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The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality

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THE HUMAN RIGHTS DUE DILIGENCE STANDARD-SETTING IN THE EUROPEAN UNION: BRIDGING THE GAP BETWEEN AMBITION AND REALITY

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Abstract

Globalization has, over the past decades, erased borders between continents and countries. It has propelled international trade to previously unforeseen heights. Nonetheless, it has brought about not only positive impact, but also negative consequences for individuals and communities worldwide. Businesses have often been alleged to have been directly or indirectly involved in human rights violations. On the other hand, rights-holders have often found it difficult to enforce corporate human rights obligations and accountability either at home or abroad. Nonetheless, the field of business and human rights has in recent years witnessed seminal developments from the adoption of binding laws in the domestic system to the advancement of negotiations on the potential UN Treaty on Business and Human Rights. This article portrays and examines the Business and Human Rights Due Diligence Standard-Setting in the European Union. First, it describes and analyses the EU Non-Financial Reporting Directive, which obliges larger corporations to annually submit reports on compliance with the non-financial indicators. Secondly, it describes and comments on the supply chain due diligence obligations under the EU Conflict Mineral Regulation. Thirdly, it discusses recent developments within the European Union to develop and adopt the potential general Directive on Corporate Accountability and Due Diligence, which promises to impose due diligence human rights obligations on all businesses. All in all, the EU's objectives for socio-economic development rest on sustainability, green economy, and digitalization. For the EU and its Member States to achieve those goals, the private sector and businesses need to subscribe to those non-financial indicators. Finally, this article argues that the binding legislation within the EU and its Member States on human rights due diligence in the global business supply chain will provide impetus for regulation in other regions and domestic legal systems.

Keywords: European Union, business and human rights, due diligence supply chains, corporate accountability

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I. Backdrop

Business and Human Rights is an interdisciplinary area that argues that businesses, states, and individuals have human rights obligations and could be accountable for business-related human rights abuses.[2] It is a concept that establishes legal obligations and accountability for corporations to observe human rights.[3] Rights-holders have been, in many contexts, left without

[2] See, for example, SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS, LONDON/NEW YORK: ROUTLEDGE, 2012; SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION, HART PUBLISHING, 2004; DAVID JASON KARP, RESPONSIBILITY FOR HUMAN RIGHTS — TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES, CAMBRIDGE UNIVERSITY PRESS, 2014, DALIA PALOMBO, BUSINESS AND HUMAN RIGHTS — THE OBLIGATIONS OF THE EUROPEAN HOME STATES, HART PUBLISHING, 2020. David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?', 12 SUR – INTERNATIONAL JOURNAL OF HUMAN RIGHTS 199 (2010). Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises, BUSINESS AND HUMAN RIGHTS JOURNAL, 2017, 2(2), 195-224. NICOLÁS CARRILLO SANTARELLI, NECESSITY AND POSSIBILITIES OF THE INTERNATIONAL PROTECTION OF HUMAN DIGNITY FROM NON-STATE VIOLATIONS, PHD THESIS, UNIVERSIDAD AUTÓNOMA DE MADRID, 2013. ANDRÉS FELIPE LÓPEZ LATORRE AF (2020) IN DEFENCE OF DIRECT OBLIGATIONS FOR BUSINESSES UNDER INTERNATIONAL HUMAN RIGHTS LAW. BUSINESS AND HUMAN RIGHTS JOURNAL 5(1):56-83; JERNEJ LETNAR ČERNIČ, CORPORATE ACCOUNTABILITY UNDER SOCIO-ECONOMIC RIGHTS, (TRANSNATIONAL LAW AND GOVERNANCE). OXON; NEW YORK: ROUTLEDGE, 2019.

[3] See, for instance, Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility (2001) 111, YALE LAW JOURNAL; Carlos M. Vasquez, Direct vs. Indirect Obligations of Corporations under International Law (2005) 43, COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 927; David Kinley and Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law (2004) 44, VIRGINIA JOURNAL OF INTERNATIONAL LAW, 931. HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN *RIGHTS* (JERNEJ LETNAR ČERNIČ AND TARA VAN HO, 2015), 27-49; BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE (DOROTHÉE BAUMANN-PAULY, JUSTINE NOLAN (EDS) 2016).

recourse to any form of justice, either judicial, quasi-judicial, or non-binding. The United Nations Human Rights Council in June 2011 adopted the United Nations Guiding Principles on Business and Human Rights (UNGPs), which are the soft-law international law standard that restates the existing international law on business and human rights.[4] The UNGPs first established state obligations to protect rights-holders against adverse corporate conduct.[5] Nonetheless, the UNGPs are not of directly binding nature, but they can be described as soft-law documents.[6] Second, they submit that corporations are obligated to respect human rights, including taking necessary steps such as due diligence to ensure respect. Third, they argue that states and companies should grant rights-holders access to justice. Given the non-binding nature of the UNGPs and their lack of enforcement, civil society has been arguing for the adoption of the binding UN Business and Human Rights Treaty.[7] The six rounds of negotiations on the

[4] John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (7 April 2008).

[5] Larry Catá Backer, Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All (2015) FORDHAM INTERNATIONAL LAW JOURNAL 38, pp. 457-542;

[6] JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, NEW YORK: W.W. NORTON & CO. (2013); John G. Ruggie, Business and Human Rights: The Evolving Agenda, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 819 (2004); Jena Martin Amerson, The End of the Beginning? A Comprehensive Look at the Business and Human Rights Agenda from a Bystander Perspective', 17 FORDHAM JOURNAL OF CORPORATE AND FINANCE LAW 871 (2012); David Bilchitz, The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?, 12 SUR – INTERNATIONAL JOURNAL OF HUMAN RIGHTS 199 (2010).; Susan Ariel Aaronson and Ian Higham, "Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' 35 HUMAN RIGHTS QUARTERLY 333 (2013). David Birchall, 'Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights' UNIVERSITY OF OXFORD HUMAN RIGHTS HUB JOURNAL 1(2) (2019); Humberto Cantu Rivera, National Action Plans on Business and Human Rights: Progress or Mirage? (2019) BUSINESS AND HUMAN RIGHTS JOURNAL, 4(2), 213-237; Nicola Jägers, UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability? 29 NETHERLANDS QUARTERLY OF HUMAN RIGHTS, 159 (2011); David Birchall, The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of "Do No Harm" JOURNAL OF BUSINESS ETHICS AND ORGANIZATION STUDIES 24(1) (2019); Damiano de Felice & Andreas Graf, The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights, 7 JOURNAL OF HUMAN RIGHTS PRACTICE 40 (2015).

