporteurs on Human Rights and the Environment, and made into a framework, which applies a human rights focus to environmental issues.[17] The conclusions have been that human rights obligations relating to the environment, include:

> **Procedural obligations** of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in decision-making, and to provide access to remedies for harm;
> **Substantive obligations** of States to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors; and

[13] Ibid, p.1.
[14] Ibid, pp.8 and 14.
[15] Note that the Preamble (at paragraph 3) to the EU Non-Financial Reporting Directive states: "Indeed, disclosure of nonfinancial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection".
[16] EU Environmental Liability Directive 2004, Article 2.2.
[17] https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx. Our thanks to Sara Seck for these insights.

> **Non-discrimination and other obligations** of States relating to the protection of members of groups in vulnerable situations, including women, children and indigenous peoples.[18]

Thus, it is evident that there are environmental human rights relevant to the activities of companies.

This approach is an environmental human rights approach rather than being in terms of environmental scientific management, as it is not about targets (or ticking boxes) but enables appropriate application to companies. Of course, this approach can be criticised for being anthropocentric, though this might be acknowledged by legal standing rules which allow for claims based on protection of the environment as the environment (see below). The environmental human rights should expressly include, as noted by the Special Rapporteurs, the particular impacts on vulnerable or marginalized individuals or groups. In addition, climate change impacts should also be specifically referred to, as the knowledge of them as being risks to individuals and groups, as well as companies, is becoming more evident. For example, a complaint was settled before the Dutch National Contact Point (under the OECD Guidelines) against ING, a financial institution based in the Netherlands, on the basis that it had not identified its indirect greenhouse gas emissions impacts.[19]

Thus, it is possible to define the scope of the environmental part of mHREDD in terms of breaches of EU legislation relating to the environment, and breaches of international environmental agreements, principles, and standards, and of customary environmental human rights law. This enables the Green Deal elements to be included in the EU legislation on mHREDD, as the Green Taxonomy has done.

3.3 Companies

The terminology to refer to corporate entities in EU legislation does vary. For example, the EU Non-Financial Reporting Directive refers to "undertakings", the EU Environmental Liability Directive refers to "operators" and the EU Brussels I Recast refers to "companies". For convenience, the terminology of "companies" will be used, though the exact terminology can be left to each Member State in their implementation, as long as it is consistent with the breadth of coverage intended by the EU legislation on mHREDD.

If the mHREDD obligation is designed to govern companies incorporated in the EU, it would not create a coherent and certain position for foreign companies operating within the EU. This issue may be addressed by imposing import bans or higher levies on goods designated for the EU market (as seen in the approach proposed in the EU Green Deal) which are produced by

[18] Ibid, their emphasis.
[19] Netherlands National Contact Point for the OECD Guidelines, Final Statement, Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING, 19 April 2019, accessible at: https://www.oecdguidelines.nl/latest/news/2019/04/19/final-statement-dutch-ncp-specific-instance-4-ngos-versus-ing-bank.

foreign companies not observing the mHREDD requirement, though this approach may raise WTO issues and does not cover service providers. Therefore, the companies included within the scope of the EU legislation on mHREDD should, at least, be those included in the EU Brussels I Recast definition. This refers to the "domicile" of a company and includes its statutory seat as (being the place of incorporation or registration), or the location of its central administration (usually its headquarters), or its principal place of business.[20] It should go beyond this to include any foreign companies operating in the EU, as is consistent with other EU legislation regarding consumer protection.. The EU legislation should also cover expressly (to avoid confusion) incorporated and unincorporated companies, partnerships and trusts, companies listed on stock exchanges and unlisted companies, as well as financial institutions and not-for-profit organizations.

There is an additional area of clarification needed. This is that the term "company" should include all entities which form a legal part of the corporate enterprise, such as subsidiaries. This is consistent with both the OECD Guidelines and the UNGPs, and with the EU Non-Financial Reporting Directive. It might also be stated expressly to include joint ventures, franchises and other forms of legal linkages between companies which are usually less than arm's length business relationships.

The inclusion of companies would need to make clear that it extends to their actions within their value chain. This is consistent with the UNGPs and OECD Guidelines. A value chain includes a supply chain as it is the full process or activities a company performs in order to add value to a good or service, including production, manufacturing, sale and marketing. In effect, it includes the sales of goods and services and not just the supply of them. However, it would be useful to include specifically the words "supply chain" in the EU legislation to avoid any doubts on this issue. Of course, the more levels of a value chain, the harder it will be for companies to implement and it is highly likely only an obligation of means can be implemented to conduct mHREDD as far as possible, with perhaps an obligation on companies of a failure to prevent human rights and environmental damage being an incentive for companies to act on this. There is, though, a question as to whether to clarify that these value chain relationships are related to a company's "business relationships", being the term used in the UNGPs, their "established business relationship", which is the terminology used in the French Duty of Vigilance Law or the "business contractual relationship" in the draft treaty. For coherence and certainty, our view is that there is benefit in defining the legal relationships as being business relationships in a value chain, to prevent a diversity of definitions by Member States.

There is an issue as to whether there should be a threshold to include some companies and not others, on the basis of not creating too large a burden on small and medium sized enterprises (SMEs). The French Duty of Vigilance Act and the UK Modern Slavery Act both have thresholds, based on employee numbers and turnovers respectively. However, the Dutch Child Labour Due Diligence Act applies to all companies trading in the Netherlands no matter

[20] Brussels I Recast, Article 63.

their size or location of incorporation, and the UNGPs and OECD Guidelines are clear that they apply to all enterprises. While larger companies may be better equipped and have more resources to conduct mHREDD, and can cause widespread impacts, smaller companies may also cause human rights and environmental impacts. Thus, it seems preferable to include companies regardless of their size.[21] To reinforce this, the EC Study indicates that the respondent companies were clear that an EU legislation on mHREDD should cover all companies no matter their size, nature or sector.[22]

This does not mean that the same expectations are placed on all businesses, as the UNGPs state that the HRDD requirements "[w]ill 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".[23] Similarly, the current draft of the business and human rights treaty provides:

> States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.[24]

It is also clear that there may be additional requirements on companies which are operating in conflict zones or fragile situations, due to the increased risks of human rights and environmental impacts in those areas.[25]

Therefore, EU legislation on mHREDD should cover all companies falling within the definitions in EU Brussels I Recast Regulation and EU Non-Financial Reporting Directive, and any uncertainty, such as over subsidiaries, should be specifically mentioned. There should be no threshold level but it should apply to all companies, with some incentives provided for SMEs to comply.

3.4 Public Bodies

Many major decisions which affect human rights and the environment are made by state bodies and state-owned entities. Indeed, most state-owned companies operate very similarly to, and compete with, private companies. The UNGPs refer specifically to this issue:

> States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies

[21] See EP Briefing on Substantive Elements of Potential Legislation on Human Rights Due Diligence, No. 1, p. 9, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/DROI/DV/2020/06-22/DGEXPObriefingHumanRightsDueDiligence_EN.pdf.
[22] See EC Study at note 6.
[23] GP 17.
[24] Article 5.6 of the 2019 draft treaty at note 4.
[25] See GP 7.

