OPTIONS FOR MANDATORY HUMAN RIGHTS DUE DILIGENCE IN BELGIUM

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EXECUTIVE SUMMARY

This report provides a series of options to pursue mandatory human rights due diligence legislation in Belgium, based on an analysis of similar initiatives in surrounding countries (chapter 1) and an analysis of possible 'anchors' in current Belgian law (chapter 2).

CHAPTER 1

MANDATORY HUMAN RIGHTS DUE DILIGENCE: THE STATE OF PLAY IN EUROPE AND POTENTIAL LESSONS FOR A BELGIAN LAW

(Claire Bright, Axel Marx)

Several European States have adopted domestic measures seeking to regulate the adverse human rights and environmental impacts arising out of business operations both within and outside their territory. Studying these measures allows to draw some conclusions with regards to the Belgian context.

THE UK MODERN SLAVERY ACT

This Act aims at preventing modern slavery in organisations and their supply chains by ensuring that the public, consumers, employees and investors know what steps an organization is taking to tackle modern slavery. It also aims at creating a level playing field between businesses. The scope of this Act is companies with a turnover of at least £35 million. It is not limited to UK-domiciled companies, but extends to companies supplying goods or services, and carrying on a (part of a) business in any part of the UK. It creates an obligation of disclosure: companies must publish an annual 'slavery and human trafficking statement', setting out the steps taken to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business. This obligation applies both to the companies' own business and their supply chains. In case of non-compliance, the Secretary of State may seek an injunction through the High court. Non-compliance with such injunction may be punishable by a fine. The Act does not provide for any liability provision. There are also no specific provisions alleviating existing barriers to accessing remedy for the victims. Moreover, it does not require companies to disclose information about their remediation processes. The strengths of this Act are that it contributed to greater awareness to modern slavery issues in companies' supply chains, and that it raised boardroom awareness through requirement that the statement be approved and signed by a director or appropriate senior person. The weaknesses, on the other hand, are that the reporting obligation approached as mere tick-box exercise, with generic statements; no assessment of the adequacy of due diligence steps have been taken; there is a lack of monitoring and effective enforcement mechanisms leading to widespread issues of non-compliance; and there is no associated provisions on corporate liability to ensure access to remedy for victims of modern slavery of human trafficking.

THE DUTCH CHILD LABOUR DUE DILIGENCE ACT

This law has a twofold objective: preventing child labour from being used in goods and services brought onto the Dutch market; and ensuring Dutch consumers 'peace of mind' in this respect. It applies to all companies selling goods and supplying services to Dutch end-users. It creates an obligation to exercise due diligence and an obligation to report. These obligations are not limited to first tier suppliers, but extend to the entire supply chain. This act also creates an enforcement mechanism with a public supervising authority. Any third party affected by a company's failure to comply can submit a complaint, but only after having submitted it first to the company, who has 6 months to address it. In case of non-compliance, administrative fines can be imposed. There is no specific liability provision. There are also no specific provisions alleviating existing barriers for victims of child labour. The strength of this law is its wide scope of application, which includes both Dutch and non-Dutch companies, without limitations in terms of size or turnover. On the other hand, there are some weaknesses. The scope is limited to the goods and services sold or supplied to the Dutch market and therefore it does not cover the activities of Dutch companies in relation to goods and services supplied outside the Dutch market. Moreover, the reporting requirement is a one-off exercise, and the law focuses on one single issue, which may incentivize prioritization over potentially more salient human rights risks for the company in question. Finally, the lack of a specific provisions to alleviate existing barriers to accessing remedy in the Netherlands for victims of child labour is another weakness.

THE FRENCH DUTY OF VIGILANCE LAW

The French law aims at enhancing corporate accountability, and at providing access to justice for victims of corporate human rights abuses. It applies to French companies incorporated or registered in France for two consecutive fiscal years, employing at least 5,000 people in France or 10,000 worldwide. These companies have to take 'reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment'. It also requires the companies to establish, implement and publish a 'vigilance plan'. These obligations apply to the own activities of the company or the companies under their control, or to the activities of their subcontractors and suppliers. Any interested party can send a non-complying company a formal notice. If the company does not comply within 3 months, interested parties can seek an injunction with the relevant French court. Any interested party can also file civil proceedings in case of harm resulting from non-compliance or inadequate compliance. The law creates an associated liability regime (any interested party can file civil proceedings). Liability is based on 3 elements: fault, damage, and causal link between the two. The specific liability provision alleviates certain barriers to access to justice for the victims. However, the burden of proof remains on the claimant (one of the main hurdles faced by claimants in business-related human rights claims). The strengths of this law are a higher percentage of companies with dedicated human rights policies, and a greatest potential to drive meaningful change in corporate behaviour. Its weaknesses are its limited scope, the existence of certain obstacles to access to justice for right-holders, the insufficient implementation, and the fact that, in practice, a majority of plans focus on risks to the business itself rather than to third parties or the environment.

THE SWISS RESPONSIBLE BUSINESS INITIATIVE AND PARLIAMENTARY COUNTER-PROPOSAL

The **Swiss Responsible Business Initiative (RBI)** would involve an amendment of the Swiss Federal Constitution to 'strengthen respect for human rights and the environment through business'. It would apply to companies that have their registered office, central administration, or principal place of business in Switzerland. It creates an obligation for these companies to respect internationally recognized human rights and international environment standards, also abroad, through 'appropriate due diligence'. These obligations would apply to the companies' own operations and companies under their control (determined according to factual circumstances – extends to *all* business relationships). If adopted, it would need to be implemented in a federal law (Swiss Code of Obligations). The initiative foresees a specific liability provision aimed at complementing other existing liability provisions under general Swiss tort law. It provides for a strict liability regime with a due diligence defence according to which companies can escape liability if they can prove that they took all due care to avoid the loss or damage. In terms of access to justice for victims, it addresses some of the recurring obstacles, in particular the ones linked to difficulties in attribution of legal responsibility (reversing the burden of proof). The **Parliamentary Counter-Proposal (PCP)**, in discussion, is limited to larger Swiss-based companies. It creates a legal duty to comply with the provisions for the protection of human rights and the environment, including when operating abroad. It extends to 'business activities of controlled companies or due to business relationships with a third party' (limited to legally controlled subsidiaries). If adopted it would need to be implemented through a 'patchwork' of legislation (Swiss Code of Obligations, Civil Code and Federal Code on Private International Law). Liability is restricted to damage caused to life and limb or property, and would be limited to the parent company - subsidiary relationship but would not extend throughout the supply chain. It provides for a strict liability regime with a due diligence defence whereby companies will not be considered liable if they can prove that they have taken measures required by law to protect human rights and the environment.

This initiative creates a positive duty to exercise due diligence in relation to adverse human rights and environmental impacts. Moreover, the specific liability provision would create a strict liability regime with a due diligence defence which would reverse the burden of proof and thereby alleviate a number of obstacles related to access to justice. On the other hand, the scope is limited to Swiss-based companies. Moreover, the PCP has a scope limited to certain Swiss-based businesses, and a specific liability provision limited to parent company liability.

THE GERMAN DRAFT LAW

This draft is a legal proposal which was made public and has not been adopted yet. It aims at ensuring the protection of internationally recognized human rights and the environment in global value chains. It applies to companies domiciled in Germany (companies who have their registered office, central administration, or principal place of business in Germany). It is limited to large companies (minimum 250 employees and turnover of more than 40 million euros, or balance sheet total of more than 20 million euros) and medium-sized companies operating in high-risk sectors. According to this law, companies must exercise adequate due diligence to identify, prevent and remediate adverse human rights and environmental impacts in their activities and across their entire value chains. These obligations extend to qualifying companies' activities within and outside of Germany, and to the companies' own activities and throughout the value chain. A competent

public authority would be in charge of the implementation and the monitoring. Sanctions for non-complying companies would include administrative fines (up to 5 million euros) and potential exclusion from public contracts with the German government. This proposal does not provide for a specific liability regime in case of harm, but victims can bring tort claims under the general principles of German law. Moreover, it seeks to improve access to remedy through 3 provisions: requirement to establish an internal complaint mechanism; conflict of law provision (overriding mandatory rules); waiving of statute of limitations.

This law would create a positive duty to exercise due diligence in relation to adverse human rights and environmental impacts and would extend to the entire value chain. Moreover, it aims to improve accesses to remedy. Its weaknesses, on the other hand, are its limited scope (limited to large companies and some medium-sized ones, and only German companies), as well as criminal sanctions for the Compliance Officer in case of breach of their duty risk creating perverse incentives whereby companies distance themselves from entities within their value chains.

IMPLICATIONS FOR A BELGIAN LAW IN THE CONTEXT OF ECCJ FRAMEWORK

ECCJ has identified 10 features for 'effective, comprehensive' mandatory Human Rights Due Diligence Legislation which are used to discuss a potential law based on the assumption of identifying the most stringent option available.

1. The scope of human rights protected should cover all internationally recognized human rights and environmental standards;

2. Companies covered by the law should include, at a minimum, large companies whose corporate seat, headquarters or principal place of business lays in the respective jurisdiction, regardless of their legal form as well as small and medium-sized enterprises whose business activity bears particular risk of severe adverse impacts;

3. The law should enshrine 'the companies' responsibility to respect internationally recognized human rights and environmental standards' in their operations and supply chains;

4. The due diligence obligations should require companies to put in place appropriate due diligence measures to identify, prevent, mitigate, and account for how they address adverse human rights and environmental impacts, and to report on their adoption and outcome;

5. The reach of due diligence obligations should extend to the company's entire corporate structure, including controlled companies as well as its business relationships;

6. Liability and access to justice;

7. Due diligence defence, according to which companies may discharge their liability if they can prove that they took all due care to identify and avoid the loss or damage, or that the damage would have occurred even if all due care had been taken;

8. The law should allow victims to bring an action against the parent company to take steps to ensure cessation of the violation and for the compensation for the harm that would have been avoided if due diligence had been exercised appropriately;

9. The law should introduce a general obligation for the defendant company to disclose evidence relevant to the case;

10. Overriding mandatory rule.

FURTHER CONSIDERATIONS FOR BELGIAN CONTEXT

Regarding the scope of the law, the Belgian context is particularly challenging, due to the sharing of competences. So far, no clear answers are to be found in the Belgian scholarship as to the level of decision for a law that would cover a broad scope (environmental issues, labour and human rights). As to liability, a civil liability provision should be a key element of mandatory due diligence legislation, to ensure compliance with the law, and to improve access to remedy for victims.

In conclusion, four broader issues may be singled out for further reflection. First, the main objective of the law has to be determined (prevention of human rights abuses or addressing access to remedy constraints). Second, it needs to be decided how to position the law vis-à-vis other national initiatives (following an already existing one or creating a new one). Third, one needs to consider the timing of a possible proposal, with the current COVID19 crisis in mind. Finally, developing a strategy, might imply different actions instead of focusing on one law.

CHAPTER 2
HUMAN RIGHTS /CSD DUE DILIGENCE IN BELGIAN LAW
(GEERT VAN CALSTER, DIANA LICA)

Belgian law does not obstruct supply chain due diligence (SCDD) while it does little to encourage its use. General laws, both substantive and procedural, are considered to be flexible enough to accommodate SCDD:

CORPORATE LAW

As of yet, no SCDD cases have been introduced based on Belgian company law. Firstly, none of the ten principles in the 2020 Belgian Corporate Governance Code (soft law)

specifically relates to SCDD and human rights terminology has been used in a very broad sense. Secondly, the 2019 Code of Companies and Associations (hard law) does not contain any obligations specifically aimed at human rights or SCDD. Human rights are mentioned twice only, and with respect to *reporting requirements*. This is the one area which one could optimistically stretch to include SCDD. In that sense, Article 128 *jo.* 96 Belgian Company Code 1999 / Article 3:45 jo. 3:5 Belgian Code of Companies and Associations 2019 make it a crime to breach the obligation to give a true image of the company in the annual report. However, this would still leave the victim with the proof of causality.

Another matter to consider is that mother companies are not generally liable for acts of their daughter companies. *Veil piercing* attempts to invert this. It specifically refers to situations in which creditors of the daughter company also (try to) engage the liability of the mother company. The most common veil piercing ground in Belgian law is abuse of right: the plaintiff will need proof that the mother company was controlling *de facto* its subsidiary.

Concealment, fraud and the creation of false appearances are three other grounds available for veil piercing in Belgian law but they are less usual. To our knowledge there has as yet been no specific application of veil piercing in the business and human rights context under Belgian law.

THE BELGIAN CODE OF ECONOMIC LAW

As far as SCDD and human rights are concerned, the Belgian Code of Economic Law disciplines false claims made by companies, namely those which do not reflect the real company practice. Article VI.100 of the Code contains a **'black list'** of such (unfair) practices (e.g. claiming to have signed a code of conduct while this is not the case; applying a label of trust without permission, etc.) which can be interesting for plaintiffs to rely in the context of SCDD. Article VI.98, 2° turns the breach of the code of conduct into an unfair commercial practice if it induced or could have induced the average consumer to engage in a commercial transaction, which he/she would otherwise not have engaged in. That a commercial practice is found to be unfair is sufficient proof of a fault in the sense of Article 1382 Civil Code (see below) and enables a claim in tort.

CONTRACT LAW

Provisions concerning SCDD are often inserted into business contracts (e.g. self-declaration regarding ISO 26000, the application of the Corporate Governance Code…). An interesting possibility from the point of view of SCDD are chain clauses, which oblige the whole chain of suppliers to ensure respect for human rights and to uphold labour conditions. The enforceability of this type of clauses can be strengthened by adding a damages clause (which allows parties contractually to determine beforehand the damages to be paid in case of a breach of contractual provision). The performance of human rights and SCDD obligations could equally be inserted as a suspensive condition or a condition of avoidance: the creation or existence of the contract, respectively, would depend on the fulfilment of the condition.

GENERAL TORT LAW

In the light of Articles 1382-1383 Belgian Civil Code 3 elements are necessary to trigger liability: (1) a fault; (2) a damage, and (3) a causal link between the fault and the damage. With regard to the causal link, the defendant can escape or reduce liability by proving *force majeure;* acts by a third party; or the fault of the victim itself. When a company has accepted certain (enforceable) human rights or SCDD obligations in a contract, a breach of such a contract can be used by a third party to prove a fault. In a company group situation and if a damage has been caused by a subsidiary, a mother company can be liable as *de facto* director if it has failed to exert control over the subsidiary or did not follow-up its subsidiary closely enough.

EMPLOYMENT LAW

Vicarious liability is enshrined in Article 1384(3) Belgian Civil Code, whereby a person is not only liable for his/her own acts or omissions but also for the acts and omissions by his/her appointee(s) (e.g. employee). In the context of SCDD, the rationale behind this arrangement (which allows the victims to claim damages from a solvent person) could go beyond a company being liable for its employees but incurring vicarious liability for a daughter company as well. (1) A bond of subordination/ appointment between employer and employee; (2) the existence of a fault as defined in articles 1382 and 1383 Civil Code; and (3) and a damage committed by the employee while performing his/her duties are necessary conditions.

PRIVATE INTERNATIONAL LAW AND PUBLIC INTERNATIONAL LAW

In terms of **jurisdiction,** Brussels I Recast applies "*in civil and commercial matters whatever the nature of the court or tribunal*" when a defendant is domiciled within an EU member state or when valid choice of court has been made. A SCDD case will usually be characterised as a 'civil or commercial matter' and most jurisdiction issues will thus be dealt with according to the Brussels I Recast as soon as a defendant is domiciled in the EU. The fact that there are three alternative concepts of domicile opens the door for *forum shopping*, meaning that plaintiffs can choose the venue thought most likely to provide a favorable judgment.

In the rare cases where the Brussels I Recast does not determine jurisdiction, the 2004 Belgian Act on private international law ('PIL Act') applies when the defendant has his domicile or usual place of residence in Belgium.

In terms of **applicable law,** which determines the substantive law but also issues such as the damage estimation and the prescription periods, matters can get very complicated in SCDD cases and may lead to *dépeçage* (this is, the application of the laws of different states to different issues in the same case). Whenever the designated law is not the *lex fori* (the law of the court hearing the case), the public policy exception can be invoked to apply the *lex fori* anyway. While the public policy exception is only rarely accepted, it should not be underestimated in a SCDD context.

Recognition and enforcement of SCDD judgments is subject to the regular procedure of recognition and enforcement of the Brussels I Recast or the Belgian PIL Act. Again, one reason to deny the recognition or enforcement of a judgement is public policy. While a judgment holding a company liable in a SCDD context cannot normally be argued to go against public policy, there may be elements pointing in that sense when the corporate veil has been pierced (see above) without any decent argumentation as to why such piercing is allowed or, conversely when a company wishes to enforce a SCDD judgment against an individual or an NGO (e.g. on costs and damages).

CONCLUSION

Many anchors in Belgian law could ground SCDD relevant court proceedings but these are scattered across various Statutes. It would seem preferable for Belgium to adopt a tailor-made SCDD Statute that would indirectly amend the many relevant provisions.

INTRODUCTION

This report provides a series of options to pursue mandatory human rights due diligence legislation in Belgium, based on an analysis of similar initiatives in surrounding countries (chapter 1) and an analysis of possible 'anchors' in current Belgian law (chapter 2).

Both chapters provide a series of options which can be considered and be combined in different ways. In developing a strategy on a possible Belgian approach towards mandatory human rights due diligence these options can be combined into one specific proposal for a law on mandatory due diligence or specific options can be pursued separately. In this context, considerations on a possible Belgian law should take into account that not everything might be covered in one law and one should consider short-term considerations versus long-term considerations as well as be clear on the ultimate objectives of the law. Concerning the latter, concrete initiatives might differ if the ultimate objective of the law is to introduce due diligence systems in Belgium and devise a law which effectively implements such systems (prevent corporate human rights violations) versus a law which is focused on providing access to remedy for victims of human rights violations. A strategy can also pursue the two objectives but this might imply that different instruments and actions are proposed possibly in a strategized sequence. Of course, one can also still pursue the strategy of developing one due diligence law which aims to cover both objectives.

The first chapter will examine the state of play of mandatory human rights due diligence legislation in Europe with a specific focus on the UK Modern Slavery Act, the Dutch Child Labour Due Diligence Act, the French Duty of Vigilance Law, the Swiss Responsible Business Initiative and its parliamentary counter-proposals and the German Due Diligence in Supply Chains Draft Law. It provides a comparative overview of the different laws, assess their strengths and weaknesses and draw implications for a possible Belgian law using the ECCJ framework which has identified 10 features for 'effective, comprehensive' mandatory Human Rights Due Diligence Legislation. It also offers further considerations on a possible law in the Belgian context focusing on economic structure, position of stakeholders and division of competences in Belgium; and on liability. In this chapter we will consistently use the term human rights due diligence (HRDD) since the regulatory measures we discuss aim to implement the UN Guiding Principles on Business and Human Rights (UNGPs) which first introduced the concept of HRDD.

The second chapter further explores some possible entry points already existing in Belgian law and focuses on the current state of play in Belgium with a focus on initiatives in relation to "due diligence" Belgian National Contact Point and 2017 Belgian National Action Plan to implement the UN Guiding Principles on Business and Human Rights, corporations law, general contract law, health, safety and regulatory law, employment law and private international law and public international law. In this chapter we will consistently use the term supply chain due diligence (SCDD) since in the Belgian context there are currently no measures in place which specifically address human rights in the supply chain. In this sense SCDD captures a broader concept to which links can be made from the perspective of HRDD.

CHAPTER 1

MANDATORY HUMAN RIGHTS DUE DILIGENCE: THE STATE OF PLAY IN EUROPE AND POTENTIAL LESSONS FOR A BELGIAN LAW

Claire Bright, Axel Marx[1]

[1] The authors thank Nina Pineau for research assistance and Huib Huyse and Boris Verbrugge for help with the survey.

1. Introduction

Over the last few years, the business and human rights legal landscape has evolved considerably, and states have increasingly been adopting domestic measures seeking to regulate the adverse human rights and environmental impacts arising out of business operations both within and outside their territory.

The concept of human rights due diligence was originally developed in the UN Guiding Principles on Business and Human Rights (UNGPs)[2] as the means through which companies can fulfil their responsibility to respect human rights.[3] It refers to the positive steps that companies need to take, through policies and processes, to identify, prevent, mitigate, and account for the adverse human rights impacts that they may cause or contribute to through their own activities, or that may be linked to their operations, products or services by their business relationships.[4]

Since then, the concept of human rights due diligence has been incorporated in several other international instruments such as the OECD Guidelines for Multinational Enterprises, following their revision in March 2011, where it was included in Chapter IV (on Human Rights) and extended to other areas of responsible business conduct including Employment and Industrial Relations, (Chapter V), Environment (Chapter VI) and Bribery (Chapter (VII). In addition, it is a key concept of the OECD Due Diligence Guidance for Responsible Business Conduct[5] as well as the various sectorial guidance developed by the OECD,[6] and has been incorporated in the ILO MNE Tripartite Declaration following its revision of March 2017. ISO 26000 also uses the concept of due diligence where it covers "the entire life cycle of a project or organizational activity'.[7]

In 2017, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities was adopted. It provides that the States obligation to protect human rights 'entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence to identify, prevent, and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights'.[8]

Similarly, the draft international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises ('Business

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[2] United Nations Office of the High Commissioner for Human Rights (OHCHR), Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs), UN Doc. HR/PUB/11/04 (2011), available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[3] UNGPs, Guiding Principle 15.
[4] UNGPs, Guiding Principle 17.
[5] OECD, OECD Due Diligence Guidance for Responsible Business Conduct, 2018.
[6] The various sectoral guidance developed by the OECD are available here: https://mneguidelines.oecd.org/duediligence/
[7] International Organization for Standardization ('ISO'), 'ISO 26 000 Social Responsibility', available at: https://www.iso.org/iso-26000-social-responsibility.html.
[8] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, available at: https://www.refworld.org/docid/5beaecba4.html

and Human Rights Treaty'),[9] that the open-ended Intergovernmental Working Group is currently elaborating, purports to introduce a similar duty on State. Indeed, Article 5 of the Revised Draft provides that 'State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction'.[10] It further specifies that States shall adopt measures necessary to ensure that business enterprises undertake human rights due diligence in order to identify, assess, prevent and monitor actual and potential adverse human rights violations or abuses that may arise from their own activities, or 'from their contractual relationships',[11] and communicate to stakeholders the policies and measures adopted.[12]

In practice, studies have shown the low level of implementation of human rights due diligence requirements by companies.[13] A recent survey of 334 businesses across the EU revealed that only one in three businesses are currently undertaking human rights due diligence which takes into account all human rights and environmental impacts.[14] In 2019, 200 of the largest publicly traded companies in the world were assessed on a set of human rights indicators by the Corporate Human Rights Benchmark.[15] It reveals that 'in aggregate, the 200 companies are painting a distressing picture: most companies are scoring poorly and the UN Guiding Principles on Business and Human Rights (UNGPs) are clearly not being implemented.'[16] The report further notes that 'Companies score 21% (3.2 out of 15) on average under the human rights due diligence assessment area, while 49% of companies score zero against every human rights due diligence indicator.'[17]

In the last decade, an increasing number of countries have started to adopt legislative measures requiring companies to report on the steps that they are taking to tackle certain human rights issues, in order to incentivize the adoption of due diligence processes by companies.[18] This is the case of the UK Modern Slavery Act analysed below. Other countries have gone beyond mere reporting requirements, and have enacted or are discussing legislations mandating companies to undertake substantive human rights due diligence.[19] Some of them are issue-specific, such as the Dutch Child Labour Due Diligence Act, whilst others, such as the French Duty of Vigilance Law, provide for an overarching duty to undertake human rights and environmental due diligence across issues and across sectors. These are presented below.

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[9] OEIWG, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: Revised Draft, (16 July 2019), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.
[10] Ibid., Article 5(1).
[11] Ibid., Article 5(2)(a).
[12] Ibid., Article 5(2)(a)-(d).
[13] L. Smit, C. Bright, R. McCorquodale, M. Bauer, H. Deringer, D. Baeza-Breinbauer, F. Torres-Cortés, F. Alleweldt, S. Kara, C. Salinier and H. Tejero-Tobed., 'Study on due diligence requirements through the supply chain', 'Study on due diligence requirements through the supply chain', Study for the European Commission, Directorate-General for Justice and Consumers [hereafter 'Study for the European Commission on due diligence requirements through the supply chain'], 24 February 2020, available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en (EC study Final Report).
[14] Ibid, at 49.
[15] Corporate Human Rights Benchmark (CHRB), "2019 Key Finding - Across Sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing", 2019, available at: https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf.
[16] Ibid., at 5.
[17] Ibid., at 5.
[18] Ibid., Article 5(2)(a)-(d).
[18] L. Smit, et al., Study for the European Commission on due diligence requirements through the supply chain'], at 172.
[19] Ibid., at 170.

Various developments and legislative initiatives are being discussed in several other countries. In Denmark, a parliamentary motion was put forward by three political parties calling on the Government to introduce a bill on human rights due diligence for all large companies as well as companies in high-risk sectors.[20] The motion received civil society, trade union, consumer and company support.[21] In Italy, the Government committed under its National Action Plan to assess existing laws and legislative reform introducing human rights due diligence,[22] and in Finland, the Government committed to conduct a study with the goal of adopting a mandatory human rights due diligence legislation.[23] In the UK, a coalition of civil society organisations have prepared a proposal for a corporate duty to prevent adverse human rights and environmental impacts based on a 2017 recommendation from the UK Joint Committee on Human Rights for a legislation modelled on the UK Bribery Act 2010.[24] The proposal contains a number of elements that are proposed to be included in a new legislation, which encompass the introduction of a duty to prevent adverse human rights and environmental impacts in companies' activities and in their supply and value chains, the obligation to develop and implement reasonable and appropriate due diligence procedures in order to prevent such impacts and to publish a forward-looking plan describing said measures. The proposal also provides for a strict liability regime in case of harm, with a due diligence defence whereby companies can escape liability if they can prove that they developed and implemented reasonable and appropriate due diligence procedures designed to prevent human rights and environmental impacts[25]. In Switzerland, a Swiss Popular Initiative entitled 'Protecting Human Rights and the Environment' was put forward in 2016 and two parliamentary counter-proposals are currently under discussion.[26] Their respective contents are detailed below. In Germany, a draft proposal from the German Federal Ministry for Economic Cooperation and Development on the regulation of human rights and environmental due diligence in global value chains was leaked to the public in February 2019.[27] In November 2019, Norway released a draft Act relating to transparency

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[20] BHRRC, 'National Movements for Mandatory Human Rights Due Diligence in European Countries' (2019) available at https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries.
[21] Ibid.
[22] Ibid.
[23] ECCJ, 'Finnish Government commits to HRDD legislation', (2019) available at http://corporatejustice.org/news/15476-finnish-government-commits-to-hrdd-legislation.
[24] UK Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability', Sixth Report of Session 2016-17, 5 April 2017, available at: https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf. On the legal feasibility of introducing such a mechanism with the UK context, see the study carried out by the British Institute of International and Comparative Law: I. Pietropaoli, L. Smit, J. Hughes-Kennett, P. Hood, 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms', 11 February 2020, available at: https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms.
[25] 'This section is based on information received in an email by Rosa Polaschek concerning the UK CSO Draft proposal on the corporate duty to prevent adverse human rights and environmental impacts.'
[26] Nicolas Bueno, "The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability", in Liesbeth Enneking et al (eds.), *Accountability, International Business Operations, and the Law*, London: Routledge (2020), 239 Nicolas Bueno, "The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability", in Liesbeth Enneking et al (eds.), *Accountability, International Business Operations, and the Law*, London: Routledge (2020), 239.
[27] J-O. Becker, L. Wijekoon, C. Osborn, M. Congiu and S. Marculewitz, 'Germany Seeks to Mandate Human Rights Due Diligence for Companies and Their Global Partners', 25 April 2019, available at: https://www.littler.com/publication-press/publication/germany-seeks-mandate-human-rights-due-diligence-companies-and-their. See also BHRRC, 'German Development Ministry drafts law on mandatory human rights due diligence for German companies' (2019), https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies.

in supply chains.[28] The draft legislation seeks to introduce a 'duty to know of salient risks that may have an adverse impact on fundamental human rights and decent work',[29] and to provide information about 'how an enterprise conducts itself with regard to fundamental human rights and decent work' to anyone who requests it,[30] which would apply to *all* enterprises that offer goods and services in Norway. In addition, the draft legislation seeks to introduce an obligation for companies distributing goods to Norwegian consumers to publish information about their production sites.[31] Furthermore, the draft legislation provides for a positive duty to exercise human rights due diligence and publicly disclose information including the due diligence processes that it has in place, which would only apply to larger enterprises.[32] Civil society campaigns have also called for mandatory due diligence laws in many countries including Austria, Belgium, Luxembourg, the Netherlands and Sweden.[33]

At the European level, various instruments have also been adopted which introduce certain human rights due diligence obligations. For instance, the EU Non-Financial Reporting Directive[34] requires large public-interest companies to disclose information on the policy they implement in relation to, *inter alia*, environmental, social and employee matters and respect for human rights.[35] Although the directive has been successful in getting many companies to start reporting, the actual meaningfulness of the reporting exercise remains limited.[36] A recent analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Directive concluded that 'while there is a minority of companies providing comprehensive and reliable sustainability-related information, at large quality and comparability of companies' sustainability reporting is not sufficient to understand their impacts, risks, or even their plans'.[37] Going beyond mere reporting requirements, the EU Timber Regulation,[38] which was adopted prior to the UN Guiding Principles, mandates operators placing timber or timber products on the EU market to put a in place a 'due diligence system' containing three key elements: measures and procedures providing certain information, risk assessment procedures, and risk mitigation procedures.[39] Similarly, the EU Conflict Minerals Regulation, which

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[28] Report from the Ethics Information Committee, appointed by the Norwegian government on June 1, 2018. Report delivered on November 28, 2019. Draft translation from Norwegian of sections of Part I. Available at: https://www.business-humanrights.org/sites/default/files/documents/Norway%20Draft%20Transparency%20Act%20-%20draft%20translation_0.pdf .
[29] Ibid, Section 5.
[30] Ibid, Section 7.
[31] Ibid, Section 6.
[32] Ibid, Section 10.
[33] BHRRC, 'National movements for mandatory human rights due diligence in European countries', available at: https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries.
[34] 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.
[35] Ibid., Art. 19a.
[36] Alliance for Corporate Transparency, '2019 Research Report: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive', February 2020, available at: http://www.allianceforcorporatetransparency.org/assets/2019_Research_Report%20_Alliance_for_Corporate_Transparency-7d9802a0c18c9f13017d686481bd2d6c6886fea6d9e9c7a5c3cfafea8a48b1c7.pdf
[37] Ibid, at 10.
[38] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.
[39] Ibid., art. 3.

will come into force on 1 January 2021,[40] will require EU importers of tin, tantalum, tungsten and gold to carry out due diligence in accordance with the OECD Guidance for Responsible Supply Chains from Conflict-Affected and High Risk Areas.[41]

In addition, the momentum for an EU-level legislation on human rights and environmental due diligence legislation is getting stronger[42], at least this was the case before the outbreak of COVID19[43]. In 2019, the European Commission (DG Justice and Consumers) commissioned a study on due diligence requirements through the supply chain.[44] The study reveals that a large majority of stakeholders (75,37% amongst business stakeholders and (96,51% amongst civil society organisations) found that an EU-level regulation on a general due diligence requirement for human rights and environmental impacts may provide benefits for business.[45] In December 2019, over 100 civil society organisations and trade unions issued a public call 'for effective EU legislation that establishes a mandatory human rights and environmental due diligence framework for business, companies and financial institutions operating, or offering a product or service, within the EU'.[46]

The next part of this report will examine the state of play of mandatory human rights due diligence legislation in Europe. In-depth analysis will be provided for six particularly relevant legislation and legislative proposals in order to inform Belgium policy makers of the lessons that can be drawn from these examples. These are the UK Modern Slavery Act, the Dutch Child Labour Due Diligence Act, the French Duty of Vigilance Law, the Swiss Responsible Business Initiative and its parliamentary counter-proposals and the German Due Diligence in Supply Chains Draft Law. For each case, we provide a short introduction, present the purpose of the law, the scope of the law, the legal obligations that it creates, the reach of these obligations, the enforcement mechanisms provided for by the law, the potential liability provisions, the potential provisions concerning access to remedy, the implementation of the law, and a conclusion. Next, we provide a comparative overview of the different laws, assess their strengths and weaknesses and draw implications for a possible Belgian law using the ECCJ framework which has identified 10 features for 'effective, comprehensive' mandatory Human Rights Due Diligence Legislation. Finally we offer further considerations on a possible law in the Belgian context focusing on economic structure, position of stakeholders and division of competences in Belgium; and on liability. We end with a short conclusion.

