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Sustainability Belgium Business and Human Rights

Shaping the future: The increasing influence of human rights on business

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The drivers of future business models may be summarised in three letters, “ESG”, and three words, “who cares, wins”.

Sustainability has become one of **the main points of attention** for governments, investors, corporates and consumers alike – all of whom increasingly demand that environmental, social and governance (**ESG**) considerations are placed at the forefront of business activities and practice. This includes the social factors arising from a company’s relationship with other businesses and communities, such as considerations relating to diversity, human rights and consumer protection.

While the “S” in ESG was not initially a primary focus of policies, partly due to difficulties in determining what these social considerations involve and measuring compliance, the last decade has witnessed a huge increase in legislation and standards addressing the adverse impact of business activities on human rights, causing both environmental and social considerations to become increasingly intertwined. As indicated by UN Secretary General Antonio Guterres, any action taken to achieve a net zero-carbon economy, without consideration for human rights, will only increase existing inequalities and the potential for exploitation of already vulnerable communities.

Companies are facing **ever-increasing standards** to meet their responsibilities to respect human rights, with the legal framework for business and human rights (**BHR**) evolving from authoritative soft law, such as the 2011 UN Guiding Principles on Business and Human Rights, to specific binding legislation, such as the European Union Non-Financial Reporting Directive and the European Union Conflict Minerals Regulation.

Unsurprisingly, there has been a **proliferation of business and human rights lawsuits**. A recently launched database profiles no less than 200 lawsuits brought against companies for human rights abuses, half of which were launched in the last ten years[1].

In addition to existing BHR legislation and standards, both the United Nations (**UN**) and the European Union (**EU**) are currently developing binding legislative instruments to impose **corporate due diligence obligations** on all companies. Such emerging regulations often require that both environmental and social factors are properly reported on and reflected in any due diligence obligations imposed on companies.

In this contribution, we will analyse the most relevant current and upcoming BHR legislation and standards, assess some of the legal, reputational and financial risks that companies may face in the event of non-compliance with these current and upcoming obligations, and suggest an approach to mitigate and manage these risks.

1. A glance at some of the existing BHR rules

1.1 The United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (**UNGPs**)[2], which were unanimously adopted by the UN Human Rights Council in 2011, are the first internationally accepted global standard for preventing and addressing the human rights risks linked to business activities. Although not legally binding, the UNGPs have established the basis for further legislative action around the world.

One of the three core pillars underpinning the UNGPs is the **corporate responsibility to respect human rights**. This means that companies should avoid infringing on human rights of others and address adverse human rights impacts with which they are involved[3]. Concretely, companies should "know and show" that they respect human rights by having, among other things, the appropriate policies and measures in place such as:

– a policy commitment to meet their responsibility to respect human rights, and policies to implement that commitment;

– a human rights due diligence process, which includes taking appropriate action to address any actual or potential human rights impacts identified through the due diligence process; and

– processes for remedying any adverse human rights impacts they caused or contributed to[4].

The OECD Guidelines for Multinational Enterprises[5], a multilaterally agreed and comprehensive code of responsible business conduct, recommend that companies adopt the very same policies and processes in order to fulfil their corporate responsibility to respect human rights.

Human rights due diligence has quickly emerged as a critical part of the corporate responsibility to respect human rights. Indeed, a robust human rights due diligence process enables companies to efficiently identify, prevent, mitigate, remedy and account for how they address potential and actual adverse human rights impacts. Without such identification, a company is not in a position to prevent or mitigate potential and actual adverse human rights impacts in accordance with its corporate responsibility to respect human rights.

Such due diligence relates to potential and actual human rights impacts caused by or contributed to through the company's own activities, as well as those directly linked to its operations, products or services by its business relationships[6]. It is worth noting that the company's "activities" include both its actions and omissions, and that its "business relationships" include its business partners, entities in its value chain, and any other State or non State entity directly linked to its business operations, products or services[7].

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1.2 The Equator Principles

While States took some time before agreeing on a global standard for BHR in 2011, the financial sector had already acted, with the adoption of the Equator Principles (**EPs**) in 2003. The EPs are a **private initiative by financial institutions** wishing to establish a risk management framework to assess and manage the environmental and social impacts of large-scale development projects.

The EPs establish a **minimum due diligence standard** for human rights, biodiversity and climate change to support responsible risk decision-making[8]. Therefore, financial institutions that have adopted the EPs will only finance projects that meet the requirements set out therein.

Currently, 114 financial institutions operating in 37 countries have adopted the EPs, including some of the largest global banks[9]. As a result, the EPs cover the majority of international project finance debt within developed and emerging markets.

In order to keep pace with the rapidly evolving standards and accurately reflect good practices, the EPs are reviewed periodically[10]. **The fourth iteration of the EPs** (**EP4**) entered into force on 1 October 2020 (see our contribution **here**). Contrary to the third iteration of the EPs, which only required human rights due diligence alongside Environmental and Social Impact Assessments "in limited high risk circumstances", EP4 now **requires an assessment of potential adverse human rights impacts for *every* project**[11].

During the loan period, the adhering financial institution will require recurrent independent monitoring and reporting by an Independent Environmental and Social Consultant or a qualified and experienced external expert to assess the project's continued compliance with the EPs[12]. In the case of any non-compliance established after the project has started, the financial institution and the borrower will work together to bring the project back into compliance. However, if the borrower continues to fail to comply within an agreed deadline, the financial institution may exercise its remedial rights, including calling an event of default[13].

While the financial institutions' adherence to the EPs may greatly reduce the environmental and social impact of projects financed by them around the world, the EPs impose more stringent obligations on companies relying on the financing provided by these institutions.

