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# Measuring the Brussels Effect of the Due Diligence Directive

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To my parents for their never-ending support.

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# 1. Introduction

In April 2013, the Rana Plaza building, housing several factories making clothing for European and American consumers, collapsed killing more than 1.100 people. Over 3.000 workers felt a sensation akin to being in an earthquake: concrete pillars imploded; and the factory floor rolled beneath their feet. The Rana Plaza collapse tells a story about the deadly cost of the clothes we wear, and more broadly, about unsustainable business practices. This story is complex as it extends all the way around the globe, but it is also simple as it immediately reveals our intuitions about a just society, where businesses respect people's dignity.

Corporations lack international mandatory rules compelling them to prevent and remedy human rights and environmental adverse impacts. The lack of a regulatory framework was first addressed in 2011 through the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs), which provided a voluntary framework for integrating human rights into business practices. However, the limited effect of voluntary measures leaves room for similar situations, like the one in Rana Plaza, to occur again. For this reason, some European legislatures (France, the Netherlands, Germany, and Norway) have recently enacted differing mandatory rules to prevent such risk. Most importantly, the European Union is currently negotiating a directive on Corporate Sustainability Due Diligence (CS3D), which as proposed by the European Commission in February 2022, aims to ensure that companies prevent and address negative human rights and environmental impacts. The draft Directive will apply to certain companies headquartered or operating in the single market, as well as to their business partners in their value chains outside the EU.

This thesis reviews Anu Bradford's notion of the Brussels Effect, the EU's power to unilaterally regulate the global marketplace, to then assess whether the draft Directive has the potential to become a global standard. More specifically, this thesis attempts to answer, through both a theoretical and empirical analysis, the following research question: *"Does the CS3D have a potential Brussels Effect?"* More specifically, Section II examines the evolution of due diligence in its three evolutive stages: business concept, voluntary guidelines, and mandatory norm, as well as the text of the draft Directive proposed by the Commission. Section III inspects our research question from a theoretical perspective, assessing if the Directive satisfies the

theoretical characteristic required to unilaterally influence other jurisdictions. Section IV analyses the directive from an empirical perspective, showing how surveys and empirical studies indicate the failure of voluntary measures and call on states to adopt mandatory due diligence provisions. Most importantly, the section highlights a recent empirical study on the impact of mandatory due diligence legislation in France through the Refinitiv human rights score and conducts a similar non-experimental study for Germany. Section V concludes.

This study finds that (i) the directive satisfies the theoretical conditions required to become a global standard and that (ii) national cases demonstrate that the introduction of mandatory due diligence is correlated to an improvement in companies' Refinitiv human rights score. Therefore, this thesis concludes that the Directive is likely to have a significant Brussels Effect, improving the respect for environmental and human rights worldwide. Yet, the magnitude of this potential impact ultimately relies on the final drafting of the legislation expected for 2024. There is no doubt that the content of the directive matters just as much as its existence. A poorly drafted legislation will not just fail to prevent adverse impacts but may also protect those responsible from facing legal consequences.

# 2. Towards mandatory human rights due diligence

Voluntary human rights due diligence (HRDD) is the primary way for companies to evaluate and address negative human rights impacts. However, mandatory human rights due diligence (mHRDD) requirements are increasingly regaras a more effective method of encouraging companies to address human rights risks in their global value chains (GVCs). The following sections examine (i) the emergence of voluntary standards, (ii) the swift to mandatory due diligence, (iii) the national legislative initiatives on mandatory due diligence, and finally, (iv) the text of the Corporate Sustainability Due Diligence Directive (CS3D) proposed by the European Commission.

## 2.2 The changing concept of due diligence and the UNGPs

Human rights due diligence seeks to entrench in law some requirements for companies to prevent, account and remedy business-related human rights abuses. However, *due diligence* has not been always characterised as such. Due diligence was initially framed as a business concept referring to a *risk-management process*, a "procedural practice to assess risk in a company's own interest".[1] Companies carry out such a process as a risk-management tool to prevent financial and legal risks.[2] For example, in the case of mergers and acquisitions, "the purpose of due diligence is […] to enable a purchaser to find out all he reasonably can about what it is he is buying to help him decide whether to proceed."[3] This unfolds in an analysis of assets, contracts, employees agreements, as well as the potential liability arising from past corruption or

[1] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights', *European Journal of International Law* 28, no. 3 (13 November 2017): 901-2, https://doi.org/10.1093/ejil/chx042. O. Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?', *Netherlands Quarterly of Human Rights Law* 32, no. 1 (1 March 2014): 51, https://doi.org/10.1177/016934411403200104. ('[the] main purpose [of due diligence] is to confirm facts, data and representations involved in a commercial transaction in order to determine the value, price and risk of such transactions, including the risk of future litigation.)

[2] John Gerard Ruggie, '*Just Business: Multinational Corporations and Human Rights,*' New York: W. W. Norton & Company, 2013: 141-48. Bonnitcha and McCorquodale, '*The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*': 900.

[3] Evans, 'Due Diligence: The English Way', *International Company and Commercial Law Review 6* (1995) 195, at 195.

environmental contamination acts.[4] In this way, this process allows the company to prevent and mitigate financial and legal risks.

The new concept of *human rights due diligence* was developed by John Ruggie during his tenure as the UN Secretary-General's Special Representative on Business and Human Rights from 2005 to 2011. HRDD is defined as a *standard of conduct* (or care) that goes beyond protecting the interests of businesses and instead prioritizes the protection of the rights of all stakeholders involved, resulting in an ongoing process that requires engagement with affected stakeholders. Ruggie's work culminated with the endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs)[5] by the Human Rights Council (HRC) in 2011. Built on the initial understanding of due diligence as a business practice, the UNGPs sought to transform the nature of due diligence providing a framework for businesses to prevent and address human rights abuses in their operations and supply chains. They are based on three pillars: the state's duty to protect from human rights abuses of businesses, the corporate responsibility to respect human rights, and victims' access to remedy in case of human rights violations. The UNGPs are not legally binding but are recognised as a global standard, and many companies adopted them in their corporate responsibility and sustainability strategies.