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[40] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down the 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.
[41] Ibid., art. 3-8.
[42] European Parliament, Report on Sustainable Finance (2018/2007(INI), at para 6.
[43] At this moment it is difficult to assess the implications of the COVID19 pandemic but it is clear that the economic consequences will be very significant. How long this will influence economic decision-making is unclear but it is clear that it might affect the momentum for new initiatives.
[44] L. Smit, et al., Study for the European Commission on due diligence requirements through the supply chain, *op. cit.*
[45] Ibid. at 142.
[46] ECCJ, 'A call for human rights and environmental due diligence legislation', 2 December 2019, available at: http://corporatejustice.org/news/final_cso_eu_due_diligence_statement_2.12.19.pdf.

2. The UK Modern Slavery Act

A. Introduction

The Modern Slavery Act entered into force on 31 July 2015, emulating the California Transparency in Supply Chains Act[47] adopted 5 years earlier.[48] The California Transparency in Supply Chains Act mandates large retailers and manufacturers to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains.[49] It was adopted in an attempt to 'educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and thereby to improve the lives of victims of slavery and human trafficking.'[50]

The transparency in supply chains clause (Section 54) of the UK Modern Slavery Act 2015[51] requires large companies to publish a yearly statement disclosing the steps that they have taken, if any, to ensure that modern slavery and human trafficking is not taking place in any of their supply chains, or in any part of their own business.

B. Purpose of law

Section 54 of the Modern Slavery Act was introduced 'to prevent modern slavery in organisations and their supply chains'.[52] The practical guide issued by the Home Secretary explains that:[53]

> The measure is designed to create a level playing field between those businesses, whose turnover is over a certain threshold, which act responsibly and those that need to change their policies and practices. However, the Government wants to encourage businesses to do more, not just because they are legally obliged to, but also because they recognise it is the right thing to do.

The practical guide explains that: 'the provision seeks to create a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards.'[54]

It further adds that:[55]

> One key purpose of this measure is to prevent modern slavery in organisations and their supply chains. A means to achieve this is to increase transparency by ensuring the public,

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[47] California Transparency in Supply Chains Act of 2012, Senate Bill No 657: it requires retail sellers and manufacturers (having more than $100,000,000 in annual worldwide gross receipts) doing business in the California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains, available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB657
[48] M. Koekkoek, A. Marx, and J. Wouters 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains', in, 8(4) *Global Policy* 2017, 522.
[49] California Transparency in Supply Chains Act of 2012, Section 1714(a)(1).
[50] California Transparency in Supply Chains Act of 2012, at §2j.
[51] UK Modern Slavery Act 2015 (UK MSA), s 54(12).
[52] Transparency in Supply Chains etc. A practical guide', Guidance issued under section 54(9) of the Modern Slavery Act 2015, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf, at 3.
[53] Ibid., at 3.
[54] Ibid., at 3.
[55] Ibid., at 3.

> consumers, employees and investors know what steps an organisation is taking to tackle modern slavery. Those organisations already taking action can quickly and simply articulate the work already underway and planned. Organisations will need to build on what they are doing year on year. Their first statements may show how they are starting to act on the issue and their planned actions to investigate or collaborate with others to effect change.

The Transparency in Supply Chains provision therefore largely relies on the 'courts of public opinion',[56] which include consumers, civil society, and investors, to address the role of businesses in preventing modern slavery from occurring in their supply chains and organisations.[57] In practice, this means that consumer-facing companies are subject to greater scrutiny.[58]

C. Scope

The scope of 'commercial organisations' which are subjected to Section 54 is limited in terms of turnover: it applies to companies which have a turnover of at least £36 million.[59] It is not limited to UK-domiciled companies but extends to companies which supply goods or services, and carry on a business, or part of a business, in any part of the UK, wherever they may be incorporated.[60] Unlike the California Transparency in Supply Chains Act, it does not require that companies conduct a certain amount of business in the UK.[61]

The scope of the Section 54 allows the law to have a wide reach and apply to a significant number of companies (approximately 12,000 companies according to estimates).[62]

D. Obligations

The obligation is one of disclosure: companies subjected to Section 54 must publish an annual 'slavery and human trafficking statement'. Section 54(4)(a) specifies that such statement must set out 'the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business'. Section 54(4)(b) gives the possibility to companies to state that they have taken no steps to address modern slavery in their supply chains.[63]

Section 54(7) provides that if the company has a website, it must '(a)publish the slavery and human trafficking statement on that website and (b) include a link to the slavery and human trafficking statement in a prominent place on that website's homepage'.[64] Section 54(8) further adds that if the

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[56] John G 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', A/HRC/8/5 (7 April 2008), 54.
[57] Transparency in Supply Chains etc. A practical guide', at 3.
[58] C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in M. Buscemi, N. Lazzerini, L. Magi and D. Russo, *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Brill, 2020), 218.
[59] Ibid., S. 54(2)(b).
[60] UK Modern Slavery Act 2015 (UK MSA), s 54(12).
[61] Shift, 'Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights', July 2015, available at: https://www.shiftproject.org/media/resources/docs/Shift_ModernSlaveryAct_UNGPs_July2015.pdf.
[62] Ibid., at 2.
[63] UK MSA 54(4)(b).
[64] UK MSA 54(7).

company does not have a website, 'it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.'[65]

Section 54 does not mandate what should be reported in the statement,[66] but indicates a non-exhaustive list of information that *may* be included:

> (a) the organisation's structure, its business and its supply chains;
>
> (b) its policies in relation to slavery and human trafficking;
>
> (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
>
> (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
>
> (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
>
> (f) the training about slavery and human trafficking available to its staff.

The slavery and human trafficking statement must be approved and signed by a director, or an appropriate senior person in the business. The practical guide explains that:

> this ensures senior level accountability, leadership and responsibility for modern slavery and gives it the serious attention it deserves. An organisation's top management will be best placed to foster a culture in which modern slavery is not tolerated in any form. They need to lead and drive the measures required to address this problem throughout the business.

E. Reach of Obligations

The disclosure obligation covers both the companies' own business and their supply chains, even though it does not necessarily cover the entirety of the supply chain.[67] The practical guide issued by the Home Secretary specifies in this respect that:

> When the Act refers to ensuring that slavery and human trafficking is not taking part in any part of its supply chain, this does not mean that the organisation in question must guarantee that the entire supply chain is slavery free. Instead, it means an organisation must set out the steps it has taken in relation to any part of the supply chain (that is, it should capture all the actions it has taken).[68]

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[65] UK MSA 54(8).
[66] Baroness Butler-Sloss, M. Miller MP and F. Field MP, 'Independent Review of the Modern Slavery Act 2015: Final Report', May 2019, at 14.
[67] C. Bright, 'Mapping human rights due diligence legislations and evaluating their contribution in upholding labour standards in global supply chains', in ILO Research Compendium on Decent work in a Globalized economy: lessons from public and private initiatives', (forthcoming, 2020) at 7.
[68] Transparency in Supply Chains etc. A practical guide', *op. cit.*, at 5.

F. Enforcement of the Law

In case of non-compliance, section 54 provides that the Secretary of State may seek an injunction through the High Court (or, in Scotland civil proceedings for specific performance of a statutory duty under section 45 of the Court of Session Act 1988).[69] Failure to comply with the injunction would constitute contempt with a court order and is punishable by a fine.[70]

The practical guide specifies in this respect that compliance does not turn on how well the statement is written or presented so long as it sets out the steps that have been taken, or the absence thereof.[71]

However, this enforcement mechanisms has never been used in practice and there have been no penalties to date for non-compliant organisations. [72]

G. Liability

Section 54 does not provide for any liability provision in case modern slavery or human trafficking is found in companies' operations or in their supply chains.

H. Access to remedy

Section 54 of the Modern Slavery Act does not contain provisions which would alleviate the existing barriers to accessing remedy in the UK for victims of modern slavery or human trafficking in the operations or supply chains of a company doing business in the UK.[73]

In addition, it does not require companies to disclose information about their remediation processes where adverse impacts have taken place.[74]

I. Implementation

The lack of concrete impact that Section 54 has had on companies' behaviour has been highlighted in various studies.[75]

In May 2019, the independent review of the Modern Slavery Act conducted at the request of the Home Secretary was published.[76] The report highlighted that section 54 'has contributed to greater awareness of modern slavery in companies' supply chains',[77] and led to 'thousands of large businesses taking action to identify and eradicate modern slavery in their supply chains.'[78]

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[69] UK Modern Slavery Act 2015 (UK MSA), s 54(11).
[70] Transparency in Supply Chains etc. A practical guide', *op. cit.*, at 6.
[71] Transparency in Supply Chains etc. A practical guide', *op. cit.*, at 6.
[72] Ibid., at 14.
[73] C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', *op. cit.* at 226.
[74] Shift, 'Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights', *op. cit.*, at 3.
[75] Field, Miller and Butler-Sloss, 'Independent Review of the Modern Slavery Act 2015: Final Report', *op. cit.* at 14.
[76] Ibid. at 7.
[77] Ibid., at 14.
[78] Ibid., at 7.

However, the report also noted that 'a number of companies are approaching their obligations as a mere tick-box exercise'[79] and that widespread issues of non-compliance persist, with an estimated 40 per cent or so of eligible companies not complying with the legislation at all.'[80] This is due to the lack of monitoring or effective enforcement mechanisms in case of non-compliance.[81] In addition, there is evidence that many statements published so far fail to respect the law's minimum requirements.[82] The Report recommends putting teeth into section 54 of the Modern Slavery Act 'so that all businesses take seriously their responsibilities to check their supply chains.'[83]

The Business & Human Rights Resource Centre, which has been tracking the transparency statements of the largest companies in the UK (FTSE 100) since the adoption of the UK Modern Slavery Act, noted in its latest annual assessment that 'three years on, most companies still publish generic statements committing to fight modern slavery, without explaining how. Sadly, only a handful of leading companies have demonstrated a genuine effort in their reporting to identify and mitigate risks'.[84]

Conclusion

The transparency in supply chains clause (Section 54) of the UK Modern Slavery Act has had some positive impacts insofar as it led a number of large companies to start taking action in relations to modern slavery in their supply chains, has helped raise awareness, and in particular boardroom awareness, to the issues.[85]

However, it has failed to meaningfully change corporate practices. The main reasons for this are linked to the fact that the obligations created by the law are limited to reporting obligations, and the law does not prescribe a positive obligation to undertake substantive human rights due diligence.[86] The majority of statements are generic and many companies approach their reporting obligation as mere tick-box exercise. In addition, the reporting obligations do not cover the entirety of the supply chain. The lack of monitoring and effective enforcement mechanisms in case of non-compliance have led to low levels of implementation and widespread issues of non-compliance. Finally, the law does not require companies to disclose information about their remediation processes where

[79] Ibid., at 14.
[80] Ibid at 14.
[81] L. Smit, et al. Study for the European Commission on due diligence requirements through the supply chain, *op. cit.*, at 245.
[82] CORE Coalition, 'Risk Averse? Company Reporting on raw material and sector-specific risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015' (2017), https://corporate-responsibility.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf; Ergon Associates Ltd, 'Modern slavery reporting: Is there evidence of progress?' (October 2018), https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739; Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability' 37 ff, https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf; Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) Modern Law Review 1017, 1042; J. Nolan and G. Bott, 'Global supply chains and human rights: spotlight on forced labour and modern slavery practices', 24(1) Australian Journal of Human Rights, 2008, 44.
[83] Field, Miller and Butler-Sloss, 'Independent Review of the Modern Slavery Act 2015: Final Report', at 7.
[84] BHRRC, 'FTSE 100 & The UK Modern Slavery Act: From Disclosure to Action' (2018), available at: https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf, at 3.
[85] A. Marx and J. Wouters, 'Combating Slavery, Forced Labour and Trafficking. Are Current International, European and National Instruments Working?', 8(4) *Global Policy* 2017, at 495.
[86] BHRRC, 'FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action', *op. cit.*, at 24.

adverse impacts have taken place, nor does it not provide access to remedy for victims of modern slavery or human trafficking.[87]

3. The Dutch Child Labour Due Diligence Act

A. Introduction

The Dutch Child Labour Due Diligence Act was adopted on 14 May 2019.[88] The exact date of its entry into force is to be determined by Royal Decree.[89] It requires companies that sell goods or provide services to Dutch end-users to exercise due diligence in relations to the risks of child labour being used in their supply chains.

B. Purpose of law

The law was developed with the twofold objective to both prevent child labour from being used in the goods and services which are brought onto the Dutch market, and ensure Dutch consumers' peace of mind in this respect. Indeed, the preamble of the law affirms:[90]

> We have taken into consideration the desirability of enshrining in law that companies that sell goods and services on the Dutch market should do everything within their power to prevent their products and services from being produced using child labor, so that consumers can buy them with peace of mind;

Article 1 defines 'end-user' as 'the natural person or legal entity using or consuming the good or purchasing the service'.[91]

Article 2 defines Child labour as meaning:[92]

> a. in any case, any form of work, whether or not under an employment contract, performed by persons who have not yet reached the age of 18 and which is included among the worst forms of child labor referred to in Article 3 of the Worst Forms of Child Labor Convention, 1999;
>
> b. if the work takes place in the territory of a State Party to the Minimum Age Convention, 1973, 'child labor' shall further mean any form of work prohibited by the law of that State in implementation of that Convention;
>
> c. if the work takes place in the territory of a State which is not a party to the Minimum Age Convention, 1973, child labor shall further be understood to mean: i. any form of work,

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[87] L. Smit, et al. Study for the European Commission on due diligence requirements through the supply chain, *op. cit.*, at 246.
[88] The Netherlands Child Labour Due Diligence Act 2019.
[89] The Netherlands Child Labour Due Diligence Act 2019, Article 11, Unofficial translation of the law commissioned by Ropes and Gray, available at: https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies.
[90] Ibid., preamble.
[91] Ibid. Article 1.
[92] Ibid., Article 2.

whether or not under an employment contract, performed by persons who are subject to compulsory schooling or who have not yet reached the age of 15, and

ii. any form of work, whether or not under an employment contract, performed by persons who have not yet reached the age of 18, insofar as such work, by virtue of the nature of the work or the conditions under which it is performed, may endanger the health, safety or morality of young persons.

2. By way of derogation from paragraph 1(c), child labor shall not include light work as defined in Article 7(1) of the Minimum Age Convention, 1973, carried out for a maximum of 14 hours a week by persons who have reached the age of 13.

C. Scope

Under article 4.1, the law applies to all companies selling goods and supplying services to the Dutch end-users, regardless of where they are incorporated or registered. It is therefore not limited to Dutch companies, and Article 4.1. expressly specifies that it extends 'to companies not registered in the Netherlands that sell or supply goods or services to Dutch end users'.[93]

The scope of the law is not limited to companies of a certain size or with a certain turnover, however, the law provides that exceptions may be granted by General Administrative Orders for certain categories of companies.[94] In addition, the law does not provide for any restrictions in terms of the legal form of the company, which is defined in Article 1 as 'a company within the meaning of Article 5 of the Trade Register Act 2007 or any entity engaged in an economic activity, regardless of its legal form and the way in which it is financed'.[95]

The law specifies that it does not apply to companies that merely transport goods to the Netherlands (Article 4.4).[96]

D. Obligations

The legal duty created by the law is twofold and comprises an obligation to exercise due diligence [*gepaste zorgvuldigheid*]; and a reporting obligation.

The obligation to exercise due diligence consists both in a duty to investigate and, depending on the results of the investigation, a duty to draft an action plan. More specifically, under Article 5.1, companies are required to 'investigate whether there is a reasonable suspicion that the goods or services to be supplied have been produced using child labor'.[97] The article further specifies that, should such a suspicion arise, the company should put in place and implement an action plan in order to address it. The investigation should be based on 'reasonably known and accessible sources.[98]

[93] Ibid., Article 4.1.
[94] Ibid., Article 4.3.
[95] Ibid., Article 1.
[96] Ibid., Article 4.4.
[97] Ibid., Article 5.1.
[98] Ibid., Article 5.2.

The requirement to exercise due diligence can be satisfied by obtaining goods or services from companies that have issued a statement on the due diligence that they exercise with respect to those goods and services.[99]

Under Article 4 of the law, companies are required to issue a statement declaring that they exercised due diligence in order to prevent such goods or services from being produced using child labor.[100] The statement must be sent to a public supervising authority whose appointment is mandated by the law within 6 months of the entry into force of the law for companies which are already registered with the trade register, or for the companies which are not so registered, 'within six months after the company supplies goods or services to end users in the Netherlands for the second time in a given year' (Article 4.2).[101] The supervising authority 'shall publish the declarations in a public register or on its website' (Article 4.5).[102] This reporting requirement is a one-off exercise.

The law does not give details as to the form or content of the statement, but provides that further rules in this respect may be laid down in the General Administrative Order.[103]

E. Reach of Obligations

The law mandates companies to exercise human rights due diligence in order to prevent the goods or services that they sell or supply from being produced using child labour. This entails that the due diligence exercise is not limited to certain tiers of the supply chains, but that the entire supply chain must be covered.[104]

F. Enforcement of the Law

The law mandates the appointment of a public supervising authority which, under Article 3, shall be charged with the supervision of compliance with the provisions of the law.[105] Any third parties affected by a company's failure to comply can submit a complaint to that supervising authority (Article 3.2), on the basis of concrete evidence of non-compliance (Article 3.3), but only after having submitted it first to the company which has six months to address it (Article 3.4).

Article 7 provides that the supervising authority may impose an administrative fine in case of non-compliance,[106] which can be up to €8,200 in case of failure to submit the statement in accordance with the act,[107] or up to €820,000 or 10% of the worldwide annual turnover in case of non-compliance with the duty to exercise due diligence.[108] In addition, Article 9 provides that a director may incur criminal sanctions where in the five years preceding the violation, an administrative fine was

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[99] Ibid., Article 5.1.
[100] Ibid., Article 4.1.
[101] Ibid., Article 4.2.
[102] Ibid., Article 4.5.
[103] Ibid., Article 4.3.
[104] L.F.H. Enneking, 'The Netherlands Country Report', in L. Smit, et al. Study for the European Commission on due diligence requirements through the supply chain, *op. cit.*, at 176
[105] The Netherlands Child Labour Due Diligence Act 2019, Article 3.1.
[106] Ibid., Article 7.
[107] R. Littenberg and N.V. Blinder, 'Dutch Child Labor Due Diligence Act Approved by Senate - Implications for Global Companies', available at: https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies.
[108] Ibid.

imposed 'for the same violation by the company, committed by order of or under the *de facto* leadership of the same manager'.[109]

General Administrative Orders will specify several aspects of the law,[110] and in particular identify the public supervising body that will supervise and enforce the legislation.[111]

G. Liability

The law does not contain any specific liability provision in case child labour is actually found in companies' supply chains.

H. Access to remedy

The law is framed in terms of consumer protection and does not contain any specific provisions aimed at enhancing access remedy in the Netherlands for the victims of child labour.[112]

I. Implementation

The Dutch Child Labour Due Diligence Act is not yet in force so there is currently no example of its implementation in practice.

Conclusion

By imposing a legal obligation on companies bringing goods and services onto the Dutch market to exercise human rights due diligence in relation to the risks of child labour being used in their supply chains, the Dutch Child Labour Due Diligence Act has the potential to have some concrete impacts in terms of reducing the use of child labour in global supply chains. This is so especially considering its far-reaching scope of application, which includes both Dutch and foreign companies selling goods or supplying services to Dutch end-users, without limitations in terms of size or turnover.[113] However, it is worth pointing out that one of the limitations of such a scope is that it is limited to the goods and services sold or supplied to the Dutch market and therefore it does not cover the activities of Dutch companies in relations to goods and services supplied outside of the Dutch market.

However, the law suffers from several weaknesses. First of all, the reporting requirement is a one-off exercise, rather than a requirement that must be regularly repeated, which constitutes a limitation of the law.[114]

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[109] The Netherlands Child Labour Due Diligence Act 2019, Article 9.
[110] A. Hoff, 'Dutch child labour due diligence law: a step towards mandatory human rights due diligence', 10 June 2019, available at: https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/
[111] J. Arvanitis and K. Braine, 'Breaking Down the Dutch Child Labor Due Diligence Act', 2 July 2019, available at: https://www.kroll.com/en/insights/publications/compliance-risk/dutch-child-labor-due-diligence-act.
[112] L.F.H. Enneking, 'The Netherlands Country Report', in L. Smit, C. Bright et al. Study for the European Commission on due diligence requirements through the supply chain, *op. cit.*, at 178.
[113] It is noted that such limitations may be specified in the future through implementing decrees.
[114] C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', *op. cit.* at 231.

In addition, its focus on a single issue, child labour, spur companies on to prioritize their efforts to address this particular issue over potentially more salient human rights risks for the company in question,[115] and risks detracting attention from other types of adverse human rights impacts.[116]

Finally, it does not contain any specific provisions aiming at alleviating the existing barriers to accessing remedy for victims of child labour.

4. The French Duty of Vigilance Law

A. Introduction

The French law on the Duty of Vigilance was adopted on 21 February 2017 and enacted on 27 March 2017.[117] It represents the first legislation worldwide to impose a legal obligation on companies to undertake human rights due diligence in order to identify, prevent and address human rights and environmental issues in their own activities and in their supply chains.[118]

B. Purpose of law

The French Duty of Vigilance Law was developed in the wake of the Rana Plaza tragedy with the objective to enhance corporate accountability and provide access to justice for the victims.[119]

The explanatory memorandum of an earlier version of the law affirmed that the pursued objective was to implement the UNGPs through the establishment of a duty of vigilance on parent and lead companies to identify, prevent and address human rights issues in their own activities and in their supply chains.[120]

C. Scope

Under the newly added Article 225-102-4 of the French Commercial Code, the French Duty of Vigilance Law applies to companies incorporated or registered in France for two consecutive fiscal years which employ at least 5,000 people in France (either directly or through their French subsidiaries), or at least 10,000 worldwide (through their subsidiaries located in France and abroad).[121] The scope of the

[115] GBI and Clifford Chance, 'Business and Human Rights: Navigating the Changing Legal Landscape', 2019, at 7, available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/03/business-and-human-rights-navigating-a-changing-legal-landscape.pdf.
[116] I. Landau, 'What are we missing by focusing on modern slavery?', available at: https://www.business-humanrights.org/en/what-are-we-missing-by-focusing-on-modern-slavery; L. Smit, et al., 'Study for the European Commission on due diligence requirements through the supply chain', *op. cit.*, at 254.
[117] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre ['The French Duty of Vigilance Law'], available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id.
[118] C. Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?', EUI Working Paper MWP 2020/01, available at: https://cadmus.eui.eu/bitstream/handle/1814/65957/MWP_2020_01.pdf?sequence=1&isAllowed=y.
[119] Ibid., at 4.
[120] Tiphaine Beau de Loménie, Sandra Cossart and Paige Morrow, 'From Human Rights Due Diligence to Duty of Vigilance: Taking the French Example to the EU level' in Angelica Bonfanti (ed), *Business and Human Rights in Europe* (Routledge 2019) 133.
[121] French Commercial Code, Article 225-102-4.

law is limited to a specific type of companies of a certain legal form under French company law known as 'sociétés anonymes'.[122]

There is no publicly available database nor official list compiled by the French government on the companies subjected to the law. A recent report for the French Government on the implementation of the law notes that it is currently impossible to establish a reliable list of eligible companies.[123] However, according to the estimates, between 200 and 250 companies would be eligible,[124] which is a rather small number.[125]

D. Obligations

The newly introduced article L. 225-102-4 of the French Commercial Code places a duty of vigilance on large companies, which must be fulfilled through:

> reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment resulting from the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship.[126]

The concept of the 'duty of vigilance' used in the French law follows the terminology used in the in the French version of the ISO26000 for the translation of the concept of 'human rights due diligence'. The concept of vigilance is also more familiar to French law than that of due diligence, and has been used in different fields.[127]

Article L. 225-102-4 provides that the vigilance plan must include five elements in particular:

- a mapping of the risks involved, containing in particular the identification, analysis and prioritization of risks;
- procedures to regularly assess risks associated with the activities of subsidiaries, subcontractors or suppliers with whom the company has an established business relationship;
- actions to mitigate risks and prevent serious harm;
- a whistleblowing mechanism collecting reports of potential and actual risks and effects, drawn up in consultation with the company's representative trade unions;
- a mechanism to monitor measures that have been implemented and evaluate their effectiveness.[128]

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[122] A. Duthilleul et M. de Jouvenel, 'Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', January 2020, available at: https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises, at 17.
[123] Ibid., at 20.
[124] Ibid., at 20.
[125] C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', *op. cit.* at 234.
[126] French Commercial Code, Article L. 225-102-4.
[127] C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', *op. cit.* at 232.
[128] French Commercial Code, Article L. 225-102-4.

The French Duty of Vigilance law encourages (but does not mandate) the consultation with relevant stakeholders in the drafting of the vigilance plan, which can also take place within multi-party initiatives.[129] This can include internal stakeholders such as CSR, legal or sustainable departments [CSR] but also auditing, finance, lobbying and public affairs as well as employees and trade unions within the company and its subsidiaries; it can also include external stakeholders, such as subcontractors, suppliers, NGOs, consumers and local communities.[130] However, in practice, a recent report has shown the consultation with external stakeholders has remained limited.[131]

E. Reach of Obligations

The duty of vigilance applies both to the company's own activities and to the activities of its subsidiaries and the companies that it controls directly or indirectly,[132] as well as the activities of subcontractors and suppliers so long as the company maintains with them an established business relationship.[133] The concept of controlled companies is defined by reference to article L. 233-16 II of the French Commercial Code as requiring 'exclusive control' in the sense that it 'enables the company to have decision-making power, in particular over the financial and operational policies of another entity'.[134] French law defines an 'established commercial relationship' as 'a stable, regular commercial relationship, taking place with or without contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'.[135] It is narrower that the concept of business relationships used by the UNGPs insofar as it excludes *ad hoc* relationships.

F. Enforcement of the Law

Unlike other legislations discussed above, the French Duty of Vigilance Law does not provide for the appointment of a public supervising authority in charge of monitoring and enforcing the law. Rather, it relies on two judicial enforcement mechanisms: the possibility for interested parties to seek an injunction in case of non-compliance, and a specific liability provision in case of harm (discussed in the next section).[136]

Under the newly added Article L. 225-102-4 of the French Commercial Code, any interested party can send a non-complying company a formal notice (*mise en demeure*) asking the company to comply with its obligation to elaborate or publish its vigilance plan.[137] Interested parties include 'stakeholders whose rights and obligations are affected by the execution or the failure to comply with the duty of vigilance, for example local communities, employees, consumers, trade unions,

[129] French Commercial Code, Article L. 225-102-4.
[130] T. Beau de Loménie and S. Cossart, 'Parties prenantes et devoir de vigilance', 2017 *Revue Internationale de la Compliance et de l'Ethique des Affaires* (50), 94.
[131] P. Barraud de Lagerie, E. Béthoux, R. Bourguignon, A. Mias, E. Penalva-Icher, 'Mise en oeuvre de la Loi sur le devoir de vigilance: Rapport sur les premiers plans adoptés par les enterprises. Synthèse de rapport', November 2019, at 7.
[132] French Commercial Code, art L.233-16 II.
[133] French Commercial Code, Article L. 225-102-4.
[134] S. Brabant, C. Michon and E. Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance', 2017 R*evue Internationale de la Compliance et de l'Ethique des Affaires* (50), 93.
[135] S. Cossart, J. Chaplier, and T. Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' 2 *BHRJ* (2017) 317, 320
[136] C. Bright, 'Mapping human rights due diligence legislations and evaluating their contribution in upholding labour standards in global supply chains', *op. cit.*, at 15.
[137] French Commercial Code, Article L. 225-102-4.

associations or NGOs'.[138] The company has 3 months to comply, after which in case of non-compliance or unsatisfactory compliance, interested parties can seek an injunction with the relevant French court to order the company to comply, with periodic penalty payments in case of continued non-compliance.[139]

Five formal notices have been sent to date: two were sent to Total (on 19 and 25 June 2019) respectively for allegedly failing to address its climate change impacts in its vigilance plan,[140] and for allegedly failing to meet the requirements of the law with respect to the company's impacts on local communities in Uganda.[141] Another formal notice was also sent to Teleperformance on 18 July 2019 in relations to issues concerning workers' rights and freedom of association in its subsidiaries.[142] A further formal notice was sent to EDF on 26 September 2019 with respect to a wind farm project in the State of Oaxaca.[143] Another formal notice was sent to XPO Logistics Europe on 1 October 2019, for allegedly failing to meet the requirements of the law in relations to labour issues in its supply chain.[144]

G. Liability

The newly added Article L. 225-102-5 of the French Commercial Code provides for an associated liability regime whereby interested parties can file civil proceedings whenever a company's failure to comply with its vigilance obligations gives rise to a damage.[145] The civil liability regime is based on the general principles of French Tort Law (Articles 1240 and 1241 of the French Civil Code) according to which three elements must be proven before civil liability can be imposed: a fault (which could be either the commission or omission of an act), a damage and a causal link between the two. It is therefore a mechanism of fault based liability.[146]

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[138] T. Beau de Loménie and S. Cossart, "Parties prenantes et devoir de vigilance", *op. cit.* at 5.
[139] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Article L. 225-102-4
[140] Notre Affaire A Tous, Sherpa, Les Eco Maires & ZEA "1,5°C: 13 French Local Authorities and 4 NGOs ask the French oil company Total to prevent global warming", 23 October 2019, available at: https://notreaffaireatous.org/wp-content/uploads/2018/10/DP-english.pdf.
[141] Environment News Service (ENS), "Total Sued Under France's New Duty of Vigilance Law" (23 October 2019), available at: http://ens-newswire.com/2019/10/23/total-sued-under-frances-new-duty-of-vigilance-law/; AFP, "NGOs file suit against Total over Uganda oil project", *The East African* (24 October 2019), available at: https://www.theeastafrican.co.ke/business/NGOs-sue-Total-over-Uganda-oil-project/2560-5323092-r3aeku/index.html. See also BHHRC, "14 Cities and NGOs call on Total to comply with French Duty of Vigilance Law", available at: https://www.business-humanrights.org/en/14-cities-ngos-call-on-total-to-comply-with-french-duty-of-vigilance-law.
[142] Sherpa, "Sherpa and UNI Global Union send formal notice to Teleperformance calling on the world leader in call centers to strengthen workers' rights", 24 July 2019, available at: https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights-2.
[143] ProDESC, "Indigenous human rights defenders and NGOs call on EDF Group to comply with its duty of vigilance regarding human rights prescribed by the French 'Duty of Vigilance' Law", 15 November 2019, available at: https://prodesc.org.mx/indigenous-human-rights-defenders/
[144] ITF, "Transport giant served notice under duty of vigilnce law in landmark legal move", 1 October 2019, available at: https://www.itfglobal.org/en/news/transport-giant-served-notice-under-duty-vigilance-law-in-landmark-legal-move.
[145] French Commercial Code, Article L. 225-102-5
[146] A. Duthilleul et M. de Jouvenel, 'Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', *op.cit.*, at 26.