1.3 The European Union's current legal framework for BHR

Human rights have always been at the heart of the EU. Indeed, the EU has been committed to promoting and protecting human rights globally since its very establishment. As a result, the EU quickly became a **global leader** on adopting human rights instruments and legislation.

For example, the EU has taken the lead on mandatory human rights reporting and due diligence legislation since the adoption of the UNGPs in 2011. As early as 2014, the EU issued the EU Non Financial Reporting Directive[14] to establish reporting and due diligence obligations for some companies on non-financial issues, including the respect for human rights. In 2017, the EU also adopted the EU Conflict Minerals Regulation[15] to regulate supply chain due diligence in the extractive sector.

These two instruments were early indicators – and still are – of the EU's firm willingness to protect human rights and regulate business activities in the area of human rights. As will be discussed in section **2.2** below, it is only a matter of time before the EU adopts binding legislation on mandatory human rights due diligence, thereby reinforcing its position as a global leader in the area of BHR.

In December 2020, the EU also adopted a new global human rights sanction regime to target serious human rights violations and abuses globally. This landmark initiative re-emphasises the EU's commitment to ending impunity regardless of who and where the perpetrators are.

(a) The EU Non-Financial Reporting Directive

The main purpose of Directive 2014/95/EU, more commonly called the 'Non-Financial Reporting Directive' (the **NRFD**), is to enable investors, consumers, and other stakeholders to assess the non-financial performance of large companies, and to encourage those companies to adopt a more responsible approach to business.

The NFRD requires that large public-interest entities (ie financial institutions, insurance companies, large listed companies, etc[16]) with more than 500 employees report annually on a range of non-financial issues such as **human rights, environmental, anti-corruption and bribery matters**.

In doing so, companies must include a description of the policies and the due diligence processes that they have adopted with respect to these non-financial matters in their management report[17]. Such reporting should include due diligence processes implemented by the company's suppliers or subcontracting chain where relevant and proportionate[18]. Companies must also report on the outcome of these policies and on the main risks related to human rights and other non-financial issues linked to the company's operations[19].

These mandatory reporting obligations should be taken seriously, as non-compliance may attract significant **penalties** under national law. For example, directors of companies subject to Belgian law may face a fine of up to EUR 10,000.00 under the Belgian Code of Companies and Associations for failure to comply with the company's obligations on non-financial reporting[20].

As we discuss **here**, the European Commission has committed to **reviewing the disclosure requirements** under the NFRD as part of the European Green Deal. In doing so, the Commission seeks to enhance the disclosure of robust environmental data by companies in order to accelerate the rate of investment into green and other environmentally sustainable activities. Key messages emerging from the public consultations indicate, among other things, strong support for a requirement to use a common reporting standard among companies, an expansion of the scope of the NFRD to certain companies, stricter audits requirements, and the use of the six environmental objectives set in the Taxonomy Regulation for environmental disclosures.

The European Commission Green Deal work programme proposed the **first quarter of 2021** as the target date for publishing draft legislation giving effect to the changes to the NFRD[21]. Companies are therefore encouraged to monitor these developments closely in the upcoming months.

(b) The EU Conflict Minerals Regulation

In addition to the NFRD, which focuses on mandatory reporting by large public-interest companies on specific issues, the EU has also developed sector-specific mandatory supply chain due diligence requirements such as the Conflict Minerals Regulation of 17 May 2017 (the **CMR**), which **entered into force on 1 January 2021**.

Under the CMR, EU-based companies importing tin, tantalum, tungsten and gold, which potentially originate from conflict-affected and high-risk areas, must comply with several **supply chain due diligence obligations** to ensure that the metals and minerals they procure are sourced responsibly and have not been produced in a way that funds conflict or other related illegal practices.

Such due diligence obligations seek to identify, address, prevent and mitigate potential and actual adverse impacts linked to the sourcing activities[22]. They include, among other things[23]:

– management system obligations[24];

– risk management obligations[25];

– independent third-party audit obligations[26]; and

– disclosure obligations[27].

According to estimates of the European Commission, the CMR will apply directly to **between 600 and 1,000 EU importers**. It is also expected to affect about 500 smelters and refiners of tin, tantalum, tungsten and gold present in the supply chains of EU companies, even if they themselves are not always based in the EU[28]. Based on the metals and minerals in the scope of the CMR, companies producing mobile phones, technology, automotive products, and medical devices or jewellery are most likely to be impacted by the supply chain due diligence obligations under the CMR.

It is worthwhile to note that companies that do not meet the volume thresholds specified in the first annex of the CMR will not be subject to due diligence obligations.

While importers subject to the CMR may build on their experience gained in the United States under the 2012 U.S. conflict minerals provision (commonly known as Section 1502 of the Dodd Frank Act), importers will need to broaden the territorial scope of their measures and policies. Indeed, the CMR's territorial scope does not only encompass the Democratic Republic of Congo and adjoining countries, but ***all* conflict-affected and high-risk areas**.

While the European Commission has issued non-binding guidelines to identify such jurisdictions, the burden will remain on companies to determine and continuously reassess which jurisdictions are "conflict-affected" and/or "high-risk" areas. The European Commission will try to help companies by providing a non-exhaustive list of such areas, but it will not provide a definitive list. Therefore, companies subject to the CMR will need to ensure that they are properly informed in this respect and structure their due diligence processes to ensure compliance with their obligations under the CMR.

Interestingly, companies may apply to have their **supply chain due diligence schemes** officially recognised by the European Commission[29]. The European Commission will then publish these schemes in a register of recognised supply chain due diligence schemes[30]. While companies are not obliged to submit their schemes for approval, one can reasonably foresee that companies failing to apply a recognised due diligence scheme may suffer from considerable reputational damage, given the increasing public pressure on companies in extractive industries to adopt ethical and human rights-compliant business models.