However, this evolution of the due diligence concept has not been a clear, much less swift. The UNGPs invoke both understandings of due diligence, namely as a risk-management process and standard of conduct, in a contradictory way, without mentioning how they relate to each other.[6] According to some commentators, Professor Ruggies strategically adopted this conceptual confusion on the definition of due diligence to build consensus among business people, who understand due diligence as a risk management process to discharge responsibility, and human rights lawyers, who understand due diligence as a standard of conduct required to discharge an obligation (i.e. prevent adverse impacts).[7] Without this nuanced ambiguity, it is possible that the Human Rights Council would have not adopted the UNGPs. As a

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[4] Bonnitcha and McCorquodale, '*The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights'*: 902.
[5] UN, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (Guiding Principles), *UN Doc. HR/PUB/11/04* (2011), available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
[6] Bonnitcha and McCorquodale, '*The Concept of Due Diligence*", 900.
[7] Bonnitcha and McCorquodale, '*The Concept of Due Diligence*", 900.

result, points 4 and 15 of the UNGPs refer to a more process-oriented approach, whereas points 17-21 appeal to a standard of conduct-oriented approach, creating uncertainty about how companies should respect human rights and provide remedies in case of violations.[8] In fact, while the business understanding of due diligence did not involve major liability repercussions,[9] human rights due diligence emerged as characterised by legal liability in case of non-compliance.[10] Bonnitcha and McCorquodale resolve this conceptual confusion by suggesting that an interpretation of the Guiding Principles would be more coherent. In fact, they argue that a company's breach of responsibility by its own conduct (its operations) is assessed against a no-fault liability, whereas a breach by a company's business partner is assessed against HRDD practices as a standard of conduct. This means that businesses have to provide a remedy for any human rights infringement, and the standard of conduct is not relevant here. Nevertheless, due diligence as a standard of conduct is relevant to assess the extent to which businesses are responsible for the human rights infringement of third parties.[11]

Moreover, the interpretation of due diligence is also linked to its use as a defence for companies against liability charges, meaning whether companies complying with due diligence norms might nonetheless be held liable for adverse impacts that occurred in their operations. Principle 17 of the UNGPs indicates that "conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse." Yet, Quijano and Lopez highlights how its commentary clarifies that "business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[12] Therefore, corporations

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[8] Bonnitcha and McCorquodale, '*The Concept of Due Diligence*", 908-9, 914.
[9] See for example Rae Lindsay's contribution at a Brick Court Chambers' online seminar on "*Business Responsibility for Human Rights"* (20 November 2020), https://www.youtube.com/watch?v=Rbf2imllBYM See also Damilola S Olawuyi, *"Corporate Due Diligence in the Era of Climate Change."* https://www.asser.nl/media/680257/damilola-olawuyi-corporate-due-diligence-in-the-era-of-climate-change.pdf
[10] Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar – Access to Judicial Remedies for Human Rights Violations by Transnational Business' (December 2013) prepared at the request of ICAR, ECCJ and CORE, 76–77.
[11] Bonnitcha and McCorquodale, '*The Concept of Due Diligence*", 912-19
[12] Gabriela Quijano and Carlos Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?" *Business and Human Rights Journal* 6, no. 2 (2021): 248.

argue that HRDD should act as a defence,[13] promoting a process-oriented standard of review, whereas corporate accountability advocates reject this idea,[14] promoting a diligence-based, outcome-oriented standard of review. The latter approach requires courts to consider other reasonable measures a company should have implemented to avoid adverse impacts. Compliance with due diligence norms is a necessary, yet not sufficient, condition to be shielded from liability against adverse impacts.[15] This standard of review aims to avoid cases of cosmetic or tick-box compliance, meaning declaratory and formalistic compliance lacking substance, which would provide companies with a tool to rebut allegations, and ultimately, prevent victims to obtain remedies.

## 2.3 The rise of national mHRDD legislation

Despite the recent uptake of voluntary due diligence standards in declarations by states and companies,[16] global corporations have not still transitioned towards sufficiently sustainable practices, as several studies demonstrated.[17] For instance, a survey conducted by the German government found that less than 50% of companies could record their compliance with HRDD guidelines.[18] As a result, the UN Human Rights Council started negotiations on an international treaty on business and human rights in 2014, and many national legislative proposals sprung up in European countries, reflecting a trend towards mandatory due diligence obligations. However, recent mandatory obligations are characterised by important differences, including the

[13] IOE statement, 'Panel on Liability (draft article 8)', 6th Session of the *UN Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (26–30 October 2020).
[14] For example, Amnesty International and BHRRC, 'Creating a paradigm shift: legal solutions to improve access to remedy for corporate human rights abuse' (4 September 2017), 7, https://www.amnesty.org/download/Documents/POL3070372017ENGLISH.PDF
[15] Olivier De Schutter, Towards Mandatory Due Diligence in Global Supply Chains (ITUC, 2020), 52–56. See also, on the basis of this study, ITUC, 'Towards Mandatory Due Diligence in Global Supply Chains', 12–13, https://www.ituccsi.
org/towards_mandatory_due_diligence
[16] Shift, 'Putting the UNGPs into Practice', https://shiftproject.org/what-we-do/putting-ungp-into-practice/.
[17] ECCJ and CORE Coalition, 'Debating Mandatory Human Rights Due Diligence Legislation (and corporate liability). A Reality check' (November 2020), https://corporatejustice.org/debating-mhrdd-legislation—a-realitycheck. Ministerie van Buitenlandse Zaken, "Van voorlichten tot verplichten: een nieuwe impuls voor internationaal maatschappelijk verantwoord ondernemerschap" (16 October 2020) https://www.rijksoverheid.nl/documenten/beleidsnotas/2020/10/16/van-voorlichten-tot-verplichteneen-nieuwe-impuls-voor-internationaal-maatschappelijk-verantwoord-ondernemerschap
[18] German Federal Foreign Office, 'Monitoring the National Action Plan for Business and Human Rights (NAP)' (13 October 2020), https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-undmenschenrechte/monitoring-nap/2131054

scope, articulation, and enforcement of such regulations.[19] In addition, the adoption of due diligence obligations might be a double-edged sword as loose or poorly enforced obligations might even prevent companies from being held liable for human rights obligations, representing a real risk to human rights protection. In short, some HRDD laws might have a significant impact while others only spur some modest change.

