

Human Rights Due Diligence: From Expectations to Obligations

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Abstract:

In the evolving landscape of business and human rights, the transition from soft law to hard law reflects a collective commitment to uphold the corporate responsibility to respect human rights in companies' own operations and throughout their global supply chains. This article explores the growing trend towards legally binding obligations for companies to conduct human rights due diligence. It retraces the historical development of soft law instruments in the field at the international level which paved the way for the adoption of legally binding national and European legislation. The shift towards hard law reflects the increasing pressure from consumers, investors and, more generally, the societal expectations towards responsible and sustainable business conduct.

Keywords:

Business and Human Rights, Corporate Accountability, Human Rights and Environmental Due Diligence.

Introduction

In the past decades, corporations have grown to become economically and politically more powerful than many states,¹ which enabled them to gain significant power of influence. In addition, the globalisation of their activities has had significant impacts on the capacity of individuals to enjoy virtually all recognised human rights through their own operations or the ones of their business relationships throughout their global value chains. Such impacts have been both positive and negative. On the one hand, businesses contribute to economic growth and development by providing goods and services that can increase well-being, creating jobs, fostering innovation, and transferring skills and technology. However, they can also negatively affect the enjoyment of human rights either of their workers or others rightsholders (such as local communities, consumers, etc.). Amongst examples of the many human rights violations that can be found in companies' operations and global supply chains are those linked to the health and safety of employees, working conditions, child labour, and forced labour. According to data from the International Labour Organization (ILO), 49.6 million people are living in modern slavery, out of which 17.3 million are in forced labour in the private sector.² According to a report from the ILO and UNICEF, 160 million children worldwide - approximately one child out of 10 - work in child labour, a number which has increased in recent years, with a particular rise in the number of children aged five to 11 years old working in hazardous conditions.³

The realisation that businesses can have adverse human rights and environmental impacts and the correlated need to regulate business activities have led to the field of Business and Human Rights (BHR) being included in the UN agenda already in the 1970s. Since then, the frameworks governing responsible business conduct have varied between soft law instruments and policies, and attempts at creating legally binding instruments.⁴ Soft law instruments have historically played a role in contributing to the development of best practices and promoting desirable norms of behaviour for companies. The United Nations Guiding Principles on Business and Human Rights (UNGPs)⁵ is the

¹ Back in 2018, 69% of the entities on the Top 100 of Economic Actors were already multinational corporations. This data was taken from a direct comparison of the annual revenue of corporations (source: Fortune Global 500 2017) and the annual revenue of countries (source: CIA World Factbook 2017). Retrieved from <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show>.

² ILO and others 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (2022) <https://www.ilo.org/global/topics/forced-labour/publications/WCMS_854733/lang--en/index.htm> accessed 22 January 2024.

³ ILO and UNICEF 'Child Labour: Global Estimates 2020, Trends and the Road Forward' (2021) <<https://data.unicef.org/resources/child-labour-2020-global-estimates-trends-and-the-road-forward/>> accessed 22 January 2024.

⁴ Sarah Joseph and Joanna Kyriakakis 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power' (2023) 36 Leiden Journal of International Law 335.

⁵ OHCHR 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', UN Doc. A/HRC/17/31 (2011) <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 22 January 2024.

authoritative document of the field. In spite of its soft law nature, it has gained persuasive authority by obtaining a very wide adherence from the private sector, civil society, and states alike. This instrument formally introduced the corporate responsibility to respect human rights, crystallising societal expectations in that respect, and set out the tools companies should use to fulfil it in practice. At the core of these tools is the human rights due diligence process which enables companies to identify and address their adverse impacts on human rights through concrete steps.

However, despite the existence of soft law instruments, corporate misconduct and the lack of corporate accountability for adverse impacts of business activities persisted. This proved that the soft law nature of international instruments in the field and the emphasis on voluntary approaches have only resulted in a limited uptake by companies of their human rights responsibilities, leading to a more recent 'hardening' of the standards arising from those instruments as a growing number of states have adopted or are developing laws in order to impose legally binding obligations on companies.