In terms of **enforcement**, the CMR states that national regulators will ensure on the ground compliance with the CMR[31]. Companies falling short of the CMR's supply chain due diligence standards may therefore be subject to national enforcement actions[32]. At the very least, non-compliant EU importers will be ordered by national enforcement agencies to comply with their obligations within a given time period[33].

Companies should also pay attention to the so-called **"white list" of global smelters and refiners sourcing responsibly** that the European Commission must publish in a timely manner[34]. Indeed, a company's absence from this list may lead to reputational damage and other indirect economic and commercial pressure.

(c) The New European Global Human Rights Sanctions Regime

In December 2020, the EU adopted the EU Global Human Rights Sanctions Regime[35] by which the EU intends to **target perpetrators of serious human rights violations and abuses** in a more tangible and direct way.

The new EU Global Human Rights Sanctions Regime **targets both individuals and entities**, regardless of whether they are State or non-State actors, that are **responsible for or involved** in serious human rights violations or abuses, or that **are associated with** them. The new EU Global Human Rights Sanctions Regime is not country-specific and can therefore tackle serious human rights violations and abuses globally, including cross-border violations and abuses.

The new EU Global Human Rights Sanctions Regime not only applies to acts such as **genocide**, **crimes against humanity**, **torture**, **slavery**, but also extrajudicial, summary or arbitrary executions and killings, the enforced disappearance of persons, and arbitrary arrests or detentions.

Other serious human rights violations or abuses may also fall within the scope of the new EU Global Human Rights Sanctions Regime where they are widespread and systematic: trafficking in human beings, sexual and gender-based violence, violations or abuses of freedom of peaceful assembly and of association, violations or abuses of freedom of opinion and expression and violations or abuses of freedom of religion or belief[36].

Applicable sanctions include **travel bans**, **asset freezes**, **or the denial of access to funds or economic resources**[37].

Given that companies could face sanctions under the new EU Global Human Rights Sanctions Regime for the actions of their business partners or subsidiaries anywhere in the world, it will be increasingly critical for companies to adopt an efficient due diligence policy and continuously monitor potential and actual serious human rights abuses throughout their entire value chain.

1.4 Mandatory due diligence reporting at national level in EU Member States

Member States have not remained inactive after the European and international communities started to regulate BHR.

The **French Duty of Vigilance Act** of February 2017[38] constitutes one of the first and most striking mandatory laws governing human rights due diligence. It requires large companies[39] incorporated in France to develop, publish and effectively implement a 'vigilance plan' or 'duty of care plan' that includes "the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms"[40].

It is worthwhile to note that the French Duty of Vigilance Act does not only affect French companies, as foreign subsidiaries must also be included in the 'vigilance plan' of their French parent company, even though they do not have to establish such a plan themselves. Companies failing to comply with these due diligence and reporting obligations may face civil liability for damages[41]. Examples include the recent civil proceedings initiated against a large petrochemical group for its pipelines project in Uganda and Tanzania and against an energy group for its wind farm project in Mexico.

In 2019, **the Netherlands** in turn adopted a **Child Labour Due Diligence Act**[42] requiring every company (whether based in the Netherlands or not) delivering products or services to the Dutch market to declare that it has carried out supply chain due diligence on the risk of child labour. Similar to the French Duty of Vigilance Act, the Dutch Child Labour Due Diligence Act also regards the actions of all subsidiaries of the companies subject to the act, thereby significantly expanding the scope of companies' obligations. Repeated non-compliance with the Dutch Child Labour Due Diligence Act may lead to criminal action against a company's directors (see our contribution **here**).

Other EU Member States are also considering legislative initiatives in the area of BHR, which will undoubtedly lead to the adoption in the near future of other mandatory human rights due diligence legislation that might impact companies selling goods or services in those countries (see section **2.3** below).

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2. A rapidly evolving legal framework

Despite the increased attention being paid to human rights issues over the past decade, the **2020 Corporate Human Rights Benchmark report**[43], covering 229 major companies worldwide[44], found that almost half of the companies fail to prove that they comply, or simply fail to comply, with the UN standards of human rights protection (including the UNGPs). The report finds, among other things, that:

- the automotive sector is the worst performing sector, with 2/3 of the companies scoring zero across all human rights due diligence indicators;
- there is a significant disconnect between companies' public commitments to respect human rights and the implementation on the ground;
- the lowest areas of improvement are associated with the human rights due diligence process, with a significant number of companies failing to meet investor expectations on human rights due diligence; and
- the negative human rights impacts are overwhelmingly felt in developing countries like India, China and Indonesia.

This suggests that the **voluntary implementation of human rights due diligence is insufficient** to protect human rights across companies' value chains around the world, and often puts compliant companies at an unfair competitive disadvantage[45].

To remedy this, both the UN and the EU are now working on **legislative initiatives** that impose mandatory human rights due diligence obligations on *all* types of companies, and establish enforcement mechanisms in the case of non-compliance.

As a result, companies that are not currently bound by the current BHR rules will need to assess their obligations under the anticipated UN Treaty on Business and Human Rights and the EU legislation on mandatory human rights and environmental due diligence. As for other companies who are currently bound by the BHR rules, they will need to update or upgrade their policies to comply with the high standards likely to be included in those two instruments covering a broad range of issues.