In order to be real game-changers, "HRDD laws [should] (i) prescribe substantive and demonstrable preventative measures along entire value chains as well as full transparency and effective participation of potentially affected rights-holders in both their design and implementation, (ii) carry the prospect of hefty penalties for non-compliance, and (iii) be systematically and robustly overseen and enforced by independent and well-resourced competent authorities may […]. [Their] impact may be further increased by clearer and stronger laws on civil liability leading to a duty to fully repair harm caused to individuals and communities."[20] By contrast, HRDD regulations that provide for tick-boxing compliance and limit or prevent both stakeholder engagement and civil liability for corporations risk neutralising the efforts of the past decade, unreasonably shielding companies from liability.

Some European countries have recently promulgated due diligence legislation. In 2017, the French Parliament adopted the *Duty of Vigilance Law* (Loi sur le devoir de Vigilance) [21] which imposes a vigilance duty on large French corporations which have to prepare and implement an annual vigilance plan to identify and prevent adverse impacts. Adverse impacts may result directly in their own activities, those of the companies they control, and those of their subcontractors and suppliers, with whom they have an established business relationship.[22] As enforcement measures, this law provides for an injunction for breaching companies[23] and civil action for victims of adverse impacts to seek compensation before French courts.[24] However, unlike the

[19] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' *International and Comparative Law Quarterly* 69, n. 4 (2020): 789, 800–801.
[20] Quijano and Lopez, *"Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?"* 244.
[21] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre « Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle au sens du II de l'article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation.»
[22] Art L.225-102-4-I(3) French Commercial Code.
[23] Art L.225-102-4-II French Commercial Code.
[24] Art L225-102-5, French Commercial Code.

UNGPs which apply to all companies' entire global value chains (GVCs), the French law only applies to large companies[25] and their "established" business relationships, referring to those business relations falling within a certain duration and intensity.[26] Despite the deviations from the UNGPs and the legal hurdles experienced by plaintiffs in civil litigation such as the burden of proof,[27] authors have widely regarded this law as a great achievement in mandatory human rights due diligence (mHRDD).[28] In fact, precedent initiatives such as the 2015 UK Modern Slavery Act and the NFRD[29] only entailed disclosure-based strategies unlikely to influence corporate decision-making.[30]

Furthermore, other European states engaged in mandatory due diligence legislation, yet these rules only entail administrative and/or criminal sanctions, failing to provide direct reparation to victims. In 2019, the Dutch Parliament adopted the *Due Diligence Child Labour Act* (Wet zorgplicht kinderarbeid)[31] requiring companies that sell goods and services in the Netherlands to conduct due diligence through their supply chains to identify and prevent child labour.[32] Companies operating in the Dutch market must issue a declaration attesting due diligence compliance across their value chains, and victims of adverse impacts may issue a complaint with specific indications of the company's wrongful conduct. The complaint is initially forwarded to the company concerned, which has six months to implement due diligence-compliant processes. If the company does not respond to the complaint or fails to respond in a satisfactory way, a supervisory authority would review the complaint, and if deemed

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[25] Large companies with over 5 000 employees in France and over 10 000 in the world.

[26] More specifically, the law refers to a "stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last" (Art L. 442-6-I-5 French Commercial Code). S Cossart, J Chaplier and TB De Lomenie, "The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All" *Business and Human Rights Journal* 2(2) (2017): 317.

[27] A Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?" *Human Rights Review 22* (2021)*:* 109.

[28] Clerc, "The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains" (13 January 2021). ETUI Research Paper, Policy Brief 1/2021. JG Ruggie, C Rees and R Davis, "Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations" (2021) 6(2) *Business and Human Rights Journal* 179. E Savourey and S Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption" *Business and Human Rights Journal 6(1)* (2021): 141.

[29] Non-Financial Reporting Directive (2014/95/EU) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0095&from=EN

[30] CM Bruner, "Corporate Governance Reform and the Sustainability Imperative" *The Yale Law Journal 131(4)* (2022): 1062–384.

[31] Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid). https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vkbklq11jgyy/f=y.pdfhttps:/www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id

[32] L Enneking, "Putting the Dutch Child Labour Due Diligence Act into Perspective: An Assessment of the CLDD Act's Legal and Policy Relevance in the Netherlands and Beyond" *Erasmus Law Review* 4 (2019): 20.

necessary, issue a compliance binding order to the company. If the latter does not comply with such an order, the supervisor can impose a fine ranging from €4.100 to up to 10% of the company's annual turnover. Additionally, officers of companies that are found to be repeatedly responsible for child labour abuses may face criminal charges and be subject to a €21,750 fine, as well as a maximum sentence of six months (for unintentional offence) or two years (for intentional offences).[33]

In 2021, the German Parliament adopted the *Supply Chain Act* (Sorgfaltspflichtengesetz) requiring Germany-incorporated companies with +3.000 employees[34] (i) to adopt a policy statement, (ii) establish a risk-management system, regular risk analyses, and preventive and remedial measures in the company's own business and towards direct suppliers, (iii) install a complaints procedure, documentation and reporting. [35] This Act adopts a narrow understanding of supply chains, and in relation to indirect suppliers, requires companies to conduct risk analysis only in case of "substantiated knowledge" of human rights abuses. In this way, companies are not required to exercise systematic due diligence, diverging from the logic of the UNGPs. [36] Moreover, companies have to draft a report, which would be made publicly available on their website for seven years, with regard to the identification and management of adverse impacts. Finally, the Norwegian Consumer Authority would impose administrative sanctions on breaching enterprises.[37]

In 2021, the Norwegian Parliament passed the *Norwegian Transparency Act*[38] requiring large companies selling goods or services in Norway[39] (i) to embed responsible business conduct in the company's guidelines, (ii) identify and assess actual and potential adverse human rights adverse impacts on human rights and working conditions, (iii) communicate with affected stakeholders and rights-holders,

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[33] L Enneking, "*Putting the Dutch Child Labour Due Diligence Act into Perspective*," 21-2.
[34] The norm would also apply to +1.000 employees companies from 2024, expectedly covering 4.800 companies.
[35] Text of the legislation available both in German and English. M Krajewski, K Tonstad and F Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?" *Business and Human Rights Journal* 6(3) (2021): 550.
[36] M Krajewski, K Tonstad and F Wohltmann, *"Mandatory Human Rights Due Diligence in Germany and Norway,"* 555.
[37] M Krajewski, K Tonstad and F Wohltmann, *"Mandatory Human Rights Due Diligence in Germany and Norway,"* 557.
[38] LOV-2021-06-18-99. English unofficial translation.
[39] Large companies are those companies defined in the Accounting Act or that exceed two of the following thresholds: sale revenues of NOK70 million, a total balance sheet of NOK35 million and/or 50 full-time employees in the financial year. The law is excepted to apply to 8.830 companies.