H. Access to remedy

The French Duty of Vigilance law brings more legal certainty with regards to corporate accountability by making an explicit connection between human rights due diligence and civil liability, and defining the conditions, by reference to the general principles of French tort law, under which a failure to carry out reasonable due diligence can give rise to liability. However, the burden of proof remains on the claimant, who will need to prove that they suffered a damage as a result of a fault on the part of the parent company.[147] Scholars have argued that the legislation constitutes a missed opportunity with regards to effective access to justice in this respect: the burden of proof often constitutes one of the main hurdles faced by claimants of business-related human rights claims in accessing remedy,[148] especially when combined with other issues linked to the complexity of corporate structures and the lack of access to information and internal documents preventing claimants from substantiating their claims.[149]

I. Implementation

Several studies have documented the positive impacts on business practices that the French Duty of Vigilance Law has had.[150] A 2018 report by Shift of the French Duty of Vigilance Law found that French companies have slightly more mature reporting than the average other companies, with an average level of 2.5 on a scale of 5, in comparison with level 2 for the average non-French company (which include over 130 from the largest companies around the world).[151] In addition, a recent report from EDH revealed that the French Duty of Vigilance Law prompted 70% of companies to start mapping risks of adverse human rights and environmental impacts or to revise existing mappings and processes.[152] The report highlights that 65% of companies have a dedicated process to identify risks of adverse human rights impacts (whilst only 30% had one prior to the adoption of the law).[153]

However, there is still some room for progress, as highlighted in a recent report for the French Government on the implementation of the law.[154] A report by French NGOs which analysed 80 vigilance plans published between March and December 2018 (first year of the application of the law) concluded that 'companies must do better'.[155] The report identified issues of non-compliance,[156] and insufficient implementation of the law amongst the complying companies. The report also

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[147] C. Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level …', *op. cit.*, at 7.
[148] Ibid., at 7.
[149] A. Marx, C. Bright and J. Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study requested by the DROI Committee, European Parliament (February 2019), available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf, at 15
[150] C. Bright, 'Mapping human rights due diligence legislations and evaluating their contribution in upholding labour standards in global supply chains', *op. cit.*, at 14.
[151] Shift, 'Human Rights Reporting in France: A Baseline for Assessing the Duty of Vigilance Law', September 2018, available at: https://www.shiftproject.org/media/resources/docs/Human-Rights-Reporting-in-France.pdf, at 6.
[152] Edh, 'Application de la loi sur le devoir de vigilance: Plans de vigilance 2018-2019', 14 June 2019, available at: https://www.e-dh.org/userfiles/EDH%20-%20Etude%20plans%20de%20vigilance%202019.pdf.
[153] Ibid., p. 13.
[154] A. Duthilleul et M. de Jouvenel, 'Evaluation de la mise en oeuvre de la loi n° 2017-399 …', *op. cit.*, at 8.
[155] J. Renaud, F. Quairel, S. Gagnier, A. Elluin, S. Bommier C. Burlet and N. Ajaltouni, "Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1: Les entreprises doivent mieux faire", February 2019, at 10 available at: https://ethique-sur-etiquette.org/Deux-ans-apres-l-adoption-de-la-loi-sur-le-devoir-de-vigilance-les-entreprises?var_mo.
[156] Ibid., at 10.

revealed that the majority of the vigilance plans focused on the risks to the business itself rather than the risks to third parties or the environment.[157]

In particular, the report noted that the vigilance plans need be more exhaustive and transparent, and include, for instance, a comprehensive list of the controlled companies, suppliers and subcontractors with which the company maintained established commercial relationships, their activity, a list of their employees, their location and the risks of adverse human rights impacts linked to their activity.[158] The report recommended that access to their vigilance plans should be facilitated,[159] and that they should be subject to a stand-alone document published on the company's website, rather than merely being integrated in the reference document (e.g. annual financial statement) of the company.[160] The report also highlighted the lack of stakeholders engagement in the elaboration and implementation of the vigilance plans analysed.[161] The report also affirmed that many vigilance plans do not sufficiently detail the actions and measures taken by the company to prevent serious human rights and environmental harms and give a very incomplete answer to the risks identified in the mapping.[162] In relation to the requirement to establish a whistleblowing mechanism, the report stated that a number of companies answered to this requirement through the setting up of an email address which the report deemed insufficient in the light of difficulties of access that this can create (e.g. lack of access to internet in many countries, lack of awareness of the email address, etc.).[163] The report noted that, generally speaking these the types of mechanisms put in place by companies remain imprecise and that, most of the time, they are not open to third parties such as affected communities.[164] Furthermore, the report pointed out that a number of companies made no mention in relation to the establishment of a mechanism to monitor measures that have been implemented and their effectiveness.[165]

Conclusion

The French Duty of Vigilance Law was the first legislation in the world to introduce legally binding obligations on companies to undertake human rights due diligence with regard to the adverse human rights and environmental impacts arising out of their operations and supply chains. As such, the law constitutes ‘a historic step forward for the corporate accountability movement’.[166] It is often perceived as having the greatest potential to drive meaningful change in corporate behaviour amongst existing legislations seeking to regulate corporations for human rights and environmental abuses. The French Duty of Vigilance Law has had positive impacts on business practices,[167] and French companies tend to have more mature reporting than the average other non-French

[157] Ibid., at 10.
[158] "Vigilance Plans Reference Guidance", op. cit., at 15.
[159] J. Renaud et al., "Loi sur le devoir de vigilance ...", op.cit., at 11.
[160] Ibid., at 11.
[161] Ibid., at 13.
[162] Ibid., at 17.
[163] Ibid., at 18.
[164] Ibid., at 18.
[165] Ibid., at 19.
[166] S.. Cossart, J. Chaplier, and T. Beau de Lomenie, ‘The French Law on Duty of Care…', *op. cit.* at 317.
[167] C. Bright, 'Mapping human rights due diligence legislations and evaluating their contribution in upholding labour standards in global supply chains', op. cit., at 14.

companies.[168] In addition, the law prompted a significant number (70% of companies) to start mapping risks of adverse human rights and environmental impacts or to revise existing mappings and processes,[169] and a large majority (65%) of companies now have a dedicated process to identify risks of adverse human rights impacts.[170]

However, the French Duty of Vigilance law was the result of a political compromise, and the version which was adopted on the 21 March 2017 was watered-down compared to the initial version of the legislation.[171] The law has a number of weaknesses. Firstly, the 'blurry' character of the law has been criticized by many stakeholders as creating legal uncertainty.[172] Secondly, its scope of application is limited to a small number of large companies of a certain legal form. Such narrow scope of application is not in line with the UNGPs which specify that the human rights due diligence requirement apply to all business enterprises, whilst also recognising that the complexity of the expected due diligence process will vary with the size of the company[173]

Thirdly, it fails to address certain recurrent obstacles to access to justice faced by victims of corporate human rights abuses. Lastly, issues relating to the insufficient implementation of the law in practice in the first vigilance plans published have been revealed, as well as a widespread tendency for a majority of vigilance plans to focus on the risks to the business itself rather than the risks to third parties or the environment.[174]

5. The Swiss Responsible Business Initiative and Parliamentary Counter-proposal

A. Introduction

In 2016, the Swiss Coalition for Corporate Justice (representing over 80 NGOs in Switzerland) launched the Swiss Responsible Business Initiative,[175] after having collected the requisite threshold of 100,000 signatures from Swiss citizens.[176] The initiative seeks to amend the Swiss Federal Constitution through the introduction of a specific provision on responsible business which would create a legal duty for Swiss-based companies to respect internationally recognized human rights and international environmental standard in their own operations and in their supply chains, which should be fulfilled through the exercise of appropriate due diligence by companies. The Swiss

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[168] Shift, 'Human Rights Reporting in France: A Baseline for Assessing the Duty of Vigilance Law', September 2018, available at: https://www.shiftproject.org/media/resources/docs/Human-Rights-Reporting-in-France.pdf, at 6.
[169] Edh, 'Application de la loi sur le devoir de vigilance: Plans de vigilance 2018-2019', 14 June 2019, available at: https://www.e-dh.org/userfiles/EDH%20-%20Etude%20plans%20de%20vigilance%202019.pdf.
[170] Ibid., at 13.
[171] C. Bright, 'Creating a Legislative Level-Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?', EUI Working Papers, MWP 2020/01, at 4.
[172] P. Barraud de Lagerie, E. Béthoux, R. Bourguignon, A. Mias, E. Penalva-Icher, 'Mise en oeuvre de la Loi sur le devoir de vigilance ...', *op. cit.*, at 7.
[173] UNGPs (n 1) Guiding Principle 17 (b).
[174] J. Renaud, at al., "Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre ...' *op. cit.*, at 10.
[175] Chancellerie fédérale, Initiative populaire fédérale Initiative populaire fédérale 'Entreprises responsables – pour protéger l'être humain et l'environnement' 'Entreprise (2016), [Hereafter 'The Swiss Responsible Business Initiative'] available at www.bk.admin.ch/ch/f/pore/vi/vis462t.html, for the official text in French, German, and Italian; Swiss Coalition for Corporate Justice, The Initiative Text with Explanations (2016), available at https://corporatejustice.ch/about-the-initiative/ , for an unofficial English translation.
[176] Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business - From Responsibility to Liability' in Liesbeth FH Enneking and others (eds.), *Accountability and International Business Operations, and the Law* (Routledge forthcoming 2020) 239, at 245.

citizens will normally be called upon to vote on this initiative, unless a counter-proposal is adopted by the parliament and the initiative is subsequently withdrawn.[177] In particular, a counter-proposal of the text was adopted by the National Council on 14 June 2018,[178] whilst another counter-proposal was adopted by the Council of States on 18 December 2019. The two chambers of the Parliament are set to discuss both texts in the coming months. The analysis below focuses on the first two (the Responsible Business Initiative and the National Council's counter proposal) as they present the most interesting features for the comparative analysis. The counter-proposal which was adopted by the Council of States on 18 December 2019, which is much more restricted that the other two proposals, is more similar to existing issue-specific or sector-specific legislations in so far that it would limit the due diligence requirements to a specific sector: conflict minerals or to a specific issue: child labour. In addition, it would not contain any civil liability mechanism in case of harm.

B. Purpose of law

Responsible Business Initiative

The purpose of the law, as stated in the first paragraph of proposed Article 101a is 'to strengthen respect for human rights and the environment through business'.[179]

Counter-proposal of the National Council

The parliamentary counter-proposal has a similar purpose, and proposed Article 716a bis of the Swiss Code of Obligations provides that the measures taken by the board of directors are 'to ensure that the company complies with the provisions for the protection of human rights and the environment relevant to its areas of activity, including abroad'.[180]

C. Scope

Responsible Business Initiative

The Responsible Business Initiative would apply to companies that 'have their registered office, central administration, or principal place of business in Switzerland'.[181]

It would cover companies of all sizes and across sectors, even though the text recognises that the 'needs of small and medium-sized companies that have limited risks of this kinds', would need to be taken into account.[182]

Counter-proposal of the National Council

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[177] Ibid., at 245.
[178] Unofficial translation of the counter-proposal by the Swiss Parliament to the citizen initiative 'Responsible Business Initiative', available at: http://www.bhrinlaw.org/180508-swiss-parliament-counter-proposal_unofficial_en-translation_updated.pdf.
[179] The Swiss Responsible Business Initiative, Article 101a.
[180] Proposed Article 716a Co (new) of the Code of Obligations.
[181] Swiss Coalition for Corporate Justice, 'The Initiative Text with Explanations', available at: https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf.
[182] Swiss Coalition for Corporate Justice, 'The Initiative Text with Explanations', available at: https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf,, Article 101*a*, §1b.

The scope of the parliamentary counter-proposal would be more limited as it would only apply to larger Swiss-based companies exceeding two of the three following thresholds: : (1) a balance sheet total of 40 million Swiss francs; (2) a turnover of 80 million Swiss francs; and/or (3) 500 full-time employees.[183] The legislation would also apply to certain Swiss companies 'whose activities entail a particularly high risk' of adverse human rights or environmental harms, regardless of their size (to be defined by the government in a decree).[184]

D. Obligations

Responsible Business Initiative

The Swiss Responsible Business Initiative would entail an amendment of the Swiss Federal Constitution to allow for the introduction of a new Article 101a entitled 'Responsibility of Business'. If adopted, the dedicated constitutional article would need to be implemented in a federal law, most likely in the Swiss Code of Obligations.[185]

The proposed Article 101a §2a provides that 'companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control'.[186]

In order to meet their legal obligation to respect international human rights and environmental standards, companies are required to carry out 'appropriate due diligence.' The proposed Article 101a §2b elaborates that this should allow companies to:

> identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken.[187]

Counter-proposal of the National Council

It adopted the counter-proposal of the National Council would need to be implemented through a 'patchwork' of legislation in the Swiss Code of Obligations, the Swiss Civil Code and the Swiss Federal Code on Private International Law.[188]

In particular, the proposed new Article 55 1bis of the Swiss Codes of Obligations would provide that companies have a legal duty to comply with the provisions for the protection of human rights and the environment, including when operating abroad.[189]

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[183] Ibid.
[184] Proposed Article 716a of the Code of Obligations, see the unofficial translation of the counter-proposal..., op. cit.,.
[185] Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business ...', op. cit., at 245.
[186] Swiss Coalition for Corporate Justice, 'The Initiative Text with Explanations', *op. cit.*
[187] Swiss Coalition for Corporate Justice, 'The Initiative Text with Explanations', *op. cit.*
[188] SCCJ, 'How does the parliamentary counter-proposal differ from the popular initiative (RBI)?' (May 2018), at 1, accessible at: https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf.
[189] Proposed Article 55 1bis of the Swiss Code of Obligations.

It also provides for an obligation to exercise due diligence through the proposed introduction of an Article 716abis of the Swiss Code of Obligations which states that the board of directors have a legal obligation to:

> take measures to ensure that the company complies with the provisions for the protection of human rights and the environment relevant to its areas of activity, including abroad. It identifies potential and actual impacts of the business activities on human rights and the environment and assesses these risks. Taking into account the company's ability to exert influence, it takes effective measures to minimize the identified risks concerning human rights and the environment as well as to ensure effective remedy for violations. It monitors the effectiveness of the measures adopted and reports on them.[190]

The article further specifies that for this due diligence process, 'the board of directors is primarily concerned with the most severe adverse impacts on human rights and the environment.'[191]

E. Reach of Obligations

Responsible Business Initiative

Under the proposed Article 101a paragraph 2b, the legal obligation to respect internationally recognised human rights and environmental standards covers the companies' own operations but extends also to the 'companies under their control'.[192] The article specifies that: 'whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.'[193]

The correlated obligation to exercise appropriate due diligence has a wider scope as it is not limited to controlled companies but extends to *'all* business relationships' (emphasis added).[194]

Counter-proposal of the National Council

Under the proposed Article 716a of the Swiss Code of Obligations, the due diligence obligations of the board of directors would cover the 'impacts of business activities of controlled companies or due to business relationships with a third party are also subject to this due diligence.'[195]

F. Enforcement of the Law

Responsible Business Initiative

The Responsible Business Initiative does not provide for a state-based oversight body to monitor and ensure compliance with the law. Rather, it relies on a judicial enforcement mechanism through a specific liability provision (presented in the next section).

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[190] Proposed Article 716a bis §1 of the Swiss Code of Obligations.
[191] Proposed Article 716a bis §2 of the Swiss Code of Obligations.
[192] Proposed Article 101a §2a.
[193] Ibid.
[194] Proposed Article 101a §2b.
[195] Proposed Article 716a of the Swiss Code of Obligations.

Counter-proposal of the National Council

Like the Responsible Business Initiative, the National Council's counter-proposal does not provide for a state-based oversight body to monitor and ensure compliance with the law, but relies on a judicial enforcement mechanism through a specific liability (see next section).

G. Liability

Responsible Business Initiative

The proposed Article 101a §1c includes a specific liability provision aimed at complementing other existing civil liability provisions under general Swiss tort law. The specific liability provision provides that 'companies are also liable for damage caused by companies under their control'.[196] It is modelled on the employer's liability provision contained in the Swiss Code of Obligations.[197]

The proposed article also provides for a due diligence defence according to which companies can escape liability 'if they can prove that that they took all due care […] to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken'.[198]

Counter-proposal of the National Council

The counter-proposal also contains a specific liability provision which is much more restricted as it would only cover damage caused to life and limb or property, and would only extend to the subsidiaries over which a parent company exercises actual control but would not extend throughout its supply chain.[199]

The proposed article 55 1bis of the Swiss Code of Obligation also provides for a due diligence defence whereby 'companies shall not be liable if they can prove that they have taken the measures required by law to protect human rights and the environment in order to prevent such damage or that they have not been able to influence the conduct of the controlled company in connection with the alleged infringements.'[200]

H. Access to remedy

Responsible Business Initiative

The proposed article on liability addresses some of the recurring obstacles to access to justice faced by claimants in business-related human rights and environmental claims, in particular the ones linked to the difficulties relating to the attribution of the legal responsibility amongst members of a corporate group or down a supply chain. More specifically, it would create a strict liability regime, modelled on the employer's liability provision contained in the Swiss Code of Obligations,[201] whereby

[196] Proposed Article 101a §2c.
[197] Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business …', *op. cit.*, at 247.
[198] Proposed Article 101a, §2c.
[199] Proposed Article 55 1bis of the Swiss Code of Obligations.
[200] Ibid.
[201] Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business - From Responsibility to Liability' in Liesbeth FH Enneking and others (eds.), *Accountability and International Business Operations, and the Law* (Routledge forthcoming 2020) 239, at 247.

parent and lead companies would be liable for the damage caused by companies under their control, assorted with a due diligence defence. In doing so, the specific liability provision would reverse the burden of proof thereby addressing some of the recurrent practical difficulties faced by claimants in accessing information necessary to substantiate their claims in relation to conduct of controlled and controlling companies located in different countries. However, it is worth noting that this reversal of the burden of proof is only partial (i.e. it only concerns the due diligence processes in place), for the other elements of the civil liability claims (such as causation) and the degree of control exercised by the parent or lead companies, the burden of proof remains on the claimant.

Counter-proposal of the National Council

The presumption of liability of parent companies for the harms caused by 'companies actually controlled by them' would also alleviate some of the difficulties related to the attribution of the legal responsibility amongst members of a corporate group, although, unlike the Responsible Business Initiative, this would not extend to the supply chain.

I. Implementation

Legal proposals currently in discussion - no examples of implementation

J. Private International Law Aspects

Responsible Business Initiative

Article 101a, §1d provides that the provisions of the text shall 'apply irrespective of the law applicable under private international law'.[202] In effect, this article turns the provisions of the text into overriding mandatory provisions which will need to be applied by the Swiss courts irrespective of the content of the otherwise applicable law. It therefore aims to ensure the applicability of the newly proposed legal obligations in situations in which the human rights or environmental harms occurred outside of Switzerland.

Counter-proposal of the National Council

The counter-proposal of the National Council also contains a specific private international law provision which provides that:[203]

> 1. In the case of claims against companies which under Swiss law are obliged to comply with the provisions for the protection of human rights and the environment also abroad, due to damage to life and limb or property abroad as a consequence of a violation of the aforementioned provisions, the unlawfulness and culpability of conduct shall be assessed in accordance with these provisions. However, they shall be subject to the law applicable under Article 133, if in accordance with the purpose of the provisions of that law and the consequences thereof, this leads to a decision that is appropriate in the Swiss legal opinion, or if the unlawfulness and culpability of the conduct exist only under that law.

[202] Proposed Article 101a, §1d.
[203] Proposed Article 139a PILA.

2. Whether a company domiciled in Switzerland, which actually controls a company domiciled abroad, is considered liable for claims of the type mentioned and whether it can release itself from liability is determined by Swiss law.[204]

Conclusion

The Swiss Responsible Business Initiative is very ambitious and has the potential to drive meaningful change in corporate behaviour. Indeed, it seeks to implement the human rights due diligence requirements from the UNGPs, and to introduce an associated liability provision creating a strict liability regime for parent and lead companies for the human rights or environmental harms caused by entities 'under their control', with an associated due diligence defence. This specific liability provision would alleviate a number of recurrent obstacles to access to justice faced by claimants in proceedings relating to business-related human rights and environmental harms.

In terms of scope, it is limited to Swiss-based companies and does not extend to other companies operating in Switzerland.

The counter-proposal of the National Council is less ambitious than the original text of the Swiss Responsible Business Initiative[205] insofar as its scope would be limited to certain Swiss based business enterprises, and that the specific liability provision would be limited to parent company liability in relation to injury of life, limb and property.

6. The German Draft Law

A. Introduction

In 2006, the German government released its National Action Plan (NAP) on Business and Human Rights in which it set out the government's expectations for German businesses with regard to respect for human rights.[206] In particular, it provides that 'the Federal government expects all enterprises to introduce the process of corporate due diligence […] in a manner commensurate with the size, the sector in which they operate, and their position in supply and value chains'.[207] In its NAP, the German government set up a target whereby by 2020, at least 50% of enterprises based in Germany with more than 500 employees should have incorporated the various elements of human rights due diligence into their corporate processes. The NAP adds that if this target is not met, 'the Federal Government will consider further action, which may culminate in legislative measures'.[208]

On the 1st of February 2019, a draft law from the German Federal Ministry for Economic Cooperation and Development on the regulation of human rights and environmental due diligence in global value chains was leaked to the public.[209] It has been suggested that the draft law may constitute 'an

[204] Proposed Article 139a of the Swiss Federal Act on Private International Law.
[205] SCCJ, 'How does the parliamentary counter-proposal differ from the popular initiative (RBI)?' (May 2018), https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf .
[206] German Federal Foreign Office, 'National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020' (December 2016), 7.
[207] Ibid., at 7.
[208] Ibid., at 10.
[209] BHRRC, 'German Development Ministry drafts law on mandatory human rights due diligence for German companies' (2019), available at: https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies.

indication of the potential legislative steps the government intends to take in the event or insufficient voluntary corporate compliance.[210]

B. Purpose

Article 1(1) provides that the purpose of the draft law is to ensure the protection of internationally recognized human rights and the environment in global value chains.[211]

C. Scope

Under Article 1(2), the legislation would apply to companies which are domiciled in Germany, defined as companies which have their registered office, central administration, or principal place of business in Germany.[212]

However, it would not cover all German-domiciled companies but would be limited to large companies which are defined by section 267(3) of the German Commercial Code (HGB) as companies meeting at least two of the following thresholds: a minimum of 250 employees and an annual turnover of more than 40 million euros, or a balance sheet total of more than 20 million euros; as well as to medium-sized companies operating in a high-risk sectors (including agriculture, mining, textile and electronics) or in conflict or high-risk areas.[213]

D. Obligations

The draft legislation would require large companies subjected to it to exercise adequate due diligence to identify, prevent and remediate adverse human rights and environmental impacts in their activities and across their entire value chains.[214] Specifically, companies would be required to:

- undertake a risk analysis on a continuous basis, the adequacy of which will be based on the country and sector-specific risks, the severity and foreseeability of the potential violations, the degree of involvement of the company with said violations as well as the size of the company and the leverage that it exercises *de facto* on the entity directly causing the violations (proposed Article 1(5)).[215]
- to implement preventive measures and monitor their effectiveness (proposed Article 1(6));[216]
- to take remedial measures where adverse impacts have taken place (Article 1(7)). In particular, companies must establish a complaint mechanism, or participate in an effective non-judicial grievance mechanism of a multi-stakeholder initiative. Such complaint mechanism should be open to their own employees and the employees of the other entities

[210] J-O. Becker, L. Wijekoon, C. Osborn, M. Congiu and S. Marculewitz, 'Germany Seeks to Mandate Human Rights Due Diligence for Companies and Their Global Partners', 25 April 2019, available at: https://www.littler.com/publication-press/publication/germany-seeks-mandate-human-rights-due-diligence-companies-and-their.
[211] Nachhaltige Wertschöpfungskettengesetz, Article 1(1).
[212] Norton Rose Fulbright, 'Compliance update – Germany' (March 2019), available at: https://www.nortonrosefulbright.com/en-de/knowledge/publications/501f3fbf/compliance-update-germany.
[213] Ibid.
[214] Ibid.
[215] Nachhaltige Wertschöpfungskettengesetz, Article 1(5).
[216] Ibid., Article 1(6).

in their value chain, as well as to third parties adversely affected by the company's activities (proposed Article 1(10)).[217]

- appoint a compliance officer in order to monitor compliance with the due diligence obligations (proposed Article 1(8));[218] and
- document and publically report on the compliance with the due diligence obligations (proposed Article 1(11)).[219]

E. Reach of Obligations

The due diligence obligation would apply to the qualifying companies' activities both within and outside of Germany. It would cover the companies' own activities and extend throughout their value chains. In particular, the draft law provides that a company may be considered to be contributing to a violation if third parties, including companies in the value chain and government agencies, or products or services of the company unlawfully contribute to a violation as a result of the company's business activities.[220]

F. Enforcement of the Law

The draft law provides that a competent public authority would be in charge of its implementation, as well as the monitoring of companies' compliance with their due diligence obligations under the law.[221]

Under proposed Article 1(13), sanctions for non-complying companies include administrative fines (up to five million euros),[222] and potential exclusion from public contracts with the German government.[223] The draft law also provides for criminal law sanctions for the Compliance Officer who may be subject to fines or imprisonment in case of breach of his/her duty (such as false statements in document on the compliance with the due diligence obligations) which causes serious bodily harm or death.[224]

G. Liability

The draft law does not provide for a specific liability regime in case of harm, however, it contain certain provisions aimed at reinforcing access to justice for victims bringing tort claims under the general principles of German Law (see section below).

H. Access to remedy

The draft law seeks to improve access to justice for affected individuals through three provisions in particular:

[217] J-O. Becker and al., 'Germany Seeks to Mandate Human Rights Due Diligence for Companies and Their Global Partners', op. cit.
[218] Ibid, Article 1(8).
[219] Ibid, Article 1(11).
[220] Nachhaltige Wertschöpfungskettengesetz, Article 1(5).
[221] Ibid, Artice 1(12).
[222] Ibid, Article 1(13).
[223] Ibid, Article 1(16).
[224] Ibid, Article 1(14).

- the requirement for companies to establish an internal complaint mechanism (established and administered by companies) or participate in effective non-judicial grievance mechanism by a multistakeholder initiative.[225]
- The conflict of law provision whereby the due diligence obligations set out in the draft law should apply as overriding mandatory rules, irrespective of the otherwise applicable law under the principles of private international law (Article 1(15)).[226]
- The requirement that the statute of limitations would be waived pending completion of the complaint procedure provided for in the law (Article 1(9)(6).[227]

I. Implementation

No examples of implementation yet as the law has not been adopted yet.

J. Private International Law Aspects

Under proposed Article 1(15), the due diligence obligations set out in the draft law should apply as overriding mandatory rules, irrespective of the otherwise applicable law under the principles of private international law.[228]

Conclusion

The German draft law seeks to introduce mandatory human rights and environmental due diligence for German companies. It has many potential strengths and the potential to drive meaningful change in corporate behaviour. The due diligence obligations that it seeks to introduce extends not only to the companies' own operations and supply chains but also across their entire value chains. In that sense, the reach of the obligations is wider than the other existing or proposed legislative models for human rights due diligence, and is more aligned with the UNGPs, which require human rights due diligence throughout the value chain.[229] In addition, it aims to improve access to remedies for affected individuals in three different ways: (1) by requiring companies to establish an internal complaint mechanism or participate in effective non-judicial grievance mechanism by a multi-stakeholder initiative; (2) by making the due diligence obligations overriding mandatory rules applicable irrespective of the otherwise applicable law under the private international law principles; and (3) by requiring that the statute of limitations be waived pending completion of the complaint procedure (Article 1(9)(6)).[230] However, it does not provide for a specific liability mechanism which would improve some of the other obstacles to access to justice frequently faced by victims of corporate human rights abuses (through, for instance, the reversal of the burden of proof).

In addition, its other main limitations lies in its scope which does not extend to all companies but is limited to large companies and medium-sized companies operating in high-risk sectors or high-

[225] Such types of mechanisms have been defined as mechanisms external to companies that administer a set of commitments that the companies have agreed to adhere to. OHCHR, 'Accountability and Remedy Project: Part III: Non-State-based grievance mechanisms. Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse: Discussion paper', 19 November 2019, at 5.
[226] Ibid., Article 1(15)
[227] Article 1(9)(6) This can be either an internal complaint mechanism inside the company or the company can take part in multi-stakeholders initiatives for non-judicial grievance mechanisms.
[228] Nachhaltige Wertschöpfungskettengesetz, Article 1(15).
[229] UNGPs, Commentary to Guiding Principle 17.
[230] Article 1(ç)(6)

risk areas, whilst the corporate responsibility to respect human rights under the UNGPs, and correlated human rights due diligence requirement applies to *all* companies.[231] Furthermore, it only applies to German companies and does not extend to companies operating on the German market. Finally, the criminal sanctions that it provides for the Compliance Officer in case of breach of his/her duty might arguably be going a step too far, at the risk of creating perverse incentives whereby companies distance themselves from entities within their value chains,[232] or perhaps cease to collaborate with certain 'risky' business partners or to invest in certain countries that present particular risks, rather than contributing to a positive change.

7. Discussion and Comparison

The various legislative initiatives display some differences on key design aspects which relate to the purpose of the law, the scope of the law, the obligations and the reach of obligations, the design of enforcement mechanisms, implementation, and the provisions on liability and access to remedy. Table 1 provides a concise summary of each legislation on these parameters. In terms of scope, some laws target more companies than others. Only large companies are affected by the French Law (defined in terms of number of employees), the UK Modern Slavery Act (defined in terms of turnover) and the German draft proposal (defined in terms of number of employees and/or annual turnover and/or balance sheet total), whilst the Swiss Responsible Business initiative would target *all* Swiss-based companies and the Dutch law covers *all* companies supplying goods and services on the Dutch market. Regarding the obligations, some laws focus on specific human rights issues, like slavery and human trafficking (UK law), or child labour (Dutch law), whilst other laws have a broad scope, tackling all human rights and environmental violations (French law, Swiss and German initiatives). The nature of these obligations can also be different, going from disclosure obligations (UK law) to full due diligence requirements (French and Dutch laws, as well as Swiss and German initiatives). In terms of the reach of the obligations, all laws aim at tackling violations both in companies' own operations and in their supply chains, even though certain legislations are limited to first tiers suppliers, whereas others cover the entire supply chain. The German draft law even considers the entire value chain. Regarding enforcement, some rely on judicial enforcement whereby interested third parties can go before the relevant courts either to seek an injunction against a non-complying company, or to seek redress in case of harm resulting from non-compliance or inadequate compliance with the law, or both (French law), whilst others (Dutch law and German proposal) rely on public authorities to monitor and ensure compliance. Only the French law and the Swiss initiatives include a specific civil liability regime for the victims in case of harm, thereby seeking to enhance access to remedy for the victims. The German draft proposal is the only one which contains specific provisions aimed at alleviating specific obstacles to access to justice and remedy. In particular, it contains a provision waiving the statute of limitations. In addition, it would require companies to establish a complaint mechanism open to their own employees and the employees of the other entities in their value chain, as well as to third parties adversely affected by the company's activities.

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[231] UNGPs, Guiding Principle 14. Commentary to Guiding Principle 14 acknowledges that 'the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size'.

[232] Shift, 'Keynote Address by John Ruggie at the Conference: 'Business & Human Rights: Towards a Common Agenda for Action', 2 December 2019, available at: https://www.shiftproject.org/news/john-ruggie-finland2019-keynote/.

Finally, there are implementation issues in all three countries where a law is actually in force, and issues of non-compliance persist. These are more widespread in countries with legislations imposing less stringent obligations (i.e. reporting obligations) on companies and weaker enforcement mechanisms (UK law) compared to countries with legislations that impose a positive duty to exercise due diligence and have stronger enforcement mechanisms in place (French law).

In addition, we identified some key strengths and weaknesses which have been linked to each of these initiatives (table 2). The main strengths include more dedicated human rights policies and greater awareness among companies, including in boardrooms. Some of these laws also have a greater potential to drive meaningful change in corporate behaviour. A far-reaching scope of application, like in the UK law, or the targeting the entire value chain and the introduction of specific provisions aimed at improving the access to remedy for victims, like in the German draft law, also make the laws stronger. On the other hand, these initiatives also present weaknesses: some of them have a limited scope, only targeting a limited number of large companies (French law), others are issue-specific (English and Dutch laws), and have no associate regime of corporate liability (English and Dutch laws) aimed at ensuring access to remedy for the victims. In the cases where the laws have already been enforced, there are also issues of insufficient implementation and compliance. This is particularly true for reporting regulations, for which the underlying assumption that companies will comply with their obligations due to civil society's pressure has not been confirmed by evaluative research.[233] Finally, consumer-facing companies are subject to greater scrutiny.[234] More generally, when the companies do comply, they tend to approach disclosure obligations as a mere tick-box exercise (UK law) and focus on the risks to the business itself rather than risks to third parties and the environment (French law).

[233] Pwc, 'Strategies for responsible business conduct', report prepared at the request of the Ministry of Foreign Affairs of the Netherlands (December 2018), available at: https://zoek.officielebekendmakingen.nl/blg-874902.pdf , at 59.
[234] BHRRC, 'FTSE 100 & The UK Modern Slavery Act: From Disclosure to Action' (2018), 4.