2.1 Binding UN Treaty on Business and Human Rights: an important step towards holding transnational corporations to account in a world of nation states

The most ground-breaking global development is the current negotiation of a binding UN Treaty on Business and Human Rights, where a second revised draft was published in August 2020 (the **Draft BHR Treaty**)[46]. If adopted, the UN Treaty on Business and Human Rights will be the **first ever globally binding standard** on business and human rights, giving real teeth to the principles currently laid down in soft law instruments such as the UNGPs and the OECD Guidelines for Multinational Enterprises.

However, the Draft BHR Treaty in its current form does not impose any direct obligations on companies. Instead, the Draft BHR Treaty puts the **responsibility on States to establish corporate obligations and liability** under their national laws and to strengthen their national mechanisms. As a result, companies will have to adapt their compliance framework based on how the various States implement the UN Treaty on Business and Human Rights.

The purpose of the UN Treaty on Business and Human Rights is to clarify and facilitate the implementation of the obligation of States to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard. However, it also aims to prevent the occurrence of human rights abuses in the context of business activities, and provide victims of human rights abuses with access to justice and effective remedy[47].

The Draft BHR Treaty foresees several **mechanisms to ensure corporate accountability** for human rights abuses.

First, victims of human rights violations will have a right to fair access to justice and effective remedy, such as restitution and compensation in the national courts[48]. In order to facilitate such access, the Draft BHR Treaty requires States to provide their courts with the necessary jurisdiction and to ensure that the doctrine of *forum non conveniens* is not used by their courts to dismiss legitimate judicial proceedings brought by victims[49]. Companies are therefore more likely to face national civil litigation for human rights abuses brought by the victims of these abuses once the UN Treaty on Business and Human Rights is adopted. States are further required to facilitate access to information and to ensure that costs do not become a barrier to commencing proceedings[50]. The Draft BHR Treaty also allows States to reverse the burden of proof in appropriate cases to fulfil the victims' right to effective remedy[51].

Second, States will have to create, implement and monitor **regulations preventing human rights abuses** by companies[52]. For example, companies will be required to conduct human rights due diligence[53] and will be subject to commensurate sanctions when they fail to do so[54]. This will create a significant risk exposure for companies early on, as these sanctions will be linked to the existence of prevention mechanisms and will therefore be applicable even if the lack of prevention does not lead to any human rights abuses as such.

Third, the Draft BHR Treaty requires States to provide for a comprehensive and adequate system of **legal liability of both legal and natural persons** for human rights abuses that may arise from their own business activities or from their business relationships[55]. The Draft BHR Treaty further determines that such system of legal liability should include the following features:

- No "*décumul*" or "decumulation" rule: liability of legal persons will be without prejudice to the liability of natural persons[56].
- Dissuasive criminal and/or administrative sanctions against natural and legal persons who have caused or contributed to criminal offences or other regulatory breaches that amount or lead to human rights abuses[57].
- Adequate, prompt, effective, and gender responsive reparations to the victims of human rights abuses[58]. The Draft BHR Treaty foresees innovative guarantees in this respect, allowing States to require legal or natural persons conducting business activities in their territory/jurisdiction to establish and maintain financial security to cover potential claims for compensation. These guarantees may take the form of insurance bonds or other types of financial guarantees[59].
- The investigation of human rights abuses and the taking of action against the natural or legal persons found responsible[60]. As a result, individuals and companies may face criminal liability or other regulatory actions from governmental agencies, even if a victim chooses not to bring a claim.
- The liability of legal or natural persons for failing to prevent another legal or natural person with whom they have a business relationship from causing or contributing to human rights abuses[61].
- No automatic exemption of liability for legal or natural persons who have caused or contributed to human rights abuses, or failed to prevent such abuses, merely based on the fact that they have conducted the required due diligence[62].
- The criminal liability or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offences under international human rights law binding on the State Party, customary international law, or their national law[63], including for acts or omissions that constitute attempt, participation or complicity in a criminal offence[64].

As for the **applicable law** in legal proceedings, it is important to note that the Draft BHR Treaty allows the victim to request that the law of another State be applicable for all relevant matters of substance regarding human rights law. However, this is only possible where: (i) the acts or omissions which resulted in human rights violations occurred in that other State, or (ii) the natural or legal person allegedly responsible for human rights violations is domiciled in that other State[65].

From a global perspective, the Draft BHR Treaty also foresees that States should make the widest measure of **mutual legal assistance and international judicial cooperation** available to one another to efficiently investigate and prosecute all situations of human rights abuses under the Draft BHR Treaty. This includes, for example, providing access to and sharing information, supplying all relevant evidence, facilitating the freezing and recovery of assets, recognising and enforcing judgments etc[66].

In light of the broad range of situations covered by and the liability mechanisms foreseen in the Draft BHR Treaty, companies will need to pay careful attention to their monitoring and reporting obligations as soon as the UN Treaty on Business and Human Rights enters into force. To prepare for such changes, companies should already start establishing efficient policies based on the existing detailed guidance in the UNGPs and OECD Guidelines for Multinational Enterprises, given that most of the Draft BHR Treaty provisions were inspired by these two instruments. This recommendation is especially important for companies operating in the EU, in light of the parallel EU developments in terms of mandatory due diligence, outlined below.

2.2 Towards a broader EU legislation on Human Rights and Environmental Due Diligence?

Whilst the NFRD imposes an obligation on certain large public-interest companies to describe their due diligence processes with respect to non-financial issues, legislative action for **broader mandatory human rights and environmental due diligence** is now being considered by the EU. If adopted, this would be the first European legislation to establish cross-sectoral mandatory due diligence obligations coupled with mandatory liability.

On 29 April 2020, European Commissioner for Justice, Didier Reynders, announced the European Commission's willingness to create a level playing field and adopt mandatory human rights and environmental due diligence legislation for the European Union[67].