(iv) provide remedies in case of misconduct.[40] In line with international standards, the Act is not limited to any specific tier in the supply chain, unlike the French case, and may be understood as comprising both upstream and downstream suppliers.[41] Moreover, companies must draft a report, which would be made publicly available on their website, with regard to the identification and management of adverse impacts, and would be required to respond to further information requests on the company's actual and potential adverse impacts on human rights and decent working conditions. Finally, either ex officio or upon request by a person with substantiated evidence, the Federal Office for Economic Affairs and Export Control (BAFA) has the authority to summon people, enter the premises of a company, and impose administrative sanctions up to €500.000 or 2% of annual turnover on breaching enterprises. Sanctioned companies can also be excluded by public procurement for a maximum of three years.[42]

Finally, intense corporate lobbying attempted, and often succeeded, in watering down due diligence legislation. In 2015, Swiss civil society organizations launched a popular initiative called the Responsible Business Initiative, which proposed requiring Swiss companies to conduct human rights due diligence (HRDD) and introduced liability for the adverse impacts caused by their controlled companies.[43] The Swiss parliament presented counterproposals that limited liability and narrowed the scope of HRDD to only conflict minerals and child labour. In June 2020, the parliament accepted to the narrower counterproposal, which campaigners considered intolerable. The promoters of the Responsible Business Initiative proceeded with a referendum, which resulted in a favourable popular vote but a rejection by the majority of Swiss cantons. As a result, a weaker parliamentary counterproposal became law, which only requires reporting on HRDD practices and focuses on conflict minerals and child labour. This marked the end of a decade-long battle for stronger corporate

[40] M Krajewski, K Tonstad and F Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway," 554-5.
[41] M Krajewski, K Tonstad and F Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway," 556.
[42] M Krajewski, K Tonstad and F Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway," 557.
[43] Quijano and Lopez, *"Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?"* 245.

accountability in Switzerland. As with the Swiss case, also the scope of the French Duty of Vigilance Law has been also reduced due to corporate lobbying.

To conclude, mHRDD regulations often differ from the UNGPs because they often are narrowed in scope and exclude civil liability, preventing victims to receive compensation. As these lines are being written, the European Parliament and the Council are debating an EU-wide due diligence directive with the potential to ultimately entrench due diligence onto mandatory provisions. Our focus would now shift to this new European directive.

***Figure 1 - Mandatory Human Rights Due Diligence Legislation and initiatives***

| National law | Scope | Size | Enforcement | Topic |
|---|---|---|---|---|
| French "*Loi Vigilance*" (2017) | "Established commercial relationship" | 5,000–10,000 employees | Civil (injunctions, civil liability) | Human resources, environment |
| Dutch "*Wet zorgplicht kinderarbeid*" (2019) | Full chain | Supplying goods/services to Dutch end-users | Administrative and criminal (fines, sanctions) | Child labour |
| German "*Sorgfaltspflichtengesetz*" (2021) | Full chain but focus on direct suppliers | 3,000 (2024: 1,000) employees | Administrative (fines) | Human resources, environment |
| Norwegian Transparency Act (2021) | Full chain | Covered by s.1–5 Accounting Act or meeting 2 out of 3 criteria: 50 employees (full-time equivalent) + NOK70 million revenue + NOK35 million balance sheet | Administrative (fines, injunctions) | Human resources |
| European Corporate Sustainability Due Diligence proposal (2022) | "Established business relationship" | Group 1 (500 employees, 150 million net turnover), Group 2, high-impact sectors (250 employees, 40 million net turnover) | Administrative and civil (fines, civil liability) | Human resources, environment |

Source: Anne Lafarre and Bas Rombouts, "Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value Chains," European Journal of Risk Regulation 13, no. 4 (2022)

## 2.4 The Corporate Sustainability Due Diligence Directive (CS3D)

On 23rd February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence.[44] This Directive aims to foster sustainable corporate behaviour in line with the European Green Deal and the UN Sustainable Development Goals, anchoring environmental and human rights consideration in companies' governance, operations, and value chains. Companies would be legally bound to address adverse impacts along their value chains, advancing the green transition and the protection of human rights in Europe and beyond.

[44] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

Different players solicited the Commission's proposal for EU-level legislation on corporate due diligence. Both the Council and the European Parliament, respectively in December 2020 and March 2021, as well as Union citizens within the framework of the Conference on the Future of Europe called on the Commission to propose Union rules on corporate due diligence.[45] Around 70% of the corporations that participated in the 2020 study on due diligence[46] and in the 2021 open public consultation[47] agreed that a harmonised legal framework on due diligence is a priority, and eight in 10 respondents in the 2020 consumer survey indicated the importance of sustainability.[48]

This joint commitment to improve the regulatory framework on sustainable corporate governance relies on several concerns. First, existing international voluntary standards on business conduct have not resulted in a significant improvement.[49] Despite the laudable efforts of some large corporations that adopted voluntary standards, these are not sufficient. Only 37% of the business respondents in the 2020 study on due diligence requirements[50] declared conducting environmental and human rights due diligence and only 16% covered the entire supply. Several EU corporations have been associated with adverse impacts, ranging from human rights violations to environmental disasters.[51] Research showed that those companies taking voluntary action only limit their focus on the first link of supply chains, neglecting those environmental and human rights violations that likely occur in lower links.[52] Thus, progress is only partial. Second, Union rules would ensure legal certainty for both companies and injured individuals. Voluntary standards do not result in legal certainty

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[45] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)); Council Conclusions on Human Rights and Decent Work in Global Supply Chains of 1 December 2020 (13512/20).

[46] Directorate-General for Justice and Consumers (European Commission) and EY, *Study on Directors' Duties and Sustainable Corporate Governance* (2020).

[47] 'European Commission - Have Your Say'.

