



**EUROPEAN COMMISSION'S PROPOSED CORPORATE SUSTAINABILITY DUE
DILIGENCE DIRECTIVE: POTENTIAL COMPLIANCE AND IMPLEMENTATION
CHALLENGES AND WHAT THE PROPOSED LEGISLATION CAN LEARN FROM
THE EXPERIENCES OF SIMILAR DUE DILIGENCE LAWS**

By Sumesh Shiwakoty

Master of Arts Human Rights Capstone Project Paper

Supervisor: Dr. Maria José Schmidt-Kessen

Central European University Private University

Quellenstrasse 51-55, 1100 Vienna

Austria

© Central European University Private University
June, 2023

Acknowledgment:

First of all, I would like to thank my Capstone Project Supervisor, Dr. Maria José Schmidt-Kessen, for advising my Capstone Project, motivating me to be a critical thinker, and instilling my interest in the topic of Business and Human Rights. I am grateful to my CEU Professors Alexander Petsche, András Sajó, Charles K. Whitehead, Csongor István Nagy, Eszter Polgári, Inga Teta Winkler, Juliana Cesario Alvim Gomes, Lorenzo Gasbarri, Marie-Pierre Francoise Granger, Markus Aurel Petsche, Michael Ignatieff, Tibor Tajti, and Zsuzsanna Tóth for raising academic curiosity in me on topics related to human rights law and corporate law and giving me opportunities to learn from them. I am also grateful to the CEU Department of Legal Studies for giving me a research grant that allowed me to travel to the University of Oxford and London to conduct my research, which has shaped and informed this Capstone Project. I am indebted to my parents and grandmothers for inspiring me to dream big in life and to be curious about the world, and it is their inspiration and blessing which has enabled me to travel to various corners of this planet in the pursuit of wisdom and knowledge.

TABLE OF CONTENTS

Abstract.....4

Introduction.....5

Methodology and Limitations.....6

Theoretical Framework.....7

Historical Backdrop.....8

EU Corporate Sustainability Due Diligence Directive: A brief overview.....14

A brief comparative assessment with the French Vigilance law and the UK's MSA.....18

Other obscure languages in Draft Directive22

Concluding Remarks and Recommendations for further research.....26

Bibliography.....33

Abstract

On 23rd February 2022, the European Commission published a draft Corporate Sustainability Due Diligence Directive (Draft Directive). The Draft Directive is currently going through the EU-tripartite process. Once it passes legislative scrutiny and gets approved, it will create legal obligations for the EU companies as well as various global companies doing business in the EU over a specified threshold to conduct various environmental and human rights due diligence throughout their global supply chain. Though this Draft Directive has the potential to be a milestone in establishing the practice of sustainable and human rights due diligence globally, the success of this legal regime would require wider support and seamless compliance. This paper would thus focus on the potential compliance challenges for the companies as well as touch upon implementation challenges authorities may face. While doing so, the paper will examine similar laws with special emphasis on the French 'Duty of Vigilance' law of 2017 (Vigilance law) and the United Kingdom's Modern Slavery Act of 2015 (MSA) and what Draft Directive can learn from experiences of those laws. Deriving conclusions from the experiences of those similar due diligence laws, the paper will warn that obscurity in certain places in the text of the Draft Directive and not learning lessons from the experiences of MSA and Vigilance Law may also create challenges for Draft Directive. The paper suggests that European legislators find a middle way where the language is not too obscure to create compliance challenges nor too clear that it will face challenges in enforcement. The paper will conclude with recommendations on how the European Commission should incorporate the lessons learned throughout the journey of Human Rights Due Diligence (HRDD) and findings from other scholarships into the Draft Directive. Moreover, the paper further illustrates various areas of the Draft Directive, which further research and scholarships could help strengthen.

INTRODUCTION

On 23rd February 2022, the European Commission published a draft Corporate Sustainability Due Diligence Directive (Draft Directive).¹ Although, the Draft Directive still needs to go through the European Parliament and the European Council before it becomes binding.² However, if it passes legislative scrutiny and gets approved, it will create legal obligations for the EU companies as well as various global companies doing business in the EU over a specified threshold to conduct various environmental and human rights due diligence throughout their global supply chain.³ Though this Draft Directive has the potential to be a milestone in establishing the practice of sustainable and human rights due diligence globally, the success of this legal regime would require wider support and seamless compliance. This paper would thus focus on the potential compliance challenges for the companies as well as touch upon implementation challenges authorities may face. While doing so, the paper will examine similar laws with special emphasis on the French 'Duty of Vigilance' law of 2017 (Vigilance law) and the United Kingdom's Modern Slavery Act of 2015 (MSA) and what Draft Directive can learn from experiences of those laws. Deriving conclusions from the experiences of those similar due diligence laws, the paper will warn that obscurity in certain places in the text of the Draft Directive and not learning lessons from the experiences of MSA and

¹ “Just and Sustainable Economy: Commission Lays down Rules for Companies to Respect Human Rights and Environment in Global Value Chains.” *European Commission*. February 23, 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

² Ford, James, Johannes Weichbrodt, Libby Reynolds, Musonda Kapotwe, Peter Pears, and Sam Eastwood. “EU Publishes Draft Corporate Sustainability Due Diligence Directive.” *The Harvard Law School Forum on Corporate Governance*. March 15, 2022. <https://corpgov.law.harvard.edu/2022/03/15/eu-publishes-draft-corporate-sustainability-due-diligence-directive/>.

³ “European Commission Proposal for a Directive for Corporate Sustainability Due Diligence.” *Deloitte Netherlands*, April 6, 2022. <https://www2.deloitte.com/nl/nl/pages/risk/articles/european-commission-proposal-for-a-directive-for-corporate-sustainability-due-diligence.html>.

Vigilance Law may also create challenges for the seamless compliance with Draft Directive. The paper will conclude with recommendations on how the European Commission should incorporate the lessons learned throughout the journey of Human Rights Due Diligence (HRDD), as well as findings from other scholarships, into the Draft Directive. Moreover, the paper further illustrates various areas of the Draft Directive, which further research and scholarships could help strengthen.