Table 1: Comparison of Main Features of five legislative initiatives

Purpose of law	Scope	Obligations	Reach of obligations	Enforcement	Liability	Access to remedy	Implementation
UK Modern Slavery Act (adopted in 2010, entered into force in 2015)							
Prevent modern slavery in organisations and their supply chains	- Companies with a turnover of at least £36 million - Not limited to UK-domiciled companies, extends to companies supplying goods or services, and carrying on a (part of a) business in any part of the UK	Disclosure: companies must publish an annual "slavery and human trafficking statement", setting out the steps taken to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business	Both the companies' own business and their supply chains	In case of non-compliance, the Secretary of State may seek an injunction through the High court. Non-compliance may be punishable by a fine. (In practice, there has been no penalties to date for non-complying companies)	Does not provide for any liability provision	- No specific provisions alleviating existing barriers to accessing remedy for the victims - Does not require companies to disclose information about their remediation processes	- Lack of concrete impact - Has contributed to greater awareness, but approached by many companies as a mere tick-box exercise. - Widespread issues of non-compliance persist (40% of eligible companies), and many published statements fail to respect the minimum requirements

Purpose of law	Scope	Obligations	Reach of obligations	Enforcement	Liability	Access to remedy	Implementation
Dutch Child Labour Due Diligence Act (adopted in 2019, not yet in force)							
Twofold objective: - Prevent child labour from being used in goods and services brought onto the Dutch market - Ensure Dutch consumers 'peace of mind' in this respect	All companies selling goods and supplying services to Dutch end-users (not limited to Dutch companies)	- Obligation to exercise due diligence - Obligation to report	Not limited to first tier suppliers, extends to the entire supply chain	Enforcement mechanism with a public supervising authority. Any third party affected by a company's failure to comply can submit a complaint, but only after having submitted it first to the company, who has 6 months to address it. In case of non-compliance, administrative fines can be imposed.	No specific liability provision	No specific provisions alleviating existing barriers for victims of child labour (framed in terms of consumer protection)	Not yet in force

Purpose of law	Scope	Obligations	Reach of obligations	Enforcement	Liability	Access to remedy	Implementation
French Duty of Vigilance Law (adopted in 2017)							
- Prevent business-related human rights and environmental harms - Enhance corporate accountability	French companies incorporated or registered in France for two consecutive fiscal years, employing at least 5,000 people in France or 10,000 worldwide	- "reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment" - Requires the companies to establish, implement and publish a "vigilance plan"	"the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers"	Any interested party can send a non-complying company a formal notice. If the company does not comply within 3 months, interested parties can seek an injunction with the relevant French court"	Associated liability regime (any interested party can file civil proceedings). Liability based on 3 elements: fault, damage, and causal link between the two.	Burden of proof remains on the claimant (one of the main hurdles faced by claimants in business-related human rights claims)	- Issues of non-compliance; insufficient insufficient implementation of the law amongst complying companies - Majority of plans focus more on the risks to the business itself than to third parties or to the environment

Purpose of law	Scope	Obligations	Reach of obligations	Enforcement	Liability	Access to remedy	Implementation
The Swiss Responsible Business Initiative (RBI) (launched in 2016) and Parliamentary Counter-Proposal (PCP) (adopted in 2018, in discussion)							
RBI Amendment of the Swiss Federal Constitution to 'strengthen respect for human rights and the environment through business'	**RBI** Companies that have their registered office, central administration, or principal place of business in Switzerland	**RBI** Companies must respect internationally recognized human rights and international environment standards, also abroad, through 'appropriate due diligence'	**RBI** Companies' own operations and companies under their control (determined according to factual circumstances – extends to all business relationships)	**RBI** Needs to be implemented in a federal law (Swiss Code of Obligations)	**RBI** Specific liability provision aimed at complementing other existing liability provisions under general Swiss tort law. Provides for due diligence defence according to which companies can escape liability if they can prove that they took all due care to avoid the loss or damage.	**RBI** Addresses some of the recurring obstacles, in particular the ones linked to difficulties in attribution of legal responsibility (reversing the burden of proof)	Legal proposals currently in discussion – not adopted

PCP Limited to larger Swiss-based companies	**PCP** Legal duty to comply with the provisions for the protection of human rights and the environment, including when operating abroad	**PCP** 'business activities of controlled companies or due to business relationships with a third party' (limited to legally controlled subsidiaries)	**PCP** Needs to be implemented through a 'patchwork' of legislation (Swiss Code of Obligations, Civil Code and Federal Code on Private International Law)	**PCP** Restricted to damage caused to life and limb or property. Would not extend throughout the supply chain. Provides for due diligence defence whereby companies will not be considered liable if they can prove that they have taken measures required by law to protect human rights and the environment.	**PCP** Strict liability regime would also alleviate some difficulties related to attribution (but would not extend to the supply chain)

Purpose of law	Scope	Obligations	Reach of obligations	Enforcement	Liability	Access to remedy	Implementation
German Draft Law							
Ensure the protection of internationally recognized human rights and the environment in global value chains	Companies domiciled in Germany (companies who have their registered office, central administration, or principal place of business in Germany) Limited to large companies (minimum 250 employees and turnover of more than 40 million euros, or balance sheet total of more than 20 million euros) and medium-sized companies operating in high-risk sectors	Companies must exercise adequate due diligence to identify, prevent and remediate adverse human rights and environmental impacts in their activities and across their entire value chains	Qualifying companies' activities within and outside of Germany. Company's own activities and throughout the value chain	A competent public authority would be in charge of the implementation and the monitoring Sanctions for non-complying companies include administrative fines (up to 5 million euros) and potential exclusion from public contracts with the German government	Does not provide for a specific liability regime in case of harm, but victims can bring tort claims under the general principles of German law	Seeks to improve access to remedy through 3 provisions: - requirement to establish an internal complaint mechanism - conflict of law provision (overriding mandatory rules) - waiving of statute of limitations	Legal proposal in discussion - not adopted

Table 2: Overview of Strengths and Weaknesses of the five legislative initiatives

	Strengths	Weaknesses
UK Modern Slavery Act (adopted in 2010, entered into force in 2015)	Contributed to greater awareness to modern slavery issues in companies' supply chains Raised boardroom awareness through requirement that the statement be approved and signed by a director or appropriate senior person	Reporting obligation approached as mere tick-box exercise. The majority of statements are generic. No assessment of the adequacy of due diligence steps taken (if any) Lack of monitoring and effective enforcement mechanisms leading to widespread issues of non-compliance No associated provisions on corporate liability to ensure access to remedy for victims of modern slavery of human trafficking.
The Dutch Child Labour Due Diligence Act (adopted in 2009, not yet in force)	Wide scope of application which include both Dutch and non-Dutch companies, without limitations in terms of size or turnover.	Scope limited to the goods and services sold or supplied to the Dutch market and therefore it does not cover the activities of Dutch companies in relation to goods and services supplied outside the Dutch market. Reporting requirement is a one-off exercise. Issue specific Does not contain any specific provisions which would alleviate the existing barriers to accessing remedy in the Netherlands for victims of child labour.

French Duty of Vigilance Law (adopted in 2017)	Higher percentage of companies have dedicated human rights policies Greatest potential to drive meaningful change in corporate behaviour	Limited scope Certain obstacles to access to justice for right-holders not addressed Insufficient implementation In practice, majority of plans focused on risks to the business itself rather than to third parties or the environment
The Swiss Responsible Business Initiative and National Council Counter-Proposal (NCCP)	Creates a positive duty to exercise due diligence in relation to adverse human rights and environmental impacts. The specific liability provision would create a strict liability regime with a due diligence defence which would reverse the burden of proof and thereby alleviate a number of obstacles related to access to justice.	Scope limited to Swiss-based companies NCPC: scope limited to certain Swiss based business enterprises specific liability provision limited to parent company liability
The German Draft Law	Creates a positive duty to exercise due diligence in relation to adverse human rights and environmental impacts. Extends to the entire value chain (wider reach of obligations) Aims to improve access to remedy	Limited scope (limited to large companies and some medium-sized ones, and only German companies) Criminal sanctions for the Compliance Officer in case of breach of their duty risk creating perverse incentives whereby companies distance themselves from entities within their value chains

8. Implications for a Belgian Law in the context of ECCJ framework

What are the implications for a possible Belgian Law? The UNGPs refer to a 'smart mix of measures - national and international, mandatory and voluntary' that should be adopted by States, as part of their duty to protect human rights, in order to foster business respect for human rights.[235] As stated by Professor John Ruggie, the author of the UNGPs, mandatory human rights and environmental due diligence initiatives 'are aligned with the spirit of the UNGPs, and they are important steps in adding "mandatory measures" into the mix'.[236]

A recent published statement by Shift on the role of mandatory measures in the implementation of the UNGPs details some of the strong reasons for States to consider comprehensive mandatory human rights due diligence which include:[237]

- The powerful effect it can have in **driving top-level attention** to human rights in companies, as well as **engaging functions** across the business;
- **Levelling the playing field** across companies and sectors, including through engagement with business partners in a company's **value chain**;
- Obliging companies to consider the **interests of stakeholders** other than shareholders;
- Incentivizing **collaborative approaches** to address systemic human rights risks; and
- **Enabling** (where civil liability is included) a clear cause of action for individuals who are harmed to pursue **remedy**.

ECCJ has identified 10 features for 'effective, comprehensive' mandatory Human Rights Due Diligence Legislation. We discuss the different legislative examples in reference to these 10 features and draw out some lessons for a possible Belgian law. The analysis is based on these identified features which represent the most 'stringent' and most 'far-reaching' perspective, rather than recommendations from the authors.

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[235] UNGPs, Commentary to Guiding Principle 3.
[236] Keynote Address by John Ruggie at the Conference 'Business & Human Rights: Towards a Common Agenda for Action', 2 December 2019, available at: https://www.shiftproject.org/news/john-ruggie-finland2019-keynote/#.XeTrw1RxJWV.twitter. See also General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities by Committee on Economic, Social and Cultural Rights which states that states: "The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights," available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y
[237] Shift, 'Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix"', 21 February 2019, available at: https://www.shiftproject.org/news/fulfilling-the-state-duty-to-protect-mandatory-measures-smart-mix/.

1) **Scope of human rights protected, which should cover all internationally recognized human rights and environmental standards.**[238]

In this respect, a number of the legislations analysed focus on a single issue (e.g. the UK Modern Slavery Act and the Dutch Child Labour Due Diligence Act) which runs the risk of detracting attention from other types of adverse human rights impacts,[239] by spurring companies on to prioritize their efforts to address this particular issue over potentially more salient human rights risks for the company in question.[240]

On the other hand, the French Duty of Vigilance Law, the Swiss Responsible Business Initiative and counter-proposal and the German draft proposal all provide for an overarching human rights and environmental due diligence which is in line with this feature. This is in line with the corporate responsibility to respect human rights, which, under Guiding Principle 12, should apply to all internationally recognised human rights, and which was extended to cover environmental standards in the OCED Guidelines.[241] It is recommended that a Belgium mandatory due diligence law would similarly cover both internationally recognized human rights and environmental standards. For possible implications on which level of governance to implement such a law in the specific Belgian context see the next section.

2) **Companies covered by the law, which should include, at a minimum, large companies whose corporate seat, headquarters or principal place of business lays in the respective jurisdiction, regardless of their legal form as well as small and medium-sized enterprises whose business activity bears particular risk of severe adverse impacts on human rights and the environment, for example because they operate in conflict or high-risk sectors and areas.**[242]

In this respect, various legislations analysed *only* apply to large companies defined in terms of number of employees (e.g. French Duty of Vigilance Law), or turnover (e.g. UK Modern Slavery Act).

Other initiatives apply both to large companies and to small and medium-sized enterprises operating in high-risk sectors (e.g. the Swiss Counter-proposal, the German Draft Proposal). Conversely, the Swiss Responsible Business Initiative would apply to all companies domiciled in Switzerland. The scope of the Dutch Child Labour Due Diligence Act is even wider as it not only applies to all companies, regardless of their size, but also covers companies that are not domiciled in the Netherlands but that sell and supply goods or services to Dutch end users. Such a scope can present a particular interest in terms of not placing Dutch companies in a situation of competitive disadvantage in relations to non-Dutch companies operating on the Dutch territory. However, it is limited to the goods and services sold or supplied to the Dutch market and therefore it does not cover the activities of Dutch companies in relations to goods and services supplied outside of the

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[238] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation', ECCJ Position Paper, June 2018, at 2.
[239] I. Landau, 'What are we missing by focusing on modern slavery?', available at: https://www.business-humanrights.org/en/what-are-we-missing-by-focusing-on-modern-slavery; L. Smit, et al., 'Study for the European Commission on due diligence requirements through the supply chain', *op. cit.*, at 254
[240] GBI and Clifford Chance, 'Business and Human Rights: Navigating the Changing Legal Landscape', 2019, at 7, available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/03/business-and-human-rights-navigating-a-changing-legal-landscape.pdf.
[241] OECD Guidelines for Multinational Enterprises, Chapter VI.
[242] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation', *op. cit.*, at 3.

Dutch market. A potential Belgium law on mandatory human rights and environmental due diligence could apply both to Belgian companies and companies selling goods and supplying services on the Belgian territory.

The different initiatives presented includes bank and financial services insofar as they meet the criteria for eligibility. A recent report from ClientEarth making the case for the adoption of mandatory due diligence at the EU level to protect the people and the planet,[243] stresses the importance of the roles of financiers and investors who should be included in mandatory human rights due diligence legislation as they 'wield a huge amount of power in facilitating projects that can have large environmental and human rights impacts'.[244] In the context of a potential Belgian mandatory due diligence law, it would therefore be crucial to specify that the scope of application of the law includes financial institutions.[245]

In addition, recommendations were made to extend the reporting obligations under the UK Modern Slavery Act to the public sector.[246] This could also apply to the due diligence obligations under a potential Belgium law which could also extend to companies in the public sector.

3) **Nature of the companies' obligations. In particular, the law should enshrine 'the companies' responsibility to respect internationally recognized human rights and environmental standards' in their operations and supply chains.**

In this respect, the only legislative initiative that purports to include such an obligation is the Swiss Responsible Business Initiative. The other legislations and legislative proposals are framed only in terms of due diligence obligations (or duty of vigilance in case of the French law).

4) **Content of the due diligence obligations, requiring companies to put in place appropriate due diligence measures to identify, prevent, mitigate, and account for how they address adverse human rights and environmental impacts, and to report on their adoption and outcome**.[247]

In this regard, reporting regulations such as the UK Modern Slavery Act do not actually place positive duties on companies to undertake substantive human rights due diligence, but are limited to reporting obligations. Other legislative measures, which do impose substantive human rights due diligence obligations, fail to require the exercise of due diligence on a continuous basis. This is the case of the Dutch Child Labour Due Diligence Act. The French Duty of Vigilance Law, the Swiss Responsible Business Initiative and counter-proposal and the German draft proposal all require the exercise of substantive human rights due diligence in line with the UNGPs. It is recommended that a potential Belgium law on mandatory human rights and environmental due diligence be firmly grounded in the UNGPs and the OECD and other related materials which provide a globally accepted

[243] ClientEarth, Strengthening Corporate Responsibility: The Case for Mandatory Due Diligence in the EU to Protect People and the Planet', July 2019, available at: https://www.globalwitness.org/en/campaigns/forests/strengthening-corporate-responsibility/.
[244] Ibid.
[245] ECCJ Legal Brief, 'EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment', February 2020, at 2.
[246] Independent Review of the Modern Slavery Act 2015: Final report, at 24.
[247] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation', *op. cit.*, at 3.

and recognised standard, and would accurately reflect the various elements of the due diligence processes set out in said standards.

In its recent legal brief on an EU Model Legislation of Corporate Responsibility to Respect Human Rights and the Environment, the ECCJ highlighted the importance of requiring companies to consult 'impacted and potentially impacted stakeholders' as part of the human rights due diligence exercise.[248] Given the shortcomings in terms of stakeholders engagement described above in relation to the French Law and underlined in the recent report for the French Government,[249] it would be worth specifying this requirement in the context of a Belgian law on mandatory human rights due diligence.

5) **Reach of due diligence obligations, which should extend to the company's entire corporate structure, including controlled companies as well as its business relationships**.

The majority of the legislations and legislative proposals on mandatory human rights due diligence are limited to companies' supply chains (or part of them). This is the case for instance of the UK Modern Slavery Act, the Dutch Child Labour Due Diligence Act, and the French Duty of Vigilance Law. The only initiative which extends companies' due diligence obligations throughout their value chains is the German draft proposal. Its approach is more aligned with the UNGPs which affirm that human rights due diligence 'should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'.[250] The UNGPs define 'business relationships' as including 'relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services'.

Professor Ruggie, the author of the UNGPs, stated in this respect that:

> all firms, including the suppliers of goods and services within global value chains, have the same responsibility to respect. But parent companies and companies at the apex of producer- or buyer-led value chains should also use whatever leverage they have in relation to their subsidiaries, contractors, and other actors in their network of business relationships. They should establish clear policies and operational procedures that embed respecting rights throughout their entire value chain system. Where leverage is limited it may be possible to increase it, for example by providing incentives or collaborating with other actors.

The statement by Shift on the role of mandatory measures in the implementation of the UNGPs highlights that mandatory human rights due diligence legislation 'should not undermine the scope of the responsibility to respect, which extends throughout the value chain, even if liability is attached to a narrower set of relationships.'[251]

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[248] ECCJ Legal Brief, 'EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment', *op. cit.*, at 5.
[249] A. Duthilleul et M. de Jouvenel, 'Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', *op.cit.*, at 37.
[250] UNGPs, Guiding Principle 17.
[251] Shift, 'Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix"', *op. cit.*

In the Belgian context, banking, financial and insurance institutions are subject to more stringent transparency requirements following Directive 2014/95. These obligations, however, concern an overall operational reporting duty rather than project specific information.[252]

In terms of considering the reach of obligations it is also relevant to consider how human rights abuses by companies occurs. Based on an extensive mapping of cases of corporate human rights abuses Marx et al.,[253] , building on Zerk's work,[254] identify five ways in which might become implicated in human rights abuses:

> (1) Cases where the company, its executives and/or staff are accused of being directly responsible for human rights abuses;
> (2) Cases where companies provide goods, technology, services or other resources to governments or State authorities, which are subsequently reported to be used in abusive or repressive ways;
> (3) Cases in which companies are accused of having provided information, assistance, logistical support or financial support to others, thus causing human rights abuses (for instance when security services have been enlisted to assist the resolution of a dispute surrounding the business activities);
> (4) Cases in which the companies have made investments in projects or governments or State authorities with poor human rights records or with connections to known abusers accused of being complicit in human rights abuses;
> (5) Cases where companies are sourcing products that are produced in violations of human rights by suppliers.

The extent to which the various legislations and legislative initiatives cover these different scenario depend upon their specific design. Scenario 1, 3 and 4 would, arguably at least, be covered by all of them. They would also cover scenario 5 although, as discussed above, some legislations cover only part of the supply chains (e.g. UK Modern Slavery Act), whilst others cover the entire supply chain (e.g. Dutch Child Labour Due Diligence Act). As for the scenario 2 which relates to the use made of goods by third parties, this would only be covered by a legislation which extend beyond the supply chain to cover the entire value chain (e.g. German draft proposal).

6) **Liability and access to justice**. The law should establish 'civil liability of companies for damage caused by entities under their direct or indirect control, where these entities have infringed internationally recognised human rights or environmental standards. Control is to be determined according to the factual circumstances. It may also result through the exercise of power in a business relationship'.[255]

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[252] See report Van Calster/Lica Human Rights / CSD Due Diligence in Belgian Law, at 15.
[253] A. Marx, C. Bright, N. Pineau and J. Wouters, 'Judicial Accountability in EU Member States for Corporate Human Rights Abuses in Third Countries', *European Yearbook of Human Rights*. 2019, 157.
[254] The typology builds on the work of J. Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies', report prepared for the Office of the UN High Commissioner for Human Rights, available at: https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf , at. 6. She identified the first four types of abuses.
[255] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation', *op. cit.*, at 3.

Key feature 8) adds that **the law should allow 'persons harmed by the breach of human rights or environmental standards to bring an action against the parent company to take steps to ensure cessation of the violation and for the compensation for the harm that would have been avoided if due diligence had been exercised appropriately**.'[256]

The Commentary to the UNGPs specifies in this respect that the responsibility of business enterprises to respect human rights is 'distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.'[257]

Several of the legislations analysed did not contain any specific liability provisions (be it in relations to parent company liability or supply chain liability) in case of business-related human rights or environmental harms. This is the case of the UK Modern Slavery Act and the Dutch Child Labour Due Diligence Act. However, the lack of implementation in practice of the UK Modern Slavery Act has shown the limitations of such an approach. In addition, it fails to ensure access to remedy for victims.

On the other hand, the French Law on the Duty of Vigilance, the Swiss Responsible Business Initiative and counter-proposal all contained specific liability provisions in case of harms. The Swiss Responsible Business Initiative used the criteria of 'control' as a trigger for liability both in parent company-subsidiary and in lead company-supplier settings, whereas the counter-proposal is limited to certain types of damage caused by a subsidiary over which the parent company exercises actual control. In the French Duty of Vigilance Law, liability extends to the damage caused by controlled subsidiaries and 'established business relationships' which could have been prevented had the parent or lead company complied with its vigilance obligations. The German draft proposal does not provide for a specific liability regime in case of harm, however, victims can bring tort claims under the general principles of German Law. Nonetheless, the German draft proposal aims to improve access to remedies for affected individuals.

John Ruggie recently warned against the risks of attaching liability to any types of human rights harm in a company's value chain:

> Global value chains are exceedingly complex. If parent or lead companies fear that they may be held legally liable for any human rights harm anywhere within their value chains, irrespective of the circumstances of their involvement, it would create the perverse incentive to distance themselves from such entities. It is important that regulation gets the balance right.

As a result, and to avoid such perverse incentive, it is recommended that a potential Belgium law on mandatory human rights and environmental due diligence include a civil liability provision clearly defining the required degree of control to trigger liability. Currently, the notion of control in Belgian corporate law (see Van Calster/Lica) is broadly defined – though closely aligning with similar notions in banking and finance law.[258] The current definition is included in Article 1:14 of the 2019 Code of companies and associations. 'Control' of a company is defined as 'the power in law or in fact to

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[256] Ibid.
[257] UNGPs, Commentary to Guiding Principle 12.
[258] M. Wyckaert, 'Het controlebegrip in de Vennootschapswetgeving', *Accountancy & Tax*, 2000, 23 ff.

exercise a decisive influence on the designation of the majority of the administrators or managers of this company, or on the orientation of its management'.[259]

7) **Due diligence defence, according to which companies may discharge their liability if they can prove that they took all due care to identify and avoid the loss or damage, or that the damage would have occurred even if all due care had been taken**.

The Swiss Responsible Business Initiative and counter-proposal are the only examples of initiatives that purports to adopt a strict liability regime whereby parent and lead companies are liable for the damage caused by companies under their control, assorted with a due diligence defence. It effectively reverses the burden of proof, and thereby alleviates certain recurrent obstacles to access to justice faced by claimants in proceedings relating to business-related human rights and environmental harms, in particular in relations to the access to information necessary for victims to substantiate their claims. It is therefore suggested that such an approach would be usefully transposed in a potential Belgium law on mandatory human rights and environmental due diligence. However, it would be essential to clarify, in line with the UNGPs, that the exercise of due diligence should not constitute an automatic defence to liability, as it is the appropriateness of the due diligence exercise that will need to be evaluated on the basis of elements including the size of the company, the specific context of operations, the type of damage suffered to decide if liability can be avoided in a specific case. In other words, due diligence as a mere "box-ticking" exercise should not be sufficient for companies to be exonerated from liability.

9) adds a requirement in terms of disclosure of evidence: **'the law introduces a general obligation for the defendant company to disclose evidence relevant to the case, in particular concerning the relationship and communication with the entity that has caused or contributed to the harm, when ordered to do so by a judge'**.[260]

This could be achieved through a strict liability regime with a due diligence defence (see key feature 7).

10) **Overriding mandatory rule**: the law sets out that its provisions apply irrespective of the law otherwise applicable under private international law.

The only examples of initiatives having expressly adopted this approach are the Swiss Responsible Business Initiative and counter-proposal and the German Draft Proposal. Since, under the General rule laid down in Article 4 of the Rome II Regulation, the law applicable to translational civil liability claims is normally the law of the place where the damage occurred (which is normally the law of the host State), it is essential that such a feature be included in a potential Belgian law on mandatory human rights and environmental due diligence in order to ensure its applicability in practice.

Finally, the legal brief on an EU Model Legislation of Corporate Responsibility highlights the importance to designate a competent public authority in charge of ensuring compliance with the duties set out by the law, and able to impose dissuasive penalties and sanctions on non-complying

[259] Belgian Code of companies and associations, Article 1:14 §1. Translation by the authors.

companies.[261] It would be important to make provision for such a public authority in a potential Belgian law on mandatory human rights due diligence.

9. Further Considerations in a Belgian context

The above discussion gives a general overview of the different options to be considered in designing a mandatory HRDD legislation. In the discussion we concentrated on the 'maximum' option in terms of most far reaching implications. Translating this further to a Belgian context generates a number of questions to be addressed in relation to Belgian's economic structure, position/preferences of stakeholders, division of competence and further considerations on liability. The answers to these questions are based on expert consultations, results of a survey and interviews.

Concerning the economic sectors and companies to be covered two key questions need to be considered. First, the size of the companies and second whether the legislation will apply only to Belgian companies or all companies operating in Belgium (Netherlands case). The answers to these questions are related to the question on the scope of the law. Legislation with a narrow scope tend to capture a wider range of companies since the argument could be made that also SMEs can take action with regard to slavery or child labor. When the scope expands the legislation tends to be more restrictive in terms of companies covered (French legislation) since it could be argued that only large companies can put sufficient due diligence measures in place to cover a wide range of issues. Hence, the answer to the question on which companies to cover depends, to a degree, on the question of scope of legislation which in the Belgian context is important given the division of competences. We will return to this later.

In addition, some other considerations of determining which companies to address can be taken into account. First, one could argue that coverage is not really an issue as the UNGPS set out clearly that the HRDD requirements apply to ALL companies, regardless of their size. However, GP 17 acknowledges that the complexity of the expected due diligence process will vary depending on the size of the company, amongst other things. So in the Belgium context, a less complex HRDD process would be expected from small companies. Second, taking the economic structure of a country into account. It could be argued that although every economy is distinct there are no significant differences between the Belgian economy and the economies studied in the sense that they are all open, diversified economies with a range of different sizes of companies. Belgian is indeed an SME-dominated economy but this holds for many economies in Europe. France, Netherlands, Germany, United Kingdom and Switzerland arguably have more multinational companies and headquarters but also have many SME's and in several of these countries the legislation goes beyond the multinationals. So we do not think the specific economic structure of the country should be taken into account to determine the legislation. Third, and related to the previous point, given the potential of a possible EU initiative it could be argued that the design in terms of companies should align as much as possible with the current approaches in the legislation since they will be taken as a starting to develop a European strategy and a European approach will in all likelihood also not distinguish between economic structures.

[261] ECCJ Legal Brief, 'EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment', *op. cit.*, at 6.

Positions of Stakeholders

Next, **considering the positions of different stakeholders** we conducted a survey among representatives from political parties (all members of Federal, Brussels, Flemish and Walloon Parliament) and other stakeholders. The survey aimed to capture positions on the overall attitude towards mHRDD as well as vis-à-vis specific proposals. 42 participated in the survey, of which 39 provided answers on some of the questions. 28 participants specified in which field they are working: Parliament of Flanders (4), NGOs (4), Unions (4), Parliament of Wallonia (3), Brussels Parliament (3), Federal parliament (3), Political parties (3), University (1), Company (1). The other participants did not give this information. The answers reflected below are not representative due to high non-response which is probably biased towards those favoring a law, but indicate political support for a possible initiative. Also interesting to identify the preferences with regard to scope and other relevant parameters for those who are in favor of a law.

Concerning the question on whether it is the responsibility of companies to make sure that their activities and those of their suppliers do not violate human rights or harm the environment, 14 strongly agree and 11 agree, while 1 has no opinion and 1 strongly disagrees. That person strongly disagrees because "as duty bearer, the States have also an essential responsibility". Concerning the question on whether there is a need for binding regulation that defines companies' obligations in terms of identifying, preventing and addressing human rights violations in their own activities and their supply chain, 17 strongly agree and 8 agree, while 1 has no opinion, 1 disagrees and 1 strongly disagrees. Among the ones who (strongly) agree, 15 think such a legal framework should be developed on the European level, 6 on the federal one, and 1 on the regional one, while 4 have no clear preference, because they "believe there must be a legal framework at federal level as a step towards a legal framework at the European level". These response indicate a clear preference for an initiative on the European level possibly to level the playing field but maybe also due to complexities of dealing with mHRDD in the Belgian context (see next point).

The survey inquired into the attitude towards the adoption of a Belgian law following the **French example**. Regarding the question whether the Belgian Federal Government or a regional government should adopt a similar law, 8 strongly agree, 14 agree, and 1 has no opinion. No one (strongly) disagrees. If a similar law would be adopted, 1 respondent thinks only very large companies (e.g. more than 1000 employees in Belgium and more than 2500 worldwide) should be targeted; 5 think that also companies with 250-1000 employees in Belgium should be targeted; 4 think that also medium-sized companies with 50-250 employees in Belgium; and 13 think that all companies should be targeted. Moreover, if a similar law would be adopted, 18 agree with a broad scope of general due diligence regarding all serious violations of human rights and environment, while 5 disagree. 10 strongly agree and 11 agree that this law should require companies to establish, implement and publish a vigilance plan, while 2 have no opinion. This vigilance plan should focus on the own activities of the company for 2 respondents, the own activities of the company and the activities of direct (first-tier) suppliers for 7, and the own activities of the companies and the activities of all suppliers for 14. A respondent commented also investors should be captured by the law. On the question regarding the burden of proof, 7 think that the claimant should prove that the company caused the harm/abuse, while 16 think the company should prove it did not cause the harm. Two respondents proposed considering different types of provisions depending on the size of the company and the characteristics of the value chain.

The survey inquired into the attitude towards the adoption of a Belgian law following the **Dutch example**. Concerning the question whether the Belgian Federal Government or regional government should adopt a similar law, 10 strongly agree, 7 agree, 2 have no opinion, and 2 disagree. If such a law would be adopted, 14 think that all companies supplying goods and services in Belgium should be targeted, 4 think that only large companies (more than 250 employees) should be targeted, and 3 think that only medium-sized and large companies (more than 50 employees) should be targeted. Regarding the scope of this law, 2 strongly agree and 3 agree that it should be limited to child labor instead of all human rights, while 8 disagree, 5 strongly disagree, and 2 have no opinion. All respondents who answered this question agree (13) or strongly agree (6) that, if such a law would be adopted, it should oblige companies to implement due diligence procedures and report on them. Seven respondents think that the due diligence plan should focus on the own activities of the company and the activities of the direct suppliers, and 14 think it should focus on the own activities of the companies and the activities of all suppliers.

The survey also inquired the attitude towards the adoption of a Belgian law following the **UK example**. Concerning the question whether the Belgian Federal Government or regional government should adopt a similar law, 7 strongly agree, 10 agree, 1 has no opinion, and 3 disagree. One respondent explicitly commented that she/he thought the UK legislation is too weak since the main focus is on transparency and reporting requirements and not on preventive/mitigation measures.

If such a law would be adopted, 14 think that all companies supplying goods and services or having part of their business in Belgium should be targeted, 2 think that only large companies (more than 250 employees) should be targeted, and 5 think that only medium-sized and large companies (more than 50 employees) should be targeted. Regarding the scope of this law, 4 agree that it should be limited to slavery and human trafficking instead of all human rights, while 9 disagree, 6 strongly disagree, and 2 have no opinion. If such a law would be adopted, 6 strongly agree and 12 agree that it should create the obligation for companies to publish an annual statement on the steps they have taken to address slavery, while 2 have no opinion one 1 disagrees. One respondent considers that it would also be "desirable that a State official can also launch a case" probably referring to launching a case in case of non-compliance.

Asked for a preference between the different laws,10 would prefer the French law model which requires large companies to put in place a vigilance plan in relation to their adverse human rights- and environmental impacts; 4 would prefer the Dutch law model which requires companies to undertake due diligence specifically on child labor, but which is applicable to all companies; none would prefer the UK law model which imposes reporting requirements only with regards to slavery and forced labor. Six respondents have no preference. Concerning the question about the German approach (first voluntary and only later mandatory), 9 support such an approach, while 11 would not support it because the government should intervene immediately.