[48] 'Meet the 2020 Consumers Driving Change - Why Brands Must Deliver on Omnipresence, Agility, and Sustainability'.

[49] UN "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011); OECD Guidelines for Multinational Enterprises (2011); OECD Due Diligence Guidance for Responsible Business Conduct (2018).

[50] British Institute of International and Comparative Law et al., *Study on Due Diligence Requirements through the Supply Chain (2020)*. https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

[51] European Parliament, 'Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union' (2016). https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU%282016%29578007

[52] British Institute of International and Comparative Law et al., *Study on Due Diligence Requirements through the Supply Chain, (2020)*.

and might even turn into an unfair competitive advantage for less responsible companies. Thus, a voluntary framework is not as efficient as mandatory provisions. Third, this directive would prevent legal fragmentation that may hamper the functioning of the single market. Some member states (France, Germany, Norway, and the Netherlands) have already adopted national legislations or plan to do so (Austria, Belgium, Finland, Denmark),[53] undermining a level playing field in the single market. New and emerging laws are considerably different, ranging from requiring directors to consider their company's external impact[54] or prioritise shareholder interests,[55] to adopting a policy statement on the respect of human rights.[56] Moreover, other member states may adopt any legislation in the foreseeable future. These different requirements are likely to increase, leading to a distortion of competition. Some companies might be subject to different requirements while other companies might not have to comply with due diligence rules at all.[57] Thus, different requirements have detrimental effects on the functioning of the single market. Therefore, the proposed Directive would advance the respect of environmental and human rights in Europe and beyond while creating a level playing field for the companies operating in the single market. In this way, the Commission would foster companies' contribution to creating a more just and sustainable planet, while preventing legal fragmentation.

### 2.4.2 How would the directive work?

While the final binding text of the directive is still under scrutiny by the European Parliament and the Council, we can analyse the provisions adopted by the Commission in its proposal. This aims to introduce mandatory human rights and environmental obligations, as well as a new duty for directors of EU companies to set up and oversee the due diligence requirements. The directive also presents potential administrative sanctions and civil liability.

[53] France (*Loi relative au devoir de vigilance, 2017)* and Germany (*Sorgfaltspflichtengesetz, 2021)* have introduced a horizontal due diligence law, other Member States (Belgium, the Netherlands, Luxembourg and Sweden) are planning to do so in the near future, and the Netherlands has introduced a more targeted law on child labour (*Wet zorgplicht kinderarbeidm 2019)*.
[54] French *Loi Pacte*
[55] For example, the Netherlands.
[56] German *Sorgfaltspflichtengesetz.*
[57] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

***Scope (Art. 2)*: This Directive would not apply to small and medium-sized companies (SMEs) but to EU companies with +500 employees and +€150 m net worldwide turnover, referred to as Group 1. Two years after the end of the two-year transposition period, the directive would also apply to EU companies with +250 employees and +€40 m net worldwide turnover (whose +50% net worldwide turnover is generated in high-impact sectors). These companies are referred to as Group 2. Moreover, non-EU companies in the EU with a net EU-generated turnover threshold aligned to Groups 1 and 2 would also fall within the directive's scope. More specifically, the Directive would apply to both direct (contractual) and indirect (non-contractual) "established business relationships". Originating from French law,[58] an "established" business relationship refers to "a business relationship, […] which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain."[59]

***Environmental and human rights (Art. 3):*** Due diligence is carried out with respect to the environmental and human rights conventions identified in the Annex.[60]

***Compliance (Art. 4-11):*** Companies are required (i) to integrate due diligence into policies, (ii) identify actual and potential adverse environmental and human rights impacts, (iii) prevent or mitigate potential impacts, (iv) bring to an end or minimise actual impacts, (v) establish and maintain a complaints procedure, (vi) monitor the effectiveness of due diligence policies and measures, (vii) publicly communicate on due diligence.[61] More specifically, where companies *deem it relevant*, they would (i) develop and implement a prevention action plan with defined timelines for action and indicators in consultation with affected stakeholders, (ii) develop contractual assurances with direct business partners, which in turn, would ensure contractual assurances with his partners, leading to contractual cascading, as well as measures to verify compliance, (iii) provide support for SME with which the company has an established business relationship in facilitating compliance. Finally, companies should

[58] Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment." *Business and Human Rights Journal* 7, no. 2 (2022): 291-7.
[59] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937: 51.
[60] Directorate-General for Justice and Consumers, Annex to the proposal for a Directive on corporate sustainability due diligence.
[61]Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937: 53.

refrain from entering into new or extending existing business relationships with breaching partners.

***Climate change obligation (Art. 15):*** Large EU (Art. 2(1)(a)) and non-EU companies (2(2)(a)) would adopt a plan ensuring the compatibility of their business model with the Paris Agreement's target to reduce global warming to 1.5C. If a company recognises climate change being a "principal risk" to or having a "principal impact" on its operations, it shall also incorporate emission reduction objectives in its plan. In addition, if the company links the long-term sustainability of the business to executives' variable remuneration, compliance with the plan would influence executives' salaries.

***Enforcement (Art. 17-21):*** Member states would designate an existing authority for the supervision and enforcement of compliance, while the Union would set up a European Network of Supervisory Authorities to reduce the cost and facilitate the supervision of cross-national companies. The latter would be under the jurisdiction of the member state in which they generate the highest turnover. Moreover, national authorities would request information and perform investigations related to compliance, initiate investigation proprio motu or on the grounds of substantiated concerns forwarded by any natural or legal person. Finally, sanctions are autonomously and proportionately decided by each member state.

***Civil liability (Art. 22. 23, 27):*** Companies would be held liable for failing to prevent, mitigate, minimise/put to an end a potential adverse impact, or if this failure leads to further adverse impacts which might have been prevented. Moreover, enterprises would not be held liable for the harm caused by an indirect partner with whom they have an established business relationship unless it was unreasonable to expect that the action would have been adequate to prevent, mitigate, minimise/put to an end a potential adverse impact.

***Duty of care for directors (Art. 25-6):*** Directors of EU companies would have to consider in their decision-making the possible "human rights, climate change and environmental consequences, including in the short, medium and long term."[62]

[62] osal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937: 66.