[7] United Nations open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, 6 August 2020, Article 2 (1), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (last accessed May 10, 2021; Lee McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 14; Humberto Cantu Rivera, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40(2) UNSW LAW JOURNAL 1200; Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 Business and Human Rights Journal 41. HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT (SURYA DEVA AND DAVID BILCHITZ (EDS., 2013) STEVEN R. RATNER, 'CORPORATIONS AND HUMAN RIGHTS: A THEORY OF LEGAL RESPONSIBILITY' (2001) 111, YALE LAW JOURNAL.

Treaty have revealed deep divisions between States of the Global North and those of the Global South.[8]

The European Union and its Member States have been the principal norms-setters in the area of business and human rights in the last decade. A majority of its Member States have adopted National Action Plans under the United Nations Guiding Principles on Business and Human Rights.[9] One of the most challenging areas in business and human rights has been how to ensure that businesses will ensure respect for human rights in their global supply chains. Business activities are nowadays extremely complex, diverse, and layered. They span over many levels and geographical areas. As a result, it does not suffice that all companies comply with human rights at home within their own business, but they have to ensure that their suppliers, distributors, and other business partners also meet their obligations. The UNGPs provide in Article 13 that "The responsibility to respect human rights requires that business enterprises: ... (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[10]

The European Union's (EU) standard setting in business and human rights is not new and goes 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"[11]. The Resolution noted in Section 1 that the European Parliament, "Welcomes and encourages voluntary initiatives by business and industry, trade unions and coalitions of NGOs to promote codes of conduct, with effective and independent monitoring and verification, and stakeholder participation in the development, implementation and monitoring of these codes; emphasizes, however, that codes of conduct cannot replace or set aside national or international rules or the jurisdiction of governments; considers that codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial

[8] See, for instance, Humberto Cantu Rivera, "Negotiating a Treaty on Business and Human Rights: The Early Stages" [2017] UNSWLawJl 44; (2017) 40(2) UNSW LAW JOURNAL 1200.

[9] OHCHR, "STATE NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS", ,HTTPS://WWW.OHCHR.ORG/EN/ISSUES/BUSINESS/PAGES/NATIONALACTIONPLANS.ASPX (LAST ACCESSED 10 MAY 2021).

[10] ID., PRINCIPLE 13(B).

[11] EUROPEAN PARLIAMENT, RESOLUTION ON EU STANDARDS FOR EUROPEAN ENTERPRISES OPERATING IN DEVELOPING COUNTRIES TOWARDS A EUROPEAN CODE OF CONDUCT, OFFICIAL JOURNAL C 104, 14.4.1999, P. 180.

scrutiny."[12] Thereafter, the EU and its different institutions have continued to develop both soft and hard law initiatives in the area of business and human rights. Those initiatives have cumulated in the last decades in adoption of two binding laws on different parts of due diligence. The EU has been the front runner in regulating the field of business and human rights. However, its approach so far has been scattered and piecemealed. Only a few areas have been relegated from the perspective of business and human rights. One such area is equal treatment, where the EU has in the last decades adopted binding directives, which private corporations have to observe.[13]

The further advancement of business and human rights areas forms part of NextGenerationEU, the recovery plan of the EU in the last phases of its post-19 socio-economic development. One of the parts of this plan is "The Recovery and Resilience Facility."[14] It will attempt "… to mitigate the economic and social impact of the coronavirus pandemic and make European economies and societies more sustainable, resilient and better prepared for the challenges and opportunities of the green and digital transitions."[15] Business and human rights, therefore, fall within the EU's recovery plan. This article portrays and analyses the major developments concerning mandatory due diligence in the European Union in the last decades. The due diligence human rights requirements are of different types. Generally, they can be distinguished in three major groups: (i) reporting/disclosure obligations; (i) supply chain management obligations; and (iii) supervision/auditing obligations and those that establish liability regimes.[16]

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[12] ID. SECTION, 1.

[13] COUNCIL DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000 ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION OJ L 303, 2.12.2000, P. 16–22; ARTICLE 3 (1) PROVIDES THAT "...THIS DIRECTIVE SHALL APPLY TO ALL PERSONS, AS REGARDS BOTH THE PUBLIC AND PRIVATE SECTORS, INCLUDING PUBLIC BODIES...". SEE ALSO COUNCIL DIRECTIVE 2000/43/EC OF 29 JUNE 2000 IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RACIAL OR ETHNIC ORIGIN, ARTICLE 3(1) OJ L 180, 19.7.2000, P. 22–26, DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 5 JULY 2006 ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL OPPORTUNITIES AND EQUAL TREATMENT OF MEN AND WOMEN IN MATTERS OF EMPLOYMENT AND OCCUPATION (RECAST); OFFICIAL JOURNAL L 204, 26.7.2006, P. 23–36

[14] EUROPEAN COMMISSION, RECOVERY AND RESILIENCE FACILITY, HTTPS://EC.EUROPA.EU/INFO/BUSINESS-ECONOMY-EURO/RECOVERY-CORONAVIRUS/RECOVERY-AND-RESILIENCE-FACILITY_EN (last accessed 10 May 2021).

[15] ID.