Across the survey one can identify some trends in the answers for those who are in favor of taking legislative action. First, there is a clear preference to have legislation on the European level. Second, there is a clear preference to cover a broad range of companies and not only large companies. Third, there is a clear preference for a broad scope to cover a full range of human rights and environmental risks. The answers to the Dutch and UK law indicate that only few respondents would consider an equally narrow scope. As one respondent commented: "our aim is to have a HRDD-legislation with a broad scope, for all human rights, including all fundamental rights at work (including occupational health and safety) and ecological prescriptions, with special attention for freedom of association

and the right to collective bargaining (incl. the right to strike).'' Fourth, inquiring into the proof of harm several respondents indicated a preference for reversing causality and putting the burden of proof with the company rather than the victim. Finally, across the answers there is a preference to include provisions on human rights protection across the supply chain.

In sum, respondents in favor of mandatory legislation expressed a preference for an elaborate and far-reaching proposal. As one respondent indicated: ''We like the French law because it covers all human rights and environmental impacts + provides for a civil liability. We dislike that it only applies to very large companies + burden of proof is with the victim. - We like the Dutch law because it is applicable to all companies + covers the whole supply chain. We dislike that it only takes into account a very specific type of human rights violations (child labor). - The UK law is insufficient : only requires reporting + only focuses on a specific type of HR violations (forced labor & slavery). Conclusion : none of the current laws is ideal but the French law is the most advanced one and closest to our idea.'' Or as another respondent concluded: ''None of the existent examples are sufficient. I think we have to learn from them and go a step further. The scope should be adapted to the Belgian context. Liability for non-compliance with HRDD but also for abuses should be part of the law as well as measures to guarantee access to justice for rights holders.'' The latter raises two issues, (1) scope in a Belgian context and (2) approach towards liability which are discussed in the next sections.

The survey was complemented with interviews with representatives from employer's federations. From an employer's federation perspective, based on interviews with VBO and Etion, several issues were raised. First, there is a concern with the wide scope of what is (or can be) understood under human rights. From that perspective a more narrow focus on specific human rights (such as in the UK and Dutch example) might be considered. Second, there seems to be a preference, in case of regulatory action, to be very sector specific and not have a 'one size fits all approach'. In that context examples of the EU Timber and Conflict Minerals regulations were given. They do contain specific due diligence measures. The question arises to which and how many sectors such an approach can be expanded. For both timber and conflict minerals traceability systems are in place which makes such an approach applicable to these sectors. Third, concerning the reach of obligations, it was mentioned that this could/should only be limited to a company's own sites/activities and possibly direct suppliers (with whom there is a contractual relationship). Going further down the value chain is considered not feasible and would also create many practical problems for effective implementation. Fourth, there is a fear that turning attention fully to companies might 'dismiss' governments in third countries from their obligations. Several human rights abuses in countries where governments do not uphold their human rights commitments. Addressing 'governance failure' in those circumstances should also be a priority which has to be pursued through state-to-state interactions for example in the context of international cooperation and possibly, on the European level, trade policy. Such an approach should also contribute to 'level the playing field' which is necessary since companies can be put in a competitive disadvantage if only European companies need to comply with stringent regulation. Fifth, related to liability, it was stressed that any legislation can only be a commitment in means not in results. The latter implies that a possible law, in design, might focus more on providing clear guidelines on due diligence and a set of enforcement procedures to check compliance with the commitment in means rather than on including strict liability provisions. Sixth, it was noted that there are several existing initiatives in place (non-financial reporting directive, OECD guidelines, ILO mechanisms) which can be used further to pursue a business and human rights agenda. Finally, there is a concern that there are

many different laws are being developed in neighboring countries which might lead to a 'mosaic' of many different initiatives increasing transaction costs for companies operating or being linked to these countries. Hence a plea for coordination on the European level.

Considerations on positioning a law in Belgium

Concerning determining the **scope of the law** to the Belgian political context does constitute a specific case. At what level of governance should a legislative initiative be taken: federal level, regional level or both? Is there a difference in this respect with regards to the various initiatives being developed in neighbouring countries? The results of our survey indicate that a majority of people who answered the survey prefer an initiative on the European level. This is not surprising since this would level the playing field. From a legal perspective[262] the question of which Belgian level of governance should/could take action is not a straightforward one and so far no clear answers can be found in the Belgian legal scholarship especially if one would consider a broad scope of the legislation covering environmental issues, labor and human rights as suggest above.

This type of due diligence legislation shows connecting factors to both corporate and association law as well as a connection to the competence of guaranteeing constitutional rights. Depending on the qualification of the legislation by the Council of State and the Constitutional Court, a different scheme of competence will have to be followed. Then again, both possible schemes will not offer a clear answer to decide on the competent governance level.

- Imagine that the legislation is classified to fall within the area of corporate- and association law. Corporate law is a **material competence that belongs exclusively to the federal government** (art. 6, § 1, VI, fifth section, 5° BWHI). The federal competence regarding corporate law includes the rules on establishment, acquiring legal personality,… along with the rules concerning the administration and management of companies. Determining the rules and conditions relevant to the validity of decisions made by organs of companies, is also a matter of federal concern. It is possible that the rules regarding human rights due diligence norms would also fall within this federal competence.

  Association law or legal entity law is considered to be a **residual competence of the federal government.** In analogy to corporate law, the matter of association law includes the legal and regulatory provisions regarding the establishment of associations with legal personality, the acquisition of said legal personality, their capital, their administration and management as well as their dissolution.

  This, however, does not mean that the regional legislator is not allowed to regulate companies that operate within areas of the regional competences. The Constitutional Court for example did not see an exceeding of competence in the regional provision securing that organs of commercial companies should have no more than two thirds of persons of the same gender to be eligible for a working-license concerning facilities for the elderly (which is a matter of regional concern). Potentially the Court would also accept that the regional

[262] This section was written after consultation with legal experts in public law. We thank Karel Reybrouck for extensive input. For more information: K. REYBROUCK en S. SOTTIAUX, *De federale bevoegdheden,* Antwerpen, Intersentia, 2019, pp. 113-117 en 595-604.

legislator is competent to impose mandatory human rights due diligence norms on companies that fall within the limits of their competences (although it will be hard to establish a link with multinationals and other big companies). General due diligence norms would most probably belong to the federal government.

- Now let us imagine that the legislation is classified as provisions which fall under guaranteeing constitutional rights (by 'guaranteeing' we mean; respecting, limiting, promoting and protecting constitutional rights). Guaranteeing constitutional rights is rather an accessory competence. In the Belgian legal system, securing constitutional rights is not considered to be a full-fledged independent competence allocated to the federal or regional governments. The federation and the regions are both competent to secure these rights each within their own area of competence. The federal government maintains the residual competence for all the related measures which do not fall under the specific competences of the regional governments.

  Consequently, it is always necessary to look for a link with the main material competence. Due diligence legislation for a group of NGO's could potentially fall under different material competences depending on the primary angle of incidence of the legislation. If the legislation focuses on environmental issues then this could fall under the regional competence on protection of the environment. If it focuses rather on protection of human rights of employees of the affected companies (as seems to be the case for the UK Modern Slavery Act, the Dutch Child Labour Due Diligence Act) then the legislation shows more of a link to the federal competence on labour law (although this division is less clear when it comes to employees working abroad). If the legislation concerns mainly commercial and corporate norms, then this will probably resort under the federal competences in these fields.

  Moreover, it is possible that both the federal government and the regional governments assume competence to take on human rights due diligence legislation and as a consequence will adopt similar, or even duplicative, norms. An illustration of this can be found in the division of competences related to regulating discrimination. The Council of State states that both the federal and the regional governments can prohibit discrimination, each within their own field of competence. According to the general principles on competences this would mean that this concerns an exclusive type of competence: the competence of one government excludes the competence of the other government. According to the Council of State, the federal government can only adopt discrimination prohibitions related to matters of federal competences and the same goes for the regional governments. However there are situations in which the federal and regional governments, all acting within the limits of their own powers, still adopt overlapping legislation on discrimination.

  Notably, the federal legislator can adopt general rules on the basis of its residual transversal competences in matters such as criminal and civil law, rules that also apply to matters falling under the competences of the regional governments. For example, criminalizing incitement to hatred or discrimination or prohibiting discriminatory clauses in the ticket-sale for cultural events. The regions can also act in these areas based on their accessory competences to tackle discrimination. This can be considered an application of the **'double**

aspect-theory' or the parallel execution of exclusive competences, which nuances the principle of exclusive competences. We can conclude from recommendations of the Council of State, also supported by the Constitutional Court, that the relation between federal and regional legislation is managed by the *lex specialis derogat legi generali* principle: the general federal anti-discrimination laws are applicable insofar the regional governments haven't adopted more specific measures.

It seems as if the Council of State will follow the same competence scheme for the adoption of mandatory human rights due diligence legislation. In case legislation is adopted which combines facets of both federal and regional competences, the Council of State will (in light of the proportionality principle) probably deem it necessary that the different governments sign a cooperation agreement before issuing this legislation.

Considerations on liability

Concerning including liability in the law the following considerations can be taken into account. The Netherlands is currently considering a draft law on mandatory human rights due diligence. Because of strategic reasons (probably aimed at gaining wider support for the legislation, including from companies), no liability provisions were included in that proposal, however there are also some arguments in favor of including it.

A civil liability provision should be a key element of mandatory due diligence legislation for 2 reasons: firstly, to ensure compliance with the law: and secondly, to improve access to remedy for the victims by easing some of the hurdles that they face in business-related human rights claims.

On the first point, certain business stakeholders have argued that a liability provision might have a negative effect on transparency because of the fear of claims. A similar argument has also been made in relations to the evolving case law on parent-company liability which, it has been argued, might create a disincentive for parent or lead companies to put in place or publish group wide policies on human rights, health and safety or the environment.[263] However, such a risk can be avoided through clear requirements in the law setting out the expectations for companies in terms of the different steps to include in their due diligence processes and the elements on which to report (if companies are mandated to report on certain elements, they will simply have to do it). In addition, the analysis of existing legislations which do not include a liability provision, such as the UK Modern Slavery Act, has highlighted low levels of implementation of said laws by companies in practice. In particular, reports on the UK Modern Slavery Act have pointed to the poor quality of the statements issued and widespread issues of non-compliance amongst eligible companies. This is the result of a lack of effective enforcement mechanism. A civil liability provision would create a legal risk for non-complying companies or companies not adequately complying with the requirements of the law, and thereby act as a deterrent against non-compliance or poor compliance.

Secondly, as already stated above, numerous reports have highlighted issues in relations to the lack of access to justice and remedy for victims of corporate human rights abuses. A civil liability provision would enhance access to remedy by overcoming certain hurdles faced by claimants. For instance, one common hurdle relates to the difficulties of attributing legal responsibility among members or a corporate group or down a supply chain, on the basis of the corporate law principle of

[263] R. McCorquodale, 'Vedanta v. Lungowe Symposium: Duty of Care of Parent Companies, April 2019, available at: https://opiniojuris.org/2019/04/18/symposium-duty-of-care-of-parent-companies/

separate legal personality. A civil liability provision, like the one of the French Duty of Vigilance Law alleviates such hurdle and allows to circumvent the corporate veil by affirming the legal accountability, in certain circumstances, of parent and lead companies for the damages resulting from the activities of their subsidiaries and business partners. The Swiss Responsible Business Initiative goes even further by proposing a strict liability regime of parent and lead companies, with a due diligence defence, thereby effectively reversing the burden of proof. On this point, it is noted that the argument relating to the burden of proof being very high in Dutch law is very specific to Dutch law. The Swiss did not seem to find it problematic to reverse the burden of proof with a provision modelled on the employer's liability provision contained in the Swiss Code of Obligation. On the other hand, as mentioned elsewhere in the analysis, it is important to strike a right balance in relation to liability. Criminal sanctions for the board members may be going a step too far, and the idea would certainly be unlikely to gain any type of business support.

Combining due diligence and civil liability for damage in the same law is the approach that has been adopted both in the French Law and Swiss Responsible Business Initiative, as well as the counter-proposal from the National Council. It is also the approach that has been taken in the revised draft of the Treaty. Article 6(6) of the Revised Draft of the Treaty affirms that states should provide for the liability of natural or legal persons for its 'failure to prevent another […] person with whom it has a contractual relationship, from causing harm to third parties' in two cases: when company sufficiently controls or supervises the relevant activity that caused the harm or when it should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities.[264] If the provision does not expressly refer to due diligence, in a liability claims, companies will be able to show, as a defence, that they exercised the required due diligence and that the harm occurred nonetheless. In that sense, there is a clear connection between the due diligence provision and the liability provision in the treaty.

10. Conclusion

In this report, we mapped and compared different regulatory options for a Belgian mHRDD law.

Should a law be drafted based on the most stringent features present in the different laws, one could recommend creating a legal duty for Belgian companies and companies doing business in Belgium to exercise human rights due diligence in order to identify, prevent, mitigate and remedy the actual or potential adverse impacts on all internationally recognised human rights and the environment, caused by them or contributed to through their own activities, or which may be directly linked to their operations, products or services through their business relationships.

The draft could be either modelled on the French Duty of Vigilance Law or on the Swiss Responsible Business Initiative. An initiative of that sort could be embedded in current Belgian law, through the entry points identified in our analysis (first report). Linking it to certain aspects of existing law is also followed in some of the examples covered in the report. For instance, in the context of the French Law, articles were codified in a part of the French Commercial Law which regulates a specific type of companies ('sociétés anonymes'), making the law applicable to that type of companies only. The Swiss proposal of the National Council equally foresees adding several articles to the Swiss Code of Obligations. In Belgium, the obligation for the board of directors to exercise due diligence could be

[264] Art. 6(6) Revised Draft.

introduced through a new Article 716abis to be inserted in the section concerning the board of directors. The precise entry point should be investigated based on a concrete regulatory proposal.

Said proposal will depend on several considerations discussed in the report, these including but not being limited to the purpose of the law, scope of the law, obligations, reach of obligations, enforcement and implementation, liability and access to remedy. On all these dimensions different options might be assessed.

In terms of strategic considerations three broader issues might be singled out for further reflection.

First, the end objective of the law is to be determined: (a) on the one hand, if the main objective is the prevention of human rights abuses, then strong emphasis has to be placed on compliance mechanisms for due diligence; (b) on the other hand, if the objective is addressing access to remedy constraints, liability and access to remedy shall be emphasised. It can also be the case that a trade-off between (a) and (b) is sought. A proposal of that sort will aim to capture both prevention and remedy but will lead to weaker provisions on both components to be politically feasible.

A second broader consideration is how to position the law vis-à-vis other national initiatives and deciding whether following an existing initiative or creating a new one is preferable. Both options might provide incentives for a more coordinated European approach. If alignment with existing approaches is sought, this might give weight to a European initiative going in the same direction. On the contrary, should a different kind of law be proposed, it is difficult to predict how that might influence a possible European coordinated initiative.

Third, one needs to consider the timing of a possible proposal. As mentioned in the introduction, the outbreak of COVID19 might have significant implications on the dynamics and momentum for business and human rights legislation. The short-term economic impact is very significant. This impact is exogenous and economies might recover fairly quickly. However, at this moment it is impossible to assess what the longer term economic consequences might be but it is likely that in the next six to ten months attention will go to economic recovery with less attention for other priorities.

CHAPTER 2

HUMAN RIGHTS / CSD DUE DILIGENCE IN BELGIAN LAW

Geert Van Calster, Diana Lica

1. Introduction and overview of the report

Belgium implements European law in matters concerning supply chain due diligence ('SCDD'), with secondary law on financial reporting being the most obvious sector. Belgium implements this without gold plating (this is, not going beyond what is required by EU law). Belgium also supports the use of international (voluntary) standards and includes SCDD in its overall corporate social responsibility ('CSR') agenda (responsabilité sociétale de l'entreprise/ maatschappelijk verantwoord ondernemen).

General laws, both substantive and procedural, are considered to be flexible enough to accommodate SCDD. However, as of yet, not a single Act or Government Decree at any level of the Belgian institutional structure is aimed directly at SCDD. In general, Belgian law does not obstruct SCDD while it does little to encourage its use.

General contract law in fact is potentially the most promising route, as things stand, to support SCDD in Belgian law. Provisions concerning human rights and SCDD obligations may be inserted into business contracts. They may be based on codes of conduct, whether international and general, particular to a certain sector or even particular to a corporation. Notwithstanding this fact, the status, and especially the enforceability of such provisions remains unclear.

It would be all too easy to blame Belgium's complex layer of heads of power and the intricate division of competencies between the federal level, the Regions and the Communities. In reality, SCDD has simply not been moved up the political agenda, perhaps due to the firm conviction among Belgian policymakers that human rights initiatives in the supply chain overall ought to remain voluntary.

This report is structured as follows:

1. Firstly, we explain the concept of "due diligence" which stems from the OECD Guidelines for Multinational Enterprises and also the actions taken by the Belgian National Contact Point ('NCP') to OECD to develop the understanding of such concept. We equally explain the 2017 Belgian National Action Plan to implement the UN Guiding Principles on Business and Human Rights (´UNGPs').
2. Secondly, we discuss SCDD in the context of **corporations law**. We look at the 2009 and 2020 Belgian Code on Corporate Governance;[265] at the 2013 Wetboek van Economisch Recht (WER) (Code de droit économique),[266] and at the 2019 Company Code (Wetboek van

[265] English version of 2009 Code available at https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/corporategovukcode2009.pdf, or https://bit.ly/2vbpoc4 last accessed 18 April 2019.
English version of 2020 Code available at https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2020_belgian_code_on_corporate_governance.pdf last accessed 27 November 2019.
For an overview of the key changes to the 2009 Belgian Code on Corporate Governance in its 2020 version, please refer to https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/comparative_table_code_2009_vs_code_2020_1.pdf last accessed 27 November 2019.

[266] NL and FR version available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013022819&table_name=wet or https://bit.ly/1Mg8z1g last accessed 18 November 2019.

Vennootschappen en Verenigingen, WVV; Code des sociétés et des associations). We equally refer to veil piercing and director's liability.

3. Thirdly, we look at SCDD obligations from the perspective of **general contract law** and how such provisions can be included into business contracts.
4. Fourthly, we turn to **health, safety and regulatory law** to understand whether SCDD obligations can be enforced based on General tort law (Article 1382 of the Belgian Civil Code).
5. Fifthly, we look at **employment law**, especially at Article 1384 of the Belgian Civil Code (vicarious liability for employees).
6. Sixthly, we turn to **private international law and public international law**. SCDD on this issue is mostly subject to EU law. We also discuss the 2004 Belgian Act on private international law, which is pertinent in the rare occasions in which the Brussels Ia Regulation in not applicable. We briefly explain the now repealed the 1993 Belgian Genocide Law.

We conclude with recommendations.

2. The Concept of Due Diligence

A. Due Diligence: A Response Provided By Oecd Guidelines

Since their adoption in 1976, the OECD Guidelines for Multinational Enterprises set a bar against which businesses could measure their contribution to economic, environmental and social progress. To ensure that the core message of the Guidelines (responsible business conduct ('RBC')) evolved at the same pace as business practices, these have been updated on 3 occasions.

In their third and last update in 2011, the OECD Guidelines[267] have been modified to include a new and comprehensive approach to due diligence and responsible supply chain management. Due diligence is defined as follows:

> *"the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems".*

Therefore, due diligence entails that organizations are accountable for how they address their actual and potential adverse impacts. Potential impacts are to be tackled through prevention or mitigation schemes while actual impacts must be address through remediation. The process described above does not, stricto sensu, concern only the adverse impacts generated by individual enterprises but also those impacts to which the enterprises contribute (either by "facilitating" them or by "incentivizing" other entities – partners; units in the supply chain; state or non-state actors – in the context of a business relationship)[268]. Of course, the "nature and extent of due diligence" must be proportional to factors such as the type of enterprise and its field of activities.

[267] The English version of the OECD 2011 Guidelines is available on http://www.oecd.org/daf/inv/mne/48004323.pdf (Consulted on 27 November 2019)
[268] See page 23 of the OECD 2011 Guidelines.

In that last regard, it should be pointed that the OECD has developed a general "*Due Diligence Guidance for Responsible Business Conduct*"[269] but also sector-specific due diligence guidance for the minerals, agriculture and garment and footwear supply chains, and good practice papers for the extractives and financial sectors[270].

All things considered, due diligence should be primarily interpreted as a process, not a still. Also, it looks at present impacts but also at prospective ones. All in all, it concerns a systematic and coherent integration of economic, social and environmental considerations and a balancing exercise. Last but not least, due diligence happens in consultation with the supply chain and also implies the involvement of stakeholders.

To date, there is no statutory definition of due diligence in Belgium. When tackling this topic, the OECD definition provided above is generally referred to.

B. Due Diligence in Belgium

BELGIAN NATIONAL CONTACT POINT OPERATIONALIZING THE OECD GUIDELINES

Although the aforementioned OECD Guidelines are non-binding for companies, adhering governments must set up National Contact Points ('NCPs') to ensure their effective operationalization[271].

Belgium established a **National Contact Point** in 1980, which is now part of the Ministry for Economic Affairs. The Belgian NCP is also a member of the Working Group on Responsible Business Conduct (which has developed the mentioned OECD Due Diligence Guidance for Responsible Business Conduct"[272]).

The presidency and secretariat of the National Contact Point are looked after by the Ministry. The NCP is further composed of representatives of the federal and regional governments, and representatives of three representative employers organisations and three national interprofessional trade unions, that have a mandate in the Central Economic Council and the National Labour Council[273]. In 2014 the NCP established a network of (currently 17 experts[274] who can

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[269] OECD Report on "*Due Diligence Guidance for Responsible Business Conduct*" available at http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf (Consulted on 27 November 2019).
[270] These sector-specific guidelines are available on http://mneguidelines.oecd.org/sectors/ (Consulted on 27 November 2019).
[271] See page 5 of the "Progress Report On National Contact Points For Responsible Business Conduct" (2019) available at http://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf (consulted on 27 November 2019).
[272] See page 3 of OECD Report on "*Due Diligence Guidance for Responsible Business Conduct*" http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf
[273] The representatives for the federal government are the ministers of Economy, Foreign Affairs, Work, Justice, Environment and Public Health. All three regional governments are represented, namely the governments of the Flemish Region, the Walloon Region and the Brussels-Capital Region.
The three national interprofessional trade unions are the *Algemeen Christelijk Vakverbond (ACV) / Confédération des Syndicats Chrétiens (CSC)*, the *Algemeen Belgisch Vakverbond (ABVV) / Fédération Générale du Travail de Belgique (FGTB)* and the *Algemene Centrale der Liberale Vakbonden van België (ACLVB) / Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)*.
The three representative employers organisations are the Federation of Enterprises in Belgium (FEB), Comeos (federation for trade and services) and Agoria (federation for technological industry).
[274] The list of experts can be found here https://bit.ly/38w2v5J (consulted on 27 November 2019).

advise the National Contact Point on general issues or specific matters in which the NCP must mediate. They are actively involved in the preparation of OECD meetings and inform the NCP on new tendencies and evolutions in their field of expertise. The Belgian NCP does not have an oversight body.

The NCP can issue opinions on general themes and negotiate on specific issues. The past years, the NCP has actively, and sometimes even proactively, advised several actors.[275] In 2014 and in 2016, the NCP drafted an action plan which is meant for the members of the NCP and contains in the first place promotion and information actions on the OECD guidelines. For instance, in 2015, the NCP organized two roundtables about due diligence in textile and extractive industries[276]. In 2016[277],another two roundtables gathering businesses, NGOs, trade Unions, government representatives and academia were held so as to present the aforementioned OECD Due Diligence Guidance for Responsible Business Conduct. In 2017, the NCP together with Febelfin organized a roundtable on due diligence in the financial sector and participated in the launch of OECD's due diligence new toolbox for the textile sector[278]. In 2018, the NCP participated in a similar event concerning the textile sector organized by the OECD in Brussels and equally supported an external activity on due diligence prepared by the Ministry for Economic Affairs[279].

Despite the fact that NCP establishes and maintains contacts with partner organizations of the OECD and is active in the field of responsible business conduct (e.g. UN Global Compact, Global Reporting Initiative and ISO 26000, which we will discuss below), **Belgium's NCP under the OECD Guidelines has hitherto not specifically dealt with human rights due diligence relevant claims**[280], though the expression "due diligence" has been briefly mentioned in several of its communiqués.

DUE DILIGENCE IN THE BELGIAN NATIONAL ACTION PLAN ON BUSINESS & HUMAN RIGHTS

Together with the OECD Guidelines, another pinnacle of the international framework of Business and Human Rights are the **31 Guiding Principles on Business and Human Rights** (also called UN Guiding Principles, 'UNGPs').

To implement these UNGPs, a Belgian "National Action Plan (NAP) for Enterprises and Human Rights" has been drafted since 2013 by the Interministerial Commission for Sustainable Development, and especially by its Working Group on CSR[281].The NAP was accepted by the federal government in July

[275] The annual reports of the NCP can be found here: https://bit.ly/35aV9Cx (last consulted on 12 December 2019).
[276] NCP 2015 annual report available at https://bit.ly/2qP8Url (Consulted on 27 November 2019).
[277] NCP 2016 annual report available at https://bit.ly/38tdBbL (Consulted on 27 November 2019).
[278] NCP 2017 annual report available at https://bit.ly/2RM9EZM (Consulted on 27 November 2019).
[279] NCP 2018 annual report available at https://bit.ly/2LPhPRf (Consulted on 27 November 2019).
[280] Huyse and Verbrugge 2018.
[281] The drafting of the NAP was also seized as an opportunity to confirm other duties under several international instruments, such as the Guidelines of the OECD on multinational enterprises (as revised in 2011), the Sustainable Development Goals set by the UN (especially goals 8, decent work and economic growth, and 12, responsible consumption and production) and the duties committed to in the framework of the ILO. A detailed description of the working process can be found here: Interdepartementale Commissie voor Duurzame Ontwikkeling (2017), annex 2.

2017 and presented officially in September 2017[282]. The federal government and the governments of the three Belgian Regions (see below for **Fout! Verwijzingsbron niet gevonden.**) decided to draft the NAP stimulated by the European Union[283]. In the drafting process, more than fifty societal organisations have been consulted several times.
The NAP serves as the opportunity for the several governments to make their commitments regarding enterprises and human rights more concrete. The NAP aims to serve as a platform to highlight good practices in sectors and enterprises and to create more consultation opportunities[284].

The NAP contains, *inter alia*, the following actions[285]:

- incorporate the principle of "due diligence" within corporate management bodies, also in terms of human rights;
- design of a toolkit concerning human rights for enterprises and organizations;
- drafting a brochure on the government related remediation mechanisms;
- stimulate existing qualitative initiatives concerning human rights and social responsibility;
- evaluation of the Belgian label for advancing socially responsible production;
- follow-up on the evolution of CSR and human rights in Belgian enterprises by means of the CSR-barometer;
- advocate a stronger integration of 'Sustainable Development' (including human rights) into free trade agreements,
- promote good practices of SMEs that adopt responsible supply chain management, especially using the "CSR Compass" tool[286].

Therefore, the principle of "due diligence" is explicitly converted into an action point in the Belgian NAP. Belgium being a federal state, the responsibilities for the implementation of this particular action on due diligence are shared. In the box below, we provide a quick summary on Belgium's federal division of competences:

[282] The NAP can be found here, but only in Dutch and French: https://economie.fgov.be/nl/themas/ondernemingen/een-onderneming-beheren-en/maatschappelijk-verantwoord (consulted on 18 October 2019).
[283] Interdepartementale Commissie voor Duurzame Ontwikkeling (2017), 19.
[284] Ibidem, 20.
[285] Ibidem, 22.
[286] The CSR Compass is a free online tool which helps companies implement responsible supply chain management. The tool is specifically targeted at SMEs. It is available at https://www.csrcompass.com/ (Consulted on 27 November 2019).

Belgium's federal division of competences and due diligence

Relevant competences Heads of Power for due diligence can be found at both the federal and the regional level. There are three Regions, namely the Flemish Region, the Walloon Region and the Brussels-Capital Region. There are also three Communities, namely the Flemish, the French and the German-speaking Community. The competences of the latter are, however, not really relevant in a due diligence context.

The federal level has all residuary competences, while the Regions (just like the Communities) only have attributed competences. The federal level is competent for, *inter alia*, Economy (partly), Justice, Employment (partly), Foreign Trade (partly) and Sustainable Development. The regional level, on the other hand, is competent for, *inter alia*, Economy (partly), Employment (partly), Foreign Trade (partly) and Nature Conservation.

Going back to the implementation of "due diligence" via the NAP, it is stated therein that the responsible authorities are the Ministry of Economy, the Walloon Region, the Flemish Region and the Brussels Capital Region. This fact shows the inherent need for cooperation between and within the governments. This reliance on cooperation can also be seen as a dilatory factor for government action in the field of due diligence. This affirmation is supported by the «*Etat des lieux du PAN «Entreprises et Droits de l'Homme»* carried out in January 2019[287].

Other than the roundtables on the subject matter of due diligence organized by the Belgian NAP under the Ministry for Economic Affairs (see above), concrete actions/ documents seem to be missing. Very interestingly, and according to said "2018 NAP État des lieux", the Ministry of Economic Affairs planned to work closely with the Federation of Belgian Enterprises ('FEB') which was, at the time, updating the 2009 Belgian Code on Corporate Governance. The underlying reason for the Ministry for Economic Affairs to reach out to the FEB was to push for the integration of the principle of due diligence in the 2020 Belgian Code on Corporate Governance. Notwithstanding these declared intentions, and as we will explain in the next pages, the principle of "due diligence" did not make it explicitly into the reviewed text of the 2020 Code but rather implicitly.

ISO 26000 STANDARD

ISO Standards are widely applied and acknowledged in Belgium. The Bureau for Standardisation (NBN) is responsible for the development and sale of standards, including the ISO Standards, in Belgium[288]. The Standards are applied by private enterprises and by the government. They are used for organisations as such, for production chains, for events, etcetera.

[287] Etat des lieux du PAN « Entreprises et Droits de l'Homme (2019) available at https://www.duurzameontwikkeling.be/fr/themes/business-human-rights/cadre-politique (consulted on 27 November 2019).
[288] https://nbn.be/en/about-nbn/nbn (consulted on 4 July 2017).

The application of ISO Standards in Belgium is varied and for the sake of this report, we have focused on the application of the ISO 26000 Standard particularly[289].

ISO 26000 sets out 7 seven key underlying principles of social responsibility: (1) Accountability; (2) Transparency; (3) Ethical behavior; (4) Respect for stakeholder interests; (5) Respect for the rule of law; (6) Respect for international norms of behavior; and (7) Respect for human rights.

Furthermore, ISO 26000 defines due diligence as follows: "*comprehensive, proactive process to identify the actual and potential negative social, environmental and economic impacts of an organization's decisions and activities over the entire life cycle of a project or organizational activity, with the aim of avoiding and mitigating negative impacts*". While the definition is very much in line with the one provided by the OECD 2011 Guidelines (discussed above), ISO 26000 focuses more on the accountability principle of social responsibility[290].

With regard to its application, on the site of the Federal Institute for Sustainable Development, one can, for instance, find that pilot projects have been elaborated within the Federal Public Services in order to implement a management system based on the ISO 26000 Standard[291]. Moreover, the *Voka Sustainable Business Charter is an initiative present in all Flemish Provinces*[292].

ISO 26000 provides for guidelines and not for requirements, it is therefore not certifiable.[293] The Netherlands Standards Institute (NEN) has developed a self-declaration for the application of the ISO 26000 Standard,[294] which is also recognized and referred to in Belgium.[295] The Flemish Region does not seem to have a regional publication mechanism for these self-declarations, so for the time being Belgian enterprises should also use the Dutch 'Publicatieplatform ISO 26000' if they want their commitment to be publicly known.[296]

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[289] For more information on the ISO 26000, including its creation process and an overall critical assessment, see Bijlmakers and Van Calster (2015), 275 *ff*.
[290] See page 13 of the report on "ISO 26000 and OECD Guidelines Practical overview of the linkages" available at https://iso26000.info/wp-content/uploads/2017/09/ISO-26-and-OECD-Guidelines.pdf (consulted on November 27, 2019).
[291] http://www.duurzameontwikkeling.be/nl/themas/duurzame-ontwikkeling-federale-overheidsdiensten/instrumenten (consulted on 4 December 2019).
[292] https://vcdo.charterduurzaamondernemen.be/provincie/west-vlaanderen/onderwerp/vcdo-vlaanderen
[293] Bijlmakers and Van Calster (2015), 290.
[294] https://www.nen.nl/NEN-Shop-2/Standard/NPR-9026C12012-nl.htm (consulted on 4 December 2019).
[295] See e.g. https://www.mvovlaanderen.be/fiche/iso-26000-zelfverklaring (consulted on 4 December 2019).
[296] https://www.nen.nl/Normontwikkeling/Publicatieplatform-ISO-26000.htm (consulted on 4 December 2019).