Finally, the Commission would further complement the directive in three ways. It would adopt delegated acts outlining the reporting due diligence criteria for third countries, issue guidelines outlining model contractual arrangements that companies can use while trading with their suppliers, and put in place other supporting measures facilitating companies (in particular, SMEs) in fulfilling their due diligence requirements.

### 2.4.3 Legal basis, subsidiarity, and proportionality

The proposed Directive is based on two articles of the TFEU.[63] First, the Directive relies on Art. 50 TFEU as it protects the interest of companies' shareholders. Art. 50 TFEU allows the EU legislature to adopt directives, through the ordinary legislative procedure, to remove obstacles to the freedom of establishment i.e. free movement rights for self-employed people and companies.[64] More specifically, Art. 50(2)(g) provides the Union with the shared competence of harmonising national company law safeguards with regard to the company's members and others (shareholders and creditors) "to attain freedom of establishment."[65] For example, the Union has previously adopted some coordination measures on shareholders' rights with a view to making them "equivalent throughout the Union."[66] This Directive falls within Art. 50(2)(g) because approximating the due diligence measures of companies' operations, value chains, and directors' duties, *protects the interests of shareholders equally throughout the Union.*

Secondly, the Directive relies on Art. 114 TFEU as it reduces the distortion of competition created by the emergence of different due diligence requirements. Art. 114 TFEU provides for the harmonisation of national laws "which have as their object

[63] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937: 10.
[64] Schütze, Robert. *European Union Law*. Third edition. Oxford: Oxford University press, 2021: 642-45.
[65] Art. 50(1) TFEU. In *Centros*, the Court has confirmed that Art. 50(2)(g) can be used "to achieve complete harmonisation" (Case C-212/97, *Centros*, para. 28). In *Daihatsu*, the Court clarified that Art. 50 relates to the approximation of both national laws with regard to the establishment and functioning of the internal market (Case C-97/96, *Verband deutscher Daihatsu-Handler eV v Daihatsu Deutschland GmbH*, para. 18).
[66] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. Art. 50(2)(g) TFEU.

the establishment and functioning of the internal market."[67] In short, the Union can adopt harmonisation measures to eliminate obstacles and distortions of competition which, respectively, hamper the establishment or/and the functioning of the single market. For example, some national rules might require companies to carry out due diligence in relation to direct suppliers while others also in relation to indirect suppliers, leading to a distortion of the "free flow of goods and services".[68] In addition, the presence of uneven requirements or civil liability regimes might also trigger a race to the bottom in due diligence legislation. Therefore, this Directive falls within Art. 114 because *eliminates the distortions of competition created by differing national laws which may hinder the functioning of the internal market*.

Furthermore, the directive has to satisfy the subsidiarity and proportionality principles. The Commission put forward four reasons to satisfy the subsidiarity principle i.e. "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States […] but can rather […] be better achieved at Union level."[69] First, member states' legislation is neither sufficient nor efficient. Environmental adverse impacts (e.g. pollution) have transnational effects and suffer a collective action problem which can be addressed only through Union rules. Second, several companies operate across different member and non-member states. Listed companies have cross-border ownership, and ultimately, their operations are influenced by the legislative action or inaction of member states. For this reason, multinational corporations request an EU-level playing field to reduce compliance costs. Third, cross-border companies require legal certainty and a level playing field. For example, diverging due diligence rules indirectly impact suppliers whose clients must fulfil different requirements. Only EU action can reduce complexity and compliance costs through a unique legal framework for the companies

[67] Art. 114 TFEU. This represents a horizontal and teleological competence of the Union as it is not confined to a policy area, but rather is defined by the objective which must be achieved. For this reason, at first, it seemed to have unlimited power. For example, in *Spain v Council*, the Court said that Art. 114 was not only limited to the elimination of divergent national laws but that it could also be used to prevent the heterogeneous development of national laws. However, the Court drew some limits in the *Tobacco Advertising case*, in which Germany objected to a directive banning tobacco advertising arguing that Art. 114 could only be used to promote the internal market, and not to limit it. The Court agreed that there was a lack of competence and invalidated the legislative act. It is worth mentioning that Art. 114 has been recently used to regulate roaming, menthol cigarettes and 65% cigarette labelling across the Union.

[68] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

[69] Art. 5(3) TFEU

operating in the single market. Finally, the action of the Union would have a global resonance, while member states' decisions would not have a great effect.

Moreover, the Commission argues that the Directive would also respect the proportionality principle i.e. "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[70] Companies would be required to bear the burden of compliance costs in a commensurate degree to their size, resources, and risk profile. Small and medium-sized enterprises (SMEs), which account for 99% of companies in the Union, would be exempted from the directive. These companies do not have the resources available to bear the compliance costs but would inevitably be exposed to some costs through their business relationships. Hence, larger companies would support their SMEs trading partners in their compliance costs, and SMEs would not fall within the value chain of the financial sector. In this way, this Directive would primarily affect large corporations which possess the resources and expertise (e.g. processes already in place such as reporting obligations) to bear the burden ensuing from the Directive. However, the Directive would apply to small companies active in high-impact sectors (e.g. mineral, garment, agricultural supply chains), that are already covered by the existing OECD sectoral guidelines,[71] starting two years after the end of the transposition period. The financial sector exception is justified "to create a balance between the interest in achieving the goals of the Directive and the interest in minimising the financial and administrative burden on companies."[72]

[70] Art. 5(4) TEU
[71] OECD, Guidelines for Multinational Enterprises, Sectoral Guidelines (2011). http://mneguidelines.oecd.org/sectors/
[72] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937: 15.

# 3. The power of default settings

The following sections analyse (i) the definition and theoretical foundations of the Brussels Effect, (ii) review previous cases of Europeanization of environmental standards, and ultimately, (iii) assess if the new due diligence directive satisfies the required conditions to become a global standard. We conclude that the directive satisfies the theoretical framework developed by Professor Bradford, and thus, has the potential to influence the global marketplace.

## 3.2 The Brussels Effect

First coined by Professor Anu Bradford, the term *Brussels Effect* refers to the European Union's "unilateral power to regulate global markets."[73] This empirically substantiated theory offers an alternative and oppositive view of the EU's perceived weakness as a global military and economic power. While the Union is often seen as facing continuous challenges, ranging from the rise of emerging markets and the refugee crises to the Ukraine conflict and growing Euroscepticism, it remains the only jurisdiction able to unilaterally set global standards.