> and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[26]

Indeed, the WGBHR has criticised the role of export credit agencies for not taking enough account of human rights matters in their provision of financial support to companies.[27] Further, public procurement is a major area of state support to private companies and yet it is only in a few areas, such as private military companies, that the regulation requires any company seeking funding to comply with human rights standards.[28] The EU has a range of legislation on public procurement,[29] of which social and environmental policies are only considered a secondary aim and taken into account as long as there is value for money.[30]

Therefore, there is a strong argument that state-owned or state-controlled companies should be included in the EU legislation on mHREDD. It is possible to include state bodies within legislation on this area, as seen in the Australian Modern Slavery Act 2018, where government departments and other government bodies are required to comply with it, and a number of Member States national legislation which apply the EU Non-Financial Reporting Directive to state-owned enterprises. This coverage should extend to all state bodies which provide financial or other support to private companies. This would ensure a broader inclusion of entities which have human rights and environmental impacts within the scope of the EU legislation on mHREDD, as well as providing increased incentives for companies to comply with the legislation. The EU legislation should also include specific provisions on public procurement requiring that HREDD is a mandatory criteria in the assessment process.

3.5 Extent of Jurisdiction

There has been some lack of clarity as to whether the OECD Guidelines and the UNGPs indicated that States should extend their laws on corporate responsibility to respect human rights and the environment to the subsidiaries and business relationships of their corporate nationals which are operating outside the State.[31] The UN Committee on Economic, Social and Cultural Rights has considered the legal position and determined:

> Corporations domiciled in the territory and/or jurisdiction of States Parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, *wherever they may be located*. The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States'

[26] GP 4.
[27] UNWGBHR Report to General Assembly, 2 May 2018, A/HRC/38/48, accessible at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/123/33/PDF/G1812333.pdf?OpenElement
[28] See Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (2019).
[29] See, for example, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J. L134/114.
[30] See, for example, the Public Sector Directive 2004/18, recital 5 in the Preamble.
[31] See OECD Guidelines, Commentary on General Policies, para 9, and UNGPs Commentary to GP 2.

> national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned. Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement. Such procedures may include imposing a duty on companies to report on their policies and procedures to ensure respect for human rights and providing effective means of accountability and redress for abuses to Covenant rights.[32]

This position is consistent with research that States do have legal obligations where an action by a company within its territory has direct transnational effects,[33] such as where the decisions by a corporate national affecting its subsidiaries or business relationships has impacts transnationally. This includes aspects of climate change impacts, as seen in the *Urgenda v The State of The Netherlands* case.[34] There now seems considerable support for the view that "[w]here a state knows that its national's activities will cause, or are causing, harm to other states or peoples, it is consistent with this [general] duty [on a state] that it should prevent such harm".[35]

Indeed, legislation in a number of states now specifically extend their scope to the operations of companies outside the territory of that State, where there are human rights impacts. For example, the France Duty of Vigilance Act extends to subsidiaries over which a French company holds 'exclusive control', as well as in relation to a French company's subcontractors and suppliers,[36] and the UK's Modern Slavery Act requires companies to report on the steps they are taking to eradicate slavery and human trafficking in their own operations and in their entire supply chains no matter where located.[37] It would also enable better reach for the actions of those companies using artificial intelligence in ways that may impact on human rights. Some recent cases in Canada and the UK also demonstrate that the scope of a parent company's duty of care can extend to the actions of its subsidiaries incorporated in another State.[38] These activities also indicate that the terminology of "transnational" jurisdiction better reflects this reality of the operations of companies and the regulation by States than "extraterritorial", as it indicates that some aspect of an infringement of human rights takes place in, or has a genuine connection to, the state.

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[32] ESCR Committee, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc, E/C.12/GC/24, 23 June 2017, para 33 (emphasis added).
[33] See Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (2010): http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.
[34] *Urgenda v The State of The Netherlands*, Dutch Supreme Court, 20 December 2019, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2006.
[35] M. Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States' in C. Scott (ed), *Torture as Tort* (2001) 491–512, 507.
[36] French Duty of Vigilance Act, Art. L. 225-102-4 and L.225-102-5 of the French Commercial Code.
[37] UK Modern Slavery Act 2015, Section 54.
[38] See, for example, *Choc v. Hudbay Minerals Inc.* 2013 ONSC 1414 (Canada); *Vedanta Resources plc v Lungowe* [2019] UKSC 20 (UK).

Further, as noted above, the EU legislation on mHREDD should apply to companies domiciled in an EU Member State, as well as those companies trading or providing goods and services within the EU. Otherwise, it would create a difference in the obligations required to be complied with by EU and non-EU companies.

Thus it can be concluded that States have international legal obligations in relation to the activities of companies domiciled in their territory to include the transnational effects and impacts on human rights of those activities when undertaken by subsidiaries or in value chains outside that territory. This approach can also be seen in the EU Conflict Minerals Regulation, the EU Ship Recycling Regulation and the EU Timber Regulation. Such an inclusion of transnational effects would enable the coverage of human rights and environmental impacts by companies, for example, in armed conflicts and on indigenous people outside the EU. Accordingly, EU legislation on mHREDD should extend to the activities of those companies domiciled in Member States which have transnational effects, including through their subsidiaries or business relationship outside the EU, and those companies providing goods or services into the EU.

3.6 Conclusions on Scope

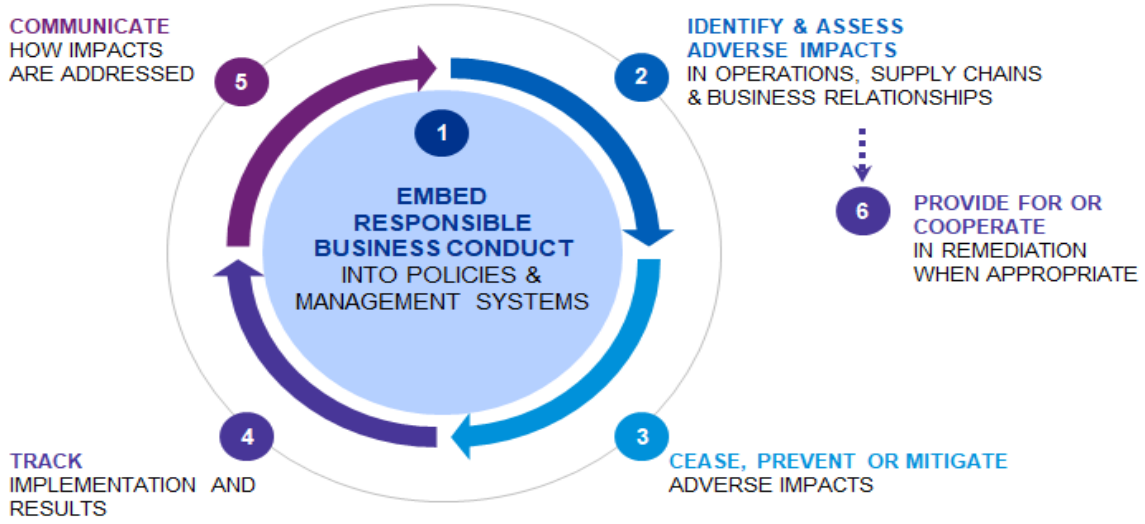
The EU legislation on mHREDD should include all human rights in the ECHR and the ESC, as well as those which are customary international human rights law, as well as indigenous rights. It should also extend to all companies domiciled in Member States, without any threshold, and make specific provision for certain sectors and types of companies, such as financial institutions, to ensure there is clarity in the scope covered. To ensure fairness in trade and competition, the legislation should apply to all companies (including subsidiaries) operating in the EU and, consistent with the French Duty of Vigilance Act, would extend to the transnational effects of activities of companies domiciled in Member States. We also propose that the legislation extends to state bodies and state-owned companies, including their public procurement and export credit activities, as this would give strong incentives for companies to comply.