METHODOLOGY AND LIMITATIONS

As the proposal for this EU-wide legislation came only in February 2022, and it is still going through EU-tripartite legislative process, there are very few available scholarships on the Draft Directive. Moreover, although some EU countries have passed their own due diligence in supply chain legislation in recent years, such as the 2021 German *Lieferkettensorgfaltspflichtengesetz* ('Supply Chain Law') that entered into force on January 2023,⁴ the impacts of those legislations still need to be seen. Thus, for comparative assessment, this paper will focus mainly on the French Vigilance Law and the UK's MSA. It is because these laws also have similar components, such as global supply chain assessment and threshold and other requirements as that of the Draft Directive. Moreover, since the MSA came into force in 2015 and the Vigilance Law came into force in 2017, there are comparatively more scholarships and data concerning these two laws compared to other similar supply chain laws. The research will depend primarily on library research, examining various primary and secondary sources. Moreover, in the lack of previous in-depth scholarships or data available to make implications on many specific requirements or provisions of the Draft

⁴Solomon, Erika. "German proposals for Supply Chain Law Spark Fierce Debate". *Financial Times*. July 19, 2020. <https://www.ft.com/content/07ea219f-160f-423a-a255-fc4968899260>

Directive, some of the comparisons in this paper may be too broader or may lack concrete symmetry.

THEORETICAL FRAMEWORK

Some legal scholars argue that, although legislative and regulatory efforts can create positive change, oftentimes, the complexity of the regulation itself undermines the regulations' potential impacts.⁵ They maintain that such complexity becomes too costly and difficult to work with for many companies and as a result become counterproductive.⁶ Moreover, scholars do agree that regulatory responses should nevertheless seek greater transparency about corporate conducts through legal reporting and other requirements and should enhance clarity and honesty by corporate actors.⁷ They argue that such legal requirements for corporations should allow shareholders and stakeholders to be confident about their investment in the company and should give them leverage to hold boards accountable.⁸ It is true that regulations seeking to cleanse global supply chains through reporting and due diligence obligations have the potential to create transparency in corporate conduct and contribute to a more just world. Nevertheless, as argued by some scholars, the complexity and vagueness of regulations may also threaten the regulations' potential righteousness.⁹ Thus, drawing comparative assessments with similar due diligence laws,

⁵ Villiers, Charlotte. "New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity." *European Journal of Risk Regulation* 13, no. 4 (2022): 548.

⁶ Ibid, 549.

⁷ Ibid, 553.

⁸ Ibid.

⁹ Ibid

this paper will warn how the existing obscurity in the language of the Draft Directive may undermine its potential impact by making it harder for companies to comply with it and authorities to enforce it. The paper will also briefly touch upon other legal scholarships that argue the benefits of ambiguity in regulations. In conclusion, the paper will insist that the Draft Directive strike a delicate balance between ambiguity and clarity in language to avoid challenges similar legislations have faced.

The proceeding part of this paper will discuss the historical backdrop of HRDD, the proposed legal framework of the Draft Directive, a comparison with the UK's MSA and the French Vigilance law, how those laws have faced challenges, and what lessons the Draft Directive can learn from those challenges. The paper will conclude by suggesting some of the areas where further research could strengthen the implementation of the Draft Directive.

HISTORICAL BACKDROP

Before embarking on a journey to elaborate on potential compliance challenges of the Draft Directive, it is important to give a brief historical backdrop of the HRDD movement. It is essential to give a brief historical overview because the current EU Draft Directive did not emerge out of thin air. However, throughout the last few years, there have been consistent efforts at the EU level to promote due diligence regimes in global supply chains that have finally become successful in taking the form of the Draft Directive. Moreover, the EU in itself has learned various lessons in the past in trying to adopt various due diligence legislations, which can be beneficial as the EU

embark on a journey to implement Draft Directive, and giving a historical backdrop may provide context and background for such discussions.

Many scholars have observed that the EU and its member states "have been the principal norms setters in the area of business and human rights in the last decade".¹⁰ Although there have been some attempts from the United Nations as well in incorporating HRDD in international law and establishing obligations for businesses to protect human rights, scholars agree that those attempts mostly played the role of creating soft law and setting the international standard for other similar due diligence initiatives to refer to.¹¹ For instance, the United Nations Human Rights Council in June 2011 adopted United Nations Guiding Principles on Business and Human Rights (UNGPs), which "restates the existing international law on business and human rights" and, as some scholars argue, has "established state obligations to protect right-holders against adverse corporate conduct" for the first time.¹² The UNGPs have continued to become a key international document that has not only influenced other international standards on HRDD but many argue have become the "global authoritative standard on business and human rights".¹³ Nonetheless, as many critics argue, these obligations under UNGPs are non-binding in nature, and given their lack of sufficient enforcement mechanisms in place, these obligations under the framework of the UN, remains mostly voluntary and "socially expected responsibility" for businesses.¹⁴ Therefore, as many scholars have observed, EU regulations are among the first binding laws on due diligence

¹⁰ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 1.

¹¹ McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* (2021): 456.

¹² Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 3.

¹³ McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* (2021): 456.

¹⁴ Ibid.

obligations for businesses and have "emerged as one of the standard-setters in the field of binding obligations of state and corporate actors in business and human rights".¹⁵

Scholars argue that the EU's attempt at international standard setting in business and human rights is not a novel project. They maintain that its history can be traced back to at least 1999 with the European Parliament's "Resolution on EU standards for European enterprises operating in the developing countries: towards a European Code of Conduct" (Resolution).¹⁶ This document notes that "the EU as the largest development aid donor, and European enterprises, as the largest direct investors in developing countries, can play a decisive role in global sustainable social and economic development".¹⁷ This Resolution highlights many incidences of human rights abuses in developing countries and stresses the EU's ability and responsibility to act.¹⁸

Many observers have noted that since this Resolution, the EU and its various organs have continued to develop multiple soft and hard law initiatives.¹⁹ From putting different obligations on businesses to conduct HRDD, such as reporting/disclosure obligations and supply chain management obligations, to supervision/auditing obligations, the EU has continued to lead and set international standards in the area of business and human rights.²⁰

¹⁵ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 12.

¹⁶ Ibid, 4.

¹⁷ "Resolution on EU Standards for European Enterprises Operating in Developing Countries towards a European Code of Conduct." *The European Parliament*. April 14, 1999. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A51998IP0508&from=EN>.