[16] See generally Nicolas Bueno, Mandatory Human Rights Due Diligence Legislation, 2019, https://www.zora.uzh.ch/id/eprint/183142/1/Teaching_Note_-_Mandatory_Human_Rights_Due_Diligence_Legislation_AM.pdf. See also Rachel Chambers, Anil Yilmaz Vastardis, (2021). Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in

Section 1 discusses and critically assesses the impact of the EU Non-Financial Reporting Directive, which imposes non-financial reporting obligations on the largest European corporations.[17] Against this backdrop, Section 2 examines and dissects the EU Conflict Mineral Regulation.[18] Section 3 will thereafter discuss the proposal for mandatory due diligence across all industry sectors.[19] The developments at the level of the European Union are important as they usually spill over not only in the domestic systems of the EU Member States, but also to other systems beyond the EU. This article will critically assess the current framework and provide recommendations to move forward. It argues that for the EU Member States to realize due diligence laws in their domestic systems, they have to develop capacity of national institutions that would be able to effectively enforce them in their national systems. As a result, it aims to fill the gap in the field particularly by discussing, connecting, and analysing current normative approaches on the due diligence within the EU. As such, it critically discusses the EU's initiatives and connects them to concepts and debates on the due diligence in the field of business and human rights. All in all, the EU's objectives for socio-economic development rest on sustainability, green economy, and digitalization. For the EU and its Member States to achieve those goals, the private sector and businesses need to subscribe to those non-financial indicators. Finally, this article argues that the binding legislation within the EU and its Member

Ensuring Corporate Accountability. Chicago Journal of International Law. 21 (2) Anil Yilmaz Vastardis; Rachel Chambers, (2018). Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?. International and Comparative Law Quarterly. 67 (2), 389-423 Justine Nolan, Business and human rights: The challenge of putting principles into practice and regulating global supply chains, *Alternative Law Journal* 2017, Vol. 42(1) 42–46; SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS, LONDON/NEW YORK: ROUTLEDGE, 2012. LISE SMIT, CLAIRE BRIGHT, ROBERT MCCORQUODALE, MATTHIAS BAUER, HANNA DERINGER, DANIELA BAEZA-BREINBAUER, FRANCISCA TORRES-CORTÉS, FRANK ALLEWELDT, SENDA KARA AND CAMILLE SALINIER AND HÉCTOR TEJERO TOBED, STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN, FINAL REPORT, EUROPEAN COMMISSION; JANUARY – 2020; CLAIRE BRIGHT, LE DEVOIR DE DILIGENCE DE LA SOCIÉTÉ MÈRE DANS LA JURISPRUDENCE ANGLAISE '[THE DUTY OF DUE DILIGENCE OF THE PARENT COMPANY IN ENGLISH CASE-LAW], 10 DROIT SOCIAL, 2017, 828-833; CLAIRE BRIGHT, NICOLAS BUENO, IMPLEMENTING HUMAN RIGHTS DUE DILIGENCE THROUGH CORPORATE CIVIL LIABILITY, INTERNATIONAL & COMPARATIVE LAW QUARTERLY, 69(4), 789-818.

[17] DIRECTIVE 2014/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 OCTOBER 2014 AMENDING DIRECTIVE 2013/34/EU AS REGARDS DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE UNDERTAKINGS AND GROUPS TEXT WITH EEA RELEVANCE, OFFICIAL JOURNAL L 330, 15.11.2014, P. 1–9.

[18] 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, OJ L 130, 19.5.2017, PP. 1–20.

[19] EUROPEAN PARLIAMENT, RESOLUTION OF 10 MARCH 2021 WITH RECOMMENDATIONS TO THE COMMISSION ON CORPORATE DUE DILIGENCE AND CORPORATE ACCOUNTABILITY (2020/2129(INL)).

States on human rights due diligence in the global business supply chain will provide impetus for regulation in other regions and domestic legal systems.

II. The Non-Financial Reporting Directive

The primary objective of businesses is to generate profit for their shareholders. However, businesses are increasingly asked and encouraged to also report on how their business activities affect the environment, human rights, and anti-corruption standards. Non-financial reporting falls within the areas of business and human rights and sustainability. Nonetheless, it should be distinguished from corporate social responsibility, which is an area which advances only voluntary standards.[20] In October 2014, the European Parliament and the Council of the European Union have adopted changes to Directive 2013/34/EU in its new Articles 19a and 29a. Generally, the Non-Financial Reporting Directive imposes non-financial reporting standards on large corporations with more than 500 employees.[21] As such, the Directive applies to more than 11,000 EU corporations.[22] More specifically, the Directive provides that:

> (1) Large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters,…[23]

Such reporting shall include: "a) a brief description of the undertaking's business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including

[20] Anita Ramasastry (2015) Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability, Journal of Human Rights, 14:2, 237-259.

[21] DIRECTIVE 2014/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 OCTOBER 2014 AMENDING DIRECTIVE 2013/34/EU AS REGARDS DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE UNDERTAKINGS AND GROUPS TEXT WITH EEA RELEVANCE; OJ L 330, 15.11.2014, P. 1–9.

[22] EUROPEAN COMMISSION, CORPORATE SUSTAINABILITY REPORTING, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (last accessed May 10, 2021).

[23] ID., ARTICLE 19A (1)

due diligence processes implemented;(c) the outcome of those policies; (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; and (e) non-financial key performance indicators relevant to the particular business."[24] The above concepts are of quite vague and general nature, at least in comparison with the Conflict Mineral Regulations.

For instance, it is not clear what the drafters meant with "key performance indicators relevant to the particular business." It appears more guidance would be necessary in determining what are these indicators and how they should be measured. The Non-Financial Directive, therefore, only requires large businesses to report about the impact of their business operations on the non-financial indicators. It does oblige them to report them in a particular manner. As a result, businesses so far have enjoyed discretion as to which indicators they include in their reports. The practice among the EU's larger corporations concerning the chosen indicators therefore differs.[25] Additionally, the language appears quite archaic and outdated. It nonetheless reflects the-state-of-the-art in the area of business and human rights in the EU at the start of their regulations

Corporations generally meet their obligations under the Directive by reporting on the non-financial indicators in their annual reports or in separate sustainability reports, which are often attached to the annual reports. So far, only a few studies have been published that included the empirical compliance of corporations with the Non-Financial Reporting Directive. For example, after examining the annual policies of major Spanish corporations, three Spanish authors have concluded that "… the IBEX-35 companies that include the required information and also publish a sustainability report present higher rates of non-financial information disclosure than those publishing no such report."[26] Another study by the Italian authors has found "that companies listed on the Milan stock exchange adopted, within legal limits, some significant regulations…".[27] They concluded that "…the companies in the study sample mainly

[24] ID.