4. Type of Obligation

4.1 Substantive Human Rights Due Diligence

HRDD, as defined by the OECD Guidelines - and which is applicable to HREDD - includes six steps as displayed in the following scheme:[39]

[39] OECD Due Diligence Guidance for Responsible Business Conduct, p. 21, which can be accessed at http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.



When implementing an mHREDD obligation it would ideally include all of these steps. This would also contribute to a global level playing field, as it would be preferable if legislators, also outside the EU, would implement comparable mHREDD.[40] Furthermore, consultation with stakeholders in and outside the EU may be helpful to develop a broader picture of mHREDD on the global level.[41] However, observing mHREDD as currently conducted by companies (on a voluntary basis), it emerges that steps 1, 2 and 5 are often better embedded in corporate activity than steps 3, 4 and 6. Step 6 (access to remedy) remains especially poor. This is due to a patchwork of local and global mechanisms with little coordination and accessibility, trust issues for rightsholders, ineffective mechanisms and enforcement issues, and because mechanisms are usually considered and assessed in isolation. Another approach should be to create 'remedy ecosystems' which may involve multiple mechanisms. For example, a locally accessible dialogue based mechanism may be supported by a more internationally functioning binding mechanism to resolve issues parties cannot agree upon in the dialogue (and after the decision the case may be referred back to the dialogue to address the remaining issues) or to provide outcomes which cannot be achieved in the dialogue based mechanism. Legislation and public supervision should support the development of these 'remedy ecosystems', operational level grievance mechanisms and capacity building at the local level. The EU or national supervisory bodies should provide formal guidance on this.[42]

Steps 1, 2 and 5 may also give rise to administrative burdens and 'ticking the box' exercises, whereas steps 3, 4 and 6 generally generate more impact on the ground in preventing and addressing human rights violations. It is also important to consult stakeholders on the different steps of HREDD which a company undertakes. In particular, gender dimensions and vulnerable groups' differences should be taken into account in such consultations and these should be culturally appropriate. These different steps of HREDD should all be addressed in legislation. In connection with this it is important cost of compliance with mHREDD is not

[40] See UN Human Rights "Issues Paper" (note 2), p. 21.
[41] Ibid, p. 23.
[42] See EP Briefing on EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims, note 20, No 2, p. 12.

unilaterally and for the largest part imposed on suppliers or other business relationships of a company.[43]

When considering substantive mHREDD two options are feasible. One may focus on the harm to human rights not undertaking reasonable and appropriate mHREDD may cause (or contribute to) or on mHREDD as such.[44] The first approach is connected to liability for such harm if reasonable and appropriate mHREDD has not been undertaken and may pose significant challenges, as is elaborated hereinunder in connection with liability. Furthermore, it is less effective if it is clear a company does not undertake reasonable and appropriate mHREDD but no specific harm to human rights caused by it can be shown. The second approach seems to raise less significant issues and is, thus, preferable.

Furthermore, it is important to note mHREDD legislation is aiming at identifying and addressing risks to other stakeholders than the company itself. However, in connection with the French law it is observed that companies still focus on the risks human rights issues cause for the company. The disadvantage of companies aiming at risks to the company is that they may try to avoid such risks and withdraw from certain locations, value chains or risk sectors. However, HREDD implies withdrawal is an option of last resort. A company should first try to address and solve the human rights issue, in collaboration with suppliers or others such as local multi-stakeholder initiatives, if possible. When this would prove unsuccessful ultimately, a responsible exit may become an option. Even when exiting, a company may not disregard human rights and environmental issues that the exit causes and should implement measures to address these issues.[45] If legislation would not address risk assessments focusing at the company itself, it may cause companies, for example financial institutions, to withdraw from certain states or risk sectors instead of contributing to improvement of the human rights situation in these states or risk sectors. Thus, the mHREDD requirement in EU Legislation should address this issue and restrict termination without any attempt to improve the human rights situation, and should promote responsible exits.

In this regard it is important to note that human rights challenges vary widely depending on state, industry, (severity of the) human rights issue at hand or type of supply chain, and the same is true for consultations with stakeholders. A ‘one size fits all’ approach is not viable in this context and it should be adapted to industry, state, issue at hand or type of value chain. That said, in our view, this particular EU legislation should not regulate a specific industry or issue, like the Conflict Minerals Regulation[46] does, but should implement a broader approach. It may be best to implement an open and broad legislative mHREDD requirement including the entire value chain and elaborate this either in industry or issue specific secondary regulation or address this issue through public supervision. However, overly detailed and

[43] See Solidaridad, *Changing gear; Accelerating inclusive and sustainable production through a new European regulatory framework*, 2020, p. 10, which can be found at https://drive.google.com/file/d/1ybVqkUVtjzJOOSDRHp8EwJBBzI3xgbln/view.
[44] UN Human Rights “Issues Paper”, note 2, p. 12 and 13. It also mentions a third option which does not include HREDD as such but incentives to undertake it, for example as a defence against liability. This will be discussed in liability below.
[45] The recent Covid-19 crisis has emphasized this.
[46] Regulation EU 2017/821. See also the Timber Regulation, EU 995/2010, on legality of imported wood.

prescriptive regimes could discourage innovation and proactive behavior and encourage narrow, compliance-oriented, check box human rights due diligence processes.[47] Thus, addressing the more specific issues through public supervision seems preferable. The EU may also incentivize development of industry and sectoral standards which support mHREDD in due course.