¹⁸ Ibid.

¹⁹ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 5.

²⁰ Ibid.

Another important EU initiative came in 2014 as the Non-Financial Reporting Directive.²¹ As per this Directive, businesses were asked and encouraged to report on how their businesses impact the environment, human rights, and sustainability.²²

The Directive clarifies that reporting should include a description of the business model, details about policies pursued by the businesses in relation to due diligence processes to minimize risks, any outcome of those policies, any further risks by business operations on the environment, human rights, and sustainability, among other obligations.²³ Under this Directive, corporations generally meet their obligations by attaching either a separate sustainability report along with their annual report or by adding non-financial indicators within their annual reports.²⁴

Currently, more than 11,000 EU corporations are within the purview of this Directive.²⁵ Various studies in recent years have confirmed that this Directive has shown positive results and has become mostly successful in meeting its objectives. For instance, researchers observing listed corporations in Poland have concluded that "mandatory non-financial regulations imposed by the Directive effectively motivated companies to improve their reporting as compared to a voluntary year".²⁶ Further, scholars also insist that this Directive was mostly "a testing ground for the

²¹ Ibid, 7.

²² Ibid, 7.

²³ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 7.

²⁴ Ibid, 8.

²⁵ Ibid, 7.

²⁶ Matuszak, Łukasz, and Ewa Różańska. "Towards 2014/95/EU directive compliance: the case of Poland." *Sustainability Accounting, Management and Policy Journal* 12, no. 5 (2021): 1052-1076.

imposition of due diligence on non-financial reporting obligations of businesses," and in that regard, it has mostly succeeded in meeting its goals.²⁷

Although the Non-Financial Reporting Directive mostly fell under the reporting/disclosure obligations, the first palpable EU's attempt to set binding obligations on businesses on their supply chain management emerged in the form of the EU Conflict Minerals and Metal Regulations (the Regulation). On May 17, 2017, the European Parliament and the Council of the European Union adopted the EU Conflict Mineral Regulation, which aimed to impose due diligence obligations for importers of minerals to the EU from conflict-prone areas of the world.²⁸ As the global trade in minerals and metals that originated from war-torn regions was linked to systematic human rights abuses, it generated international movement, mainly in the global North, for appropriate regulations of global supply chains of corporations that were involved in such trading.²⁹ The first regulatory attempt came in the form of the "Kimberley process," which was mainly an industry-wide voluntary initiative.³⁰ However, the European legislators felt a need for a more binding regulation with a proper enforcement mechanism which gave birth to this EU-wide regulation.³¹ Today, the Regulation sought to curb the supply of conflict minerals and metals from entering the EU market and set global industry standards in this domain.³² This Regulation is binding EU law, and as some scholars have noted, the Regulation has "emerged as one of the standard-setters in the field of binding obligations of state and corporate actors in the business and human rights."³³

²⁷ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 10.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 11.

³³ Ibid, 16.

Further, this Regulation has even more significance as, unlike the EU Non-Financial Reporting Directive, which only requires for reporting obligations, the Regulation also imposes on EU importers obligations to "effectively manage its supply chains, to identify real and potential risks, to disclose information, and to submit information and reports to third party audits".³⁴ Further, the Regulation requires the EU importers "to establish a grievance mechanism as an early-warning risk awareness system or provide such mechanism through collaborative arrangements with other economic operators or organizations".³⁵ The Regulation's goal for establishing such grievance obligation is not only to prevent but also to respond to any early stages human rights abuses.³⁶ Moreover, EU importers are required to "identify and assess the risks of adverse impacts in their mineral supply chain" and "implement a strategy to respond to the identified risks".³⁷ For identifying risks, the EU importers are obligated to work with direct and indirect suppliers and should consult these various stakeholders for "a strategy for a measurable risk mitigation in the risk management plan".³⁸ Furthermore, the Regulation also establishes rigorous external supervision of the EU importer's compliance and clarifies that they "should be controlled by the third party auditors".³⁹ Many scholars agree that the Regulation has served as a standard setter in

³⁴ Ibid, 12.

³⁵ "Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas." *Official Journal of the European Union*. May 17, 2017. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821>.

³⁶ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 13.

³⁷ "Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas." *Official Journal of the European Union*. May 17, 2017. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821>.

³⁸ Ibid.

³⁹ Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 13.

corporate due diligence not only in the EU but worldwide.⁴⁰ Although the Regulation, as well as the EU Non-Financial Reporting Directive, are still in their early days, their total impacts in cleansing the global supply chain remain to be seen.⁴¹ Nevertheless, they have still turned out to be a stepping stone for more comprehensive and rigorous EU-wide regulation in the domain of business and human rights, such as the proposed Draft Directive.

EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE: A BRIEF OVERVIEW

The main goal of the Draft Directive is to ensure that companies that are active participants in the EU market contribute towards the goal of international human rights promotion, sustainable development, and economic transition towards sustainability.⁴² These companies are anticipated to contribute to these goals "through the identification, prevention and mitigation, cessation and minimization of potential and actual adverse human rights and environmental impacts connected with companies' own operations, subsidiaries and value chain"⁴³.

The European Commission has estimated around 13,000 EU companies and around 4,000 third-country companies to fall within the scope of this proposed Directive.⁴⁴ These so-called in-scope

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² "European Commission (Finally) Proposes Mandatory Human Rights and Environmental Due Diligence Directive – a Deep Dive Q&A on the Commission Proposal." *Ropes & Gray*. October 28, 2022. <https://www.ropesgray.com/en/newsroom/alerts/2022/February/European-Commission-Finally-Proposes-Mandatory-Human-Rights>.

⁴³ Ibid.