[25] Lara Tarquinio, Domenico Raucci, and Robeto Benedetti. 2018. An investigation of global reporting initiative performance indicators in corporate sustainability reports: Greek, Italian and Spanish evidence. SUSTAINABILITY 10: 897–915

[26] Laura Sierra-Garcia,; Maria A Garcia-Benau,.; Helena M. Bollas-Araya, Empirical Analysis of Non-Financial Reporting by Spanish Companies (2018) Adm. Sci. 8, no. 3: 29, p. 14.

[27] Fabio Caputo & Rossella Leopizzi & Simone Pizzi & Virginia Milone, The Non-Financial Reporting Harmonization in Europe: Evolutionary Pathways Related to the Transposition of the Directive 95/2014/EU

opted to integrate the information into the management report or, as with international companies, in the annual report."[28]

As for the listed corporations in Poland, researchers confirmed "the relatively high effectiveness of the Directive in the initial period of implementation in relation to the number of reporting companies and the content reported."[29] They argue that the "mandatory non-financial regulations imposed by the Directive effectively motivated companies to improve their reporting as compared to a voluntary year."[30] As far as the financial reporting at the Ljubljana Stock exchanges goes, the quality of non-financial reporting have varied.[31] Authors have argued that further indicators should be developed in order to empirically measure compliance.[32] It appears that most of the studies have reached similar conclusions that some improvements have been made; however, to move forward, clear and uniform indicators and their supervision would be required. Moreover, the EU institutions and their member states should take a more active approach in supervision of the business conduct.[33] Surely, the area would benefit from an in-depth comparative study of non-financial reporting of leading corporations in all 27 EU Member States that would provide a legal basis for further binding legislation.

As things stand, it seems that the current Non-Financial Directive is of limited nature, as it only applies to corporations with 500 and more employees. As such, it would be useful for its application to also extend to medium sized corporations. Nonetheless, the Non-Financial Reporting Directive has been used as a testing ground for the imposition of due diligence on

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within the Italian Context (2019) Sustainability, MDPI, Open Access Journal, vol. 12(1), pap 1-13, December 2019

[28] ID.

[29] Łukasz Matuszak, Ewa Różańska, Towards 2014/95/EU directive compliance: the case of Poland, (2021) Sustainability Accounting, Management and Policy Journal, Vol. ahead-of-print No. ahead-of-print, p. 21.

[30] ID.

[31] Jernej Letnar Černič, Gorazd Justinek, Christian Bukor, Spoštovanje človekovih pravic v družbah prve kotacije ljubljanske borze : raziskava letnih poročil, PRAVNIK : REVIJA ZA PRAVNO TEORIJO IN PRAKSO, 2020, Vol. 75, no. 11/12, 799-830.

[32] ID.

[33] Karin Buhmann, Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action (2018) Business Human Rights Journal. 3 (1), 23-45; Olga Martin-Ortega, Joanna Hoekstra, Reporting as a Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive (2019 European Law Review 44(5), 622 - 645. See also Dorothée Baumann-Pauly and Justine Nolan (eds.), Business and Human Rights: From Principlesto Practice (New York: Routledge, 2016).

non-financial reporting obligations of businesses. It has succeeded, as it was aimed only at the largest players and as there is no European or national authority that would effectively supervise whether corporations comply with such reporting obligations and how they would comply. Additionally, reporting obligations are perhaps the easiest part of due diligence obligations to comply with. Nonetheless, as far as initial steps go, one can draw the conclusion that the Directive was successful. Further steps would require development of indicators of uniform nature that could be applied to all corporations regardless of their size.

III. The EU Conflict Minerals and Metals Regulation

The global trade in mineral and metals originating in the armed conflict areas has been unregulated for decades. Systematic and general human rights abuses have generated the movement towards greater regulations of the global supply chains of corporations that have traded in mineral and metals from the war-torn area, mostly in the countries of the Global South. The industry-wide voluntary initiatives, such as the Kimberley process, have emerged as the first level of regulation.[34] Nonetheless, more binding regulations and enforcement were needed. On May 17, 2017, the European Parliament and the Council of the European Union have adopted the EU Conflict Mineral Regulation, which imposes due diligence obligations for importers of the conflict minerals.[35] The preamble of Regulation notes that "… Union citizens and civil society actors have raised awareness with respect to Union economic operators not being held accountable for their potential connection to the illicit extraction of and trade in

[34] Kimberely Process, "The Kimberley Process (KP) is a commitment to remove conflict diamonds from the global supply chain. Today, participants actively prevent 99.8% of the worldwide trade", https://www.kimberleyprocess.com/en/what-kp (last accessed May 10, 2021).

[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, OJ L 130, 19.5.2017, pp. 1–20. See also, for instance,

Valentina Grado, (2019) EU approaches on 'conflict minerals': are they consistent with the UN/OECD supply chain due diligence standards? In: Bonfanti A (ed) Business and human rights in Europe: international law challenges. Routledge, New York, pp 157–167.

minerals from conflict areas."[36] It adds that "… consumers are indirectly linked to conflicts that have severe impacts on human rights, in particular the rights of women, …"[37]

The conflict minerals and metals have (in)directly contributed to systematic and general violations of human rights in the past decades. As such, the EU Regulation aims to establish "…a Union system for supply chain due diligence … in order to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold."[38] It works toward ensuring "…transparency and certainty [with] regards [to] the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas."[39] The Regulation applies to all natural and legal persons that do business with minerals and metals in the European Union.[40] The European Commission has estimated that the Regulation applies to up to 1,000 EU importers. [41] As a result, the main objectives of the Regulations are to curtail the imports of conflict minerals and metals in the EU market; to increase the industry standards not only as to the EU importers, but also globally; and to strengthen protections of the rights-holders, who work in the industry. In June 2020, the European Parliament and Council have thereafter adopted thresholds limits for EU-based corporations.[42] The Regulation started to apply on January 1, 2021.[43] The Regulation is one of the binding laws under the EU law which most clearly set out due diligence obligations for businesses.[44] As a result, the EU has, by its

[36] ID, PREAMBLE, 10.