The Development of Soft Law Instruments at the International Level

In the 1970s, Chile had the initiative within the UN Economic and Social Council to adopt a resolution for the creation of a group 'to study the role and effects of multinational companies in the development process, particularly in developing countries, and their implications for international relations'.⁶ This led to developments at UN level that resulted, in 1974, in the establishment of the UN Centre on Transnational Corporations⁷ (UNCTC) and the Intergovernmental Commission on Transnational Corporations.⁸ To limit the economic and political influence of companies, the UNCTC developed a Draft Code of Conduct for TNCs⁹ which largely focused on the adequate conduct of businesses towards states - and not so much towards individual rightsholders - as well as on the adequate conduct of states towards businesses.¹⁰ However, this code was never actually adopted and, in 1992, the draft code project and the UNCTC were terminated.

In the late 1990s, a working group set up by the UN Sub-Commission on the Promotion and Protection of Human Rights - a subsidiary body of the UN Commission on Human Rights - initiated a

⁶ UN ECOSOC 'The Impact of Multinational Corporations on the Development Process and on International Relations' Resolution 1721 (LIII) (1972) <<https://digitallibrary.un.org/record/214903>> accessed 22 January 2024.

⁷ Established through Resolution 1908 (LVII), 2 August 1974 of UN ECOSOC.

⁸ Established through Resolution 1913 (LVII), 5 December 1974 of UN ECOSOC.

⁹ Commission on Transnational Corporations 'Proposed Text of the Draft Code of Conduct on Transnational Corporations', Annex IV, UN Doc. ST/CTC/103 (1990) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download>> accessed 22 January 2024.

¹⁰ Jennifer Bair 'Corporations at the United Nations: Echoes of the New International Economic Order?' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 159.

second attempt at drafting an instrument to regulate the activities of TNCs at the UN level, through the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights'.¹¹ These Norms sought to impose extensive obligations on companies, including regarding the protection and fulfilment of human rights. However, they raised concerns as many states were worried about the potential influence their endorsement could have on their economic development and they were not approved by the UN Commission on Human Rights. Nonetheless, even though not formally approved, they had an impact in subsequent developments in the BHR field.

In 1999, during the Annual Meeting of the World Economic Forum at Davos, former UN Secretary-General Kofi Annan proposed a new pact between business leaders and the UN based on shared values and principles which would 'give a human face to the global market'.¹² This proposal led to the creation of the UN Global Compact, an initiative whereby adhering companies are requested to embrace and 'align strategies and operations'¹³ with 10 universal principles on human rights, labour, environment and anti-corruption. This initiative has been adhered to by thousands of companies across the globe, and has facilitated the sharing of best practices between companies. However, the extent of its impact on corporate conduct remains limited insofar as the norms are vague and the sole consequence companies may face for failing to report or to act in accordance with the 10 principles is their delisting from the initiative.¹⁴

Subsequently, Professor John Ruggie, who was the main architect of the UN Global Compact, was nominated Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). Under his first mandate,¹⁵ Ruggie developed the 'Protect, Respect and Remedy' Framework, which is based on three principles: (i) the state duty to protect human rights from violations by third-parties, such as companies; (ii) the corporate responsibility to respect human rights; and (iii) access to remedy for rights holders affected by business activity.¹⁶ These principles became the three pillars of the UNGPs, which were developed

¹¹ Sub-Commission on the Promotion and Protection of Human Rights, 'Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights', Resolution 2003/16 (2003) <<https://digitallibrary.un.org/record/501576>> accessed 22 January 2024.

¹² 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos' (*UN Global Compact*, 1 February 1999) <<https://press.un.org/en/1999/19990201.sqsm6881.html>> accessed 22 January 2024.

¹³ 'Who We Are' (*UN Global Compact*) <<https://unglobalcompact.org/what-is-gc>> accessed 22 January 2024.

¹⁴ Joseph and Kyriakakis (n 4).