The ability to regulate global business conduct and product requirements is an unintended by-product of European integration that has created a large and valuable consumer market. To operate in such a lucrative market, third-country companies either adjust their business to Brussels's regulations or do not operate in the EU market completely. However, companies rarely decide to leave as they would hardly recoup their revenues in smaller or less affluent markets. Moreover, to benefit from the economies of scale, companies decide first to adopt Brussels's standards, which often are the most stringent globally, to their entire production process and then lobby their home countries to adopt similar rules to avoid distortion of competition creating a level playing field. In this way, Brussels operates a "Europeanization" of the global business environment without adopting any coercive measures.

[73] Anu Bradford, "The Brussels Effect: How the European Union Rules the World" *Oxford University Press* (Oxford: 2019): XIV.

Professor Bradford categorises this process with two variants of the Brussels Effect. The *de facto* Brussels Effect refers to corporations' incentives in adopting EU standards to their worldwide operations, whereas the *de jure* Brussels Effect refers to corporations' incentives in lobbying their home countries to pass EU-like laws. This phenomenon leads to a form of disguised coercion, whereby leveraging on its internal market, the Union indirectly influences the global business environment. For this reason, the standards set for the single market, ranging from data and environmental protection to food safety and competition policy, are often adopted by businesses beyond Europe. For example, EU laws regulate timber harvesting in Indonesia, honey production in Brazil, Cocoa pesticides in Cameroon, as well as what chemicals and factory equipment are used respectively in Japan and China.

## 3.3 Five conditions for a normative superpower

Professor Bradford identifies five conditions for a jurisdiction to unilaterally exert regulatory power: "*market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility*."[74] The combination of these elements allows the Union to exert its global regulatory power through market forces. The first condition is *market size*, which is a proxy to exert regulatory power over foreign corporations. More specifically, the market size depends on consumers' number and affluence. With a pool of over a billion consumers each, China and India are the largest consumer markets, whereas the United States is the world's most affluent market with a GDP per capita of $59,500. However, Chinese and Indian consumers only have a GDP per capita of $16,700 and $7,200, while the United States only has a 300 million consumer pool. By contrast, Europe has a large and valuable market with more than 450 million consumers and a GDP per capita of $40,900. Not surprisingly, some American corporations (Facebook, Google) often have more consumers and revenues in the EU than in the United States. In this way, the single market operates as a gravitational force for foreign corporations, and the Union is able to exert its regulatory power by offering conditional access to it. Companies often choose to bear the adjustment costs of Brussels's stringent regulations rather than abandoning such a profitable market.

[74] Bradford, *"The Brussels Effect,"* 25-66.

However, market size is a necessary, but not sufficient, condition for a regulatory hegemon. The second condition to unilaterally exert regulatory power is having a *regulatory capacity*, meaning the "ability to promulgate and enforce regulations."[75] Since the 1986 Single European Act that aimed at completing the single market by 1992, the EU developed an extensive regulatory capacity. Several factors, such as the Union's limited budget and competencies, as well as the pro-integration "bias" of the European personnel and courts have advanced Brussels's regulatory capacity. Initially, the Union had a small staff and budget, which only amounted to revenues from the external custom union. In the past fifty years, however, the Union acquired more competencies and resources, and the European Parliament gained significant influence in the legislative process as co-legislator with the Council. The expansion of Union competencies was accompanied by the "judicial integration" carry out by the ECJ, which has been instrumental in the interpretation of treaties, as well as in creating some of the central concepts of EU law such as the principles of supremacy or direct effect. For example, Art. 114 TFEU, which provides the Union with the power to harmonise national laws to ensure the establishment and functioning of the internal market, allowed for legislating on domains such as public health, where the EU has been given a limited mandate to act.[76] In addition, the Union has faced several crises over the years, including the 2012 sovereign debt crisis, the 2015 refugee crisis, and the COVID-19 pandemic in 2020. These crises have led to a strengthening of the EU's role in several areas, including border control, bank supervision, and the issuing of new EU sovereign bonds, increasing the EU's bureaucratic and regulatory capacity.

Furthermore, Professor Bradford highlights the importance of the political will to enforce *stringent standards* as a crucial component of regulatory capacity. These stringent standards allow companies to maintain a uniform standard across their operations, reducing compliance costs and minimizing the risk of errors. Wealthier nations tend to adopt these regulations more readily, as they would not have significant adverse effects on businesses and individuals. On the other hand, developing nations may be more hesitant to implement strict regulations that could hinder economic growth. Europe serves as a noteworthy example of a region that has undergone a transformation in this regard. In the 1990s, Europe lagged behind in terms of safety

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[75] Bradford, "*The Brussels Effect*," 31.

[76] For example, see *"Tobacco Advertising I",* Case C-376/98 Germany v Parliament and the Council, 2000 E.C.R. 8419 and *"Tobacco advertising II",* Case C-380/03 Germany v Parliament and the Council, 2006 E.C.R. 11573.

and environmental standards, but it has since taken the lead in the energy transition while preserving its social welfare system. The implementation of increasingly stringent standards was driven by several factors, including changes in public perception due to events such as the mad cow disease and the Chornobyl disaster, as well as the objective of completing the formation of the single market. Additionally, Europe's social market economy, as outlined in Article 3 of the Lisbon Treaty, necessitates the state's active involvement in regulating the economy and implementing stricter regulations. Finally, the adoption of stringent standards has led to a tendency towards administrative rulemaking and a precautionary approach. Unlike the United States, which relies on tort liability rules, class action lawsuits, and substantial monetary awards to deter harmful practices, the European Union relies on state intervention to prevent and put to an end such practices. The EU takes a more proactive and precautionary approach, while the United States tends to be more reactive and market-oriented. The EU's pre-emptive approach has been reinforced by the adoption of the precautionary principle, which is derived from Swedish and German environmental law.[77] This principle was recognised as a "general principle" of EU law in the *Artegodan* case and has provided the foundation for several regulations, including REACH, GMOs, and on beef hormones.[78] In short, the EU's institutional architecture, economic prosperity, and social market economy have all contributed to the development of stringent standards in public health and environmental regulations, which in turn, allows companies to apply a single standard to all markets.