[37] ID.

[38] ID., ARTICLE 1.

[39] ID.,

[40] ID., ARTICLE 2 (L).

[41] European Commission, The Conflict Mineral Regulation Explained, https://ec.europa.eu/trade/polichttps://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/y/in-focus/conflict-minerals-regulation/regulation-explained/ (last accessed May 17, 2021).

[42] Commission Delegated Regulation (EU) 2020/1588 of 25 June 2020 amending Annex I to Regulation (EU) 2017/821 of the European Parliament and of the Council by establishing volume thresholds for tantalum or niobium ores and concentrates, gold ores and concentrates, tin oxides and hydroxides, tantalates and carbides of tantalum, C/2020/4164, Official Journal L 360, 30.10.2020, p. 1–3.

[43] European Commission, The Conflict Mineral Regulation Explained, https://ec.europa.eu/trade/polichttps://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/y/in-focus/conflict-minerals-regulation/regulation-explained/ (last accessed May 17, 2021).

[44] JUSTINE NOLAN AND DOROTHY BAUMANN PAULY (EDS.), BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE, ROUTLEDGE, UK, 2016; JUSTINE NOLAN, HUMAN RIGHTS AND GLOBAL SUPPLY CHAINS: IS EFFECTIVE SUPPLY CHAIN ACCOUNTABILITY POSSIBLE?, IN SURYA DEVA AND DAVID BILCHITZ (ED.), BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS, CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2017, PP. 238-265; Jolyon Ford, and Justine Nolan, , Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the

adoption, emerged as one of the standard-setters in the field of binding obligations of state and corporate actors in business and human rights.

The EU Conflict Minerals and Metals Regulation established mandatory due diligence obligations for all businesses based in the EU throughout their supply chains. It obliges them to "…keep documentation demonstrating their respective compliance with those obligations, including the results of the independent third-party audits."[45] The Regulation does not only establish reporting obligations, as does for example the EU Non-Financial Reporting Directive, but imposes on 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.[46] As such, the Regulations imposed in Article 4 details management obligations that were derived from the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[47]

First, businesses are obligated, as far as management obligations go, to adopt policies and inform their suppliers.[48] They introduce conflict mineral avoidance policies and communicate them with their business partners in the supply chains. They are to "…structure their respective internal management systems to support supply chain due diligence by assigning responsibility to senior management."[49] They shall improve the control of their supply chains by "… strengthen(ing) their engagement with suppliers by incorporating their supply chain policy into contracts and agreements with suppliers."[50] As such, this will not be any easy task, as increasing engagements with suppliers will most likely incur more costs. The EU importers are to make their supply chains even more transparent. Equally important, they are to grant rights holders with access to remedy. More specifically, they are obligated "….to establish a grievance mechanism as an early-warning risk-awareness system or provide such mechanism through collaborative arrangements with other economic operators or

Social Audit (May 26, 2020). AUSTRALIAN JOURNAL OF HUMAN RIGHTS, 26 (1), 1-19 (2020), UNSW LAW RESEARCH PAPER NO. 20-29.

[45] Regulation (EU) 2017/821, Article 3.

[46] ID.

[47] OECD, DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (3RD ED. 2016).

[48] Regulation (EU) 2017/821, Article 4 (a and b).

[49] ID., ARTICLE 4 (C).

[50] ID., ARTICLE 4 (D).

organisations, or by facilitating recourse to an external expert or body, such as an ombudsman.".[51] The objective of such grievance mechanisms is both to prevent and respond to early stages of business-related human rights abuses. Nonetheless, it will not be an easy feat to turn such a mechanism from paper-based to operational systems that work in practice. Moreover, corporations are obligated to establish "a chain of custody or supply chain traceability system" in order to trace the origins and minerals.[52] Such traceability systems may prevent future business-related human rights violations.

Secondly, the EU importers are to comply with risk management obligations. They are to "identify and assess the risks of adverse impacts in their mineral supply chain"[53] and "implement a strategy to respond to the identified risk,"[54] The EU Importers are obligated in the order to identify risks and gather information from direct and indirect suppliers about smelters/refiners and about conflict-affected and high-risk areas. The businesses should make serious efforts to consult with different stakeholders on "a strategy for measurable risk mitigation in the risk management plan."[55] In this way, they are to rely on the indicators and measures derived from the OECD Due Diligence Guidance.[56] They are obligated to produce reports where they identify and submit recommendations for reform.[57]

Thirdly, the Regulation establishes a strict external supervision system of the EU importers' compliance with due diligence processes. Those should be controlled by the "third-party auditors." Auditors are obligated to examine " …all of the Union importer's activities, processes and systems used to implement supply chain due diligence regarding minerals or metals, including the Union importer's management system, risk management, and disclosure of information…"[58] The audit shall proceed on the basis of the institutionalized mechanism to

[51] ID., ARTICLE 4 (E).

[52] ID., ARTICLE 4 (F AND G).

[53] ID., ARTICLE 5 (1) (A).

[54] ID., ARTICLE 5 (1) (B).

[55] ID., ARTICLE 5 (2).

[56] ID., ARTICLE 5 (3).

[57] Id. More specifically, they are obliged to "identify and assess, in accordance with Annex II to the OECD Due Diligence Guidance and the specific recommendations set out in that Guidance, the risks in their supply chain based on available third-party audit reports concerning the smelters and refiners in that chain, and, by assessing, as appropriate, the due diligence practices of those smelters and refiners." Article 5 (4).

[58] ID., ARTICLE 6 (1) (A)

oversee and support the audit process, which includes the following parts: "accreditation, oversight, verification, publication capacity building, and grievance resolution."[59] They are required to determine compliance of "the Union importer's supply chain due diligence practices."[60] The text of Articles 3 and 5 of the Regulation implies that the Union importers of minerals and metals have an obligation to monitor their suppliers and other business partners in the supply chains and that failure of such obligations would establish their vicarious liability for omissions. Businesses can only discharge their obligations if they meet their human rights obligations throughout their supply chains in their relationships with business partners. Nonetheless, it is not clear whether determination of the non-compliance will trigger any kind of liability.