3. Corporate Law and SCDD

KEY NOTIONS

Belgian Code on Corporate Governance: The Belgian Code on Corporate Governance– ''soft law'' - applies to ***listed companies*** *(those whose ownership is organized via shares of stock) incorporated in Belgium, as defined by the Code on Companies and Associations. Very recently, the 2009 Corporate Governance Code has been reviewed in the 2020 Corporate Governance Code.*

''Comply or explain'' principle: Belgian companies are expected to comply with all provisions in the Belgian Code on Corporate Governance unless they provide a satisfactory explanation for deviating from the listed principles.

Belgian Code of Companies and Associations: Enacted by the Belgian parliament on 28 February 2019, it repealed the existing Belgian Companies Code. The new Belgian Code of Companies and Associations – ''hard law'' in contrast to the ''soft law'' enshrined in the Belgian Code on Corporate Governance–is an attempt to modernize the Belgian enterprise landscape by harmonizing the rules applicable to profit and non-profit legal persons and by simplifying the possible business structures (from 17 to 4).

Veil piercing /attributability: The rule of thumb is that mother companies are not be liable (responsible) for acts of their daughter companies. Veil piercing or attributability attempts to invert the above: it specifically refers to situations in which creditors of the daughter company also (try to) engage the liability of the mother company. The most common veil piercing grounds in Belgian law are abuse of right; concealment; fraud and the creation of false appearances (see infra).

Director´s liability: All directors, managers and people having de facto management powers, are required to exercise them properly. A court may find a director or manager liable if his or her decisions went beyond what a normally cautious director or manager would have done in the same circumstances and if this decision derived in a serious damage.

Gold plating: Following the definition provided by the European Commission, the practice of gold-plating consists in the transposition of EU directives into the national law of Member States which goes beyond what is required by that legislation. Examples of such practice would be adding procedural requirements to the ones listed in the directive or the application of stricter penalty regimes.

As an initial consideration, no SCDD cases have been introduced based on Belgian company law, so it remains an open question what the outcome of such cases would be.

We therefore summarily review the varied parts of company law rules which might be relevant in the context of due diligence. Several issues will be addressed: we will begin with the 2009 and 2020 versions of the Belgian Code on Corporate Governance via the rules on annual accounts and annual reports in the 1999 Belgian Company Code and the new 2019 Code of Companies and Associations.

We will then move to explain the concept of liability in company law and we will refer to the practice of veil piercing but also to the directors' liability.

Finally, and although strictly the provisions in the Belgian Code of Economic Law cannot be considered as 'company law', we will also discuss these in this second chapter.

A. Belgian Corporate Governance Code

Since 2004, there is a Belgian Code on Corporate Governance. The Corporate Governance Code received statutory recognition in the Act of 6 April 2010 for the reinforcement of corporate governance. This Act amended article 96 of the 1999 Company Code (*Code des sociétés; Wetboek van vennootschappen*) and introduced the obligation for listed companies (those whose ownership is organized via shares of stock) to assign the **2009 Corporate Governance Code** as their code of reference.[297] This obligation was introduced to implement in the Belgian legal order, Directive 2006/46.[298]

2009 VERSION OF THE CORPORATE GOVERNANCE CODE

The 2009 Code[299] contains nine principles regarding corporate governance but none of them specifically relate to human rights let alone to SCDD. Human rights terminology is used only in a very wide sense and only in Guideline 1.2, which invites the board to *''pay attention to corporate social responsibility, gender diversity and diversity in general''* when *''translating values and strategies into key policies''*.

2020 VERSION OF THE CORPORATE GOVERNANCE CODE

Very recently, the 2009 Corporate Governance Code has been reviewed in the **2020 Corporate Governance Code**[300] which applies compulsorily to reporting years beginning on or after 1 January 2020 (however companies were already able to apply the 2020 Code for reporting years beginning on or after 1 January 2019). These deadlines also match the ones for the entry into force of the new Belgian Code on Companies and Associations (*Code des sociétés et des associations;* Wetboek van vennootschappen en verenigingen) which, as we will explain below, replaces the 1999 Company Code. Within the meaning of Article 3:6(2)(4) of this new Code on Companies and Associations Code, Belgian listed companies will be required to designate the Belgian Corporate Governance Code 2020 as a reference code.

In comparison[301] to the 2009 version, the 2020 Code contains 10 principles of corporate governance instead of nine. Just as the 2009 Code, the 2020 Code applies/ will apply to listed companies through a 'comply or explain' principle. This entails that when listed companies do not comply with a certain provision from the code, they must explain why[302]. However, none of these reviewed ten principles in

[297] Art. 96, §2, 1° Company Code 1999.
[298] Directive 2006/46 on the annual accounts of certain types of companies [2006] OJ L224/1.
[299] A full English version is available here: http://www.corporategovernancecommittee.be/en/about-2009-code/2009-belgian-code-corporate-governance (consulted on 5 December 2019).
[300] More specifically, on 17 May 2019, the Royal Decree of 12 May 2019 laying down the 2020 Code was published in the Belgian Official Gazette. A full English version is available here: https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/2020_belgian_code_on_corporate_governance.pdf (consulted on 27 November 2019).
[301] For a more thorough comparison between the 2009 Code and the 2020 Code, refer to the "Overview of changes to the 2009 Belgian Code on Corporate Governance", available in English at https://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/comparative_table_code_2009_vs_code_2020_1.pdf (consulted on 27 November 2019).
[302] Recent research has shown that few companies make use of this flexibility and the compliance rate is at 96%: 94% of the provisions are complied with and for 2% of the provisions, it is explained why they are not complied with. See http://www.corporategovernancecommittee.be/en/2009-code/compliance-with-the-code (consulted on 5 December 2019).

the 2020 Code specifically relate to human rights nor SCDD. Human rights terminology is again used only in a very broad sense. The wording of Guideline 1.2 in the 2009 Code, which invited the board to *''pay attention to corporate social responsibility, gender diversity and diversity in general''* when *''translating values and strategies into key policies''* has been scattered across several provisions:

- **Provision 2.2 of the 2020 Corporate Governance Code:** "In order to effectively pursue such sustainable value creation, the board should develop an inclusive approach that balances the legitimate interests and expectations of shareholders and other stakeholders".

- **Provision 3.3 of the 2020 Corporate Governance Code:** "The composition of the board should be determined so as to gather sufficient expertise in the company's areas of activity as well as sufficient diversity of skills, background, age and gender".

B. 2019 Code of Companies and Associations

Having entered into force on 1 May 2019 only, the Code replaces the 1999 Company Code and the 1921 Associations Code. The Act is meant to modernize Belgian company law, making it more transparent, as well as attractive to foreign investors. It is also a general tidying-up exercise following many years of piecemeal transposition of EU secondary law.

SCDD did not feature as a reason behind the new Act. This is not surprising as one of the key elements of human rights and SCDD in Belgium is that it is based on the voluntary engagement of enterprises. Thus, no obligations specifically aimed at human rights or SCDD have been introduced in company law.

In fact, in the 794 pages of the Government Bill introducing the Act[303], human rights are mentioned only twice only, with respect to **reporting requirements.** This is the one area which one could optimistically stretch to include SCDD and it has not changed in the 2019 version of the Act as compared to the version of 1999. Directors of every company are obliged to publish their annual accounts and the requirements for those accounts depend on the size of the company.[304]

Much of the report, attached to the annual accounts, is purely financial. One of the elements however in the report that is imposed on most companies, relates to human rights, but it will not always be included. *Only when it is necessary for a good understanding of the development, the results or the position of the company*, must the analysis of the company not only mention financial elements, but also non-financial essential performance indicators, including 'in particular information concerning environmental and staff issues'. Human rights issues are absent verbatim however the use of the wording 'in particular' is clearly non-exhaustive.

It is clear that recalcitrant corporations may quite easily circumvent this reporting requirement.

[303] Available (bilingual text) at http://www.dekamer.be/FLWB/PDF/54/3119/54K3119001.pdf or https://bit.ly/2KOMFLD, last accessed 11 December 2019.
[304] See art. 94 Belgian Company Code 1999; Article 3:6:§1 in fine, 2019 Code.

Listed companies are also obliged to report on the application of the aforementioned Corporate Governance Code (see above, section 2.1).

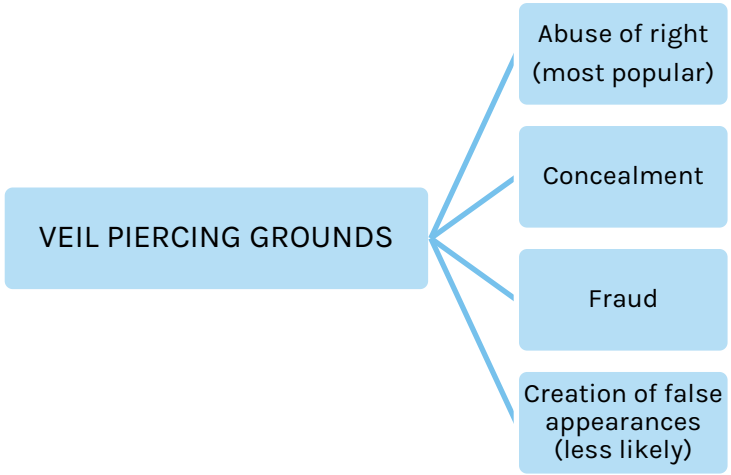
Certain listed companies, credit institutions and insurance undertakings with over 500 employees are subject to **more stringent transparency requirements** because of Directive 2014/95, transposed without gold plating (the Belgian Government requiring exactly the obligations of the Directive and nothing more) by an Act of 18 December 2015. Pension funds and collective investment funds had already been subject to transparency requirements, as to the question whether they take into account social, ethical and environmental aspects in their investments strategies.[305] Information may be given in a declaration and report, yet it need not be included in the annual account and report.

C. Liability

VEIL PIERCING

In this context, veil piercing refers to situations in which a subsidiary or daughter company is liable, for whatever reason, and the creditors of the daughter company also (try to) engage the liability of the mother company. *Attributability*, in fact might be the better term[306]. Veil piercing is in the first place aimed at insolvency situations and only few might be relevant in a SCDD context[307]. This can be shown in a brief overview of relevant veil piercing grounds in Belgian law. Of note is that veil piercing or attributability discussed here, targets the mother company, not its directors: the latter issue is discussed below, under 'directors liability'.

The most popular veil piercing ground is abuse of right (*abus de droit, rechtsmisbruik*). Concealment (*simulation, veinzing*), fraud (*fraude, bedrog*) and the creation of false appearances (*apparence, rechtmatig vertrouwen*) are three other grounds available for veil piercing in Belgian law,[308] but they are less common.



[305] Art. 42-47 of the Act of 28 April 2003 concerning supplementary pensions (*Loi relative aux pensions complémentaires*); art. 58, §1 and art. 88, §1 Act of 3 August 2012 concerning institutions of collective investments (*Loi relative aux organismes de placement collectif*); Aydogdu (2016b), 894; Enneking et al. (2015), 162.
[306] See also Van Calster (2019), forthcoming.
[307] For a more elaborate CSR-oriented analysis, see Demeyere (2015b), 397-399.
[308] See e.g. Court of Appeal Antwerp 12 December 1995, *TRV* 1996, p 62; Cass. be. 6 December 1996, C.950260.N, www.cass.be.

Abuse of right (*abus de droit, rechtsmisbruik*)

As such, limited liability is a privilege, created to incentivize risk-taking with the goal of maximizing profits without being personally liable for the losses those risks may cause to the company and its creditors. However, limited liability may be abused[309] insofar the risks taken may surpass the benefits. Claimant first has to prove that the subsidiary is liable, no matter what the basis for its liability is. Then, a claim against the mother company for abuse of the privilege of limited liability may be filed.

> To pierce the veil, the plaintiff will need proof that the mother company does not earn the privilege of limited liability because it did not respect the rules concerning the autonomy of the subsidiary. In other words, that the mother company was controlling de facto the subsidiary.
>
> However, the threshold for abuse is high as only when the right was exercised in a way that *obviously* goes beyond the way it would be exercised by a reasonably forward-looking and careful person, there is an abuse.

Concealment

Concealment occurs when parties to a contract intentionally differentiate between their expressed and actual intentions.[310] According to article 1321 Belgian Civil Code, third parties can choose to rely on the consequences of the expressed intentions or on the consequences of the actual intentions.[311] Concealment can be a tool in a company group to organize the insolvency of a certain company in order to escape from its creditors. A company that was founded with merely this goal is considered a fictitious company (*société fictive*).[312]

> The indications of concealment match to a large extent the indications of abuse of right, such as the absence of decent bookkeeping, the malfunction of organs, and the lack of decision-making power of organs. Multinational enterprises will, however, rarely have such a poor administration, but if they have, this can be deployed to the benefit of the victims of the subsidiary's practices.

[309] Such abuse was historically based on articles 544 and 1382 of the Civil Code but is now by some said to be a general principle of law. See De Boeck (2011), 6 and 8-10; Van Ommeslaghe (2013a), 65, no. 22 and 73, no. 25.
[310] Wéry (2011), 877.
[311] Geens and Wyckaert (2011), 326; Van Gerven and Van Oevelen (2015), 227.
[312] See e.g., Court of Appeal Bastia 19 October 2011, no. 10/00457, www.legifrance.gouv.fr. This case is based on French law, but is a good example for Belgian law as well since the rules on concealment are nearly identical.

Fraud

Fraud is another legal basis that exists in Belgian law to establish the liability of a mother company[313]. The maxim *fraus omnia corrumpit* means that no one may invoke his own fraud in order to justify the application of legal rules to his benefit. The maxim is recognised as a general principle of law.[314]

> The judge will rely on the principle to hold a mother company liable if the mother company itself does not respect the legal autonomy of its subsidiary but invokes it vis-à-vis third parties. Fraud will lead to the impossibility to invoke a certain act (*inopposabilité*) .The existence of the separate legal personality can then not be invoked against the victims.

Creation of false appearances

The judge-made theory of creation of false appearances is a last possibility to establish the liability of the mother company[315]. In Belgian law, the legitimate confidence of a third party in a certain situation can be honoured by forcing the person that created the appearance to live up to it.[316]

> It is rather unlikely that this theory will be relevant when a subsidiary has caused damage in tort. The damage then just happens to the victim and the victim did not think about the constellation of the company or group so he/she cannot have had legitimate confidence in the unity of the group. Even for contractual creditors, a claim on the basis of creation of false appearances is only accepted in rare situations. Fraud or concealment would overall seem more attractive to plaintiffs, as the latter require no proof of the legitimate confidence in the created situation.

A final way to hold a mother company liable for the debt of its subsidiary occurs when the mother company can be designated as a director of the subsidiary. The mother company might then be liable on legal grounds specific to company law or based on general tort law. Both are discussed below (see infra: Section 2.3.2).

DIRECTORS' LIABILITY?

Company law is also concerned with the liability of the director(s) of a company. Directors may be liable based on company law, or based on common tort law (see below, Chapter 4). While several provisions refer to directors' liability, only one category of them seems relevant for the purposes of

[313] See Lenaerts (2013-14), 362. For the French language version of this text, see Lenaerts (2014), 98–115.
[314] Lenaerts (2013-14), 362; Wéry (2011), 248.
[315] Wéry (2011), 876.
[316] Cauffman (16 February 2005), 15–18.

current study, namely the liability towards the company and towards third parties for a breach of the provisions of the Belgian Company Code or a breach of the articles of incorporation.[317]

> There is little in the Belgian Company Code with a clear SCDD impact, except the directors' liability, linked to a breach of the obligation to publish non-financial indicators in the annual report. Indeed, Article 128 *jo.* 96 Belgian Company Code 1999 / Article 3:45 jo. 3:5 Belgian Code of Companies and Associations 2019 make it a crime to breach the obligation to give a true image of the company in the annual report.
>
> However, an extra hurdle to give rise to directors' liability is the required causality between the mentioned breach and the damage (see Chapter 4). Especially when the breach consists in a lack of action, such as an omission in the annual report, is it hard to prove causality.[318] In case such a crime (this is, the breach) is committed, the wrongful act of the director(s) will be certain, but this **still leaves the victim with the proof of causality.**

We deal with tort law below (Chapter 4), but a *caveat* should already be added on the potential tortious liability of a director towards a contracting party of the company. In Belgian law, so-called 'executory agents' (*agent d'exécution, uitvoeringsagent*) can only be liable in tort towards the contracting party of their principal under the same conditions as the principal could be liable in tort towards his contracting party. Conditions are strict.

Other provisions concerning the liability of the directors are mainly directed towards insolvency situations,[319] or can only be invoked by the company, but not by third parties.[320] They seem of no relevance to the current study.

D. The Belgian Code of Economic Law

The Belgian Code of Economic Law (*Code de droit économique, Wetboek economisch recht*) covers all corporations and contains several provisions on unfair commercial practices, as result of a transposition of the Unfair Commercial Practices Directive of 2005[321] – which might be relevant in the context of SCDD. The Belgian legislator went further than what was required under the Directive and included some provisions which allow to combat window dressing (which can simply be defined as the practice of making a company look better financially than it really is). Unfortunately, there is no Belgian case law on this matter either.[322]

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[317] Artt. 263 and 528 Belgian Company Code 1999 / Artt. 4:27 and Art. 5:78 of the Belgian Code of Companies and Associations 2019. See extensively Vandenbogaerde (2009), 82-121.
However, it is not always clear whether a provision of the articles of incorporation really has statutory value and is thus able to engage the liability of the director(s). See Vandenbogaerde (2009), 85-87.
[318] Vandenbogaerde (2009), 93, no. 108.
[319] See artt. 265 and 530 Belgian Company Code.
[320] See e.g. artt. 262 and 527 Belgian Company Code.
[321] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.
[322] See also Caucheteux and Roegiers (2015), 662.

Unfair commercial practices are targeted by a '**black list'** of practices which can be interesting for plaintiffs to rely (Article VI.100 of the Belgian Code of Economic Law):

- Claiming to have signed a code of conduct, while this is not the case;
- Applying a label of trust, quality or the like without the required permission;
- Claiming that a code of conduct has been recognised by a public or other authority, while this is not the case;
- Claiming that a company, including its commercial practices, or a product has been recommended, recognised, approved or allowed by a public or private authority, while this is not the case.

Other than the items covered by the 'black list', we should also mention **2 general requirements:**

1. **Article VI.98, 2°** specifically targets the breach of a code of conduct, as already provided for in Article 6 (2) of the Directive. The breach will be considered as an unfair commercial practice if the code of conduct is more than a mere letter of intent (and can be verified) and the company has indicated in the context of a commercial practice that it is bound by said code of conduct. The breach of the code of conduct will then be considered to be an unfair commercial practice when it has induced or could have induced the average consumer to engage in a transaction, which he/she would otherwise not have engaged in.

2. **Article VI.97** may also be relevant in a human rights and SCDD context: providing incorrect information is disciplined, as it is providing factually correct information which nevertheless misleads the average consumer (this is, by inducing him or her into a transaction he or she would not have engaged in). Of particular relevance here is the reference (sub ,3°) to 'the nature of the sales process' and, sub 6°, the qualities of the corporation, including any prizes or labels received. It is suggested that whether the standard of misleading is met, is judged against the general requirements of professional diligence in the sector. The latter can be made more concrete by taking into account codes of conduct that are applied in the relevant sector.[323] While the protection against unfair commercial practices is aimed at consumers, a company can also rely on these provisions and act against unfair commercial practices of another company when the professional interests of the claiming company are at stake (art. VI.104).

[323] Caucheteux and Roegiers (2015), 660.

When a court finds that a commercial practice of a certain company is unfair, **a prohibitory injunction** (defined as a court order preventing the continuation of such practice) will follow. Additionally, once a commercial practice is found to be unfair, that counts as sufficient proof of a fault in the sense of Article 1382 Civil Code: this enables a claim in tort (see Chapter 4) which can be brought by both competitors and consumers (commensurate with any damage they may have suffered).

Hence, as far as SCDD and human rights are concerned, the Economic Code essentially disciplines false claims made by companies in their regards, without reflecting real company practice.

4. Contract law and SCDD

KEY NOTIONS

Autonomy of the parties: In the field of contract law, the autonomy of the parties refers to the freedom they have to enter or not in a contractual relationship, with whom and under which terms.

Force majeure: extraordinary event or circumstance beyond the control of the parties, e.g. war, strike, riot, etc. or a natural event such as a hurricane, earthquake, which prevents one or both parties from fulfilling their obligations under a contract

Damage clause: Allows parties to contractually to determine beforehand the damages to be paid in case of a breach of a certain provision in the contract.

Privity of contract: According to this principle, a contract cannot confer rights or give rise to liabilities to third parties. Privity of contract can be overcome by inserting provisions in favour of a third party.

Suspensive condition: A clause of this type suspends rights and obligations enshrined in the contract until a predetermined event occurs.

Condition of avoidance: A clause of this sort allows one party to one-sidedly terminate the contract by merely stating so.

Provisions concerning SCDD are often inserted into business contracts. Contracting parties can include a wide range of obligations, such as a declaration (for instance the self-declaration regarding ISO 26000, see above ISO 26000 STANDA), the application of the Corporate Governance Code and provisions concerning SCDD. These may be based on codes of conduct, whether international and general, particular to a certain sector or even particular to an enterprise. Despite their widespread use, the status, and especially the enforceability, of such provisions is often unclear. Since Belgian case law on this question is still lacking, we refer to general contract law.

The fundamental principle in Belgian contract law is the **autonomy of the parties**.[324] This entails the liberty to close a contract, to close it with whoever one deems fit and to include whatever provisions they want in the contract. This is of course only possible within the limits of mandatory rules and rules of public order.[325] Of note is that parties often deliberately leave out a specification on the enforceability of the provisions– e.g. the code of conduct – they include in their contract(s). In such a case, it will be up to the Belgian judges to determine the value of such provisions.

When the enforceability of such an obligation is certain, whether because it is clearly determined by the parties, or whether because a judge has later confirmed its enforceability, the question arises whether a particular obligation which is alleged to have been breached, actually constitutes a **best efforts obligation** (*obligation de moyens*, *inspanningsverbintenis*) or an **obligation to achieve a certain result** (*obligation de résultat*, *resultaatsverbintenis*).[326]

	Best efforts obligation	**Obligation to achieve a certain result**
Proof needed	It will be up to the claimant to prove that the debtor has not taken all reasonable efforts to perform his/her obligation.	Only that the obligation has actually been breached. The defendant will have to prove that the breach was due to *force majeure*.
Example	The promise to insert a certain provision in a subsequent contract with another party, such as a supply chain enterprise.	The promise to assure by own investigations that no subcontractors allow child labour in their foreign factories.

The distinction is of major importance to the burden of proof: in case a claimant asserts that an obligation to achieve a result has been breached, the only proof necessary is that the obligation is actually breached. It is then up to the debtor / defendant to prove that the breach was due to *force majeure* (unforeseeable circumstances that prevented the defendant fulfilling a contract) and that it must not be held accountable for it. In case a 'best efforts obligation' would be breached, however, it is up to the claimant to prove that the debtor has not taken all reasonable efforts to perform the obligation. It is usually up to the judge to determine whether a particular obligation was one of best efforts or one to achieve a result.

If contracting parties want to ensure the enforceability of the obligations they insert, a variety of options are available, and most clauses can be combined all at once.

A first interesting clause is a damages clause.[327] This clause allows parties contractually to determine beforehand the damages to be paid in case of a breach of a certain contractual provision. The real damages then do not have to be proven[328] and it does not matter whether they would

[324] Stijns (2005), 37; Van Gerven and Van Oevelen (2015), 71; Van Ommeslaghe (2013a), 168, no. 79.
[325] Art. 6 Belgian Civil Code; Stijns (2005), 45; Van Gerven and Van Oevelen (2015), 77.
[326] See Stijns (2005), 142, no. 196; Van Gerven and Van Oevelen (2015), 169; Van Ommeslaghe (2013a), 50, no. 15.
[327] Stijns (2005), 181, no. 253; Van Gerven and Van Oevelen (2015), 188.
[328] Cass. be. 3 February 1995, no. C.928358.N, *Arr.Cass.* 1995, 130, *RW* 1995-96, 226.

approach the damages foreseen in the contractual provision. The predetermined amount must be paid, while the damage that actually occurred may be significantly more or less. Only when the predetermined damages are unreasonably high, can a judge mitigate them.[329] When the predetermined damages would be unreasonably low, the provision must be recharacterised as a disclaimer.[330]

Secondly, contracting parties can grant to one (or both) of them the possibility to dissolve the contract, without having to go to court,[331] (ordinarily required under article 1184 Belgian Civil Code (see below)). Notice upon the debtor is not required if this is explicitly provided in the contract.

Thirdly, the circle of claimants can be broadened by inserting provisions in favour of a third party.[332] A third party, such as employees of the debtor, can be given the right to enforce a contractual provision concerning their labour conditions. This is a way to overcome privity of contract (art. 1165 Civil Code) and to grant rights to third parties. Very concrete elements could enhance the enforceability of such provisions, such as advertising the rights and obligations of the employees in plain language within the factory buildings.[333] Hitherto no SCDD relevant case-law on this issue exists.

Fourthly, in case there is a chain of contracts not all involving the first creditor who wishes to impose human rights or SCDD obligations, there is a possibility to insert a 'chain clause' (*kettingbeding*).[334] Such a clause obliges the contracting party to insert a certain obligation in a subsequent contract, coupled with the obligation to let any subsequent contracting party insert it as well.

> Inserting chain clauses can be very interesting from the point of view of SCDD. Such provisions could, for instance, oblige the whole chain of suppliers to ensure respect for human rights and to uphold humane labour conditions. The enforceability of this clause can be strengthened by adding a provision in favour of a third party, namely the first creditor, and a damages clause. The first creditor can then enforce the obligation against any sub supplier who has accepted this provision. The latter, however, shows the weakness of this provision. The sub supplier will only be liable when the provision was actually inserted into his contract.

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[329] Art. 1231, §3 Belgian Civil Code.
[330] A disclaimer will in Belgian law be invalid when (i) it is contrary to mandatory law, (ii) it concerns an essential obligation of the contract, or (iii) it would exonerate the debtor for his own fraud. See Stijns (2005), 163, no. 231; Van Gerven and Van Oevelen (2015), 179.
In the other cases, the recharacterised damages clause will be a valid disclaimer and must be upheld.
[331] Van Gerven and Van Oevelen (2015), 202.
[332] Art. 1121 Belgian Civil Code; Stijns (2005), 241, no. 336; Van Gerven and Van Oevelen (2015), 235; Van Ommeslaghe (2013a), 685, no. 442.
See also van der Heijden (2011), 6.
[333] van der Heijden (2011), 8.
[334] Sagaert (2014), 29, no. 28; Stijns (2005), 239, no. 333; Van Gerven and Van Oevelen (2015), 233.
See also van der Heijden (2011), 6.

Fifthly, the performance of human rights and SCDD obligations could be inserted as a suspensive condition (*condition suspensive, opschortende voorwaarde*) or as a condition of avoidance (*condition résolutoire, ontbindende voorwaarde*).[335] This goes further than the provisions we just discussed, because the creation or (further) existence of the contract depends on the fulfillment of the condition. Moreover, once a condition is fulfilled, the contract will automatically be created or dissolved and there will be no moment for negotiations, considerations or whatsoever.

Next to these explicit and especially inserted provisions, general contract law rules on breach of contract will also be available when the enforceability of the provisions is certain. When the contractual breach is serious enough, the creditor can claim performance in kind with additional damages.[336] If performance in kind is not possible, substitute damages will be awarded. When the contract is reciprocal – which will usually be the case, the contract can be dissolved by the judge and the creditor can also claim additional damages in case damage has occurred.[337]

5. General Tort Law (Article 1382 of Code Civil 1804 and SCDD

Tort: A wrongful act or a breach of a right giving rise to legal liability.
Vicarious liability: Refers to the responsibility of the superior (e.g. employer) for the damage caused by his or her subordinate (e.g. employee).
Bonus pater familias: Acting like a bonus pater familias implies behaving like a normal, prudent person would do in a similar situation.
Duty of care: Being obliged to observe a standard of reasonable care (this is, acting like a bonus pater familias would) while performing any acts that could potentially harm third parties.
Culpa levissima: Even the slightest fault.
Liable in solidum: Even when the fault is shared, the defendant must pay the whole amount (= in solidum) of damages it owes to the plaintiff. Such defendant can reclaim from the other parties who are also liable. Therefore, when liability is divided, victims have the option to apply for compensation of the damage to each of the defendants, whether simultaneously or consecutively.

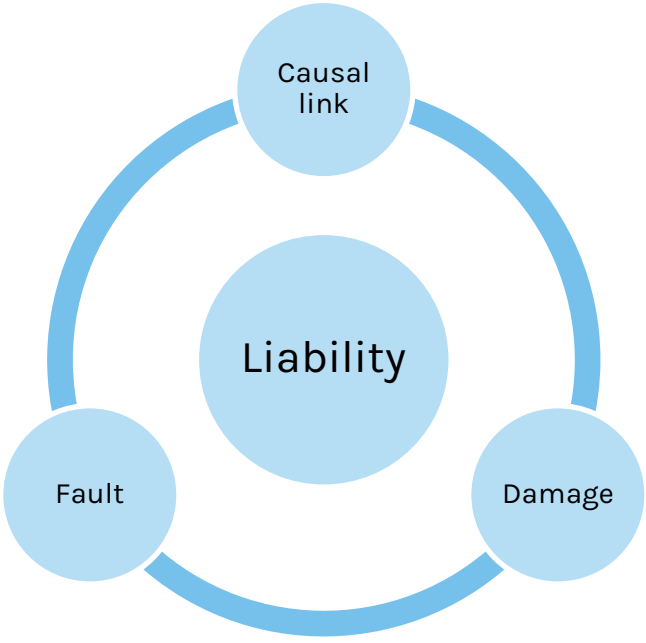
According to article 1382 Civil Code, '[*any] act whatever of man, which causes damage to another, obliges him by whose fault it occurred, to compensate it*'[338]. Article 1383 Civil Code provides the same for negligence causing damage. In other words, for every action/inaction having led to harm, the person who committed the damage (even by omission), must make reparation of that damage.

Legal persons (for example, corporations) are subject to these provisions, just as natural persons (individual human beings). Mind however that, generally, when a representative of the legal person commits a fault, it will be imputed to the **legal person**, not to the natural one.[339]

[335] Artt. 1181-1183 Belgian Civil Code; Stijns (2009), 3, no. 2; Van Gerven and Van Oevelen (2015), 537; Wéry (2016), 333, no. 339.
[336] Stijns (2005), 172, no. 242; Van Gerven and Van Oevelen (2015), 182; Van Ommeslaghe (2013a), 838, no. 546.
[337] Art. 1184 Belgian Civil Code; Stijns (2005), 192, no. 269; Van Gerven and Van Oevelen (2015), 195; Van Ommeslaghe (2013a), 894, no. 582.
[338] "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*"
[339] Simonart (1995), 451.

A new draft of the Belgian Civil Code was adopted in plenary session on April 4, 2019, but fell on the wayside as a result of the Belgian Government's collapse. However, the contents of the new Article replacing Article 1382 were not materially changed: the proposed articles 5.146 *ff* applies the three same old conditions for liability (fault – damage – causal link between fault and damage, see explanatory chart below). The liability of a legal person for its representatives (natural persons) will, however, be characterized as **vicarious liability** (see Chapter 5).

For a person to be liable under Belgian law (Article 1382 or article 1383 of the Belgian Civil Code), three elements must be present: a fault, damage, and a causal link between the fault and the damage.



A. First condition: fault

The first condition, ***fault***, can be a wrongful act or a wrongful omission and consists in the violation of a statutory rule or the violation of a duty of care, whether intentional or not.[340] When a person does not act as a reasonably forward-looking and careful person, as a *bonus pater familias* (this is, as a good family father), he/she has infringed the **general duty of care**. Overall, a fault is easily accepted and a *culpa levissima* (slight fault or neglect) suffices to engage the liability of the person committing the fault.[341]

[340] Van Gerven and Van Oevelen (2015), 368; Van Ommeslaghe (2013b), 1219-1220, no. 830.
[341] Van Ommeslaghe (2013b), 1225, no. 834.