¹⁵ Set out in OHCHR 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. E/CN.4/RES/2005/69 (2005) <https://ap.ohchr.org/documents/e/chr/resolutions/e-cn_4-res-2005-69.doc> accessed 22 January 2024.

¹⁶ United Nations Human Rights Council 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5 (2008) <<https://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/a-hrc-8-5.doc>> accessed 22 January 2024.

during his second mandate in order to implement the framework¹⁷ and were unanimously endorsed by the UN Human Rights Council in 2011. Based on the failed experience of the UN Norms, he opted for a different approach relying on a soft law instrument, rather than a legally binding one. Ruggie had rightly anticipated that treaty-making would be slow due to lack of agreement and difficult to enforce,¹⁸ and he considered the UNGPs to be a more effective approach in the short term which would pave the way to other legislative and regulatory developments in the longer term.¹⁹

The UNGPs were successful in clarifying and offering guidance for the distinct yet complementary human rights-related duties and responsibilities of both states and companies. They reasserted that, under existing international law, states have the duty to protect against human rights abuse by third parties - including business enterprises - within their territory and/or jurisdiction and clarified that, in order to fulfil this duty, states should take appropriate steps 'to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.²⁰ The UNGPs also affirmed that companies have the responsibility to respect human rights which arises out of social expectations and entails that they should 'avoid infringing on the human rights of others' and 'address adverse human rights impacts with which they are involved'.²¹ One of the key achievements of the UNGPs was to define a common language that was mostly suitable both for business practitioners and for human rights advocates. At the core of the UNGPs is the concept of due diligence, which was originally drawn from the field of business and reframed under a different light to assist business practitioners in understanding how to operationalise the corporate responsibility to respect human rights. As set out in the UNGPs, human rights due diligence refers to a bundle of processes to 'identify, prevent, mitigate and account for how [a company is addressing its] adverse human rights impacts'²² - setting itself apart from conventional due diligence by being an ongoing process and focusing on the risks to stakeholders rather than the risks to the company and its shareholders.²³ Finally, the UNGPs have reasserted the need for victims of corporate human rights arms to obtain effective access to remedy.

The UNGPs have become the international standard of reference in the field and have gained a persuasive authority as they have been followed and endorsed by many companies, business

¹⁷ Set out in OHCHR 'Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' UN Doc. A/HRC/RES/8/7 (2008) <https://ap.ohchr.org/documents/e/hrc/resolutions/A_HRC_RES_8_7.pdf> accessed 22 January 2024.

¹⁸ John Ruggie 'Business and Human Rights: Treaty Road not Travelled' (*Global Policy Forum*, 6 May 2008) <<https://archive.globalpolicy.org/social-and-economic-policy/social-and-economic-policy-at-the-un/un-and-business/32270-business-and-human-rights-treaty-road-not-travelled.html>> accessed 22 January 2024.

¹⁹ *Ibid.*

²⁰ UNGPs (n 5), GP 1.

²¹ *Ibid.*, GP 11.

²² *Ibid.*, GP 17.

²³ Jonathan Bonnitcha and Robert McCorquodale 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899.

associations, states, regional organisations, and civil society organisations. Outside the UN, other initiatives at the international level that had emerged were subsequently revised in order to align with them. This is notably the case of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct²⁴ - which are considered to be 'the most comprehensive international standard on responsible business conduct', and expanded the concept of human rights due diligence to other fields such as the environment, bribery, and consumer interests, among others²⁵ - and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy²⁶, which focuses more specifically on labour rights and decent work.

Nonetheless, the uptake by companies of these non-legally binding human rights responsibilities has remained limited in practice.²⁷ The 2022 Corporate Human Rights Benchmark, which assessed how 127 companies across the food and agricultural, ICT manufacturing, and automotive manufacturing sectors were aligning themselves with the UNGPs, showed progress compared to the 2017 baseline, but revealed that over a third of all companies still scored zero on human rights due diligence.²⁸ Additionally, the 2023 Corporate Human Rights Benchmark, which focused on companies in the extractives and apparel sectors, revealed that although certain companies are showcasing transformations in this regard, the overall rate of progress still lags behind at an unsatisfactory pace.²⁹ Against this backdrop, hard law, in spite of its limitations, has been envisaged as having more potential to incentivise 'companies to move more rapidly towards respecting the human rights of all affected stakeholders'.³⁰

The National Developments

²⁴ OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023 edition) <<https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1708591814&id=id&accname=quest&checksum=71AFD3B017CBBA7555A2FE0161B43640>> accessed 22 January 2024.