In his announcement, Commissioner Reynders referred to the findings of the "**Study on due diligence requirements through the supply chain**"[68], published by the European Commission in February 2020, which identified that current practices of human rights due diligence in companies' supply chains were not widespread enough to incentivise good practice. As a result, a large majority (75.37%) of business respondents indicated that they supported the introduction of a due diligence requirement at EU level, as this would provide for a "single, harmonised EU-level standard (as opposed to a mosaic of different measures at domestic and industry level)"[69]. The Study on due diligence requirements through the supply chain reported that such new requirement would increase legal certainty and consistency without significantly distorting the competitiveness and innovativeness of EU businesses.

To progress the shaping of new EU due diligence legislation, the European Commission launched a **public consultation** on 26 October 2020 (open until 8 February 2021). The European Commission is seeking the views of a broad range of stakeholders on matters such as directors' duty of care, directors' variable remuneration and mandatory due diligence in the supply chain – areas that are likely to be the subject of EU legislative changes and initiatives in the future (see our contribution **here**).

This European Commission initiative reflects a trend to look at supply chain/value chain due diligence to implement the commitments under the Paris Agreement and UN Sustainable Development Goals and related objectives[70]; similar due diligence requirements are already embedded in the above-mentioned NFRD and EU Conflict Minerals Regulation, as well as in the Timber Regulation[71], and the Proposal for a Batteries Regulation[72], which is, at the time of writing, subject to a public consultation. Whilst the text of a European Commission legislative initiative on mandatory cross-sectoral human rights and environmental due diligence is not to be expected before the second quarter of 2021[73], it is anticipated that any upcoming European Commission proposal will be inspired by these existing and future regimes. The European Parliament Committee on Legal Affairs (**JURI Committee**) already published a draft report (2020/2129(INL)) with its recommendations for a new EU Directive on "Corporate Due Diligence and Corporate Accountability" in September 2020 (**Draft JURI Recommendation**)[74]. This draft report was put to vote on 27 January 2021 and the JURI Committee adopted the draft legislative proposal.[75] As the newly adopted text has not been published as of yet, this contribution analyses the Draft JURI Recommendation from September 2020.

At the time of writing, it is not yet clear whether the European Parliament will effectively adopt a resolution in line with the Draft JURI Recommendation. Even so, the Draft JURI Recommendation might be an indicator of the position that the European Parliament may adopt in the legislative process that may be triggered following a proposal by the European Commission on this topic.

In any case, the proactive approach adopted by the JURI Committee, and the launch of the European Commission's public consultation on a sustainable governance initiative, suggest a degree of urgency in implementing mandatory due diligence legislation across the EU, and considerations over the broad scope of such legislation.

As we discuss **here**, the two most noteworthy elements in the **scope of** the **Draft JURI Recommendation** are that the obligations contained therein (i) do not only cover mandatory *human rights* due diligence but also the environment and good governance (contrary to the UNGPs), and (ii) do not only apply to the companies' supply chain, but to their entire value chain[76].

Article 3 of the Draft JURI Recommendation defines a '**value chain**' as encompassing all "*entities with which the undertaking has a direct or indirect business relationship, upstream and downstream, and which either (a) supply products or services that contribute to the undertaking's own products or services, or (b) receive products or services from the undertaking*". The term 'value chain' therefore covers a much broader group of business entities than 'supply chain'. According to the study published by the European Commission in February 2020, downstream activities within the value chain can include "*operations that relate to processing the materials into a finished product and delivering it to the end user, including transportation, distribution, consumption and disposal/recycling*". As a result, consumer industries also fall within the scope of a company's due diligence obligations under the Draft JURI Recommendation.

The Draft JURI Recommendation details the extent of the due diligence obligations and establishes new reporting obligations and stakeholders' involvement. **Due diligence obligations** under the Draft JURI Recommendation include the ongoing identification and assessment of any risks to human rights, the environment or good governance. For these purposes, 'risk' is defined as a potential or actual adverse impact on individuals, groups of individuals and other organisations in relation to human rights, the environment or good governance[77].

If the company identifies risks, it must establish a due diligence strategy that must[78]:

– stipulate the risks identified and their level of severity and urgency;

– publicly disclose "*detailed, relevant, and meaningful information about the undertaking's value chain, including names, locations, and other relevant information concerning subsidiaries, suppliers and business partners in its value chain*";

– indicate the policies and measures it seeks to adopt to cease, prevent or mitigate the identified risks;

– set up a prioritisation policy in the event that the company does not have the capacity to deal with all the risks simultaneously; and

– specify the methodology used for setting up the due diligence strategy, including details on the stakeholders consulted throughout the process.

In addition, as part of their corporate due diligence strategy, companies must **adopt contractual clauses to make their codes of conduct binding** and enforceable against entities with whom they maintain business relationships, and regularly verify compliance[79].

Companies will also have **increased reporting obligations**, such as publishing the company's risk assessment and due diligence strategy, as well as communicating the company's due diligence strategy to its workers, business relationships and to national competent authorities[80].

As for enforcement, Member States will have to ensure that companies comply with their obligations. Hence, if a company fails to comply with its obligations, it will be accountable at national level, either through **penalties** or through **criminal liability**. For example, repeated infringements committed intentionally or with serious negligence will qualify as criminal offences[81]. Similarly to the Draft BHR Treaty, compliance with reporting and due diligence obligations will not relieve companies from any civil liabilities that they may incur under national law for the harm they have caused or contributed to[82]. It is also important to note that the Draft JURI Recommendation foresees that members of the administrative, management and supervisory bodies will be held collectively responsible for the company's compliance with its obligations[83].