4.2 Beyond Reporting

Because an EU reporting requirement on corporate social responsibility (CSR, which is not the same as human rights) already exists for larger companies,[48] the proposed legislation should go beyond a mere reporting requirement regarding HREDD. This is welcomed as experience in the UK, US and Australia in connection with reporting on modern slavery reveals that reporting as such may not be sufficient to safeguard proper implementation of all aspects of HREDD with beneficial results for affected rightsholders on the ground.[49] Where only reporting is expected, the focus may shift to a convincing presentation of efforts in public statements instead of action which benefits rightsholders. Furthermore, if the reporting requirement would not only cover modern slavery, but broader HREDD, this enables companies to pay most attention to the topics they feel would be best to present. Thus, such public statements are hard to compare, as experience with the EU regulation on CSR reporting has shown.

However, this does not mean future legislation should not include public reporting at all. As legislation in France shows, it may be part of the mHREDD obligations imposed on companies. As HREDD includes public reporting it makes sense to include it in the EU legislation. Reporting requirements may also facilitate enforcement by private parties as they would then have better insights into the company's performance on HREDD compared to the situation in which a reporting requirement is absent.

4.3 Liability and Defence

Other solutions to shape the EU mHREDD legislation are also conceivable. Liability could be directed towards companies and may include subsidiaries, and could also be directed towards board members of companies. However, the latter typically involves high thresholds for liability and is accepted in exceptional cases only, unless there is a change in EU legislation about the social purposes of a company. Pursuant to article 4 section 2 of the Rome II Regulation the law of the state in which the violation has occurred will govern the case and EU law, including a liability standard, would not be applicable. Thus, such liability would have to include an international private law provision rendering EU law applicable as an overriding mandatory law requirement. However, this would be contrary to usual international private law paradigms.[50] Showing causality between a company's operations, behaviour or omission and the damage suffered through an adverse human rights impact may be

[47] UN Human Rights "Issues Paper" (note 2), p. 9.
[48] Directive 2014/95/EU amending directive 2013/34/EU.
[49] See e.g. EP Briefing on Substantive Elements of Potential Legislation on Human Rights Due Diligence, note 20, No 1, p. 12.
[50] Note that the Swiss legislative proposal does include such an overriding mandatory law provision.

challenging too, especially if the impact is further remote from the company's core activities, but is caused by subsidiaries or suppliers. In connection with this several regime require damage to be foreseeable for the tortfeasor, which may be complicated in such instances.[51] Access to information residing with the company or subsidiary in connection with the impact may pose another hurdle. Furthermore, it may be questioned why liability is created for human rights violations caused by subsidiaries but not for (first tier) suppliers. Therefore, this approach to liability would pose considerable challenges and does not seem to fit well with other EU regulation such as the Rome II Regulation and is not preferable.

One may consider liability for not exercising mHREDD as such and also for human rights violations caused by business operations. Indeed EU legislation on mHREDD should make civil liability of a company for a failure to conduct reasonable and appropriate HREDD. A liability provision for failure to prevent or not undertaking reasonable and appropriate HREDD is an option, as the legal systems of several Member States already include such liability.[52] We use the term 'liability' here in a broad sense meaning that legal consequences are attached to a failure to undertake reasonable and appropriate HREDD, where consequences not only include reparation of harm but also other legal sanctions. That said, one should bear in mind mHREDD does not only relate to subsidiaries or (first tier) contractual relationships, but also to the broader value chain as far as a company has leverage and is directly linked with an activity in the value chain. However, according to the UNGPs and OECD Guidelines it only has to provide a remedy when it has caused an adverse human rights impact or has contributed to such an impact, for example by imposing huge time pressure on a supplier where the adverse human rights impact has occurred. Thus, it would make sense to limit liability to not undertaking reasonable and appropriate mHREDD which has caused an adverse human rights impact or where this has contributed to an adverse human rights impact. In any case, liability provisions should clarify which business relationships in the value chain not undertaking reasonable and appropriate mHREDD pertains to and, thus, are relevant in connection with liability.

Liability for not exercising HREDD by a company would address most of the challenges discussed above, as the HREDD should be undertaken in the EU. Moreover, national laws of several EU member states include a general liability provision in case entities do not comply with applicable (national or EU) laws. In these states, there would be no need to create liability on the EU level. However, it may be challenging for rightsholders to acquire compensation for non-observance of HREDD requirements, as it may be hard to prove causality between non-observance of these requirements and a specific human rights violation. This may be addressed by reversing the burden of proof, as is part of the Swiss legislative proposal, but this may trigger defensive behaviour by companies. Furthermore, it may be that, even where reasonable and appropriate mHREDD has been undertaken, the human rights or environmental violation would still have occurred. Beyond this, rightsholders may be confronted with procedural and other challenges, such as funding and access to skilled

[51] See UN Human Rights "Issues Paper", note 2, p. 13.
[52] See the Country Reports in the EC Study, accessible at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/%20language-en.

representation. However, these issues do not arise, or only to a lesser extent, if no damages are claimed but a court order to undertake reasonable and appropriate HREDD is made.

Thus, EU legislation could include a liability provision for non-observance by companies of HREDD, which would to facilitate private enforcement, especially in member states which do not have a general liability provision for non-compliance with applicable legislation.[53] Of course, such liability may still trigger defensive responses from business, for example by withdrawing from states or risk sectors. However, this approach is an indirect way to incentivize HREDD, as it may take quite a long time before European courts have developed coherent case law regarding liability. Yet this approach should not be the sole objective of EU legislation on mHREDD but should support a substantive mHREDD obligation.

Undertaking reasonable and appropriate HREDD may serve as a (rebuttable) defence against liability for human rights violations, and legislation may implement this type of defence (sometimes called a "safe habour"). Next to serving as a defence to the extent to which mHREDD is undertaken may also determine the type and severity of sanctions and remedies.[54] Furthermore, it is conceivable that implementing standards of multi-stakeholder initiatives approved by the EU may serve as a (rebuttable) presumption that a company has undertaken reasonable and appropriate HREDD. This solution is chosen in the Dutch law on due diligence in connection with child labour and in the unofficial German proposal.[55] This may be a way to comply with the mHREDD requirement for SMEs which do not have the financial means to establish their own HREDD systems throughout their supply chains.

4.4. Measuring Impact

In terms of the effectiveness of the mHREDD obligation on companies in bringing about improvement on the ground, it is a challenge to measure such improvement. In connection with environmental and climate change impacts, methodologies have been developed to measure impact and improvement, for example regarding greenhouse gas emissions. Some measurement instruments have also been developed in the human rights arena, such as the Corporate Human Rights Benchmark. However, the elaborated environmental impact assessments may provide inspiration for improving human rights impact assessments and may pave the way to comprehensive and coherent Environmental, Social and Governance (ESG) measurement methodologies.

EU legislation should support and facilitate this, for example by having EU bodies comparing methodologies and approving certain methodologies. A good example of such an integrated approach is the EU Taxonomy on Sustainable Finance, which provides measurement methodologies, to be used by financial institutions, indicating when a loan or investment is sustainable, so as to measure environmental and climate change impact. It also requires

[53] See UN Human Rights "Issues Paper", note 2, p. 14 and 15.
[54] Ibid, p. 6.
[55] The unofficial German proposal does not implement an approval by the government but provides the safe harbour if the initiative covers the entire supply chain, takes into account the core elements of HREDD and has been developed in a multi-stakeholder process and is externally audited. If the standard meets these requirements, liability is limited to intent and gross negligence.

observance with the OECD Guidelines and UNGPs as a minimum, although it does not yet include methodologies on measuring human rights impact.[56] EU legislation on mHREDD will facilitate and speed up such development.