²⁵ 'Homepage' (OECD Guidelines for Multinational Enterprises) <<https://mneguidelines.oecd.org/>> accessed 22 January 2024.

²⁶ International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (6th edn, 2022) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 22 January 2024.

²⁷ European Commission, Directorate-General for Justice and Consumers, Francisca Torres-Cortés and others 'Study on Due Diligence Requirements through the Supply Chain: Final Report' (2020), Part IV.

²⁸ World Benchmarking Alliance '2022 Corporate Human Rights Benchmark' (2022) <<https://assets.worldbenchmarkingalliance.org/app/uploads/2023/12/2022-Corporate-Human-Rights-Benchmark-Insights-Report-edited-15.12.23.pdf>> accessed 22 January 2024.

²⁹ World Benchmarking Alliance '2023 Corporate Human Rights Benchmark' (2023) <<https://assets.worldbenchmarkingalliance.org/app/uploads/2023/12/2023-Corporate-Human-Rights-Insights-Report-28Nov23.pdf>> accessed 22 January 2024.

³⁰ *Ibid*, Key Finding 1.

In recent years, a trend has emerged whereby the principles concerning the corporate responsibility to respect human rights articulated in the UNGPs, and the OECD Guidelines have been hardened into legislation.³¹ In particular, the prevailing trend has focused on making it a legally binding obligation for companies to put in place and implement human rights due diligence processes. Across the European continent, countless examples of this trend, can be observed³², which include the following examples:

- In the United Kingdom, the UK Modern Slavery Act³³, enacted in 2015, mandates that certain commercial organisations³⁴ prepare and publish on their corporate website 'a slavery and human trafficking statement for each financial year of the organisation'.³⁵ The statement aims to ensure that these entities take effective measures to prevent slavery and human trafficking or, in cases where no such actions have been taken, explicitly communicate this stance.³⁶
- In France, the Duty of Vigilance Law³⁷, adopted in 2017, mandates large French companies³⁸ to create, implement, and publicise an annual vigilance plan. The main goal is to enable the identification of risk and 'the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls (...) as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship'.³⁹
- In Germany, the Supply Chain Due Diligence Act,⁴⁰ adopted in 2021, represents one of the most recent examples of mandatory human rights due diligence legislation.⁴¹ It provides that

³¹ See Claire Bright and Nicolas Bueno 'Chapter 11: Mandatory Human Rights Due Diligence', Teaching Business and Human Rights (Edward Elgar Publishing Limited 2023).

³² Claire Bright 'Mapping Human Rights Due Diligence Regulations and Evaluating their Contribution in upholding Labour Standards in Global Supply Chains', G. Delautre, E. Echeverría Manrique and C. Fenwick, *Decent work in globalised economy: Lessons from public and private initiatives* (ILO 2021) 75-108.

³³ Modern Slavery Act 2015.

³⁴ It applies more specifically to commercial organisations carrying on a business, or part of a business, in the UK, supplying goods or services with a total turnover of at least £36 million.

³⁵ *Ibid.*, Article 54 (1).

³⁶ *Ibid.*, Article 54 (4).

³⁷ French Duty of Vigilance Law 2017, Article 1 (French Commercial Code, Article L. 225-102-4).

³⁸ Defined as those employing, for two consecutive fiscal years, at least 5,000 people in France (either directly or through their French subsidiaries), or at least 10,000 people worldwide (through their subsidiaries located in France and abroad).

³⁹ *Ibid.* French Duty of Vigilance Law 2017.

⁴⁰ German Act on Supply Chain Due Diligence 2021.