In addition to its proposal for mandatory human rights and environmental due diligence legislation, the JURI Committee also proposed changes to the Rome II regulation (on applicable law) and the Brussels Ia regulation (on jurisdiction).

In terms of **applicable law**, the proposed Article 6a (of the Rome II Regulation) expands the possibilities available to the victims of human rights violations, allowing them to choose between four possible alternatives:

(i) the law of the country in which the damage occurred;

(ii) the law of the country in which the event giving rise to damage occurred;

(iii) the law of the country in which the parent company is domiciled; or,

(iv) where the parent company is not domiciled in a Member State, the law of the country where it operates.

While this provision is undoubtedly positive for victims, allowing them to rely on the obligations set out in the Draft JURI Recommendation even where EU law would not generally apply, it creates legal uncertainty for companies, as they will not be able to determine the applicable law (including their specific obligations) beforehand[84].

As for **jurisdiction**, the proposal seeks to introduce a new Article 26a to the Brussels Ia Regulation, extending the jurisdiction of Member States' courts regarding business-related civil claims against EU companies for human rights violations caused by entities in their value chain (including subsidiaries or suppliers in third countries). This would take the form of a "*forum necessitatis*" clause, providing for the jurisdiction of Member States' courts if the right to a fair trial or the right to access to justice so requires. This includes cases where:

(i) proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or

(ii) a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised and the dispute has a sufficient connection with the Member State of the court seised.

Overall, even if the European Commission is not bound by the recommendations contained in the Draft JURI Recommendation, the extent of a future European Commission's initiative will most likely include similar obligations to those described above, as the JURI Committee has mainly based its proposal on the UNGPs. A comprehensive and up-to-date understanding of current developments in corporate human rights due diligence is therefore essential for companies operating in the EU, especially those with complex supply chains.

2.3 Parallel multiplication of the legislative initiatives at national level in Europe

Various States have also shown a willingness to anchor human rights due diligence to national legislation. As momentum is building in an increasing number of States, companies operating in those States or subject, in one way or another, to the laws of those States will inevitably be impacted.

- **Germany**, for example, is **currently drafting** a due diligence law that would require German companies with over 500 employees to prevent adverse human rights impacts linked to their business activities. The companies' due diligence obligations under the proposed act are backed by severe fines for non-compliance and uncapped liabilities to enable private enforcement.
- The inhabitants of **Switzerland** voted on a responsible business initiative on 29 November 2020[85]. As the initial proposal backed by a broad range of NGOs failed to pass (despite winning the popular vote), a counter-proposal that was approved by the Swiss Parliament in June 2020 now looks more likely to be passed. The counter-proposal will automatically enter into force if no referendum is submitted within 100 days. While this counter-proposal is considered milder because it does not include any liability and sanctions regime, companies will nevertheless have reporting and due diligence obligations regarding human rights and the environment.
- In the **Netherlands**, action is also being taken to broaden mandatory due diligence obligations beyond the scope of the Dutch Child Labour Act. Following calls by Dutch businesses, four political parties submitted a proposal to the second chamber of the Dutch Parliament on 17 June 2020[86]. This proposal establishes due diligence obligations for all Dutch-based companies, regardless of their size or sector. In autumn 2020, the Dutch Social and Economic Council also recommended that the Netherlands introduce mandatory due diligence legislation.
- In **Norway**, the Ethics Information Committee published its recommendations for an "Act relating to transparency regarding supply chains, the duty to know and due diligence" in November 2019[87]. This Act would apply to all companies offering goods and services in Norway. It would include duties such as the duty to provide access to and disclose information or the duty to know about the potential risks to human rights. Larger companies would have additional due diligence and public disclosure obligations.
- While the **United Kingdom** adopted the Modern Slavery Act[88] in 2015, civil society is now pushing for the adoption of a broader law on mandatory human rights due diligence. As a result, the government has announced that it will adopt a new due diligence law in the Environment Bill aimed at preventing deforestation and protecting rainforests. The main features of this new law include greater due diligence obligations, a prohibition against larger companies using key commodities if they have not been produced in line with local laws protecting forests and other natural ecosystems, and fines in the event of violations.
- In **Austria**[89] and in **Denmark**[90], political parties have introduced a draft bill on social responsibility in the garment sector, and a parliamentary motion calling for a bill on human rights due diligence for all large companies as well as companies in high-risk sectors. There is also growing discussion (often driven by citizen-led initiatives) in **Belgium**[91], **Finland**[92], **Luxembourg**[93], and **Sweden**[94] on implementing national mandatory human rights due diligence legislation.

3. Increased non-compliance risks for companies

BHR laws and standards affect all companies, regardless of their size or sector. Indeed, every single company has impacts on human rights, whether directly or indirectly. Such human rights impacts can lead to significant legal, reputational and financial risks if they are not dealt with properly.

While companies are often aware of their direct impacts on human rights, they should be particularly careful of their indirect impacts on human rights. These impacts result, for instance, from the actions of their subsidiaries, borrowers or suppliers. Accordingly, companies should be mindful not only of their responsibility for potential and actual risks of human rights abuses in their own operations *but also* in their networks of suppliers, partners and contractors.

3.1 Litigation risks and sequels

In the last decade, national courts and other bodies have seen a **considerable increase in the number of complaints** brought against multinational companies, often in respect to human rights violations connected with their overseas subsidiaries and supply chains.

According to a recently launched Lawsuits Database[95], more than 200 lawsuits have been filed against companies for human rights abuses to date. Interestingly, one in two of these lawsuits were filed in a different country to that in which the harm occurred, highlighting the increased use of transnational litigation by victims and communities.