It will be interesting to see in future Belgian case law whether a demanding duty of care is upheld for companies in a human rights and SCDD context, particularly in the absence hitherto of a general SCDD requirement. In this respect, developments of French case-law on its *devoir de vigilance* will be of particular interest, as Belgian case-law tends to employ French authority – albeit in the case at issue, the results might vary given that Belgium does not have plans for passing specific legislation as is the case for the French *devoir de vigilance.*

Another relevant element is the ease with which a contractual breach is equated with a fault in case the contractual breach causes damage to a third party (said in other words, a breach of contract = fault if there is a damage to a third party).While according to Belgian scholarship and the Belgian Court Supreme Court, a fault must be separately proven, case-law of lower courts shows that no separate proof of a fault is required when a contractual breach has been proven.[342]

If the damage is caused by a subsidiary, it will not be easy to prove that the mother company has committed a fault as well.[343] If a mother company has made human rights or SCDD statements, however, the mother company set the standard for the duty of care higher for itself. In that case, it arguably will be accepted more easily that the mother company be liable for its subsidiary's acts or negligence.[344] Apart from this hypothesis, it can be argued that the mother's omission to intervene is a fault. When the mother company knew about the unacceptable acts of its subsidiary and looked the other way, a judge might decide the mother company be liable because it did not use its ability to control to end the unacceptable practices.[345] One might even go further and argue that even if the mother company did not know about the unacceptable acts, it is liable for omission because it did not follow its subsidiary up closely enough. The latter two applications of the fault in a company group context come down to liability as *de facto* director (*dirigeant de fait*).[346] The mother company might have assumed the management of its subsidiary and will be liable for faults it commits in its management.[347] When the judge decides whether something amounted to a fault or not, he must however take into account the policy margin a director has[348].

When a company has accepted certain (enforceable) human rights or SCDD obligations in a contract, a breach of such a contract can serve as a basis for a third party to prove a fault of the company (breach of the contract = fault).

[342] Demeyere (2015a), 35, no. 79.
[343] See also Demeyere (2015b), 393.
[344] Compare Queinnec and Caillet (2010), 654.
[345] See also Aydogdu (2016a), 698, no. 56; Thomas (2013), no. 13.
[346]Gallez (2013), 163.
[347] Cornelis (1989), 166.
[348] Vandenbogaerde (2009), 131.

B. Second condition: damage

The damage is the loss of a pecuniary or other benefit and can be material or immaterial.[349]

> Proving damage will, in most cases, be the easiest part of proving liability under article 1382 or 1383 Civil Code.

Third condition: Causal link between the fault and the damage

The claimant also has to prove the **causal link between the fault and the damage** before it can recover damages. Belgian law clearly adheres to the 'equivalence doctrine'[350]. This means that there is a causal link whenever the fault has contributed to the existence of the damage.

This view on the causal link as valid in current Belgian law is **very permissive**.

With regard to the causal link, the defendant can escape or reduce liability by proving that he/she was not the only factor contributing to the creation of the damage. Other situations which may break the causal link and lead to a **division of liability** are the following[351]:

- *Force majeure* (extraordinary event or circumstance beyond the control of the parties, e.g. war, strike, riot, etc. or a natural event such as a hurricane, earthquake, which prevents one or both parties from fulfilling their obligations under a contract).
- Acts by a third party.
- Fault of the victim itself.

> That there is a division of liability does not really disadvantage the claimants: whenever the company is partly liable, it is liable *in solidum,* this is, it must pay the whole amount of damages it owes to the claimants (even if the fault is shared). Given entity may later (try to) reclaim from the other persons that are liable.
>
> The consequences of the above in SCDD cases is that the victim/s could apply for compensation of the entirety damages to each of the defendants, whether simultaneously or consecutively.

[349] Van Gerven and Van Oevelen (2015), 453 and 459.
[350] Van Gerven and Van Oevelen (2015), 423.
[351] Van Gerven and Van Oevelen (2015), 437 *ff.*

6. Employment Law and SCDD: Article 1384 Civil Code on Vicarious Liability for Employees

Tort: A wrongful act or a breach of a right giving rise to legal liability.
Vicarious liability: Refers to the responsibility of the superior (e.g. employer) for the damage caused by his or her subordinate (e.g. employee).

Chapter 5 is complementary to Chapter 4, in which we introduced the notion of liability and its 3 condition (fault – damage – causal link between fault and damage). It is very important to note that in Belgian law, a person is not only liable for his/her own acts or omissions but also for the **acts and omissions by his/her appointee(s)** (*préposé, aangestelde*). An example of an appointee would be an employee.

Article 1384, third limb Civil Code states that 'masters and employers [are liable] for the damage caused by their servants and employees in the functions for which they have been employed'[352]. An employer or any other 'appointer' is thus liable for a fault committed by his employees, or 'appointees',[353] while **employees themselves will only rarely be liable**[354]. The responsibility borne by the superior for the damages cause by his or her subordinates is called **vicarious liability**. Article 1384 was enacted to ensure that a victim can claim damages from a solvent person. The 'master' plays a guaranteeing role[355].

> The rationale behind this arrangement (master/servant) is definitely valid for liability in group law. The relevant question in the context of SCDD is whether a company would not only be liable for its own employees, but might incur any **vicarious liability** for **a daughter company** as well. Below, we will try to answer to this question.

Generally speaking, a mother company is not liable for fault committed by its subsidiary. That is because the latter is not regarded as the appointee of the mother company[356].

However, let's imagine a situation in which the tables might turn: one in which a director of the subsidiary is, at the same time, an employee of the mother company. **In such case the mother company can be vicariously liable for its employee.** It could also be argued that the director is appointed by the mother company even if he/she is not an employee in the strict sense. In this case, the fault of the director of the subsidiary (the figure of the appointee/employee formerly referred to) might possibly engage the liability of the mother company (alias the master) on the basis of article 1384 Civil Code.

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[352] *''Les maîtres et les commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.''* This article may in the future be replaced by article 5.157 with a similar scope.
[353] The concept of 'appointee' is broader than that of 'employee', but liability for other appointees than employees is irrelevant in this context.
[354] See art. 18 Belgian Employment Contracts Act (act of 3 July 1978): the employee will only be liable for fraud, his *culpa lata*, and his not accidental *culpa levis*.
[355] See Malinvaud, Fenouillet and Mekki (2014), 473-474.
[356] Contra, supporting such idea of appointment: e.g. Queinnec and Caillet (2010), 652-653.

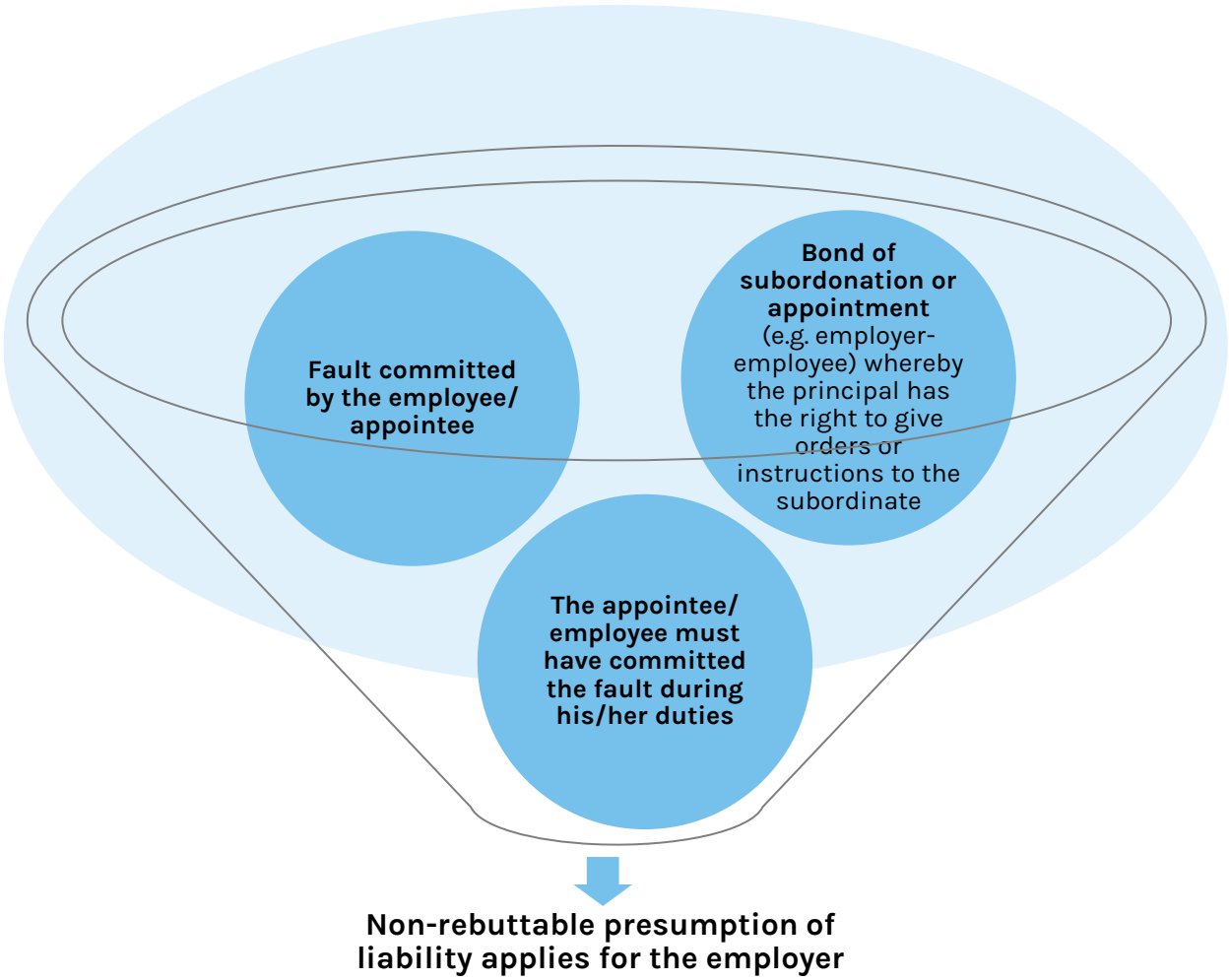
To engage the liability of the employer, three conditions have to be fulfilled:

First, there has to be a bond of subordination or appointment. The employee must not only socially or economically be dependent on the employer or 'appointer'. The employer must also have the right to give orders and instructions. It is the right to do so which is relevant. Not its actual exercise[357] or compliance with the instructions by the employee[358]. This first condition is fulfilled even when the defendant has, in the eyes of a reasonable third party, created the appearance that he/she has the right to give orders and instructions[359]. A labour contract is not required, nor need there be any wage for the employee[360].

Second, the employee has to have committed a fault as defined in articles 1382 and 1383 Civil Code, although the liability of the employee himself must not be established[361].

Third, the employee has to have caused the damage while exercising his/her duties[362]. A mother company will probably argue that the person that caused the damage only exercised his duties in the subsidiary, and not his duties for the mother company. However, this last condition is interpreted particularly broadly. It suffices for the damage not to have been present in such a way if the subordinate had never been employed.[363]

[357] Cass. be. 27 February 1970, *Pas.* 1970, I, 565; Ronse and Lievens (1986), 162.
[358] Cass. be. 3 January 2002, no. C.99.0035.N, *AJT* 2001-02, 768, note I. Boone.
[359] Van Gerven and Van Oevelen (2015), 395.
[360] Ronse and Lievens (1986), 163.
[361] Van Gerven and Van Oevelen (2015), 397.
[362] ibidem, 398.
[363] See, for instance, Cass. be. 7 February 1969, *RW* 1968–1969, 1545. An employer is, for instance, even liable when his employee causes a traffic accident while driving a company car without a driver's licence after his working hours. See Cass. be. 2 October 1984, *Arr.Cass.* 1984–1985, 181.



Once these three conditions are fulfilled, a **non-rebuttable presumption of liability applies** (meaning that the presumption cannot be refuted by argument or evidence) [364].

[364] Van Gerven and Van Oevelen (2015), 394.

7. Private International Law and Public International Law

KEY NOTIONS

Forum non conveniens: possibility for the courts to dismiss a case upon determination that the case may be heard more appropriately in other jurisdictions.

Forum necessitatis clause: allows jurisdiction of national courts when no other provision does, provided the case has narrow ties with that particular jurisdiction and a procedure abroad appears impossible or it would be unreasonable to demand that the claim is introduced abroad.

Renvoi: A referral to foreign law which includes the private international law rules of that State. It is generally excluded for it leads to practical complications.

Dépeçage: The application of the laws of different states to different issues in the same case.

Lex fori: National law of the country in which an action is brought.

Lex locus damni: The law of the place where the damage occurred.

Lex causae: The general term for 'the law that applies to the case at issue'

Lex societatis: The law which governs company law relationships.

Lex concursus: The law applicable to the insolvency proceedings.

Non-contractual obligation: all actions which seek to establish liability of a defendant and which are not related to a contract.

Overriding mandatory provisions: provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.

Private international law is in Belgium for a large part regulated by EU Regulations, which fall outside the scope of current contribution: we review them summarily only. For each question concerning a private international law issue (jurisdiction, applicable law and recognition and enforcement of judgments), we provide the answer for EU law according to the Regulations, and for Belgian national law according to the Belgian Act on Private International Law. For both we focus on jurisdiction rules that might be relevant in SCDD cases and leave out an analysis of the other rules.

A. Jurisdiction

UNDER THE BRUSSELS I RECAST REGULATION[365]

Article 1 of the Brussels I Recast determines its scope. The Regulation applies *"in civil and commercial matters whatever the nature of the court or tribunal."* Several matters are excluded from the scope of the Regulation, such as bankruptcy[366]. In such a case, the Insolvency Regulation (recast) would have to be applied[367]. The Brussels I Recast Regulation is applicable *ratione personae* when a defendant is **domiciled in a member state** or when **valid choice of court** has been made in accordance with article 25.[368]

[365] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L351 (hereafter Brussels I Recast).
[366] Art. 1, limb 2 Brussels I Recast.
[367] Regulation 2015/848 on insolvency proceedings, [2015 OJ L141.
[368] Van Calster (2016), 60. The Regulation is also applicable when a court of a member state has exclusive jurisdiction as determined in article 24.

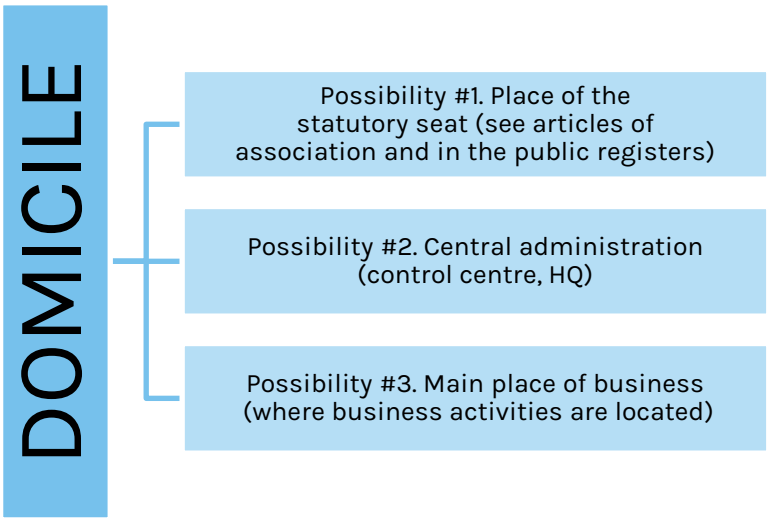
A SCDD case will usually be characterised as a 'civil or commercial matter' and most jurisdiction issues will thus be dealt with according to the Brussels I Recast **as soon as a defendant is domiciled within a member state of the European Union** (the nationality of the defendant and the nationality and domicile of the claimant are irrelevant)[369]. But what does "being domiciled within a member state of the European Union" actually mean? See below our discussion on the three alternative concepts of domicile.

Article 4 of the Brussels I Recast determines the general jurisdiction over a defendant who is domiciled in an EU member state, independent from the location of the activities to which the action relates[370]. The domicile of the defendant who is a legal person, is to be determined according to article 63, which contains three alternative concepts of domicile:

- **First,** the courts of the country where a company has its *statutory seat* have jurisdiction. The statutory seat can be found in the articles of association and in the public registers. The second limb of article 63 defines the statutory seat for the UK as the registered office, the place of incorporation or the place under the law of which the formation took place.

- The **second** possible domicile is the *central administration*. This is the real seat, *i.e.* the management and control centre, and depends on factual circumstances[371].

- **Third,** the principal *place of business* can also grant jurisdiction. This is the place where the business activities are located, again depending on factual circumstances[372].



[369] Van Calster (2016), 60.
[370] Van Calster (2016), 129.
[371] Magnus and Mankowski (2016), 995, no. 5.
[372] Magnus and Mankowski (2016), no. 6.

All three concepts are meant to avoid negative conflicts of jurisdiction[373]. Usually all three criteria will point to the same country, but this is not necessarily so. If several venues are available, this creates an interesting possibility for **forum shopping** for the plaintiff. Forum shopping can be defined as the strategic activity of a plaintiff to choose the venue thought most likely to provide a favorable judgment.

Over and above the concept of domicile we have just explained, Article 7(1) determines jurisdiction in '**matters relating to a contract**.' The claimants, or one of them, might have a contract with the company. **The place of performance of the obligation provides for an extra possibility to establish jurisdiction, over and above the domicile of the defendant of article 4.** The existence of a contract can also be relevant for the determination of the applicable law (see below

[373] Magnus and Mankowski (2016), 994, no. 3; Van Calster (2016), 63.

B. Applicable Law).

Several categories of contracts receive special treatment under the Brussels I Recast, in order to protect one of the parties involved. Jurisdiction is regulated in a mandatory way for insurance contracts (art. 10-16), consumer contracts (art. 17-19) and employment contracts (art. 20-23).[374]

Especially the provisions regarding employment contracts may be relevant in a SCDD context. When proceedings are started against the employer, the options to sue that employer in a certain member state are extended.

Therefore:

- If the employer is domiciled in an EU Member State, he can be sued:
  - in the courts of the EU Member State in which the employer is domiciled; or,
  - in the EU Member State where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or,
  - if the employee does not or did not habitually carry out his work in any one country, in the courts of the EU Member State where the business which engaged the employee is or was situated.
- If the employer is **NOT** domiciled in an EU Member State, he can be sued:
  - in the EU Member State where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or,
  - if the employee does not or did not habitually carry out his work in any one country, in the courts of EU Member State where the business which engaged the employee is or was situated.

This might be a means to direct a SCDD case concerning employment outside the EU, to an EU court. As we can see above, even when the employer is not domiciled in the EU, those provisions are also valid to sue him in a Member State anyway (art. 21 (2)).

Article 7(2) determines jurisdiction **in tort cases** and states that the courts of the country where the harmful event occurred, have jurisdiction. But as the CJEU clarified in *Bier,* the country where the harmful event occurred can be both:

a) the *locus delicti commissi*: the place of the event giving rise to the damage; and,
b) the *locus damni*: the place where the damage has occurred[375].

[374] For employment contracts see Gangsted and Van Calster (2016-17), 83-141.
[375] CJEU 30 November 1976, *Bier v. Mines de potasse d'Alsace*, Case C-21/76.

Especially the place of the event giving rise to the damage will be an interesting ground for jurisdiction as this can be the country where the company is domiciled, although this does not bring us any further than the general jurisdiction under article 4 (discussed above, together with the concept of domicile).

In the case that the damage did occur in the EU, important restrictions apply to the jurisdiction of the place where the damage occurred. Firstly, only the place where the *direct* damage occurred is relevant[1]. Secondly, if the jurisdiction is based on the place where the damage occurred, the court concerned can only rule on the damage that occurred in that country and not on damage that occurred abroad[376].

Article 7(5) aims at the situation in which a dispute arises out of a branch, agency or establishment[377]. According to Article 7(5), an employer domiciled in a EU Member State may be sued in the in the courts for the place where the branch, agency or other establishment is situated (for as long as they are actually situated within the EU). The requirement that the dispute *''arises out of''* a branch, agency or establishment, will also have a restrictive effect[378].

Article 25 on the prorogation of jurisdiction gives preference to the *forum* choice by contracting parties over and above the general and specific rules we described (articles 4-7), but cannot be applied to trump the provisions on employment contracts (art. 20-23). The regulation of forum clauses tries to find a balance between the formalities ensuring legal certainty and the need of swiftness in commercial practice.[379]

[376] CJEU *Fiona Shevill and Others v. Presse Alliance SA*, Case C-68/93.
[377] On article 7(5) see *ibid.*, 129.
[378] Van Calster (2014), 130.
[379] Van Calster (2016), 78.

It is important to involve other related parties, such as a daughter company, in the proceedings as well. It might be that the judge decides that the mother company is not liable, but that the subsidiary is.[380]

Unfortunately, if the subsidiary has its domicile outside the EU one cannot rely on article 8(1) of the Brussels I Recast, which includes the 'anchor defendant' mechanism[381], but one must look at national law. When the subsidiary is, on the contrary, domiciled within the EU, the claim against the subsidiary can according to article 8(1) be brought before the same court as the claim against the mother company *"provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments relating from separate proceedings"*[382]_[383]

For the sake of completeness, we mention article 26 of the Brussels I Recast. This article prevails over articles 4 and 7 and provides for jurisdiction **when the defendant appears voluntarily**. This is of course very unlikely, but **if the defendant appears, jurisdiction is possible in all EU member states.** An appearance to contest jurisdiction is not an appearance granting that court jurisdiction, even when the defendant argues on the merits.[384]

UNDER THE BELGIAN ACT ON PRIVATE INTERNATIONAL LAW (PIL ACT)385

In the rare cases where the Brussels Ia Regulation (discussed above) does not determine jurisdiction, the 2004 Belgian Act on private international law (hereafter 'PIL Act') applies.

In a commercial or civil matter specifically, the PIL Act will apply when the defendant is not domiciled within the EU and there is no other basis for its applicability (such as exclusive matters of jurisdiction).[386] The Act also applies when the matter of the issue is not addressed by the Brussels I Recast or another EU Regulation, such as the Insolvency Regulation.[387] Given the **unlikely applicability of the PIL Act**, we will only briefly describe its main jurisdiction rules.

The general jurisdiction clause can be found in article 5 and provides that the Belgian courts have jurisdiction when the defendant has his domicile (*domicile, verblijfplaats*) or usual place of residence

[380] CJEU *Fiona Shevill and Others v. Presse Alliance SA*, Case C-68/93.
[381] The Regulation does not expressly require the claim against the anchor defendant to have any merit. It provides (emphasis added) in Article 8 that "a person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."
[382] On the application of the anchor mechanism see [2019] UKSC 20 Vedanta and Konkola v Lungowe and G van Calster, 'Modern families. UK Supreme Court confirms CSR jurisdiction yet with one or two important caveats', www.gavclaw.com, 4 April 2019, https://bit.ly/34n4qWV.
[383] CJEU (6th Chamber) 11 January 1990, *Dumez France SA*, Case C-220/88, at 20.
[384] CJEU *Elefanten Schuh GmbH v. Pierre Jacqmain*, Case C-150/80.
[385] Act of 16 July 2004 on the code of private international law.
[386] Art. 6 (1) Brussels I Recast; Van Calster (2014), 129.
[387] Art. 2 Belgian PIL Code; Erauw (2009), 147, no. 74.

(*residence habituelle, voornaamste verblijfplaats*) in Belgium.[388] In case of a legal person, the usual place of residence is understood as the principal establishment (*établissement principal, voornaamste vestiging*) (art. 4, §2, 2°).

Article 5, §2 is also relevant as it states that a Belgian judge also has jurisdiction when a claim concerns the exploitation of a secondary establishment (*établissement secondaire, nevenvestiging*) in Belgium, in case the legal person does not have a domicile or principal establishment in Belgium.[389]

Article 6 confirms the legitimacy of a *forum* clause in favour of Belgian courts, but contains an application of ***forum non conveniens*** (possibility for the Belgian courts to dismiss a case upon determination that the case may be heard more appropriately in other jurisdictions). This doctrine is followed the case has '**no meaningful link' to Belgium** (art. 6, §2) but is applied restrictively.[390]

Article 11 contains a ***forum necessitatis*** clause: it allows jurisdiction of the Belgian courts when no other provision goes against this fact, the case has narrow ties with Belgium and a procedure abroad appears impossible or while it would be unreasonable to demand that the claim is introduced abroad. The PIL Act also contains a clause on connected claims, similar to the Article 8 anchor mechanism of the Brussels I Recast.

Article 96 PIL Act provides extra possibilities for jurisdiction concerning contractual and tortious obligations. For contractual obligations, Belgian judges will also have jurisdiction when the obligation has arisen in Belgium, or is or should be performed in Belgium. For liability in tort, the Belgian judges will have jurisdiction when the tort has occurred (or threatens to occur) completely or partly in Belgium or if and in so far as the damage has occurred (or threatens to occur) in Belgium. Employment and consumer contracts are again subject to a special regulation. Article 97, §2 adds to article 96 that the employment is performed in Belgium when the employee usually performs his work in Belgium at the moment the dispute arises. A *forum* clause will only be valid when it has been agreed upon after the dispute concerning the employment of consumer contract has arisen (art. 97, §3).

In summary, the PIL Act does not therefore offer claimant unexpected interesting possibilities to bring a claim in a Belgian court. Except for articles 6 and 11, the Code does not create other possibilities than the Brussels I Recast. In any case, the PIL Act does not contain any specific mentions of human rights or SCDD.

With an Act of 1993, however, Belgium had allowed for universal jurisdiction for international crimes. The **1993 Belgian Genocide Law**[391] allowed prosecution for war crimes, even when committed in an internal conflict, against both a natural person and a legal person, even *in absentia*. The latter meant that the person involved did not need to be present on Belgian territory to prosecute that person.[392]

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[388] Article 4 determines what the domicile or usual place of residence of a person is. See also Erauw (2009), 150, no. 79 *ff.*
[389] See Erauw (2009), 152, no. 81.
[390] Erauw (2009), 153, no. 82.
[391] Act of 16 June 1993 concerning the punishment of serious violations of the Geneva Conventions of 12 August 1949 and on the additional protocols of 8 June 1977, *BS* 5 August 1993, 17751.
[392] Wouters (2003-04), 10.

The amendments of 1999[393] broadened the scope of the Belgian Genocide Law and also included the prosecution of genocide and crimes against humanity. Article 5, §3 moreover stated that no immunity connected to an official capacity could prevent prosecution.[394] Especially since 1999, victims discovered the Act and several complaints were launched, also against heads of state in function.[395] Only very serious international crimes could be prosecuted under the Belgian Genocide Law, but in a SCDD or human rights context, such crimes are not unimaginable. Under international pressure,[396] **the Belgian Genocide Act was repealed** and some provisions of the Act, none granting universal jurisdiction, were introduced in the Belgian Criminal Code and the Code on Criminal Procedure.[397]

The only relevant human rights procedure that was started in Belgium is the TotalFinalElf case under the Belgian Genocide Act. In April 2002, four refugees from Myanmar filed a complaint against the company for its alleged involvement in human rights violation in the course of construction and exploitation of gas pipelines.[398] The procedure was however overtaken by the legislative changes and the repeal of the Belgian Genocide Act in 2003. The Belgian Supreme Court decided in 2005 that the proceedings could not be continued, and that the complaint was inadmissible since there was no more legal basis for jurisdiction of the Belgian courts.[399] The case was eventually terminated in 2008 after a couple more appeals to the Constitutional Court and the Supreme Court.[400]

[393] Act of 10 February 1999 concerning serious violations of international humanitarian law, *BS* 23 March 1999.
[394] See Wouters (2003-04), 11.
[395] For a brief overview, see Wouters (2003-04), 12.
[396] The USA had, for instance, threatened to block the expansion of the NATO headquarters in Brussels. See Wouters (2003-04), 17.
[397] Act of 5 August 2003, *BS* 7 August 2003, 40506.
[398] See Enneking et al. (2015), 163.
[399] Cass. 29 June 2005, no. P.040482.F, www.juridat.be.
[400] For a more complete overview of the case, see Enneking et al. (2015), 164.

B. Applicable Law

The law applicable to the case must be determined depending on the connecting factor present in the case, such as a contract or a tort.

> In SCDD cases, matters can get very complicated because of a combination of several connecting factors, possibly leading to dépeçage. ***Dépeçage*** is *"the application of the laws of different states to different issues in the same case."*[401]
>
> Especially in a veil piercing case (we have explained this concept in Chapter 2), *dépeçage* might occur. Such a case typically involves two separate issues:
>
> 1. first the liability of the subsidiary on any basis, e.g. contract or tort; and,
> 2. the veil piercing question[402]
>
> But, in practice however, courts fall short of addressing two or more issues separately. They mostly determine the law applicable to one of the two steps and apply this law to the entire case. Even when only one law must be applied to a case, the judge will be inclined to apply the *lex fori* (this is, the national law of the country in which an action is brought) since this will be much easier and less costly than applying the law of another state.[403]

Applicable law determines the substantive law, but also other issues, such as the damage estimation (this is, quantity) and the prescription periods (maximum period within which a legal action can be brought or a certain right enforced)[404].

We will assume that a Belgian court has jurisdiction. The question as to the applicable law can thus be dealt with in conformity with the relevant EU Regulations, and the Belgian PIL Act in the unlikely event that none of the Regulations would be applicable.

LEX SOCIETATIS

The involvement of a company in a case evidently does not automatically lead to the application of the *lex societatis (defined as the law which governs company law relationships).*

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[401] Symeonides (2011), 185.
[402] See also Demeyere (2017b), no. 21.
[403] Vandekerckhove (2007), 611; van Calster (2016), 133. In a couple of veil piercing cases in Belgian law, it shows that the judges apply the *lex fori* without any explicit consideration as to the conflict of laws question. See Cass. 6 December 1996, no. C.950260.N, www.cass.be; Court of Appeal Antwerp 1 February 1994, *TRV* 1996, 64; Court of Appeal Antwerp 12 December 1995, *TRV* 1996, 62.
[404] Enneking et al. (2015), 81-82.

In every case, the connecting factor(s) must be determined in order to apply the correct conflict of laws rule. In a veil piercing case, for instance, whether the veil will be pierced may conceivably be subject to *lex fori* (this is, the national law of the country in which an action is brought), the *lex societatis* of the subsidiary and the *lex societatis* of the shareholder / mother company[405]. Given the listed options, determining ***lex causae*** (*the system of law which applies*) can be a real problem but not one which is systematically or properly addressed by the courts.

As we are not concerned with an insolvency situation, the *lex concursus* (the law applicable to the insolvency proceedings) is not an option. Within this section, we limited our analysis to *lex societatis* under Belgian law.

> If the applicable law is *lex societatis*, then according to article 110 PIL Act, the applicable law is that of the **principal establishment of a company**. The **central administration** is the main element for the determination of that 'principal establishment' of article 110.[406] Article 111 determines the material scope of article 110 and liability for a breach of the Belgian Company Code or a breach of the articles of association is also envisaged.

LAW APPLICABLE TO CONTRACTS

If the claimant has a contractual relationship with the company, e.g. an employment or lease contract, the claim can be based on the contract. In such a case, **Rome I will be applicable for contracts concluded after 17 December 2009**. For contracts from before this date, the Rome Convention of 1980[407] determines the applicable law. Even when a case concerning a contract does not fall within the scope of Rome I, the Belgian PIL Act refers to its general articles to determine the law applicable to the case.[408]

If the contract is **NOT** an employment contract,[409] articles 3 and 4 Rome I determine what law is applicable. When the parties have made a choice for a certain law, this law will be applied.[410] If the law is not chosen by the parties, it must be determined by the characteristic performance in accordance with Article 4(1) Rome I. When no characteristic performance can be identified according to article 4(1), the law of the place of habitual residence[411] of the debtor of the characteristic performance is to be applied. Article 4(3) is an escape clause and provides that *''where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.''*.

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[405] Vandekerckhove (2007), 573 and 585. See also for an application to CSR cases, Demeyere (2017b), nos. 44-47.
[406] See Parliamentary documents of the Senate, Session 2001-2002, 1 July 2002, 2-12225/1, 31-32.
[407] Rome Convention 1980 on the law applicable to contractual obligations.
[408] Art. 98, §1, second limb PIL Code.
[409] It should neither be a carriage, consumer or insurance contract as articles 5, 6 and 7 respectively determine the law applicable to these cases.
[410] Article 3 (1).
[411] The habitual residence of a company is its place of central administration (art. 19 (1)).

For employment contracts, Article 8 Rome I determines that the law chosen by the parties is in principle the applicable law. However, the employee can always rely on the mandatory provisions of the law of the country where he/she habitually carries out his/her work. When the latter country is not an EU country, the employment contract is not a favourable connecting factor.