Fourthly, disclosure obligations oblige businesses to disclose all third party reports or provide evidence that they not only adhere to, but also comply with, a supply chain due diligence scheme approved by the European Commission.[61] The EU importers are obligated to disclose all information to the buyers.[62] They are obligated to provide information about their due diligence policies and practices to the wider public.[63] The disclosure obligations aim to prevent violations and abuses throughout their supply chains.

The Regulation applies mostly to the EU importers. Nonetheless, the mineral and metals often get refined in the territory of the EU; therefore, global smelters and refiners also fall within the ambit of the application of the Regulation. The potential extraterritorial impact of the Regulation is therefore wide-reaching. The Commission has to prepare and publish the list of the names and addresses of global smelters and refiners, who are obligated to subscribe to the supply chain due diligence schemes that are recognised by the Commission.[64] The wording of

[59] Conflict Minerals Law, EU Conflict Minerals Regulation – OECD Guidance Step 4: Independent Third-Party Audits, Slide 9, February 25, 2021, https://www.squirepattonboggs.com/-/media/files/insights/events/2021/02/eu-conflict-minerals-workshop/conflict-minerals-eu-oecd-guidance-workshop-step-4.pdf?utm_source=SPB%20Email%20Campaign&utm_medium=email (last accessed May 17, 2020).

[60] ID., ARTICLE 6 1 (C).

[61] ID., ARTICLE 7 (1).

[62] ID., ARTICLE 7 (2).

[63] ID., ARTICLE 7 (3).

[64] ID., ARTICLE 9 (1).

the Regulation is a bit vague here, as the Regulation provides that "the Commission shall use its best endeavours to identify those smelters and refiners…" It is not clear what "best endeavours" refers to nor whether the Commission will be able, upon identification of global smelters and refiners, to exercise supervision of their compliance with the Regulation.

All in all, the Regulation established a full-fledged framework that the EU importers are obligated to meet in order to do business in the European Union. One aspect that is perhaps less clear are provisions on establishing supervision, enforcing liability, and imposing potential sanctions. The Regulation stipulates in Article 10 that national "competent authorities" are responsible for the implementation of the Regulation.[65] The Commission has not published the names of the competent authorities, but only practice will show if they will carry out their functions effectively.[66] National authorities are obligated to conduct "appropriate ex-post checks in order to ensure that Union importers of minerals or metals comply with the obligations."[67] Such "ex post checks" include: "examination of the Union importer's implementation of supply chain due diligence obligations under this Regulation, including regarding the management system, risk management, independent third-party audit and disclosure; examination of documentation and records that demonstrate the proper compliance with the obligations…; and examination of audit obligations in accordance with the scope."[68] In such a way, the Regulation placed a rigorous burden on national authorities of the Member States. It is doubtful that all competent authorities in 27 Member States will be able or willing to discharge their obligations by diligently and effectively supervising the business operations of the EU importers. On the other hand, it is likely that most of them will not have too much work, as the EU importers of mineral and metals are based only in a handful of the member states.

The Conflict Diamonds and Metals Regulation imposes wide-ranging obligations of the EU businesses that import minerals and metals to make sure that they comply with their supply chain due diligence obligations. Di Lorenzo and Levin-Nally have correctly argued that "the real goal of mandatory due diligence is to ensure companies continue engaging constructively

[65] European Commission, List of Member State competent authorities designated under Article 10(1) of Regulation (EU) 2017/821, https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157843.pdf (last accessed 14 May 2021).

[66] Regulation (EU) 2017/821, Article 10 (4).

[67] ID., ARTICLE 11 (1).

[68] ID., ARTICLE 11 (3) (A-C).

with these fragile economies while at the same time promoting more responsible sourcing practices that can, in the long run, shape new and more responsible businesses, supply chains and societies."[69] Corporate due diligence obligations in this regard are not only those of reporting and disclosure of business practices throughout the supply chain. On the contrary, the Conflict Regulation centers corporate obligations on the prevention of risk and avoidance of risks in the due diligence management in the supply chain of metals and minerals. As such, the Conflict Diamonds Regulations is a textbook of the standard setting in business and human rights in not only the EU, but also globally.

As a result, its framework could be easily translated to all industrial sectors and forms a basis for the novel EU corporate accountability and due diligence obligations. It is still the early days, and the real impact of the Regulation on the management of the supply chain of minerals and metals remains to be seen. Nonetheless, the creation of a legal framework in itself is a step towards preventing and remedying business-related human rights abuses in the global supply chain of minerals and metals. The EU and its Member states should in the future strive to establish more complex liability regimes where rights-holders could enforce corporate accountability for violations of the due diligence obligations set out in the Directive and where the EU institutions and Member States would not only be able but also willing to impose sanctions.

IV. The Proposals for the Corporate Accountability and Due Diligence Directive

The European Institutions have not originally adopted proposals for the General Corporate Accountability and Due Diligence Directive. The current proposal is based on good practices in domestic systems. In the past years, several EU Member States have adopted, or at least attempted to adopt ,the mandatory due diligence legislation.[70] France has introduced both mandatory human rights diligence and a liability regime, which obliges corporations to protect

[69] Fabiana Di Lorenzo and Estelle Levin-Nally, The 'Conflict Minerals Regulation' or the 'Regulation on Responsible Sourcing of Minerals': Evolving Purpose and Terminology, Business and Human Rights Journal Blog, 22 Feb 2021, https://www.cambridge.org/core/blog/2021/02/22/the-conflict-minerals-regulation-or-the-regulation-on-responsible-sourcing-of-minerals-evolving-purpose-and-terminology/ (last accessed 10 May 2021)

[70] Modern Slavery Act (UK, 2015); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, 2010); Modern Slavery Act 2018, Australia (No. 153, 2018).

human rights throughout their supply chains in their relationship with business partners.[71] IN 2019, the Dutch Senate adopted the Child Labour Due Diligence Law, which imposes administrative sanctions for failing to comply with the due diligence obligations.[72]

The English courts have over the past years developed extensive doctrine of the duty of care.[73] In the recent case *Vedanta Resources PLC*, Lord Briggs of the UK Supreme Court noted that parent corporation Vedanta "may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial, after full disclosure of the relevant internal documents of Vedanta and KCM, and of communications passing between them."[74] The UK Modern Slavery Act 2015 establishes similar due diligence obligations.[75] Recently, Germany and the UK have also been developing their own due diligence legislation.[76]

Against this backdrop, the European institutions have been under pressure from different civil society groups deliberating the adoption of the general Corporate Accountability

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[71] Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Official Gazette of the Republic of France, Mar. 27, 2017.;

[72] The Dutch Child Labour Due Diligence Law, Eerste Kamer, vergaderjaar 2016–2017, 34 506, A.