Recent examples of **lawsuits** filed against corporations **in Europe** include:

- Ongoing legal proceedings in France against a large petrochemical group, in two separate proceedings, for insufficiencies in its vigilance plans under the French Duty of Vigilance Act. In the first, the group is accused of having failed to adequately identify the risks of and prevent human rights abuses and environmental damage linked to its projects in Uganda and Tanzania. In the second, it allegedly failed to prevent human rights violations and environmental damage that could result from the significant amount of greenhouse gas emissions linked to its activities.
- Ongoing legal proceedings against an energy group before the French courts under the French Duty of Vigilance Act for its alleged failure to comply with its due diligence obligations and with the local community's right to free, prior and informed consent in relation to its wind energy project in Mexico.
- Formal notices served on multinationals, including a large omnichannel company, a logistics company, an energy group and a mass-market retail group for alleged failures to comply with the French Duty of Vigilance Act.
- Ongoing proceedings by ten Tanzanian victims against a gold mining company before the UK High Court for alleged serious abuses, including killings, by security forces at the company's gold mine in Tanzania. This new lawsuit arises after the company had previously reached an out-of-court settlement for similar allegations relating to the failure to prevent the use of excessive force by local police in 2015.

Other recent lawsuits **in the rest of the world** include:

– An ongoing lawsuit against four tech giants in the United States because they allegedly profited from forced child labour in cobalt mines in the Democratic Republic of Congo.

– The potential liability of two large food companies for aiding and abetting human rights violations abroad by virtue of their corporate conduct in the United States. The human rights violations in question relate to accusations of child labour in their supplying cocoa farms in the Ivory Coast.

The **banking sector** is also increasingly the target of complaints, including, for example:

– A criminal complaint in France against a global bank for complicity in crimes against humanity, genocide and torture committed by the Sudanese regime. The complaint is based on the allegation that the bank acted as the regime's "de facto central bank" between 2002 and 2008 despite international sanctions being in place.

– A complaint lodged with the Dutch OECD national point of contact against a global bank for financing companies that have allegedly been involved in environmental, human rights and labour rights abuses in the palm oil sector. The Dutch OECD national contact point has already confirmed, in its initial assessment, that it is the correct entity to assess the alleged violation by the bank, that the reporting parties meet the requirements in terms of legal standing and that the issues raised are *prima vista* substantiated.

– The approval by a development bank of an international investigation in November 2019. This investigation seeks to look into the compliance of the bank's private lending arm with the bank's social and environmental standards in its financing of a hydroelectric project in Colombia.

– A complaint lodged with the Australian OECD national contact point against a multinational bank in January 2020 for financing fossil fuel projects. The complaint was brought by an NGO and by the bushfire victims based on the harm and damage caused by the massive bushfires that took place in 2019.

– A lawsuit in the Netherlands against a development bank because of its role in the financing of a dam project in Honduras. The bank allegedly failed to respect the human rights of the local community affected by the project, which lost access to clean water and to fishing grounds, and neglected warnings about human rights violations in the area.

As illustrated by these examples, companies can face **both civil and criminal liability** for their actions before national courts.

It is important to note that legal risks may also arise in countries that have not yet adopted any specific BHR legislation. For example, a group of NGOs filed a criminal complaint against a large chemicals producer before the Belgian courts in 2019 for its role in a shipment of chemical components to a buyer with close ties to the Syrian regime. The investigation seeks to determine the end-use of these chemical components, as they could have been used to produce both pharmaceuticals and sarin, a deadly chemical agent that has been used by the Syrian government against civilians.

In addition, one may reasonably expect even more litigation in the EU in the near future in light of the upcoming EU legislation on mandatory environmental and human rights due diligence and the increasing number of national legislative initiatives currently being considered.

In order to **mitigate such litigation risks**, it is essential that companies are able to point the court to effective policies and internal controls aimed at preventing and detecting risks of human rights violations. Indeed, in light of the increasing due diligence and reporting obligations applicable to companies, the ability to demonstrate that significant efforts have been made to prevent and mitigate human rights violations will be key to any defence, even if often not enough on their own to avoid liability for human rights abuses. However, companies should be aware that, even where litigation does not succeed, the financial and reputational costs related thereto may be significant.

3.2 Reputational damage

While legal risks might seem more tangible for companies, reputational damage can be just as harmful, if not more harmful. Reputational damage can be disastrous for companies, at every level:

– **customers** may become anxious about a certain service or product, or not wish to be associated with a tarnished brand;

– **suppliers and other business partners** may be unwilling to offer the same business terms as they previously did or might have done;

– **regulators** may focus on stricter regulation of a specific company, or the whole sector;

– **stakeholders** may decide to withdraw their capital for the reasons specified above; and

– the corporate and financial **value of the company** may significantly diminish.

Contrary to legal risks, reputational damage may occur even where companies have no legally binding human rights obligations. Indeed, a company's respect for human rights is an essential part of a community's acceptance of that company's project, which provides the company with a "**social licence to operate**". If a community does not approve of a company's project, it may result in serious reputational damage, even where the company had no specific legal obligation with respect to human rights in the first place. In such instances, the company might face risks such as public protests or blacklisting, which could, in turn, lead to the consequences listed above.

Noteworthy examples of significant reputational damage include:

– One of the biggest tech giants, whose reputation was hit by reports of underage hiring and child labour at one of its subcontractors' factory in the China in 2014, in contradiction to its own sustainability report. To control this reputational damage as quickly as possible, the company excluded that supplier from its roster of suppliers.