⁴⁴ Ibid.

companies falling within the purview of the Draft Directive are categorized in terms of jurisdictions in which they are incorporated, annual revenue they generate, number of people they employ, and industry sectors in which they operate.⁴⁵ For instance, for a company forming within an EU Member State, the Draft Directive will apply if the company employs more than 500 employees and generate a net worldwide turnover of more than 150 million euros.⁴⁶ However, if an EU company is generating a net worldwide turnover of more than 40 million Euros but if at least 50 percent of the net worldwide turnover is generated in specified high-risk sectors such as textiles, forestry, and mining, then those companies also fall within the purview of the Draft Directive.⁴⁷ Moreover, for non-EU companies, an employee test will not apply.⁴⁸ However, the Draft Directive will apply if they generate a net turnover of more than 150 million euros in the EU.⁴⁹ Nevertheless, they also fall within the scope of the Draft Directive if they generate net turnover between 40 million to 150 million Euros in the EU, but at least 50 percent of their net worldwide turnover was generated in specified high-risk sectors.⁵⁰

The Draft Directive defines adverse human rights impact as an adverse impact on a protected person that results from the breach of rights or prohibition in accordance with various international human rights instruments such as the right to life and security and prohibition of torture or cruel, inhuman or degrading treatment along with dozens of other similar rights or prohibition instruments.⁵¹ Similarly, the Draft Directive defines adverse environmental impacts as the harms

⁴⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937.” *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> .

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

inflicted on the environment as a result of breaching of environmental conventions such as pertaining to biological diversity and endangered species, exporting and importing hazardous waste among others.⁵² Companies are expected to cease their adverse impacts and the adverse impacts resulting from the activities of their subsidiaries.⁵³ Furthermore, companies should make efforts to minimize adverse impacts from those entities with which companies have established business relationships.⁵⁴

If the Draft Directive passes the EU's tripartite legislative process--that is, reaching a consensus from the European Commission, European Parliament, and the European Council-- then the EU's member states would be required to transpose the provisions outlined in the Draft Directive into their respective national laws.⁵⁵ Once adopted, member states will have two years to transpose the provision into their national laws.⁵⁶ As per the provision, the large EU and non-EU entities should comply within two years after the Directive enters into force, while moderate size entities with net turnover between 40 million Euros to 150 million Euros will enjoy an additional two years period until they must comply.⁵⁷

Besides, on the climate change front, companies are required to ensure that their business model and decision are in alignment to transition to a sustainable economy "with limiting global warming to 1.5 degrees Celsius in line with the Paris Agreement".⁵⁸ The Draft Directive clarifies that for the purpose of fulfilling climate change-related obligations, the company would be required to link

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

directors' compensation to their contribution to setting companies' business strategy compatible with sustainability.⁵⁹ Moreover, company directors, while acting in the best interest of their company, are also required to take consequences of their business decisions into sustainability, climate change, and applicable human rights matters.⁶⁰ The Draft Directive requires member states to ensure that company directors also abide by their human rights and sustainability duties as outlined.⁶¹

Moreover, the Draft Directive requires member states to designate one or more supervisory authorities whose goal shall be to supervise companies for compliance with the due diligence and climate change-related obligations adopted under national law to satisfy under the Directive.⁶² The Draft Directive further outlines details about adequate powers and resources member states supervisory authorities should possess to conduct their jobs.⁶³ Moreover, for the sanctions for violations of obligations, member states would be required to establish rules on sanctions that are effective, proportionate, and dissuasive.⁶⁴ The proposed regulation clarifies that pecuniary sanctions should be based on companies' turnover.⁶⁵ Nevertheless, the Draft Directive also allows the national supervisory authorities to allow companies to be given an appropriate period to take remedial action.⁶⁶ However, it also makes it clear that any such remedial action would not preclude a supervisory authority from the "imposition of administrative sanctions or the triggering of civil liability in case of damages".⁶⁷

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

As we can see from the content of the Draft Directive, some of the provisions have evolved from the previous similar EU regulations, such as the EU Non-Financial Reporting Directive and EU Conflict Mineral Regulation. The next chapter will compare the Draft Directive with similar enacted laws, such as the French Vigilance Law and the UK's MSA.

A BRIEF COMPARATIVE ASSESSMENT WITH THE FRENCH VIGILANCE LAW AND THE UK'S MSA

The Draft Directive shares similar features with the French Vigilance Law and the UK's MSA in that all these three regulations were created with the goal of due diligence in a global supply chain, and all these regulations have extraterritorial components. However, these three regulations still have some very fundamental differences. This chapter will briefly introduce the French Vigilance Law and the UK's MSA and briefly demonstrate how these two laws have faced implementation obstacles in the past and how the EU's Draft Directive should learn from the lessons from the shortcomings that these two similar laws are still facing.

In 2017, France enacted its own supply chain law called the Vigilance Law.⁶⁸ As per this law, businesses are required to incorporate vigilance plans into their business strategies which include "reasonable vigilance measures to adequately identify risks and prevent serious violations of

⁶⁸ McGaughey, Fiona, Hinrich Voss, Holly Cullen, and Matthew C. Davis. "Corporate responses to tackling modern slavery: a comparative analysis of Australia, France and the United Kingdom." *Business and Human Rights Journal* 7, no. 2 (2022): 257.

human rights and fundamental freedoms, risks to serious harms to health and safety and the environment".⁶⁹ Considering the extraterritorial jurisdiction of this law, it also outlines provisions through which victims, who are even based out of France's territory, can bring a civil action for remedies at French courts.⁷⁰ Many scholars have heralded this law as "the best known and most far reaching" due diligence law to be enacted and implemented.⁷¹

However, in its comparatively shorter life, this new French law has already faced many hurdles. One of the hurdles that the Vigilance Law is currently facing is a lack of clarity on terms such as an "established commercial relationship" and what constitutes an established relationship for the purpose of the Vigilance Law.⁷² Legal scholars point out that in the lack of statutory clarity on established business relationships, many entities have wrongly ranked various subcontractors with regards to a company's value chain.⁷³

Although, as per scholars, the EU's Draft Directive has imported the terminology "established business relationship" from the Vigilance Law, it repeats the mistake of Vigilance Law by failing to clearly define what constitutes an established business relationship.⁷⁴ Scholars such as Christopher Patz have argued that although "the Commission has attempted more clarity by proposing that 'established' cover both direct (contractual) and indirect (non-contractual) relationships--which are—or are expected to be—'lasting' in view of their intensity or duration,

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Savourey, Elsa, and Stéphane Brabant. "The French law on the duty of vigilance: Theoretical and practical challenges since its adoption." *Business and Human Rights Journal* 6, no. 1 (2021): 141.

⁷² Ibid, 145.

⁷³ Ibid.