⁴¹ See Markus Krajewski, Kristel Tonstad and Franziska Wohltmann 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' *Business and Human Rights Journal Cambridge Core* (2021) 6(3) *Business and Human Rights Journal* 550-558

large German companies⁴² must implement a human rights and environmental due diligence process.⁴³ More specifically, companies are required to exercise due diligence with regards to human rights and certain environment-related risks, which include: establishing a risk management system; designating (a) responsible person(s) within the enterprise; performing regular risk analyses; issuing a policy statement (adopted by senior management); laying down preventive measures in its own area of business and vis-à-vis direct supplier taking remedial actions; establishing a complaints procedure; implementing due diligence obligations with regards to risks concerning indirect suppliers; documenting and reporting.

Other examples include the Dutch Child Labour Due Diligence Law⁴⁴, the Swiss Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour⁴⁵, and the Norwegian Act on Business Transparency and Work with Fundamental Human Rights and Decent Work.⁴⁶ Other examples also exist beyond Europe as well such as the California Transparency in Supply Chains Act,⁴⁷ the Australian Modern Slavery Act⁴⁸ and the proposed initiative on mandatory human rights due diligence in Brazil, the Lei Marco Nacional sobre Direitos Humanos e Empresa.⁴⁹ These laws illustrate the recent trend towards mandatory human rights and environmental due diligence.

The European Union Developments

The European Union has been closely attuned to the growing concerns surrounding corporate sustainability, particularly concerning the impacts of corporate activities. Since the early 2000s, the European Commission embarked on the journey first through the concept of corporate social responsibility,⁵⁰ focusing on voluntarism through which companies aimed to minimise their societal

<<https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8>>.

⁴² Defined as those employing more than a thousand workers.

⁴³ German Act on Supply Chain Due Diligence 2021, § 1.

⁴⁴ Dutch Child Labour Due Diligence Act 2019.

⁴⁵ Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour 2020.

⁴⁶ Act on Business Transparency and Work with Fundamental Human Rights and Decent Work (also known as the 'Transparency Law'), Proposition 150 L, 2020-2021.

⁴⁷ California Transparency in Supply Chains Act, Senate Bill N.º 657 Chapter 556 2010.

⁴⁸ Australian Modern Slavery Act 2018.

⁴⁹ Projeto de Lei n.º 572/2022 2022.

⁵⁰ See Commission of the European Communities, 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' (2001) COM(2001) 366 final <[https://www.europarl.europa.eu/meetdocs/committees/deve/20020122/com\(2001\)366_en.pdf](https://www.europarl.europa.eu/meetdocs/committees/deve/20020122/com(2001)366_en.pdf)> accessed 15

impact. Progressively, the paradigm shifted towards accountability for adverse impacts generated by corporate activities. Various significant milestones were reached throughout this legislative journey within the European Union, which include:

- Regulation (EU) No. 995/2010⁵¹ which aims to combat illegal logging and deforestation. It requires the 'firsts placers' of timber products on the single market, *i. e.* operators introducing timber and timber products into the EU market for the first time, and traders to exercise due diligence when placing timber or timber products on the market.⁵² Due diligence under this instrument involves (i) measures and procedures providing access to relevant information about the wood or wood product supply by the operator; (ii) risk assessment procedures enabling the operator to analyse and evaluate the risk of placing illegally harvested timber or derived timber products on the market; and (iii) risk mitigation procedures.⁵³
- Regulation (EU) 2017/821⁵⁴ which establishes due diligence obligations for importers of tin, tantalum, tungsten, their ores, and gold originating from conflict-affected and high risks areas. This due diligence duty translates into the obligation to verify whether the products purchased are responsibly sourced and do not contribute to generating or maintaining conflicts or other related illegal activities.⁵⁵ To achieve this, they must (i) identify and assess risks associated with their mineral supply chains; (ii) implement a strategy to address identified risks and to prevent or mitigate those adverse impacts; (iii) conduct audits, through an independent third party, of their due diligence duty in the supply chain; (iv) disclose an annual report on their policies and practices of responsible sourcing.⁵⁶
- Regulation (EU) 2023/1115⁵⁷ establishes rules regarding the placement and availability in the single market, as well as export outside this market, of products containing or made with cattle, cocoa, coffee, oil palm, rubber, soya and wood, products. The regulation aims to (i)

January 2024. And European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Corporate Social Responsibility: A New EU Strategy for the Period 2011-2014' (2011) COM(2011) 681 final <[https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0681_/com_com\(2011\)0681_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf)> accessed 15 January 2024.