[73] HRIC, "Italian Legislative Decree N. 231/2001 on Administrative Liability of Legal Persons and B&HR Violations: A Brief Overview', July 2017, 2-3, https://docs.wixstatic.com/ugd/6c779a_ae42b0a57aad4620ba65b9708836f3ef.pdf (last accessed May 10, 2021).

[74] Vedanta Resources PLC and another v. Lungowe and others; [2019] UKSC 20. Judgment. At https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf (last accessed May 10, 2021). UK Supreme Court, 10 April 2019, at para. 61. See in more detail Anil Yilmaz-Vastardis & Sheldon Leader, Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains, Essex Business and Human Rights Project (2017), https:// www1.essex.ac.uk/ebhr/documents/Improving-Paths-to-Accountability-for-Human%20Rights-Abuses-in-the- Global-Supply-chains-A-Legal-Guide.pdf (last accessed May 10, 2021). See also earlier cases Connelly v R.T.Z. Corporation, [1998] A.C. 854 at 868-69; Connelly v R.T.Z. Corp. Plc., [1998] A.C. 854 (House of Lords) (citing Sim v Robinow, 1892 Sess. Cas. (R.) 668 and Spiliada Maritime Corp. v Cansulex Ltd., [1987] A.C. 460, 474).

[75] Modern Slavery Act 2015, c. 30, part 6, Section 54.

[76] Business and Human Rights Resource Centre, Germany: Cabinet passes mandatory due diligence proposal; Parliament now to consider & strengthen, 3 March 2021, Germany: Cabinet passes mandatory due diligence proposal; Parliament now to consider & strengthen (last accessed May 10, 2021); The Norwegian Supply Chain Due Diligence Law, Prop. 150 L (2020–2021); Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), 9 April 2021, https://www.regjeringen.no/no/dokumenter/prop.-150-l-20202021/id2843171/ (last accessed May 10, 2021).

and Due Diligence Directive. Recently the European Parliament adopted a Resolution along with the Draft Recommendations for the text of the general Directive.[77] The Draft Proposal submits that the Objective of the Directive is that "…undertakings under its scope operating in the internal market fulfill their duty to respect human rights, the environment and good governance, and do not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business relationship or in their value chains, and that they prevent and mitigate those adverse impacts."[78] The Draft Proposal builds on the existing business and human rights concepts and employs the language of the UNGP as it refers to the "value chains" and "adverse impacts."

Interestingly enough, the Draft notes that the Directive will apply not only to large corporations, but also to the small and medium sized corporations.[79] It is doubtful that such a high level of regulation for the small and medium sized enterprises is the best viable option and will be accepted with open arms. Particularly, small enterprises have a limited capacity to cover the cost of additional regulations. The Proposal recognizes such challenges for the medium and small sized companies. Therefore, it includes in Draft Article 15 "specific measures in support of small and medium-sized undertakings" by proposing that national authorities publish "... a specific portal for small and medium-sized undertakings [to be] available where they may seek guidance and obtain further support and information about how best to fulfill their due diligence obligations."[80] It is highly unrealistic that any portal will be able to meet the challenges that small and medium-sized businesses will encounter when attempting to implement their due diligence obligations. Therefore, it is unlikely the final version of the Directive proposal will have such a broad scope.

The Directive notes that businesses are to a draft due diligence strategy, which means that they shall "…in an ongoing manner make all efforts within their means to identify and assess [their impact on human rights], by means of a risk based monitoring methodology that

[77] European Parliament, Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[78] Id., Recommendations as to the Content of the Proposal Requested, Recommendations for Drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability, Text of the Proposal Requested, Draft Article 1.

[79] Id., Draft Article 2.

[80] ID., DRAFT ARTICLE 15 (1).

takes into account the likelihood, severity and urgency of potential or actual impacts on human rights, the environment or good governance, the nature and context of their operations, including geographic, and whether their operations and business relationships cause or contribute to or are directly linked to any of those potential or actual adverse impact."[81] The proposal notes that corporations are obligated to include the following steps in its due diligence processes: "specify the potential or actual adverse impacts on human rights…;[82]; map their value chain and, with due regard for commercial confidentiality, publicly disclose relevant information about the undertaking's value chain;[83] adopt and indicate all proportionate and commensurate policies and measures…;[84] andset up a prioritisation strategy … in the event that they are not in a position to deal with all the potential or actual adverse impacts at the same time."[85] The current version of the Directive concerning due diligence human rights obligations falls short with regard to the nature of obligations and their supervision. It falls short of the already applicable obligations under the EU Conflicts Minerals Obligations concerning the internal and external supervision. For those reasons, it is submitted that the current Proposal should clarify its scope and the nature of its due diligence obligations.

As for the access to a remedy for enforcing corporate accountability, the recommendations for the potential Directive note that corporations "…shall provide a grievance mechanism,"[86] and they list among potential options "…an early-warning mechanism for risk-awareness and as a mediation system, allowing any stakeholder to voice reasonable concerns regarding the existence of a potential or actual adverse impact on human rights, the environment or good governance."[87] It appears that such wording is very vague. It is not clear what is the legal definition and nature of "voicing reasonable concerns." One positive contribution of the European Parliament is that its recommendations urge the Commission to include complex liability regimes for failing to enforce due diligence obligations.

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[81] ID., DRAFT ARTICLE 4 (2).

[82] ID., DRAFT ARTICLE 4 (4) (I).

[83] ID., DRAFT ARTICLE 4 (4) (II).

[84] ID., DRAFT ARTICLE 4 (4) (III).