It is unclear whether Rome I allows *dépeçage* in the absence of a choice of law. Article 3(1) Rome I and Article 4(1) of the Rome Convention explicitly allow dépeçage. It can be argued under the Rome Regulation *a contrario* that dépeçage will not be allowed if the parties to the contract did not determine the applicable law themselves[412]. However, in the case of an exclusion of dépeçage, this would not influence the determination of the applicable law for issues that have nothing to do with the contract, such as veil piercing. For the latter, the applicable law exercise would have to be redone anyway. Although this is how it should be in theory, we cannot be sure that a judge would not apply the exclusion of dépeçage in a very broad way and apply the law designated by Rome I to the whole case as this considerably eases off the conflict of laws issues.

LAW APPLICABLE TO TORTS

The **Rome II Regulation is applicable to events that occurred after 11 January 2009.**[413] Before this date, residual national conflict of laws must be applied. Rome II's application, like Rome I's, is universal as the Regulation applies even when the law of a non-EU country is designated as the applicable law (Art. 3 Rome II).

Renvoi (this is, the possibility for a court to consider applying not the national law but the law of another state in a situation of conflict of laws) is excluded (as it is in Rome I) so Rome II designates a law, excluding the conflict of laws of that law (Art. 24 Rome II). The concept 'non-contractual obligation' determines the scope of Rome II and is autonomously interpreted without reference to the national interpretation.[414] The CJEU stated in *Kalfelis* that non-contractual obligations are *''all actions which seek to establish liability of a defendant and which* are not related to a 'contract' within the meaning of Article 5(1) [of the Brussels Convention].''[415] Article 15 clarifies the concept to a certain extent and article 15 (g) elucidates that vicarious liability also falls within the scope of Rome II.

Article 1(2) excludes several issues from Rome II. Does Article 1(2) (d)[416] about companies exclude any of our relevant cases? Director's liability is closely related to company law and so might vicarious liability for an employee/director or subsidiary. However, as this provision is an exception, it must be interpreted strictly. Several authors agree that general director's liability falls within the scope of Rome II.[417]

Article 4 (1) determines the general rule. **The law of the place where the damage occurred (*lex loci damni*) is applicable to the non-contractual obligation.**

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[412] Magnus (2009), 31.
[413] See articles 31 and 32.
[414] Recital 11.
[415] CJEU (5th Chamber) 27 September 1988, *Kalfelis*, Case C-189/87, at 18.
[416] Art. 1 (2) (d): *''non-contractual obligations arising out of the law of companies [...] regarding matters such as the creation [...], legal capacity, internal organisation or winding-up of companies [...], the personal liability of officers and members as such for the obligations of the company [...]''*
[417] See e.g. Dickinson (2008), 208; Van Calster (2016), 159-160.

The general application of the *lex loci damni* (law of the place where the damage occurred) appears to be justified because it generally favours the victim, or at least does not favour the tortfeasor.[418] However, this can designate the law of a third country where the state of the law might be less developed.

Several exceptions exist to the general rule (explained below) so it is possible albeit not easy to get around the default application of the *lex loci damni*. In specific cases, the application of the *lex loci damni* might not be detrimental to the case. In the Dutch Shell case for instance, Nigerian law was applicable, but the Dutch judges dealt with it in a light-headed way by stating that Nigeria applies common law[419] and 'hence' essentially English tort law.

Article 4(3), also known as the **'escape clause'**, is the first exception to the general rule of the *lex loci damni*, but can only rarely be applied.[420] When the tort is manifestly more closely connected with a country than the one indicated by the general rule, the law of that country is applicable. The whole tort must be closer connected to another country and not only one element of the tort.[421] When there is *''only a tenuous connection with the country of damage''*, it can be *''considered appropriate''* to apply the escape clause.[422]

In a SCDD context however, the application of the escape clause is unlikely since the damage will usually have occurred in another country than the one where the case is tried.[423]

Another way to get away from *lex loci damni*[424] is Article 7 on environmental damage. Article 7 gives the victim a **choice between application of the *lex loci damni* and the *lex loci delicti commissi***.[425] The

[418] Recital 16; Van Calster (2016), 252
[419] Rechtbank 's-Gravenhage 24 February 2013, Akpan and Vereniging Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd, at 4.22.
[420] As emphasised by the Commission in the memorandum of the proposal. See the explanation of Article 3, paragraph 3 in Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM (2003) 427 final, 22/07/2003.
[421] Van Calster (2016), 255.
[422] Dickinson (2008), 310.
[423] Van Calster (2014), 130.
[424] See more elaborately Demeyere (2017b), nos. 27-30.
[425] Art. 7 Rome II: *''The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.''*
A definition of environmental damage can be found in recital 24 of the Regulation. The restrictions to this concept in the Environmental Liability Directive (ELD) are not present in Rome II, but nuclear damage is excluded from Rome II. See art. 1 (2) f Rome II; Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

locus delicti commissi is the place of the event giving rise to the damage; and, the *locus damni* is the place where the damage has occurred[426].

For article 7 to apply, the consequence of the event giving rise to damage must be analysed as environmental, not the event giving rise to damage itself.[427]

> The broad definition of the concept 'environmental damage' entails that this favourable rule might apply in several SCDD cases.

The considerations of the European Commission support a broad application of this provision: *''[…] the point is […] also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from this harmful activity.''*[428] Once a choice on the basis of article 7 is made,[429] that law must apply for all purposes. Dépeçage is not allowed.[430] The claimant can opt for the application of the ***lex loci delicti commissi***, but what laws can be designated as such? DICKINSON defines the event giving rise to damage as "*the event for which the defendant is responsible, whether or not it consists of his own act or omission.''*[431] It is acknowledged that several material events or causes can give rise to the damage. Several *loci delicti commissi* are thus possible. OTERO argues that the best choice would be for the law of the place where the most substantial event occurred.[432] The burden of proof required to show that the substantial event occurred in the *forum* and not abroad, will, however, not be easy to overcome.[433] There is no clear rule about this, so it is not forbidden to pick a country where only part of the event has occurred. It is not clear according to which law the *lex loci delicti commissi* should be determined. The *lex fori* could be decisive, but if it is an autonomous concept, one must look at EU law to determine its meaning.[434]

Article 11 on **undue authority** seems an interesting provision in order to hold a mother company liable. However, article 11 only covers claims in the relationship between the principal and the person who acts without due authority.[435] It is therefore not relevant as exception to the general rule in article 4 (1).

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[426] CJEU 30 November 1976, *Bier v. Mines de potasse d'Alsace*, Case C-21/76.
[427] Dickinson (2008), 437.
[428] Explanatory Memorandum in Proposal of the European Commission COM (2003) 427 final, 19.
[429] Recital 25 specifies that the choice must be made "*in accordance with the law of the Member State in which the court is seised.''*
[430] Dickinson (2008), 440.
[431] Dickinson (2008), 439.
[432] Otero Garcia-Castrillon (2011), 570.
[433] Van Calster (2014), 131.
[434] If EU law is to determine the event giving rise to the damage, it can be argued that a decision taken in the headquarters of a company is eligible as the event giving rise to the damage. This wide notion of *locus delicti commissi* is in conformity with the ratio for article 7 envisaged by the Commission. Article 7 should prevent companies from damaging the environment where there is the least protection. See Proposal of the European Commission COM (2003) 427 final, 19-20.
Belgian law gives very little guidance on whether the *lex loci delicti commissi* should be the place of the actual behaviour or omission causing damage, or the place where the decision for this behaviour or omission was taken (*cf. infra*). (BAXI gives an overview of the possible interpretations of the *locus delicti commissi.* See Baxi (1999), no. 276.)
[435] Dickinson (2008), 512-513.

Article 17 enables the application of the rules of safety and conduct of the place and time of the event giving rise to the liability. The concept 'rules of safety and conduct' refers to "*all regulations having any relation to safety and conduct.*"[436] This broad interpretation includes rules based on case law and possibly even customs and business practices.[437] However, this law is not really applied to the case, but shall be taken into account in assessing the conduct of the person claimed to be liable. According to the Commission, the competent court *"must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages."*[438] The courts have a wide margin of appreciation to decide whether, for what purpose and to what extent they take account of the national rules of safety and conduct.[439] Thanks to this provision, the duty of care owed by a mother company can, for a great part, be determined on the basis of the *lex loci delicti commissi,* even when this law is not the designated law.[440]

When Rome II is not applicable, Belgian law designates, first, the law of the country where the tortfeasor and the victim have their place of residence.[441] If they do not normally reside in the same country, the *lex loci delicti commissi* as the law applicable to the tort case.[442]

However, very few have wondered what law this is in the case of a more complex situation than a skiing accident. In the case of vicarious liability, Claeys and Erauw state that Belgian law considers the place of the employee / subsidiary as the place where the event giving rise to the damage occurred, and not the country of the employer / mother company.[443] This view will be detrimental to the case, but Belgian law generally accepts any place where a part of the event giving rise to the damage occurred, as a *locus delicti commissi.*[1]

PUBLIC POLICY EXCEPTION: APPLICABLE LAW VS. INTERNATIONAL HUMAN RIGHTS, ILO CONVENTIONS, ETCETERA?

The question whether Belgian law allows to apply international human rights, ILO Conventions and other mandatory rules of international law over and above a foreign law that should be applied to a case before the Belgian courts, actually comes down to the question **whether a public policy exception will be accepted by the courts**. The applicability of specific protective rules, such as for employment contracts and rules of safety and conduct, has already been discussed above.

Whenever the designated law is not the *lex fori*, the public policy exception can be invoked to apply the *lex fori* anyway. In which cases? When the result of the application of the foreign law is contrary to the public order of the country in which the case is tried, the *lex fori* can be applied instead of the foreign law to that particular part of the case.[444] An example of the above is the displacement by lex

[436] Recital 34.
[437] Dickinson (2008), 640.
[438] Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations, COM (2006) 83 final, 21/02/2006, 25.
[439] Dickinson (2008), 640.
[440] See however Van Calster (2014), 131, stating that *"the additional 'rules on safety and conduct' of Article 17 arguably have less of a calling for environmental litigation than may be prima facie assumed."*
[441] Art. 99, §1, 1° Belgian PIL Code.
[442] Art. 99, §1, 2° Belgian PIL Code; Claeys (1998), 1524-1528.
[443] Claeys and Erauw (1993), 633; Erauw (1982), 159.
[444] Audit and d'Avout (2010), 275 and 284.

fori (national law) of the applicable foreign law which accepted, for instance, bigamy (which is against public order in the EU).

Rome I and Rome II both contain the public policy exception. So, whenever one of these Regulations designates the applicable law, the parties can avoid this application by calling on the public policy exception. However, it can only be applied **in exceptional circumstances**.[445]
There is no European definition of 'public policy', but *''the limits of that concept are a matter of interpretation of the Convention.''*[446] When the national conflict of laws designates the applicable law, the public policy exception can also be applied. Article 21 of the Belgian PIL Act states that the foreign law should not be applied when it leads to a result that is manifestly contrary to public policy.[447]

> While the public policy exception is only rarely accepted, the importance of it should not be underestimated in a SCDD context. As the liability of a company for human rights violations, by the company itself or by its (foreign) subsidiary is increasingly the subject of international and supranational regulation, it can be argued that it is an element of the public order of a civilised country to hold a company accountable for such violations.

Another potential application of this exception is found in piercing the corporate veil. EHRENZWEIG argues that only the *lex fori* can decide upon the veil piercing issue because it involves principles of justice or 'moral data'. The *Bundesgerichtshof* has however not accepted this reasoning,[448] which is an indication for the likely non-acceptance of this argument by the Belgian courts.
Whatever law is to be applied, Rome I and Rome II allow the application of 'overriding mandatory provisions' of the *forum* in Article 9 and 16 respectively. Article 9 (1) Rome I defines 'overriding mandatory provisions' as *''provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.''* This definition is valid for the application of Article 16 Rome II as well.[449] It is for the national court to determine whether a rule is a 'mandatory rule' and the court must take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned.[450]

C. Recognition and Enforcement of Judgments

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN BELGIUM

The Brussels I Recast Regulation not only deals with jurisdiction, but also with recognition and enforcement of judgments that that fall within its scope and which are be executed in a EU Member

[445] Recital 37 Rome I and recital 32 Rome II; CJEU 28 March 2000, *Krombach v. Bamberski*, Case C-7/98.
[446] CJEU 28 March 2000, *Krombach v. Bamberski*, Case C-7/98, at 22.
[447] See also Cass. 4 May 1950, *Pas.* 1950, I, 624; Cass. 27 February 1986, *RCJB*1989, 56.
[448] BGH 5 November 1980, *BGHZ* 78, 318, *NJW* 1981, 522, *ZIP* 1981, 31, *MDR* 1981, 314; Dambre (1989), 252.
[449] Dickinson (2008), 634.
[450] CJEU (3rd Chamber) 17 October 2013, *Unamar*, Case C-184/12, at 50.

State other than the one in which the judicial decision was made. The wide scope of the Regulation has already been described above (see above **Fout! Verwijzingsbron niet gevonden.**, Section 6.1).

When a judgment has been given by a court of a EU country and concerns a (non-excluded) civil or commercial matter, the Brussels I Recast (articles 36-60) is applicable to the recognition and enforcement of the judgment if it is to be executed in another EU country, e.g. Belgium, than that of the court that has decided upon the case. It plays no role whether the jurisdiction of the latter court had been established by the Brussels I Recast or any other instrument, such as national private international law.[451]

This Title of the Regulation is very liberal and ensures the **'freedom of judgments'** within the EU.[452]

Recognition: No special procedure is required for the recognition of a judgment and there is a presumption in favour of recognition. No intermediary procedure is needed to enforce a judgment since article 39 states that *''[a] judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.''*

Enforcement: The Regulation mainly addresses some formalities regarding the enforcement, but contrary to the recognition, a procedure, albeit simplified, is always required for the enforcement of a judgment under the Brussels I Recast.[453]

The grounds for refusing recognition (art. 36 (2)) and enforcement (art. 46) are exhaustively listed in Article 45. One of these grounds is **the public policy exception**, which can only be applied when "*recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.''*[454] The recognition and enforcement within the EU are not likely to present any problems as it has become *''near-automatic.''*[455]

When the recognition and enforcement of a judgment does not fall within the scope of the Brussels I Recast or another EU Regulation, regard must be had to the Belgian PIL Act, articles 22 to 31 of which are concerned with recognition and enforcement of foreign judgments (and official deeds).[456] Article 23 states the procedure for the enforcement of the judgment, but no such procedure is required for its recognition (art. 22, §1, second limb).[457] For both recognition and enforcement, the production of certain documents is required according to article 24. The judgment must moreover first be authenticated (art. 30). The grounds for refusing recognition or enforcement are summed up in article 25 and are more elaborate than under the Brussels I Recast Regulation.

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[451] Van Calster (2016), 190.
[452] Van Calster (2016), 188.
[453] Van Calster (2016), 200.
[454] CJEU (5th Chamber) 11 May 2000, Case C-38/98, at 30.
[455] Van Calster (2016), 188.
[456] Article 115 is relevant for a judgment regarding the validity, function, dissolution or liquidation of a company.
[457] Erauw (2009), 278, no. 204. Recognition normally happens as of right without a procedure, but is also possible through a separate claim (art. 22, §2).

RECOGNITION AND ENFORCEMENT OF SCDD JUDGMENTS

The recognition and enforcement of CSR judgments is be subject to the regular procedure of recognition and enforcement of the Brussels I Recast or the Belgian PIL Act. Unless procedural shortcomings are found in the proceedings before the foreign court, there does not seem to be a reason to deny the recognition or enforcement of those judgements in Belgium. The grounds for refusal in article 45 Brussels I Recast or article 25 PIL Act provide the only means to prevent the recognition or enforcement.

A refusal ground present in both the Brussels I Recast Regulation and the Belgian PIL Act is **public policy**. A judgment holding a company liable in a SCDD context can normally not be argued to go manifestly against public policy and we even argued above that it might actually be an element of public policy to hold a company liable for serious human rights violations).

In two specific situations, there may be elements going **against public policy:**

1. One element that may go in a case establishing liability for a breach of SCDD rules, might be when the corporate veil has been pierced without any decent argumentation as to why such piercing is allowed. The separate legal personality of a company is a key stone in Belgian law, and as shows from the brief overview above, veil piercing is only allowed in very limited cases. A foreign judgment (too) easily accepting the liability of a mother company for its subsidiary might thus give rise to problems when it must be recognised or enforced in Belgium. The foreign judgment as such can, however, never be reviewed on the merits.[458]

2. Conversely, one can see a possibility for refusal of recognition and /or enforcement in the event a company wishes to enforce a SCDD judgment against an individual or an NGO, e.g. one on costs or damages (such as were a foreign court to uphold disproportionate libel damages in a SCDD context).

Other grounds to refuse the recognition or enforcement of a judgment are mostly procedural, such as the existence of a prior judgment (*res iudicata*) or a pending case, and have no special relevance for SCDD cases. This also goes for the rights of defense, mentioned in general in the Belgian PIL Act, while only some elements are mentioned in article 25 Brussels I Recast. The protection of employees (if they were the defendant in legal proceedings) against the recognition and enforcement of judgments not in line with Section 5 of the Brussels I Recast, will normally not be triggered by a judgment finding a SCDD liability, so this is not relevant either.

[458] Erauw (2009), 286.

8. Conclusion and Recommendations

Belgian law is no obstacle to SCDD . Neither however is it much of an accelerator. Belgian law has not thought about SCDD in a systematic manner. Many anchors in Belgian law could ground SCDD relevant court proceedings however few have done so (or at least are known to us: Belgium's case-law is published in an appallingly haphazard manner).

Given the many SCDD relevant provisions in Belgian law, and their wide spread across various Statutes, it would seem preferable for Belgium to adopt a tailor-made SCDD Statute which even while referring to the various existing articles, would not attempt at amending these directly. Rather, it would insert an overarching Statute that would indirectly amend the many relevant provisions.

Further, the comparative part of current study shows a disparity of SCDD initiatives as well as, arguably, a 'best practice'. While it may be tempting indeed logical to aim for the best possible outcome, it is good to bear in mind that a Belgian Statute which would be different from the others, would have one important benefit: it would increase the platform for the Commission to intervene with its own initiative under Article 114 TFEU (harmonization in the framework of the internal market).

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ANNEX I: ABBREVIATIONS AND TRANSLATIONS

English	Dutch	French
Bureau for Standardisation (NBN)	Bureau voor Normalisatie (NBN)	Bureau de Normalisation (NBN)
Civil Code	Burgerlijk Wetboek	Code Civil
Code of Economic Law	Wetboek Economisch Recht (WER)	Code de droit économique (C.D.E.)
Company Code	Wetboek venootschappen	Code des sociétés
Belgian Code on Companies and Associations	Wetboek van vennootschappen en verenigingen	Code des sociétés et des associations
Corporate social responsibility (CSR)	Maatschappelijk verantwoord ondernemen (MVO)	Responsabilité sociétale des entreprises (RSE)
FPS Economy, S.M.E.s, Self-employed and Energy	FOD Economie, K.M.O., Middenstand en Energie	SPF Economie, P.M.E., Classes moyennes et Energie
Interministerial Commission for Sustainable Development	Interdepartementale Commissie voor Duurzame Ontwikkeling (ICDO)	Commission Interdépartementale pour le Développement Durable (CIDD)
Private limited company	Besloten vennootschap met beperkte aansprakelijkheid (bvba)	Société privée à responsabilité limitée (sprl)
Public limited company	Naamloze vennootschap (nv)	Société anonyme (sa)
Supply Chain Due Diligence (SCDD)	??	Diligence raisonnable appliquée à la chaîne d'approvisionnement

ANNEX II: BELGIAN GENOCIDE ACT

This is the 1999 version of the law concerning serious violations of international humanitarian law.

LOI DU 16 JUIN 1993 RELATIVE A LA REPRESSION DES VIOLATIONS GRAVES DE DROIT INTERNATIONAL HUMANITAIRE

Chapitre I – Des infractions graves

Article 1er.
§ 1er. Constitue un crime de droit international et est réprimé conformément aux dispositions de la présente loi, le crime de génocide, tel que défini ci-après, qu'il soit commis en temps de paix ou en temps de guerre. Conformément à la Convention pour la prévention et la répression du crime de génocide du 9 décembre 1948, et sans préjudice des dispositions pénales applicables aux infractions commises par négligence, le crime de génocide s'entend de l'un des actes ci-après, commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux comme tel:

1° meurtre de membres du groupe;

2° atteinte grave à l'intégrité physique ou mentale de membres du groupe;

3° soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;

4° mesures visant à entraver les naissances au sein du groupe;

5° transfert forcé d'enfants du groupe à un autre groupe. (1)

§ 2. Constitue un crime de droit international et est réprimé conformément aux dispositions de la présente loi, le crime contre l'humanité, tel que défini ci-après, qu'il soit commis en temps de paix ou en temps de guerre. Conformément au Statut de la Cour pénale internationale, le crime contre l'humanité s'entend de l'un des actes ci-après commis dans le cadre d'une attaque généralisée ou systématique lancée contre une population civile et en connaissance de cette attaque:

1° meurtre;

2° extermination;

3° réduction en esclavage;

4° déportation ou transfert forcé de population;

5° emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international;

6° torture;

7° viol, esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée et toute autre forme de violence sexuelle de gravité comparable;

8° persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans le présent article. (2)

§ 3. Constituent des crimes de droit international et sont réprimées conformément aux dispositions de la présente loi, les infractions graves énumérées ci-après, portant atteinte, par action ou omission, aux personnes et aux biens protégés par les Conventions signées à Genève le 12 août 1949 et approuvées par la loi du 3 septembre 1952 et par les Protocoles I et II additionnels à ces Conventions, adoptés à Genève le 8 juin 1977 et approuvés par la loi du 16 avril 1986, sans préjudice

des dispositions pénales applicables aux autres infractions aux conventions visées par la présente loi et sans préjudice des dispositions pénales applicables aux infractions commises par négligence:

1° l'homicide intentionnel;

2° la torture ou les autres traitements inhumains, y compris les expériences biologiques;

3° le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique, à la santé;

4° le fait de contraindre à servir dans les forces armées de la puissance ennemie ou de la partie adverse un prisonnier de guerre, une personne civile protégée par la convention relative à la protection des personnes civiles en temps de guerre ou une personne protégée à ce même égard par les Protocoles I et II additionnels aux Conventions internationales de Genève du 12 août 1949;

5° le fait de priver un prisonnier de guerre, une personne civile protégée par la Convention sur la protection des personnes civiles en temps de guerre ou une personne protégée à ce même égard, par les Protocoles I et II additionnels aux Conventions internationales de Genève du 12 août 1949, de son droit d'être jugé régulièrement et impartialement selon les prescriptions de ces dispositions;

6° la déportation, le transfert ou le déplacement illicites, la détention illicite d'une personne civile protégée par la Convention sur la protection des personnes civiles en temps de guerre ou une personne protégée à ces mêmes égards par les Protocoles I et II additionnels aux Conventions internationales de Genève du 12 août 1949;

7° la prise d'otages;

8° la destruction et l'appropriation de biens, non justifiées par des nécessités militaires telles qu'admises par le droit des gens et exécutées sur une grande échelle de façon illicite et arbitraire;

9° les actes et omissions, non légalement justifiés, qui sont susceptibles de compromettre la santé et l'intégrité physique ou mentale des personnes protégées par une des Conventions relatives à la protection des blessés, des malades et des naufragés, notamment tout acte médical qui ne serait pas justifié par l'état de santé de ces personnes ou ne serait pas conforme aux règles de l'art médical généralement reconnues;

10° sauf s'ils sont justifiés dans les conditions prévues au 9°, les actes consistant à pratiquer sur les personnes visées au 9°. même avec leur consentement, des mutilations physiques, des expériences médicales ou scientifiques ou des prélèvements de tissus ou d'organes pour des transplantations, à moins qu'il s'agisse de dons de sang en vue de transfusions ou de dons de peau destinée à des greffes, pour autant que ces dons soient volontaires, consentis et destinés à des fins thérapeutiques;

11° le fait de soumettre la population civile ou des personnes civiles à une attaque;

12° le fait de lancer une attaque sans discrimination atteignant la population civile ou des biens de caractère civil, en sachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu, sans préjudice de la criminalité de l'attaque dont les effets dommageables, même proportionnés à l'avantage militaire attendu, seraient incompatibles avec les principes du droit des gens, tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique;

13° le fait de lancer une attaque contre des ouvrages ou installations contenant des forces dangereuses, en sachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu, sans préjudice de la criminalité de l'attaque dont les effets dommageables même proportionnés à l'avantage militaire attendu seraient incompatibles

avec les principes du droit des gens, tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique;

14° le fait de soumettre à une attaque des localités non défendues ou des zones démilitarisées;

15° le fait de soumettre une personne à une attaque en la sachant hors de combat;

16° le fait d'utiliser perfidement le signe distinctif de la croix rouge ou du croissant rouge ou d'autres signes protecteurs reconnus par les Conventions et les Protocoles I et II additionnels à ces Conventions;

17° le transfert dans un territoire occupé d'une partie de population civile de la puissance occupante, dans le cas d'un conflit armé international, ou de l'autorité occupante dans le cas d'un conflit armé non international;

18° Le fait de retarder sans justification le rapatriement des prisonniers de guerre ou des civils;

19° le fait de se livrer aux pratiques de l'apartheid ou à d'autres pratiques inhumaines ou dégradantes fondées sur la discrimination raciale et donnant lieu à des outrages à la dignité personnelle;

20° le fait de diriger des attaques contre les monuments historiques, les oeuvres d'art ou les lieux de culte clairement reconnus qui constituent le patrimoine culturel ou spirituel des peuple auxquels une protection spéciale a été accordée en vertu d'un arrangement particulier alors qu'il n'existe aucune preuve de violation par la partie adverse de l'interdiction d'utiliser ces biens à l'appui de l'effort militaire, et que ces biens ne sont pas situés à proximité immédiate d'objectifs militaires.

Les faits énumérés aux 11°, 12°, 13°, 14°, 15° et 16° sont considérés comme infractions graves au sens du présent article, à la condition qu'ils entraînent la mort, ou causent une atteinte grave à l'intégrité physique ou à la santé d'une ou plusieurs personnes.

Article 2

Les infractions énumérées aux paragraphes 1er et 2 de l'article 1er et aux 1°, 2° et 11° à 15° du paragraphe 3 de l'article 1er sont punies de la réclusion à perpétuité.

Les infractions énumérées au 3° et au 10° du paragraphe 3 du même article sont punies de la réclusion de vingt à trente ans. Elles sont punies de la réclusion à perpétuité si elles ont eu pour conséquence la mort d'une ou plusieurs personnes.

L'infraction visée au 8° du paragraphe 3 du même article est punie de la réclusion de quinze à vingt ans. La même infraction ainsi que celle visée au 16° du paragraphe 3 du même article sont punies de la réclusion de vingt à trente ans si elles ont eu pour conséquence soit une maladie paraissant incurable, soit une incapacité permanente de travail personnel, soit la perte de l'usage absolu d'un organe, soit une mutilation grave. Elles sont punies de la réclusion à perpétuité si elles ont eu pour conséquence la mort d'une ou plusieurs personnes.

Les infractions énumérées aux 4° à 7° et 17° du paragraphe 3 du même article sont punies de la réclusion de dix à quinze ans. Dans les cas de circonstances aggravantes prévues à l'alinéa précédent, elles sont punies, selon les cas, des peines prévues à cet alinéa.

Les infractions énumérées aux 18° à 20° du paragraphe 3 du même article sont punies de la réclusion de dix à quinze ans, sous réserve de l'application des dispositions pénales plus sévères réprimant les atteintes graves à la dignité de la personne.

L'infraction prévue au 9° du paragraphe 3 du même article est punie de la réclusion de dix à quinze ans. Elle est punie de la réclusion de quinze à vingt ans lorsqu'elle a entraîné des conséquences graves pour la santé publique.

Article 3

Ceux qui fabriquent, détiennent ou transportent un instrument, engin, ou objet quelconque, érigent une construction ou transforment une construction existante, sachant que l'instrument, l'engin,

l'objet, la construction ou la transformation est destiné à commettre l'une des infractions prévues à l'article 1er, ou à en faciliter la perpétration, sont punis de la peine prévue pour l'infraction dont ils ont permis ou facilité la perpétration.

Article 4

Sont punis de la peine prévue pour l'infraction consommée:

- l'ordre, même non suivi d'effet, de commettre l'une des infractions prévues par l'article premier,
- la proposition ou l'offre de commettre une telle infraction et l'acceptation de pareille proposition ou offre,
- la provocation à commettre une infraction, même non suivie d'effet,
- la participation au sens des articles 66 et 67 du code pénal, à une telle infraction, même non suivie d'effet,
- l'omission d'agir dans les limites de leur possibilité d'action de la part de ceux qui avaient connaissance d'ordres donnés en vue de l'exécution d'une telle infraction ou de faits qui en commandent l'exécution, et pouvaient en empêcher la consommation ou y mettre fin, ou la tentative, au sens des articles 51 et 53 du code pénal, de commettre une telle infraction.

Article 5

§ 1er. Aucun intérêt, aucune nécessité d'ordre politique, militaire ou national, ne peut justifier, même à titre de représailles, des infractions prévues par les articles 1er, 3 et 4 sans préjudices des exceptions mentionnées aux 9°, 12° et 13° du paragraphe 3 de l'article 1er.

§ 2. Le fait que l'accusé a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité, si, dans les circonstances existantes, l'ordre pouvait manifestement entraîner la perpétration d'un crime de génocide ou d'un crime contre l'humanité, tels que définis par la présente loi, ou d'une infraction grave aux Conventions de Genève du 12 août 1949 et à leur premier protocole additionnel du 8 juin 1977.

§ 3. L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi.

Article 6

Sans préjudice des articles 4 et 8 de la présente loi, toutes ces dispositions du livre premier du code pénal, à l'exception de l'article 70, sont applicables aux infractions prévues par la présente loi.

Chapitre II – De la compétence, de la procédure et de l'exécution des peines

Article 7

Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu ou celles-ci auront été commises.

Pour les infractions commises à l'étranger par un belge contre un étranger, la plainte de l'étranger ou de sa famille ou l'avis officiel de l'autorité du pays ou l'infraction a été commise n'est pas requis.

Article 8

Ne sont pas applicables aux infractions prévues à l'article premier de la présente loi, l'article 21 du Titre préliminaire du code de procédure pénal et l'article 91 du code pénal relatifs à la prescription de l'action publique et des peines.

Article 9

§ 1 - Sous réserve des articles 99 et 108 de la convention de Genève relative au traitement des prisonniers de guerre du 12 août 1949, de l'article 75 du 1er protocole additionnel et de l'article 6 du II è protocole additionnel du 8 juin 1977, les infractions prévues par la présente loi ressortissent, lorsque la Belgique est en temps de guerre, à la compétence de la juridiction militaire.

§ 2 - Lorsqu'une infraction ressortissant de la compétence de la juridiction ordinaire est connexe à une infraction ressortissant en vertu du 1er du présent article à la compétence de la juridiction militaire, chacune de ces infractions est jugée par la juridiction militaire.
§ 3 - Lorsqu'une infraction prévue à la présente loi ressortit à la compétence de la juridiction militaire, l'action publique est mise en mouvement, soit par la citation de l'inculpé par le ministère public devant la juridiction de jugement soit par la plainte de toute personne qui se prétendra lésée par l'infraction et qui se sera constituée partie civile devant le président de la commission judiciaire au siège du Conseil de guerre dans les conditions prévues à l'article 66 du code d'instruction criminelle.
Dans ce dernier cas, la décision de ne pas poursuivre ne peut être prise que par le conseil de guerre composé uniquement du membre civil assisté d'un greffier, ou par la Cour militaire composée uniquement de son président et de deux de ses membres militaires ayant le grade de major, assistée par un greffier, sans préjudice de l'application des articles 111 à 113, 140 et 147 du Code de procédure pénale militaire. Cette décision ne sera rendue, le ministère public entendu en ses réquisitions, que dans les conditions prévues à l'article 128 du code d'instruction criminelle ou lorsque l'action publique n'est pas recevable ; elle comportera la condamnation de la partie civile aux frais exposés par l'Etat et par l'inculpé.
§ 4 - La procédure de renvoi à la discipline de corps prévue à l'article 24, 1er du code de procédure pénale militaire, n'est jamais applicable aux infractions prévues par la présente loi.


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