⁵¹ Regulation (EU) No. 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295.

⁵² *Ibid.*, Article 1.

⁵³ *Ibid.*, Article 6.

⁵⁴ Regulation (EU) 2017/821 of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130.

⁵⁵ *Ibid.*, Article 1 (1).

⁵⁶ *Ibid.*, Articles 5, 6 and 7.

⁵⁷ Regulation (EU) 2023/1115 of the European Parliament and of the Council on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L150.

minimise the Union's contribution to global deforestation and forest degradation and by this means contributing to the reduction of worldwide deforestation, and (ii) reduce the Union's contribution to greenhouse gas emissions and biodiversity loss.⁵⁸ Thus, it is expected that before placing on the market or exporting the derivative products, operators must exercise due diligence, including the collection of information, data, and documents; the adoption of risk assessment measures; and, the adoption of risk mitigation measures.⁵⁹

- Regulation (EU) 2023/1542⁶⁰ aims 'to contribute to the efficient functioning of the internal market, while preventing and reducing the adverse impacts of batteries on the environment, and to protect the environment and human health by preventing and reducing the adverse impacts of the generation and management of waste batteries'.⁶¹ To achieve this, it establishes a set of obligations, notably requiring economic operators⁶² to have a due diligence process⁶³ for identifying, preventing, and eliminating existing and potential social and environmental risks associated with the sourcing, transformation, and commercialization of raw materials and secondary raw materials necessary for battery manufacturing.⁶⁴ To comply, operators must (i) adopt and communicate a company due diligence policy for batteries; (ii) establish strong company management systems supporting the due diligence policy; (iii) identify and assess risks in the upstream supply chain; (iv) design and implement a strategy to respond to identified risks; (v) undergo third-party verification (performed by a notified body) of the due diligence policies and their implementation in the management system.⁶⁵

In addition to the existing legislation that mandates the implementation of due diligence processes to address specific negative impacts or sectors, there are ongoing discussions about the European

⁵⁸ *Ibid.*, Article 1 (1).

⁵⁹ *Ibid.*, Articles 4 and 8.

⁶⁰ Regulation (EU) 2023/1542 of the European Parliament and of the Council concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L191.

⁶¹ *Cit. Ibid.*, Article 2.

⁶² The Batteries Regulation is applicable to all manufacturers, producers, importers, and distributors of every type of battery placed within the European Union market.

⁶³ According with Article 47 of the Batteries Regulation economic operators with a net turnover of less than forty million euros and that are not part of a group which on a consolidated basis exceeds the limit of forty million euros, are exempted from the obligation of performing a due diligence process.

⁶⁴ Regulation (EU) 2023/1542, Article 47.

⁶⁵ *Ibid.* Articles 47, 48, 49, 50, 51 and 52.

Raw Materials Act⁶⁶ and the Forced Labour Regulation,⁶⁷ both of which will significantly influence operations within and beyond the single market.

This legislative journey culminated with the introduction of legislative proposal seeking to compel companies to adopt human rights and environmental due diligence processes: the Draft Corporate Sustainability Due Diligence Directive,⁶⁸ commonly known as CSDDD or CS3D. This draft directive has been under consideration since 2020,⁶⁹ following the announcement by the European Commissioner for Justice, Didier Reynders, of the intention of the European Commission to table a legislative proposal on mandatory human rights and environmental due diligence on the basis of the findings of the study on due diligence requirements in supply chains.⁷⁰ The exact scope, obligations, and enforcement mechanisms have undergone some variations throughout the different proposals of the European institutions discussed over the past three years. However, the consistent intent is to introduce legally binding obligations for large companies to put in place and implement human rights and environmental due diligence processes in order to identify, prevent, manage, mitigate, repair, and remediate potential and actual environmental and human rights impacts caused by the activities of the companies subjected to the law, as well as the activities of their subsidiaries and business partners.