– The reputational damage suffered by a global beverage company, when its Burmese partner was revealed in 2015 to have a connection to a jade mining business responsible for serious human rights violations (in breach of the then existing US Reporting Requirements on Responsible Investment in Burma[96]). In an effort to limit the damage, the multinational invested heavily in supply chain due diligence and expressed public support for the requirements.

– A company active in the automotive sector, which, together with four other major tech companies, currently faces a lawsuit in the United States for allegations of child labour in the Congolese cobalt mines within its supply chain. Such accusations, which were widely reported in reputable newspapers around the world, undermine the company's public image as a sustainable business.

– A successful fast fashion business, which saw about 50% of its share value (GBP1.5 billion) wiped out in 48 hours in 2020 after reports of modern slavery in a suppliers factory in the United Kingdom. The company immediately launched an investigation into its supply chain.

In light of these examples, one cannot emphasise enough how important it is for companies to avoid these reputational risks by adopting efficient and comprehensive human rights due diligence measures, not only in their own operations, but also in their entire network. Only then will a company be able to manage its reputational risks efficiently and avoid the *post facto* damage control.

3.3 Financial damage

Both legal and reputational risks may lead to financial damage for companies facing issues linked to human rights abuses. Such damage can take **various forms**, such as blocking or hindering a project's financing, negatively affecting mergers and acquisitions or other transactions, or involving large settlements or the payment of significant compensation.

As shown above (see section **1.2**), **financial institutions** now integrate sustainability factors, such as human rights and the environment, into their investment decisions by applying the EPs. Hence, a company that does not comply with its obligations or with globally accepted ESG standards exposes itself to greater pressure, and potential refusals, from lenders who increasingly require human rights due diligence as a precondition to project financing.

Similar pressure may also come from **investors**, such as public pension funds, who increasingly require companies to demonstrate compliance with the UNGPs or other voluntary reporting requirements. For example, in 2019, the Investor Alliance for Human Rights, acting on behalf of a group of investors representing USD1.9 trillion in assets, strongly advocated for enhanced investor due diligence regarding ESG risks, including human rights risks, throughout the investment lifecycle[97]. Similarly, in 2018, more than 70 large Dutch pension funds, representing assets of almost EUR1.2tr, signed a covenant in which they committed to worldwide cooperation to promote sustainable investment based on respect for human and labour rights[98].

We also note the increased importance of compliance with human rights due diligence for **prospective purchasers**, who will, more often than not, consider it key to assess their target's compliance with human rights standards and the risks of human rights impacts throughout the target's value chain. In doing so, these purchasers seek to prevent and avoid future liability or reputational harm linked to, for example, the actions of a foreign subsidiary of the newly acquired company.

Companies may also face greater pressure from their **business partners** to comply with their human rights obligations throughout their supply chain, which often takes the form of adhering to voluntary principles and codes of conduct. 'Supplier codes of conduct' create a real possibility that corporate actors will be disqualified from business opportunities by partners or customers who may be unwilling or unable to vouch for their human rights compliance.

Finally, human rights abuses in a company's own operations or in its networks may lead to **large settlements or the payment of significant compensation**, which represent a significant financial cost for the company. For instance, a large multinational oil and gas company agreed to an out of court settlement with a local community in Nigeria in 2015, after the members of the community filed a lawsuit in 2012 in the United Kingdom seeking compensation for two oil spills and losses suffered to their health, livelihoods, and land. The multinational accepted responsibility for the spill and agreed to a multi-million settlement to pay for cleaning up the spill. More recently, in June 2018, a joint venture of two large mining companies signed a deal with Brazilian authorities that settles a multi-billion lawsuit in relation to a dam collapse in Brazil in 2015, which released 50 million cubic metres of toxic iron-ore residue, destroying a nearby district, killing 19, and polluting the water supply of hundreds of thousands of residents. However, in October 2020, the Brazilian prosecutors asked a court to reopen the multi-billion civil lawsuit following allegations by State prosecutors that the companies were not meeting their obligations in a timely fashion under the previous settlement agreement.

Such large settlements reflect the increased risks that companies may face as a result of the human rights impact of environmental damage, and highlight the increasing need to focus on the prevention of such damage now.

"Companies must, now more than ever, invest time, money and efforts in their ESG policies and in the implementation of these policies throughout their value chains."

4. Conclusion

Companies can no longer ignore the importance of ESG considerations in their day-to-day business activities.

The rapidly expanding legal framework for BHR highlights the need for companies to **know**, **understand** and **comply with** their corporate responsibility to respect human rights. Many companies may still be unfamiliar with such responsibility and will need to familiarise themselves as a matter of priority with the applicable international and national human rights standards, in particular in relation to human rights due diligence.

The forthcoming adoption of binding mandatory human rights due diligence instruments at UN and EU level will take companies' human rights reporting and due diligence obligations to another level, requiring companies to establish, adapt or strengthen their human rights policies and processes.

The legal, reputational and financial risks linked to non-compliance by a company (or by its business relationships) will become more tangible to many as the legal framework for BHR continues to evolve. In order to **manage such risks** as much as possible, companies should make sure that they:

- carefully monitor legislative developments on mandatory human rights and environmental due diligence;
- conduct proper human rights impact assessments and take efficient measures to prevent and mitigate the risks identified;
- report and communicate, both internally and externally, on the measures and policies they implement;
- establish or strengthen grievance mechanisms; and
- allocate resources to comply with their obligations and to develop the required expertise, including by providing training to employees and board members.

Companies must, now more than ever, invest time, money and efforts in their ESG policies and in the implementation of these policies throughout their value chains. If they do not, they may face penalties and reputational harm in the short run, and potential obsolescence in the long run.

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Appendix

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