However, measuring human rights impact is challenging, partly due to the fact that human rights impact is seen as subjective in the sense that one individual may experience higher impact from the same conduct by a company compared with another individual. Effective operational level and other types of grievance mechanisms may assist in making these assessments, but are not often deployed to fulfill this function. Strengthening access to remedy as part of the mHREDD legislation enhances the use of these mechanisms. Therefore, EU legislation should support and facilitate development of common impact measuring methodologies like those in the environmental spheres, and support and facilitate the use of grievance mechanisms, or even better 'remedy ecosystems' (see above), to enhance measurement of human rights impact. This would also enable, for example, investors to be able to clarify the actions taken by a company on HREDD and the outcomes emerging from it. In order to incentivize coherent ESG approaches, these human rights impact measuring methodologies (measuring 'S') would as far as possible be commensurate with those in the environmental arena (measuring 'E').

4.5. Use of New Technologies

The development of such methodologies, and HREDD more generally, may be supported by new technologies such as blockchain (deployed in supply chains) or artificial intelligence, which are increasingly used in this arena. Thus, part of the HREDD best practices arising from the EU legislation on mHREDD could be the use of such technologies. However, as the use is rather specific in connection with the issue, sector or state at hand, prescribing the use of these technologies in legislation may not be feasible. In some instances, this technology may not work and create an assumption not grounded in fact that HREDD is exercised where it is not.

Moreover, such technologies may give rise to further human rights impacts, such as infringing privacy or labour rights. Therefore, it is important these technologies have proven their functioning in practice. A direct EU legislative requirement to make use of these technologies (other than as part of a best practice) seems not necessary at this moment. There is value, though, in implementing minimum requirements for the usage of these technologies so that human rights and environmental impacts are not increased. For example, most companies have developed their own (not public) blockchains in supply chains, whereas (at least partially) public blockchains in supply chains would create more transparency and confidence.

[56] EU Taxonomy on Sustainable Finance accessible at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf, p. 2, 17, 18 and 32-35.

4.6. Type of EU Legislation

The EU legislation on mHREDD could adopt the form of a Directive or a Regulation. It is noted that the EU Conflict Minerals Regulation is a Regulation. As a European level playing field is important and diverging mHREDD legislation should be prevented as much as possible, as discussed above, then a Regulation is preferable. Having a Regulation may also be helpful in creating powers of a supervisory European entity (discussed below) in connection with monitoring and enforcement.

4.7. Conclusions on Type of Obligation

The type of obligation to be implemented in EU legislation should be an open and broad substantive mHREDD requirement including the entire value chain which covers all six steps of mHREDD. It is also important to consult stakeholders on the different steps of mHREDD a company undertakes. In particular gender dimensions and vulnerable groups' differences should be taken into account in such consultations and these should be culturally appropriate. As human rights challenges vary widely depending on state, industry, (severity of the) human rights issue at hand or type of supply chain and the same is true for consultations with stakeholders, the EU may incentivize development of industry and sectoral standards which support mHREDD in due course.

EU legislation on mHREDD should make civil liability on a company for a failure to conduct reasonable and appropriate HREDD. A liability provision for failure to prevent or not undertaking reasonable and appropriate HREDD is an option, as the legal systems of several Member States already include such liability. If reasonable and appropriate HREDD is undertaken by a company, this could serve as a defence against liability, and an incentive to comply with the legislation.

Developing comprehensive methodologies for measuring human rights impact should be supported and facilitated by EU legislation and should be commensurate and coherent with such methodologies regarding the environment and climate change. Preferably an EU body should assess and approve such integrated measurement methodologies as is currently done in the EU Taxonomy on Sustainable Finance.

The prescription of the use of new technologies is not necessary at this moment. However, EU legislation could include minimum requirements regarding these technologies to prevent exacerbating human rights impact through these technologies and to support their functioning in order to facilitate measurement of human rights impact.

5. Monitoring and Enforcement

5.1 Objective

An important objective of public supervision on compliance with mHREDD requirements should be incentivizing material changes to enable desired behaviour of companies and

preventing human rights and environmental adverse impacts while also reducing administrative burdens and discouraging 'ticking the box' exercises. However, public supervision should not discourage implementation of effective multi-stakeholder or industry initiatives.

Beyond this, public supervision on mHREDD can appear to be contrary to traditional command and control or rule compliance public supervisory approaches, as the areas it should be applied to vary widely in terms of states, risks or human rights and environmental issues involved. They also concern issues beyond the direct operations of a specific company in states where the public supervisor has no supervisory powers. It is pivotal public supervision does not focus on mistakes made by companies (road to the bottom) but incentivizes companies to improve continuously (road to the top) and, thus elicits as much possible positive changes in corporate behaviour. This especially applies to obligations of means regarding HREDD implemented through legislation. Thus, a combination of these types of public supervision is possible.

5.2 European Direction

The EU Conflict Mineral Regulation defers monitoring and enforcement to Member States. This approach would not support a coherent and certain EU mHREDD legislation if this enforcement is implemented in diverging ways. For example, one Member State may choose to implement criminal sanctions or leave enforcement to private entities (the system chosen in the French Duty of Vigilance Act), whereas other Member States may rely on different types of public supervision. Furthermore, as many human rights issues arise in different states outside the EU, in different sectors and include different issues, Member States may invest considerable funds to develop capacity and strategy to address this issue, whereas another Member States may not have expertise on the issue.

Therefore, EU legislation on mHREDD should either implement public supervision on the EU level or include specific guidance on the shape and type of monitoring and enforcement in Member States. It should also include provisions on collaboration by, and exchange of, information between the relevant public supervisors in Member States facilitated by an European supervisory entity in order to enable continuous learning of the national supervisors. The legislation should also prescribe effective, proportionate and dissuasive sanctions for non-compliance.[57] This European entity may, for example, organize meetings and capacity building events for national supervisors, establish a clearing house for exchange of monitoring or enforcement information, establish a repository of company reports on HREDD, conduct or commission research on HREDD (e.g. on methodologies) and maintain a repository of best practices or information on human rights issues in specific industries, sectors or regarding specific issues as far as relevant in connection with public supervision. There could be an option to grant the EU supervisory entity the power to instruct national supervisors in connection with companies which have their domicile in multiple European states or regarding a specific human rights issue of interest to the EU as a whole. Of course, public

[57] See EP Briefing on EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims, note 20, No 2, p. 11; UN Human Rights "Issues Paper", note 2, p. 15 and 16.

supervision by Member States is dependent on the budget of the national supervisor, so it is important that national supervisors have sufficient budget to meaningfully implement supervision on mHREDD. Furthermore, the Court of Justice of the European Union would have a role to decide whether public supervision in Member States is effective and meets the requirements of the EU legislation.