[85] ID., DRAFT ARTICLE 4 (4) (IV).

[86] Id., Draft Article 9 (1).

[87] Id.

The recommendations for the Directive should encourage Member states to equip national authorities with relevant capacities to enforce administrative liability of businesses for failing to comply with the Directive. Currently, the Directive only notes that Member States are to ensure that supervision of national authorities "…are independent and have the necessary personal, technical and financial resources, premises, infrastructure, and expertise to carry out their duties effectively."[88] National authorities shall have competencies "…to carry out investigations to ensure that undertakings comply with the obligations…"[89] They "…shall be authorised to carry out checks on undertakings and interviews with affected or potentially affected stakeholders or their representatives,"[90] which would "include examination of the undertaking's due diligence strategy, of the functioning of the grievance mechanism, and on-the-spot checks."[91] The European Parliament's Recommendations are a potentially far-reaching move towards even greater regulation in business and human rights. Such a detailed liability regime and supervision competencies are welcomed to ensure that the due diligence standards are equally applied and implemented across the European Union. The introduction of such standards and supervision will certainly not be a simple task, as it requires that the European Commission and national authorities strengthen their capacity and standards. As a result, the Commission will be obligated to draft "general non-binding guidelines for undertakings on how best to fulfill the due diligence obligations."[92]

Also, the burden of imposing sanctions will rest with national authorities in the Member States.[93] Such obligations will require not only the establishment of new national authorities, but also substantial funding. Nonetheless, the dilemma is whether the national authorities will be able or willing to supervise corporations in such a manner without interfering with their right to conduct business in the free market economy. The European Parliament's Recommendations are broad, wide-reaching, and particularly concerned with the execution and supervision of the due diligence obligations. On the other hand, they propose to establish obligations that will be

[88] Id., Draft Article 12 (2).

[89] Id., Draft Article 13 (1).

[90] Id.

[91] Id.

[92] ID., DRAFT ARTICLE 14 (1).

[93] ID., DRAFT ARTICLE 18 (1). It notes that "Member States shall provide for proportionate sanctions applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those sanctions are enforced."

particularly difficult for medium and small-sized businesses to carry out. As for the nature of due diligence obligations, the drafters should draw parallels and best practices from the text of the EU Conflicts Minerals Regulation. To be clear, challenges will appear for businesses to execute their obligations under the Directive if adopted in the current form. Most of all, small and medium sized businesses will incur excessive costs if they want to meet their obligations. As a result, the Drafters should also be creative in proposing how the obligations should be implemented. As for the start of its application, the Directive will only gradually become applicable perhaps in the usual 2 year's time frame or even longer.

As such, the European Parliament's recommendations for a directive on corporate accountability and due diligence are one of the most ambitious legislative proposals. If they were adopted in its current draft form, they would thoroughly shake up the way that business is currently done in the EU. It would create binding human rights due diligence standards throughout supply chain standards for all companies that do business in the EU. It would fill a gap in the due diligence supply chain in the EU, which is at the moment of a limited nature. Moreover, the EU institutions should be aware that their proposal, if adopted in its current form, would deeply affect the freedoms to perform business activity.

As such, the drafters should attempt to consider comments and feedback from the business community. They should pay attention to their feedback, especially in relation to human rights due diligence obligations of small and medium sized companies. The administrative liability regime could be strengthened in this way by granting an EU specialized organ with the competence to supervise the implementation of the Directive. The EU Fundamental Rights Agency could be an example of an EU public agency that could supervise the discharge of human rights obligations. The capacity of Member States will surely not be sufficient to effectively supervise the implementation. One of the open dilemmas that the EU institutions will have to solve in the final text of the proposal is whether the member States should be in charge of the execution of the directive or whether it is perhaps better to leave the supervision to the Commission. It appears highly unlikely that the Member States will be able to efficiently supervise their businesses. Another possibility would be to create a two-level supervision system based on the cooperation between Member States and the EU institutions.

V. Way forward?

Rights-holders have not been fully protected in the European Union nor in its member states against the adverse impacts of business activities. As a rule, business operations of EU-based corporations affect not only the human dignity of the residents of the EU, but also of those beyond its borders. The global supply chains of the EU-based corporations spread out across different continents and countries, potentially affecting the human rights of billions of individuals. Business and human rights in the EU, therefore, does not only have significance for its own residents, but it is of global importance. Binding regulation in the area of business and human rights has been on the agenda of the EU for at least the last two decades. In this period, the EU has adopted binding laws with the aim of strengthening equal treatment, non-financial reporting, and the supervision of human rights due diligence in the global supply chain.

This article described and analyzed the existing and potential initiatives on due diligence human rights in global supply chains. So far, the EU has tested specific and individual approaches to the due diligence supply management. It first attempted with non-financial reporting obligations and thereafter moved to the due diligence supply chain management obligations in a specific industry sector of minerals and metals industrial sector. Whereas the non-financial reporting has proved successful across domestic systems of the EU, it is still in the early days of the implementation of the Conflict Minerals Regulation. Two conclusions that can nonetheless be drawn from the execution of the non-financial reporting directive is that indicators have been piecemealed and that supervision has been lacking and deficient. However, those binding laws have been of a limited nature, as they cover only the largest corporations and/or they apply only in certain industry sectors. As a result, stakeholders have, consequently, identified shortcomings of the current framework and have attempted to remedy them in the new initiatives.

The European Parliament has included most of the negative lessons in their recommendation on the new draft directive on corporate accountability and due diligence. The current draft now includes not only non-financial reporting obligations and supply chain management obligations, but also establishes an administrative regime and provides a legal basis for sanctions. As such, the EU should not turn a blind eye from adopting a general binding law that would impose human rights due diligence obligations for all industries and also for medium sized companies. The EU would, in this way, sail its ships in the dock and provide

rights-holders with further possibilities to enforce corporate accountability through more binding corporate human rights obligations. The EU should take its privileged role as a standard setter in business and human rights seriously and should, through further legislation on binding human rights due diligence, not only protect human dignity of rights-holders at home, but also beyond its borders. As such, the EU and its Member States could reinforce its image and role as an organization that is built on the rule of law, human rights protection, and solidarity.