⁷⁴ Patz, Christopher. "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment." *Business and Human Rights Journal* 7, no. 2 (2022): 291-297.

and which do not ‘represent a negligible or merely ancillary part of the chain’”, “a definitive definition is still pending”.⁷⁵ Patz implies that the current text of the Draft Directive in regards to “established business relationship” is obscure by raising questions such as, “what level of intensity or duration of time is needed for a relationship to qualify as ‘established?’”⁷⁶ Patz further predicts that, in the lack of a clear definition of “established business relationship”, businesses, after doing cost/benefit analysis, may “restructure their existing ‘established’ sourcing relationships into a myriad of shorter, fewer and less ‘intense’ ones” with a motive of avoiding obligations and liabilities.⁷⁷ Thus, not learning from the shortcomings of the Vigilance Law, and importing obscure languages such as “established business relationship” without properly defining it, will most likely also create compliance and implementation challenges for the Draft Directive as it has for the Vigilance Law.

Further, in 2015, the United Kingdom introduced Modern Slavery Act as a result of domestic pressure to take action to end various forms of modern-day slavery and as a response to “international anti-slavery activism through new abolitionist discourse”.⁷⁸ This law provides for protection for victims, the establishment of an anti-slavery commissioner, and business reporting obligation, among other obligations for businesses.⁷⁹ This law was created in consultation with relevant stakeholders with the hope that regular business reporting would create transparency in businesses and assist businesses in eradicating modern slavery from their business operations.⁸⁰

⁷⁵ Ibid, 291.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ McGaughey, Fiona, Hinrich Voss, Holly Cullen, and Matthew C. Davis. "Corporate responses to tackling modern slavery: a comparative analysis of Australia, France and the United Kingdom." *Business and Human Rights Journal* 7, no. 2 (2022): 256.

⁷⁹ Ibid, 255.

⁸⁰ Ibid.

The MSA is similar to the Draft Directive in a way that both of these regulations have similar provisions. For instance, MSA applies to companies that have annual revenue exceeding 36 million Pounds and are active participants in the UK's market through the supply of either goods or services.⁸¹ The Act requires those businesses within the purview of the MSA to prepare and publish slavery and human trafficking statements in every financial year and put those statements "in a prominent position on their homepage" of their website.⁸² The statement, among other things, should explain steps businesses have taken to ensure that slavery or human trafficking is not taking place in any of businesses' supply chains.⁸³ Further, the Act requires such statements should be approved by a senior official of the business.⁸⁴ Finally, the Act also includes provisions for civil enforcement for non-compliance.⁸⁵

Many critics of this Act have pointed out that beyond the requirement for preparing such statements and publishing them annually, there are very few mandatory provisions that the Act requires regarding details on what the statements should include.⁸⁶ Moreover, the main shortcomings of the MSA, as pointed out by many legal scholars, is that the MSA does not clearly define the term "supply chain," thus "leaving the definition open to interpretation regarding scope".⁸⁷

⁸¹ Ibid, 256.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

The EU's Draft Directive has again failed to learn from the MSA's shortcomings by not clearly defining the supply chain and its scope. Although, the Draft Directive attempts to define supply chain as a company's own operations, its subsidiaries, and their value chains,⁸⁸ the fact that the Draft Directive does not provide "a definitive definition" on what is "established business relationship", the current legal provision of the Draft Directive is not very clear on what constitutes the supply chain.⁸⁹ On the other hand, some of the recent legal scholarships argue that the lack of clarity on what constitutes a company's supply chain is a principal obstacle in conducting human rights due diligence in global supply chains.⁹⁰ For instance, legal scholars have argued that many companies are already struggling to define their supply chain for the purposes of HRDD, and not having legal clarity will further exacerbate companies' compliance with due diligence laws.⁹¹

OTHER OBSCURE LANGUAGES IN DRAFT DIRECTIVE

For a company registered within an EU member state, the Draft Directive applies only to companies with headcounts of more than 500 employees worldwide and a net turnover of more than 150 million euros worldwide.⁹² This threshold requirement is similar to that of Vigilance law. The legal text of the Vigilance Law also states that it applies only to companies registered in France

⁸⁸ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937." *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

⁸⁹ Patz, Christopher. "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment." *Business and Human Rights Journal* 7, no. 2 (2022): 291-297.

⁹⁰ Smit, Lise, Gabrielle Holly, Robert McCorquodale, and Stuart Neely. "Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard." *The International Journal of Human Rights* 25, no. 6 (2021): 945-973.

⁹¹ *Ibid*, 949.

⁹² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937." *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

with employee headcount over a given threshold.⁹³ However, legal scholars argue that such information about a company is not "systematically public and easily identifiable" and that merger, acquisition, and other corporate restructurings further complicate the identification of such companies.⁹⁴ Many French NGOs working in corporate accountability have long struggled to create a comprehensive list of companies falling within the scope of the Vigilance Law.⁹⁵ After long protests from NGO groups asking the government to disclose the list of such companies, the French Government in May 2019 tasked senior public servants to establish such a list.⁹⁶ However, in February 2020, the government report concluded, "it is impossible to establish a reliable list of the companies concerned."⁹⁷

How will the Draft Directive create an exhaustive list of companies that will fall under the proposed supply chain law as the Draft Directive also has similar threshold provision? Although Article 18 of the Draft Directives proposes that EU Member States should designate supervisory authorities "with powers to request information and carry out investigation" of companies⁹⁸, the actual impacts of this provision still need to be tested.

Moreover, to discover risks and adverse impacts, the Draft Directive asks that companies consult with "potentially affected stakeholders," but only when companies determine that such

⁹³ Savourey, Elsa, and Stéphane Brabant. "The French law on the duty of vigilance: Theoretical and practical challenges since its adoption." *Business and Human Rights Journal* 6, no. 1 (2021): 141-152.

⁹⁴ *Ibid.*, 142.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, 143.