5.3. Access to Remedy and Enforcement

Human rights obligations of the EU and Member States include access to remedy, as does the UNGPs and the OECD Guidelines, so the EU legislation on mHREDD requirements should also be enforceable by those affected. Companies have to provide a remedy in such cases if they have caused or contributed to this human rights violation. However, if they have exercised reasonable and appropriate HREDD it seems unlikely they have caused it or contributed to it (or have a defence to it). They may be directly linked to the impacts and, in those instances, they do not need to provide a remedy according to the UNGP and OECD Guidelines, although they may choose to do so. Of course, it may not be easy to prove (either in private enforcement or criminal prosecution) that a failure to conduct reasonable and appropriate HREDD by a company has caused a human rights or environmental violation. However, a claim for a forward looking court order to improve HREDD may succeed without needing to show causality, because several legal systems of Member States enable such a court order even when no damage is suffered or when it is unclear whether a causal link exist between damage and not undertaking reasonable and appropriate HREDD.

Private Enforcement

It is evident that the EU legislation on mHREDD should enable private enforcement, for example through litigation in courts.[58] In connection with this, it would be recommended to address some procedural hurdles rightsholders may be confronted with in access to remedy. For example, under the Brussels I Recast Regulation it is often highly doubtful whether a rightsholder will be administered justice in the state where the human rights abuse took place, and under the Rome Regulation I and II there are issues concerning the applicable law and whether overriding mandatory rules should be implemented. There are also obstacles concerning access to information about company documents, evidence, risk of retaliation, (reversal of the) burden of proof and the cost of litigation,[59] either in EU legislation or on a Member State level.

Civil enforcement may result in different remedies for rightsholders. Civil liability for non-observance of mHREDD may result in damages if the non-observance of mHREDD has caused damage. This sanction should be commensurate with the gravity of the abuse and harm

[58] See e.g. EP Briefing on Substantive Elements of Potential Legislation on Human Rights Due Diligence, note 20, No 1, p. 13.
[59] See on these e.g. the EC Study, note 6, p. 278-280; Axel Marx, Claire Bright & Jan Wouters, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third States*, European Parliament 2019; EP Briefing no 2 on EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims, p. 8. See for examples of such procedural provisions regarding arbitration: https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

suffered and reflect the degree of culpability of the company.[60] As elaborated above, it may not be easy to show causality between non-observance of HREDD and the damage of the rightsholder as undertaking reasonable and appropriate HREDD may not prevent all human rights and environmental abuses by companies. Next to damages, civil liability adopted in most Member States includes court orders to improve or implement HREDD if it does not meet the legislative requirements or to cease or discontinue operations or financing until reasonable and appropriate HREDD has been implemented, even where non-observance of HREDD has not caused damage. Such court order may be enforced through periodic penalty payments in most Member States if the court order is not properly observed. Some Member State systems also include an option to disgorge profits obtained by non-observance of legislation. Thus, profits generated through non-observance of HREDD may be disgorged in these systems. Beyond this, liability provisions in Member States, because of the Unfair Trade Practices Directive,[61] include liability for claiming to have implemented a certain (multi-stakeholder initiative) standard by using the label of this initiative, without actually having implemented it in full. If the standard includes HREDD, non-observance of HREDD but still using the label, would result in liability, even without an explicit liability provision regarding non-observance of HREDD in EU law or at a Member State level.

It should be noted that these sanctions may fit better with some of the steps of HREDD than others. For example, a court order to develop a HREDD policy or to implement it and identifying risks or to report, would be feasible. However, a court order to provide access to remedy through participating in a dialogue-based dispute resolution mechanism may be more challenging, because this would require a willingness of all parties to negotiate meaningfully, which they may lack even if a court order is given. Beyond this, it may not be helpful to order companies to establish an operational level grievance mechanism which meets certain criteria as, even if it does, this does not mean this mechanism is able to address individual complaints in a meaningful manner, especially if rightsholders would not trust such mechanism. For example, civil enforcement of step 6 of HREDD may be challenging.

It may pose considerable challenges for rightsholders, in particular for those residing outside the EU, to access EU court systems. More generally speaking, it should be decided who would have standing in courts in connection with private enforcement.[62] We feel it is not necessary to impose too narrow restrictions. Next to those who have suffered damage or their representatives, NGOs and CSO more broadly aiming at implementing and undertaking reasonable and appropriate mHREDD and with a sufficient interest in a specific case should have standing. Also class or collective actions on behalf of rightsholders should be enabled.

Rightsholders will often need support from NGOs but this may not be sufficient to enable them to engage in litigation and acquire a remedy, as the cases filed by NGOs may depend of the specific issues NGOs are interested in, aware of, and want to spend their funds on, for example because of their policy objectives. Access for rightsholders may be improved if collective redress would be allowed in case of non-observance of HREDD, and broad rules to

[60] See UN Human Rights "Issues Paper", note 2, p. 15 and 16.
[61] Unfair Trade Practices Directive, Directive 2005/29/EG.
[62] See UN Human Rights "Issues Paper" (note 2), p. 18.

allow legal standing, especially in instances of environmental damage. That said, other issues, such as the cost of litigation, still have to be addressed. Some of the Member State's liability systems allow litigation on behalf of individual rightsholders or collective redress on 'no cure no pay' basis, which means that the rightsholders do not have to pay unless the court decides in their favour. It may be considered to facilitate this approach for non-observance of mHREDD on the EU level. Another solution to address this cost issue may be a fund on the EU level to cover the cost of litigation on behalf of rightsholders in cases of non-observance of HREDD by companies (if these cases are not obviously without merit). Furthermore, in order to enable private enforcement by NGOs consumers should be informed of HRDD compliance in a way which they understand, for example by using benchmarks of company performance or other easily accessible information.

Companies may react differently to liability, although generally liability in legislation may trigger defensive behaviour. Civil enforcement cases against companies regarding human rights violations so far have attracted a lot of media attention, also because of active engagement of litigating NGOs with the media. Therefore, these types of cases raise extensive media coverage and potential ensuing reputational damage for companies. In this respect, this type of litigation differs from ordinary corporate litigation where the reputational consequences are often less prominent, not least because submissions to the courts tend not to be made public. Reputational damages resulting from human rights cases may be even more disadvantageous to companies than having to pay damages to individual rightsholders.

Therefore, the issues raised above in connection with causality may not pose huge challenges as litigation for courts orders to observe HREDD may be sufficient to incentivize compliance with mHREDD legislation. This has even resulted in litigation of companies against NGOs to prevent or mitigate reputational damage, so called 'slapp'-suits. Some states, for example the US, do consider whether 'anti-slapp' regulation should be adopted. These cases are less frequent in the EU, so this type of provision does not seem necessary at this moment.