Unlike the other above-mentioned European laws introducing due diligence requirements, the CSDDD takes the form of a directive, entailing that Member States will be entrusted with the mission of transposing its content into their national laws. Another point worth noting is that all the legislative initiatives mentioned that emerged since December 2019 are essential outcomes of the European Green Deal⁷¹ and the European Union's pursuit of achieving sustainability goals and objectives. This means that these instruments are being strategically designed and redesigned in a complementary

⁶⁶ See Proposal for a Regulation Of The European Parliament And Of The Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020 [2023] COM(2023) 160 final.

⁶⁷ Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market [2022] COM(2022) 453 final.

⁶⁸ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] COM(2022) 71 final.

⁶⁹ Ana Duarte 'Proposta de Diretiva Relativa Ao Dever de Diligência Das Empresas e a Responsabilidade Empresarial' Nova Centre on Business, Human Rights and the Environment Blog (May 2021) <<https://novabhre.novalaw.unl.pt/proposta-diretiva-responsabilidade-empresarial/>> accessed 1 February 2024.

⁷⁰ L. Smit, C. Bright. R. McCorquodale and al. 'Study on Due Diligence Requirements through the Supply Chain', Study for the European Commission, February 2020, 1-572 < <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>> accessed 1 February 2024.

⁷¹ See European Commission 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions – European Green Deal' (2019) COM(2019) 640 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640>> accessed 1 February 2024.

manner to ensure policy coherence. Notably, both the Corporate Sustainability Reporting Directive⁷² (CSRD) and the Taxonomy Regulation⁷³ emphasises the need to adopt due diligence processes concerning both human rights and the environment. In the former, it forms part of the contents to be included in the reporting⁷⁴, while in the latter, it serves as a means to ensure that a company's activities comply with the Minimum Safeguards.⁷⁵

Conclusion

In this evolving business and human rights landscape, the transition from soft law to hard law reflects a collective commitment to holding businesses accountable for their human rights impacts and promoting responsible corporate conduct on a global scale. These legislative developments have not only sought to reshape the operational model for companies but have also transcended national boundaries in order to respond to the globalised nature of supply chains. Indeed, mandatory human rights and environmental due diligence legislation have implications beyond the jurisdictions in which it is enforced and affect those beyond their direct reach through the trickle-down effect. By imposing legally binding obligations on companies to exercise human rights and environmental due diligence throughout their supply chains, it also indirectly have implications on their business partners within these supply chains since, in order for the companies in scope of these laws to fulfil their own obligations under these laws, they will need to require their suppliers and business partners throughout their supply chains (who may not be directly subjected to these laws) to also respect certain human rights and environmental standards. As a result, these changes are fostering a market where sustainability becomes a competitive edge, since adopting responsible and sustainable business practices is the best way for suppliers and business partners not to be excluded from the supply chains of companies in scope of these laws.

This evolution will, undoubtedly, have tangible and specific consequences in the way in which each company operates. Beyond the evident short-term costs associated with personnel, specialised tools, and procedures tailored to this new reality,⁷⁶ there will be long term benefits for companies adopting ethical practices in an increasingly conscientious market.

⁷² Directive (EU) 2022/2464 of the European Parliament and of the Council amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322.

⁷³ Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198.

⁷⁴ Directive (EU) 2022/2464, Article 19a (2) (f).

⁷⁵ Regulation (EU) 2020/852, Article 18.

⁷⁶ See European Coalition for Corporate Justice (ECCJ) and Corporate Responsibility (CORE) Coalition 'Debating Corporate Due Diligence: A Reality Check' (2020) pp. 15 and 16 <<https://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf>> accessed 1 February 2024.