⁹⁷ *Ibid.*

⁹⁸ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937." *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>

consultation is relevant.⁹⁹ Scholars such as Patz insist that the Draft Directive does not guide how companies should conduct such consultation thereby creates uncertainty.¹⁰⁰

Furthermore, the Draft Directive under Article 25 mandates company 'Director's Duty of care' and asks that company directors, while fulfilling their duty to act in the best interest of their company, should take into account "the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences".¹⁰¹ Moreover, to incentivize company directors to incorporate sustainability goals with corporate strategies, Draft Directive asks companies to tie directors' remuneration with their contribution towards reaching the sustainability goal.¹⁰² The exact wordings of the text say, "with a view to ensure that such emission reduction plan is properly implemented and embedded in the financial incentives of directors, the plan should be duly taken into account when setting directors' variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability."¹⁰³ Many legal experts have argued that this provision that asks for the determination of executive compensation of a private company is a "significant encroachment" of corporate governance that impacts not just EU companies but also non-EU companies.¹⁰⁴ However, what is more concerning is the obscurity of this provision of the Draft Directive. The provision is obscure and may create challenges for smooth compliance and

⁹⁹ Patz, Christopher. "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment." *Business and Human Rights Journal* 7, no. 2 (2022): 295.

¹⁰⁰ Ibid.

¹⁰¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937." *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Allen Campbell, JD. "European value chain legislation marches on". *The CPA Journal*. September 30, 2022. <https://www.cpajournal.com/2022/09/30/european-value-chain-legislation-marches-on/>

enforcement because the text is not clear on mechanisms regarding how exactly the authorities will determine what the current total compensation of a director is, especially that of non-EU companies, and what legal tools they have at their disposal to employ if authorities would conclude that a director's effort is not enough to meet company's emission reduction targets.

Many legal scholars have also argued against such vagueness. For instance, in an article, legal scholars Federica Agostini and Michele Corgtelli also point to the vagueness of Article 25.¹⁰⁵ They state that "the notion of directors is broadly defined and includes different limited liability forms, one and two tier board systems, and also entities which functionally and not formally serve as a managerial position like CFO".¹⁰⁶ Agostini and Corgtelli also make a comparative assessment of Article 25 of the Draft Directive with section 172 of the United Kingdom Companies Act 2006 (Section 172).¹⁰⁷ Just like Article 25 that specifies a list of consequences that directors should consider while acting in the best interest of the company, Section 172 also codifies a list of duties directors must consider while promoting the success of the company.¹⁰⁸ For instance, Section 172 states that "a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefits of its members as a whole, and in doing so have regards (amongst other matters)...the impact of the company's operations on the community and the environment".¹⁰⁹

¹⁰⁵ Corgatelli, Michele, and Federica Agostini. "Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?." *European Company Law* 19, no. 4 (2022).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

Nevertheless, legal scholars argue that since the formulation of text in Section 172 is vague, such as “it fails to clarify what the interest of the company is”, the law has not become very successful in meeting its goal.¹¹⁰ In addition, legal scholars also point to the lack of enforcement mechanisms for stakeholders as the main weakness of Section 172.¹¹¹ They argue that “shareholders, and not the other stakeholders are the ‘proper claimants’ empowered to bring a derivative claim for breach of director’s duties”.¹¹² Moreover, there has only been one unsuccessful claim in the UK under Section 172 for environmental reasons where an NGO brought a claim in its capacity as a shareholder.¹¹³ In this case, the director’s duty is “predominantly interpreted as subjective”. Thus, providing lessons from the experience of Section 172, Agostini and Corgtelli, in their article, also conclude that due to vague formulation in Draft Directive, “the current wording of the proposal will have very little effect on the law of Member States concerning the enforcement of director’s duties”.¹¹⁴

CONCLUDING REMARKS AND RECOMMENDATIONS FOR FURTHER RESEARCH:

The paper has shown evidence of how in the hand of obscure languages, prior due diligence laws such as Vigilance Law and the MSA have suffered. Thus, conventional wisdom would be to recommend that European legislators refrain from allowing obscure languages and vagueness in the Draft Directive and ask European legislators to provide clear statutory guidance to avoid

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

unnecessary uncertainty. However, we need to understand that the laws do not exist in black and white but mostly in “shades of grey”.¹¹⁵ Although, through various examples, this paper has illustrated that obscurity in the legal texts undermines regulations' potential impact, one should not also diminish the fact that vagueness in language often assists in the enforcement of the law as well. Moreover, legal scholars also argue that vagueness in the language of legal texts often provides flexibility "necessary to allow for the modification of legal requirements over time in light of new information".¹¹⁶

On the other hand, legislations also have to be clear and steadfast to maintain the stability of the law.¹¹⁷ We have seen from the prior European due diligence legislation itself how too much flexibility in a regulation hinders its impacts.¹¹⁸ For instance, legal scholars have demonstrated how European Union’s Renewable Energy Directive and Timber Regulation was unable to prevent deforestation in the Democratic Republic of Congo and Indonesia, and scholars blame ambiguity and flexibility in regulation for “no effective sanctioning” and thus compliance deficit.¹¹⁹

One solution would be taking a middle way, and that is precisely what scholars like Charlotte Villiers argue as well.¹²⁰ Villiers maintains that one of the challenges for the EU due diligence

¹¹⁵ Ellis, Jaye. "Shades of grey: Soft law and the validity of public international law." *Leiden Journal of International Law* 25, no. 2 (2012): 313-334.

¹¹⁶ Villiers, Charlotte. "New Directions in the European Union’s Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity." *European Journal of Risk Regulation* 13, no. 4 (2022): 564

¹¹⁷ *Ibid.*

¹¹⁸ Partzsch, Lena, Lukas Maximilian Müller, and Anne-Kathrin Sacherer. "Can supply chain laws prevent deforestation in the Democratic Republic of the Congo and Indonesia?." *Forest Policy and Economics* 148 (2023).

¹¹⁹ *Ibid.*

¹²⁰ Villiers, Charlotte. "New Directions in the European Union’s Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity." *European Journal of Risk Regulation* 13, no. 4 (2022): 564

legislation "is to develop a legal framework that is both flexible in certain respects and steadfast in others".¹²¹ Villers goes on to argue that for the effectiveness of due diligence legislation, "it is necessary to distinguish the redundancies that are inefficient and those that are constructive and reinforcing".¹²² In the spirit of Villiers' argument, to avoid potential challenges arising from the ambiguity of the languages that the similar provisions of other due diligence legislations are currently facing, the Draft Directive should strike a balance that is "flexible in certain respects and steadfast in other".¹²³ What such a middle way and balance might look like is a topic for yet another research.