Another issue may be whether provisions on lifting the corporate veil or directors' duties should be implemented. Current jurisprudence has rendered this issue less prominent, as courts have in principle accepted responsibility of parent companies deploying and enforcing global policies in cases where these have been violated by subsidiaries.[63] The approach adopted in this jurisprudence may better fit with the notion of 'contributing' as a requirement for the obligation to provide remedy as set out in the OECD Guidelines and UNGPs, than as a provision lifting the corporate veil or regarding directors' duties in case of human rights violations. Thus, a general provision lifting the corporate veil or regarding directors' duties in case of human rights violations may not be preferable. That said, it may be conceivable in cases in which this is accepted in liability law, also beyond human rights and environmental issues, for example in case of fraud or abuse of rights. This does not require specific provisions in connection with human rights violations. However, diverging (procedural) provisions at a Member State level jeopardize the coherence and certainty of one EU legislation, and thus provisions, if any, on the EU level are preferable.

[63] See *Vedanta v Lungowe* at note 38.

EU legislation may prescribe civil liability should be implemented, but may leave the elaboration of it to Member States. Although it should be noted that divergent regulation at a Member State level may jeopardize the EU level playing field. Thus, the EU should at least set out what civil liability should entail and should not leave broad discretion to Member States in this area.

Criminal Enforcement

EU legislation on mHREDD could enable criminal prosecution in cases of gross violations.[64] Whether specific criminal sanctions should be developed at the Member State level should also be guided from the EU level in order to safeguard a coherent and certain EU standard. An example may be the Dutch law on mHREDD in connection with child labour, which creates criminal sanctions for board members who repeatedly and willfully disregard this mHREDD obligation. As explained above, it is preferable if all Member States implement comparable criminal sanctions. That said, broader mHREDD requirements may not fit well with criminal sanctions, as these require the definition of specific actions or behaviour which is not allowed.[65]

So far criminal sanctions at a Member State level, except for the Dutch law, are not connected to (willful) non-observance of mHREDD as such, but to specific crimes, for example in connection with (profiting from) modern slavery, human trafficking or worker exploitation. Furthermore, criminal prosecution of companies is restricted in several Member States and, thus, criminal sanctions may be more effective if these would be directed towards individuals such as board members. This approach is implemented in the Dutch Child Labour law in case of repeated non-compliance with the mHREDD requirement. Such an approach may be preferable at the EU level.

However, criminal sanctions are effective only if the public prosecutor prosecutes repeated non-observance of mHREDD. This may not happen because of priority setting, observed chance of success of a case, lack of expertise of the prosecutor or budgetary reasons. The example of the California Transparency in Supply Chains Act, which includes a criminal sanction, has shown no company has been prosecuted so far. Obviously, the EU cannot order public prosecutors at a Member State level to prosecute companies. The extent to which companies expect criminal sanctions to be applied in practice influences the incentives these provide on companies to observe mHREDD. Thus, criminal sanctions seem tough in theory but may prove otherwise if no criminal prosecution is deployed in practice.

5.4. Public Supervision through Administrative Law

Public supervision deploying administrative law, and including development of administrative policies, seems pivotal. Public supervisors are able to develop policies building on best practices much faster than case law, and can deploy and enforce these in markets, whereas a

[64] See e.g. EP Briefing on Substantive Elements of Potential Legislation on Human Rights Due Diligence, note 20, No 1, p. 13.
[65] See UN Human Rights "Issues Paper", note 2, p. 19.

decision of a court cannot be enforced against other market participants although it may have implications in terms of litigation against other companies which allegedly are not complying with the rule developed in case law. It is also more flexible in connection with changing market conditions, such as those resulting of the Covid-19 crisis.[66] Furthermore, these policies of public supervisors may be challenged in administrative courts, which provides clarity regarding the conformity of this policy with the EU and Member State legislation for a whole market. There is usually standing for companies and NGOs to challenge such policies or they may urge public supervisors to enforce such policy against a market participant. If the supervisor refuses the latter, NGOs often have recourse to administrative courts to challenge this refusal. The public supervisor should implement a risk oriented approach, for example, by initially focusing on sectors or issues with the most severe human rights risks or where a delayed response could make them irremediable and bearing in mind companies may be unable to address all actual or potential human rights risks simultaneously.[67] It may also require enhanced mHREDD in high risk areas or countries.

Beyond this, assessments of non-observance of HREDD by public supervisors should have consequences for public procurement, access to export credit, or EU or Member State's subsidies, and may support civil enforcement if observations of the public prosecutor are made public.[68] It also may provide input in civil litigation for damages (as happens in cartel cases). In our view, it would be sensible to include in EU legislation when and how observations of public supervisors regarding HREDD should be made public and may serve as a basis in civil enforcement.

It is most logical to establish one public supervisor in connection with mHREDD or, if necessary, a collaborative body in which relevant public supervisors participate and which has powers granted by law to exchange information on supervised entities, either on the EU level or on a Member State level. This facilitates (continuous) learning from different sectors, whereas public supervision divided over sectors may be unnecessarily costly and burdensome for companies if public supervisors in different sectors implement different policies and approaches with diverging requirements regarding mHREDD.

As HREDD usually differs depending on the sector, state and issue at hand, it poses a challenge to develop clear, consistent and sufficiently concrete standards which apply throughout these sectors, states and issues and across Member States. This should not be solved by trying to include all these standards in EU legislation. This poses the challenge of huge legislative effort by the EU which may also result in solutions which may be hard to deploy in practice. To solve this issue, implementing best practices which have been developed in industries or regarding specific challenges in a dynamic fashion and have matured in markets to a certain extent, is a way forward, which means that these best practices

[66] Ibid, p. 19.
[67] Ibid, p. 11.
[68] Several public supervision systems at a Member States level include the option to make sanctions imposed by the public supervisor public, including the reason for such a sanction.

improve over time and best practices of the past are not always best practices of today.[69] This could be done by frequently adapting secondary legislation, but this creates a huge legislative effort, so implementing these best practices through public supervision may be a more feasible option as this can be more dynamic. An additional advantage of best practices is that these are deployed in practice and companies cannot argue that the legislator has prescribed solutions which are not practical.

Furthermore, best practice may apply to any of the six steps of HREDD and thus enable credible implementation of all these six steps. Obviously not all best practices, not even in a specific industry or specific issue, are susceptible to be implemented by every company. For example, a small-scale solution developed by a SME, may not be feasible for larger companies. That said, this does not mean the larger company may just denounce this best practice. It is conceivable parts of the best practice can be implemented. However, the foregoing shows best practices have to be appropriate and proportionate considering the type of business activity and its context. Furthermore, these should be dependent on probability of materialization of risks, severity of actual or potential damage (more severe risks require more attention) and the ability of a company to exercise leverage on the prevention of human rights abuse or remediation of abuse. So 'comply or explain' type of approach may be indicated, meaning that the larger company has to either implement the best practice or explain why it cannot implement (parts of) it and what it will do to address the issue in an alternative manner.

Best practices do not necessarily need to be developed by companies but may also originate from, for example, multi-stakeholder initiatives or collaboration between companies. This approach may also incentivize business support for mHREDD legislation, as it is developed in consultation with markets as well as collaboration between companies and in multi-stakeholder initiatives. However, a best practice generally is not a solution which has been deployed only once, it should have gained some maturity in a specific industry or regarding a specific issue. The European supervisory entity may also conduct or commission research on best practices in EU markets or could assist with training and capacity building to develop best practices.[70]

More generally, a system incorporating best practices (through secondary legislation or public supervision) may, unlike current national public supervision, provide a 'reward' for companies or multi-stakeholder initiatives, which have developed such best practices, as these are considered to be the best achievable standard at a certain moment in time.[71] Thus, supervision build on best practices may incentivize voluntary initiatives to improve HREDD

[69] See on this C.C. van Dam and M.W. Scheltema, Opties voor afdwingbare IMVO-instrumenten, p. 110-118 (https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2020Z06176&did=2020D12968, research commissioned by the Dutch government and sent to the Dutch Parliament).
[70] See UN Human Rights "Issues Paper", note 2, p. 23.
[71] Different instruments may be deployed in connection with dynamic supervision. There can be benchmarking development and implementation of best practices, development of best practices in collaboration with business and relevant stakeholders, establishing supervisory minimum HREDD requirements based on these best practices, using these benchmarks in public procurement and in connection with subsidy requirements as well as through public benchmarks and labelling on consumer markets.

and not create a ‘race to bottom’ in which every company or multi-stakeholder initiative tries to stay as close as possible to the legislative requirements. That said, it may be conceivable that public supervision still entails some minimum requirements which may be adapted over time and building on best practices which have become market standards.

However, it may differ depending on market conditions how effective this supervision will be in practice. It is likely markets in which, for example, consumer or investor pressure is felt, the development of best practices is better accepted and implemented than in markets lacking such pressure. Furthermore, the European entity should, also bearing in mind article 36 VWEU, monitor whether best practices accepted by public supervisors of member states do not distort the EU internal market.

5.5 Conclusions on Monitoring and Enforcement

It is pivotal that monitoring and enforcement do not focus on mistakes made by companies (road to the bottom) but incentivizes companies to improve continuously (road to the top) and, thus, elicit as much as possible positive changes in corporate behaviour. EU legislation on mHREDD should either implement public supervision on the EU level or include specific guidance on the shape and type of monitoring and enforcement in Member States. There should also be provisions on collaboration by, and exchange of, information between the relevant public supervisors in Member States facilitated by an European supervisory entity, in order to enable continuous learning of the national supervisors. It should also prescribe effective, proportionate and dissuasive sanctions for non-compliance.

It is evident that the EU legislation on mHREDD should enable private enforcement, for example through litigation in courts. In connection with this, it is recommended to address some procedural hurdles rightsholders may be confronted in access to remedy. Civil enforcement may result in different remedies for rightsholders, for example compensation of damages but also in forward looking court orders or arbitral awards. It should be noted these sanctions may fit better with some of the steps of HREDD than others. Another issue may be whether provisions on lifting the corporate veil or directors’ duties should be implemented. Current jurisprudence has rendered this issue less prominent, as courts have in principle accepted responsibility of parent companies deploying and enforcing global policies in cases where these have been violated by subsidiaries.

EU legislation on mHREDD could enable criminal prosecution in cases of gross violations. This would help to counter behaviour from company boards which are repeatedly and willfully disregard human rights and environmental impacts. Whether specific criminal sanctions should be developed at the Member State level should also be guided from the EU level in order to safeguard a coherent and certain EU level law.

Public supervision deploying administrative law and including development of administrative policies is also essential. Public supervisors are able to develop policies building on best practices much faster than case law and can deploy and enforce these in markets.

Furthermore, these policies of public supervisors may be challenged in administrative courts, which provides clarity regarding the conformity of this policy with the EU and Member State legislation for a whole market.

Recommendations on EU Legislation on Mandatory Human Rights and Environmental Due Diligence

Justification and Scope

1. The legislation should be consistent with and supportive of other EU legislation and initiatives, as well as the OECD Guidelines, UNGPs and ILO Declarations.

2. The legislation would benefit from, and affect, a global model on mandatory human rights and environmental due diligence.

3. The legislation should include a broad definition of human rights, based on the European Convention on Human Rights and the European Social Charter, as well as customary international humanitarian and international criminal law, and should integrate a gender and vulnerable group perspective.

4. The legislation should include environmental damage and environmental human rights.

5. The legislation should cover all types of business entities regardless of their size, sector or type of incorporation, and should be based on their domicile. It should include all companies (including subsidiaries) operating in the EU.

6. The legislation should apply to state-owned and state controlled companies, and public bodies.

7. The legislation should cover the activities of companies having transnational effects, including through their subsidiaries or business relationships outside the EU.

8. The legislation should include all six steps of human rights due diligence as defined by the OECD Guidelines and UNGPs. It should focus on risks to rightsholders and should discourage 'ticking the box' exercises.

9. The legislation should be implemented through an EU Regulation.

Obligation

10. The legislation should implement an obligation to conduct human rights and environmental due diligence and it might perhaps have liability for harm caused by not undertaking reasonable and appropriate human rights and environmental due diligence.

11. The legislation should include a broad human rights and environmental due diligence requirement, and it should be allowed to be elaborated for different sectors, states and issues, with best practices assessed and enforced by a public supervisor.

12. The legislation should include consultation of stakeholders on the different steps of human rights and environmental due diligence which a company undertakes, taking into account in particular gender dimensions and vulnerable groups.

13. The legislation should go beyond mere reporting.

14. The legislation should have liability for a company not undertaking human rights and environmental due diligence, though as non-compliance with legislation triggers liability in several Member States, a separate liability requirement is not needed in those Member States.

15. The legislation should provide for a defence against liability where a company has undertaken reasonable and appropriate human rights and environmental due diligence.

16. Consistent and comprehensive methodologies should be developed to measure human rights impact, which may be supported by new technologies, and an EU body should assess and approve such integrated measurement methodologies as is currently done in the EU Taxonomy on Sustainable Finance.

Monitoring and Enforcement

17. An EU body should supervise or at least coordinate supervision compliance with the legislation.

18. Private enforcement of human rights and environmental due diligence should be facilitated, including by NGOs and through collective action or mass claims.

19. The legislation should provide for criminal sanctions to address gross human rights and environmental impacts, and to counter behaviour from company boards which repeatedly and willfully disregard human rights and environmental due diligence.

20. The legislation should provide for public supervision based on administrative law, and with powers to monitor compliance and best practices related to human rights and environmental due diligence and all six steps of human rights and environmental due diligence, to support the development of best practices by training and capacity building, and to enforce the legislation.

21. Monitoring and enforcement should, above all, incentivize companies to improve continuously and elicit positive changes in corporate behaviour.