Nevertheless, for some of the challenges illustrated in this paper concerning similar provisions of other due diligence laws, the Draft Directive might not face as many difficulties as these other regulations are currently facing due to provisions in Article 17.¹²⁴ Article 17 provides for "Supervisory Authorities" having "adequate powers and resources...to request information and carry out investigations related to compliance with the obligations set out" in the Draft Directive.¹²⁵ Moreover, Article 21 of the Draft Directive also provides for the "European Network of Supervisory Authorities" with a motive of facilitating the cooperation of the supervisory authorities, appropriate sharing of information, and coordinating efforts to find a solution.¹²⁶ However, one cannot still conclude with complete certainty that this provision will work fully as the actual impacts of this provision still need to be tested in the context of human rights and

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937." *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>

¹²⁵ Ibid.

¹²⁶ Ibid.

environmental due diligence. The Draft Directive will benefit from any future research on this domain.

In addition, as a solution to potential compliance challenges arising from obscure languages, Article 13 of the Draft Directive provides that the Commission has the power to issue further guidelines.¹²⁷ The actual wording of Article 13 reads, "in order to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations, the Commission, in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, and where appropriate with international bodies having expertise in due diligence, may issue guidelines, including for specific sectors or specific adverse impacts."¹²⁸ However, pursuing such a route may create bureaucratic delays, requiring consultation with member states and relevant stakeholders. The European legislators should thus be mindful and have appropriate procedures in place to ensure that going through such a provision does not create unnecessary bureaucratic delays.

Nevertheless, this research has raised more questions on the Draft Directive than it has been able to propose solutions or provide answers. For instance, this paper illustrates how similar due diligence laws have struggled with the lack of clarity on terms such as "supply chain" and "established commercial relationships". As a solution to these issues, some legal scholars have recommended shortening of supply chains that would allow effective monitoring.¹²⁹ Many

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Villiers, Charlotte. "New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity." *European Journal of Risk Regulation* 13, no. 4 (2022): 562

research have shown that "the long, complex supply chains of the world's leading multinational companies hide environmental and social costs in hundreds of thousands of locations all around the world, which hampers transparency and accountability".¹³⁰ Is there a way EU legislators can create incentives for companies to shorten their supply chain through introducing some new provisions in the Draft Directive? Future research on Draft Directives should explore the answers to this question.

Moreover, while discussing incentives, the experience of the EU Directive on Non-Financial Information has shown that companies can be incentivized better through rewards than with fines.¹³¹ Nevertheless, research conducted on HRDD, commissioned by the European Commission, shows that businesses already overwhelmingly support EU-wide mandatory HRDD legislation because, from the businesses' perspective, such an EU-wide legislation would provide "a single harmonized EU-level standard".¹³² In addition, for businesses, such EU-wide legislation can also provide legal certainty, coherence, consistency, and a level playing field.¹³³ How can EU legislators embed these incentives and include businesses in successfully implementing the Draft Directive? This can also be a topic of another research.

¹³⁰ Schilling-Vacaflor, Almut, and Andrea Lenschow. "Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges." *Regulation & Governance* (2021).

¹³¹ Mio, Chiara, Marco Fasan, Carlo Marcon, and Silvia Panfilo. "Carrot or stick? An empirical analysis of the different implementation strategies of the EU directive on nonfinancial information across Europe." *Corporate social responsibility and environmental management* 28, no. 6 (2021): 1591-1605.

¹³² McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* (2021): 455-478

¹³³ *Ibid*, 464.

Additionally, another shortcoming of the Draft Directive in its current form is that currently, the proposal would only apply to less than 0.2% of EU companies.¹³⁴ Many legal scholars are not happy with this provision as they have argued that leaving out SMEs means those SMEs could engage in riskier activities.¹³⁵ NGOs working in corporate accountability also argue that “by restricting the scope so dramatically, the proposal willfully ignores many harmful business operations”.¹³⁶ One solution to this problem would be to have a provision where SMEs can also abide by the obligations of the Draft Directive on a voluntary basis. What should the specifics of those voluntary provisions look like, and how can the EU incentivize SMEs to voluntarily oblige with the Draft Directive? This can be a topic of yet another research.

Finally, many legal scholars have also contended that although the Draft Directive gives foreign victims of corporate wrongdoing an opportunity to access EU courts, it does not make it easier for foreign plaintiffs to bring cases against large corporations in EU courts.¹³⁷ Scholars such as Mark Kawakami assert that the Draft Directive “does not give plaintiffs any increased access to necessary evidence that would help them substantiate their claim” that corporate malfeasance inflicted the harm, nor does it shift the preliminary burden of proof on companies for them to prove that they did nothing wrong.¹³⁸ Kawakami further insists that “although the establishment of a

¹³⁴ Kawakami, Mark. “Don’t Sweat the Small Stuff? The New Proposal for the EU Directive on Corporate Sustainability Due Diligence.” *Maastricht University* (2022).
<https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due>

¹³⁵ Villiers, Charlotte. “New Directions in the European Union’s Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity.” *European Journal of Risk Regulation* 13, no. 4 (2022): 561.

¹³⁶ Kawakami, Mark. “Don’t Sweat the Small Stuff? The New Proposal for the EU Directive on Corporate Sustainability Due Diligence.” *Maastricht University* (2022).
<https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due>

¹³⁷ Ibid.

¹³⁸ Ibid.

supervisory authority...could contribute to plaintiff making their case in subsequent civil suits", the Draft Directive does not make it clear whether such information obtained by supervisory authority can be disclosed or shared with foreign plaintiffs.¹³⁹ Many prior legal scholarships on extraterritorial human rights duties of corporations have explored many such practical challenges emerging in such transnational cases, mainly covering lawsuits from the United States and the United Kingdom, and as Kawakami has argued, those scholarships also often point to "structural asymmetries in information placing the claimants from countries in the Global South, often belonging to marginalized groups, at a disadvantage in proving their cases".¹⁴⁰ What can EU legislators learn from those practical challenges in other jurisdictions and embed those lessons in the Draft Directive? The future scholarships exploring these questions may inform EU legislators and potentially benefit in the implementation of Draft Directive.

To conclude, as scholars have attested, in weighing the good and the bad of the Draft Directive, it is more prudent to celebrate all the good that this proposed EU legislation has,¹⁴¹ as the goodness of the Draft Directive has the potential to be a milestone in establishing a higher standard in global due diligence laws. Moreover, scholars such as Chantal Mak also conclude that "due diligence laws may not hold all the answers but they may inspire new ways of seeing the role of law in developing sustainable business practices",¹⁴² and in that regards, the Draft Directive, as it

¹³⁹ Ibid.

¹⁴⁰ Schilling-Vacaflor, Almut, and Andrea Lenschow. "Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges." *Regulation & Governance* (2021).

¹⁴¹ Kawakami, Mark. "Don't Sweat the Small Stuff? The New Proposal for the EU Directive on Corporate Sustainability Due Diligence." *Maastricht University* (2022).
<https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due>

¹⁴² Mak, Chantal. "Corporate sustainability due diligence: More than ticking the boxes?." *Maastricht Journal of European and Comparative Law* 29, no. 3 (2022): 301-303.

currently stands, holds so much potential. However, the Draft Directive should still not ignore some of the compliance challenges that similar due diligence laws are facing as a result of vague and obscure languages. It should learn from the experiences of those similar laws and should try to find a middle way where the language is not too obscure to create compliance challenges nor too clear that it will face challenges in enforcement. The continuous refinement of the Draft Directive informed by various rigorous scholarships will assist in the success of this proposed EU legislation, which may go a long way in setting a global standard for future due diligence legislation.

BIBLIOGRAPHY

Allen Campbell, JD. "European value chain legislation marches on". *The CPA Journal*. September 30, 2022. <https://www.cpajournal.com/2022/09/30/european-value-chain-legislation-marches-on/>

Cernic, Jernej Letnar. "The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality." *The Global Business Law Review* 10 (2022): 1.

Corgatelli, Michele, and Federica Agostini. "Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?." *European Company Law* 19, no. 4 (2022).

Ellis, Jaye. "Shades of grey: Soft law and the validity of public international law." *Leiden Journal of International Law* 25, no. 2 (2012): 313-334.

Villiers, Charlotte. "New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity." *European Journal of Risk Regulation* 13, no. 4 (2022): 548-566.

"European Commission (Finally) Proposes Mandatory Human Rights and Environmental Due Diligence Directive – a Deep Dive Q&A on the Commission Proposal." *Ropes & Gray*. October 28, 2022. <https://www.ropesgray.com/en/newsroom/alerts/2022/February/European-Commission-Finally-Proposes-Mandatory-Human-Rights>

"European Commission Proposal for a Directive for Corporate Sustainability Due Diligence." *Deloitte Netherlands*, April 6, 2022. <https://www2.deloitte.com/nl/nl/pages/risk/articles/european-commission-proposal-for-a-directive-for-corporate-sustainability-due-diligence.html>.

Ford, James, Johannes Weichbrodt, Libby Reynolds, Musonda Kapotwe, Peter Pears, and Sam Eastwood. "EU Publishes Draft Corporate Sustainability Due Diligence Directive." *The Harvard Law School Forum on Corporate Governance*. March 15, 2022. <https://corpgov.law.harvard.edu/2022/03/15/eu-publishes-draft-corporate-sustainability-due-diligence-directive/>.

“Just and Sustainable Economy: Commission Lays down Rules for Companies to Respect Human Rights and Environment in Global Value Chains.” *European Commission*. February 23, 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

Kawakami, Mark. "Don't Sweat the Small Stuff? The New Proposal for the EU Directive on Corporate Sustainability Due Diligence." *Maastricht University*(2022).<https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due>

Mak, Chantal. "Corporate sustainability due diligence: More than ticking the boxes?." *Maastricht Journal of European and Comparative Law* 29, no. 3 (2022): 301-303.

Matuszak, Łukasz, and Ewa Róžańska. "Towards 2014/95/EU directive compliance: the case of Poland." *Sustainability Accounting, Management and Policy Journal* 12, no. 5 (2021): 1052-1076.

McGaughey, Fiona, Hinrich Voss, Holly Cullen, and Matthew C. Davis. "Corporate responses to tackling modern slavery: a comparative analysis of Australia, France and the United Kingdom." *Business and Human Rights Journal* 7, no. 2 (2022): 249-270.

McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* (2021): 1-24.

Mio, Chiara, Marco Fasan, Carlo Marcon, and Silvia Panfilo. "Carrot or stick? An empirical analysis of the different implementation strategies of the EU directive on nonfinancial information across Europe." *Corporate social responsibility and environmental management* 28, no. 6 (2021): 1591-1605.

Patz, Christopher. "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment." *Business and Human Rights Journal* 7, no. 2 (2022): 291-297.

Partzsch, Lena, Lukas Maximilian Müller, and Anne-Kathrin Sacherer. "Can supply chain laws prevent deforestation in the Democratic Republic of the Congo and Indonesia?." *Forest Policy and Economics* 148 (2023).

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937.” *European Commission*. February 23, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> .

“Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk

Areas.” *Official Journal of the European Union*. May 17, 2017. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821>.

Resolution on EU Standards for European Enterprises Operating in Developing Countries towards a European Code of Conduct.” *The European Parliament*. April 14, 1999. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A51998IP0508&from=EN>.

Savourey, Elsa, and Stéphane Brabant. "The French law on the duty of vigilance: Theoretical and practical challenges since its adoption." *Business and Human Rights Journal* 6, no. 1 (2021): 141-152.

Schilling-Vacaflor, Almut, and Andrea Lenschow. "Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges." *Regulation & Governance* (2021).

Smit, Lise, Gabrielle Holly, Robert McCorquodale, and Stuart Neely. "Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard." *The International Journal of Human Rights* 25, no. 6 (2021): 945-973.

Solomon, Erika. "German proposals for Supply Chain Law Spark Fierce Debate". *Financial Times*. July 19, 2020. <https://www.ft.com/content/07ea219f-160f-423a-a255-fc4968899260>

Villiers, Charlotte. "New Directions in the European Union’s Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity." *European Journal of Risk Regulation* 13, no. 4 (2022): 548-566.