The fourth condition for a jurisdiction to unilaterally impose its own standards is that stringent standards are aimed at *inelastic targets*, meaning "[immobile] products or producers that are not responsive to a regulatory change."[79] These products or producers, such as consumer products, are more likely to fall under the jurisdiction of a particular state. An example of an inelastic target is the consumer market, where products must comply with the standards of the market where they are sold, regardless of the state of incorporation of the company or the location of production. This means that companies operating in the EU must adopt stringent standards or exit the market.

[77] Ragnar E. Löfstedt, "The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis," *Journal of Risk and Uncertainty* 28 (2004): 237, 243–44.
[78] David Vogel, *"The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States,"* (Princeton: Princeton University Press, 2012): 10.
[79] Bradford, "*The Brussels Effect*," 49.

By contrast, capital markets are an example of elastic targets, as capital can easily move to jurisdictions with more favourable, less stringent rules. This is why the EU has more power to regulate product requirements but can hardly regulate corporate tax or financial services. Corporations and financial institutions can easily move their operations to other countries. In addition, the dichotomy between elastic and inelastic targets explains why there is no "Washington Effect." The United States, with its developed capital markets, has mainly regulated financial services rather than product requirements, without externalising its jurisdiction through market forces.

Finally, the fifth condition for a jurisdiction to unilaterally impose its standards on the global marketplace is *non-divisibility,* meaning the standardisation of "production and business practises across jurisdictions."[80] Domestic laws become global standards only when they are applied to a company's worldwide operations. This occurs when due to the economies of scale the benefits of using a single standard outweigh "the costs of forgoing lower costs in less regulated markets."[81] For instance, the adoption of a single (often most stringent) standard allows for maintaining a single production process, avoiding compliance errors, diverting exports in case of shortages, and preserving a global brand and reputation. More specifically, there are three types of non-divisibility: legal, technical, and economic, referring to the legal requirements, technical, and economic reasons determining the adoption of a single standard. Examples of this include Facebook's adoption of the EU privacy standards for all global users as most non-EU users are governed by the company's Dublin-based corporate entity.[82] US farmers' decision to no longer grow GMOs to prevent contamination with non-GMO crops, as well as US meat producers' decision to halt the production of hormones-treated meat to avoid compliance errors with Brussels regulations[83] or the exclusion from the single market. However, some products or conducts are divisible, limiting Brussels' range of action. For example, labour standards are divisible as long as producers are not required to concentrate production in a specific location nor to grant certain working conditions across their entire value

[80] Bradford, "*The Brussels Effect*," 54.
[81] Bradford, "*The Brussels Effect*," 54.
[82] It is worth mentioning that Facebook has subsequently introduced divisibility by moving users in Asia, Middle East, Africa and Australia under its US corporate entity.
[83] Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 O.J. (L 119) 32, 33; Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268).

chain. Therefore, non-divisibility is a crucial condition ensuring the externalisation of domestic rule worldwide.

In conclusion, a regulatory hegemon requires a combination of market power and regulatory capacity to enforce stringent standards on inelastic, non-divisible targets. Currently, the European Union is the only regulator possessing all of these conditions, enabling it to extend its regulations globally. Other nations such as the United States and China lack the same level of regulatory power due to the absence of their markets of both a large and valuable consumer pool and an active bureaucracy willing to enforce stringent standards.

## 3.4 The Europeanisation of environmental standards

The European Union's commitment to environmental protection in multilateral fora is well known. However, the Union's environmental aspirations have been best accomplished through the Brussels Effect, namely, through a unilateral imposition of European environmental standards.[84] Professor Bradford identified three domains where the EU has set global standards, including the regulation of hazardous substances and electronic waste, animal welfare, and the establishment of an emission trading system. These exemplify the impact of both the *de facto* and *de jure* Brussels Effect on environmental regulation.

In the past two decades, the European legislature enacted two influential directives for the electronics industry. In 2002, the directive on the Restriction of Hazardous Substances in Electrical and Electronic Equipment (RoHS)[85] banned the use of hazardous substances in the production of electrical and electronic equipment sold within the single market to avoid them from polluting the environment once devices end their life cycle. In 2012, the directive on Waste from Electrical and Electronic Equipment (WEEE)[86] aimed at moving e-waste from landfills to recycling. As a result, EU-operating companies were charged with the responsibility of product

[84] Bradford, "*The Brussels Effect*," 207.
[85] Directive 2002/95/EC, of the European Parliament and of the Council of 27 January 2003 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2003 O.J. (L 37) 19.
[86] Directive 2012/19/EU, of the European Parliament and of the Council of 4 July 2012 on Waste Electrical and Electronic Equipment (WEEE), 2012 O.J. (L 197) 38.

management throughout their products' entire life cycle. Companies operating in the single market, such as Hitachi and the Taiwan Semiconductor Manufacturing Company, soon comply with the new legislative acts.[87] However, selling products within the single market was not the only rationale behind companies' decision to spend "billions of dollars to redesign their products." [88] Compliance with RoHS was also due to other factors. First, the electronics industry is highly globalised. Several companies, including Oracle and Fujitsu, publicly stated to have made their entire production line RoHS compliant to avoid a separation of production lines.[89] Second, as larger players such as Dell, Samsung, and Apple began publicising their RoHS compliance as a way to differentiate themselves from competitors and appeal to environmentally conscious consumers, smaller companies followed suit in order to remain competitive.[90] In this way, these directives became a global standard for the technological industry.

Furthermore, the widespread adoption of RoHS compliance by companies also motivated them to push for similar regulations in their countries and regions, resulting in a de jure Brussels Effect. As noted by the Commission, RoHS provisions "have stimulated a reduction in hazardous materials all over the world: several countries, including China, Korea and the US, have developed RoHS-like legislation."[91] Many countries, including developed and developing ones, have adopted EU-like legislation on hazardous substances, such as Argentina, Brazil, China, India, Japan, Malaysia, Singapore, South Korea, Switzerland, Taiwan, Turkey, and Vietnam. [92] The state of California and South Korea are two prominent examples of this phenomenon. California enacted the California RoHS[93] and the California Waste Recycling Act,[94]

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[87] Cited in Bradford, "*The Brussels Effect*," 214. *Hitachi Group to Eliminate 6 Chemical Substances Targeted in RoHS by March 2005 Shifting to Lead-Free Solder by March 2004 in Japan and by March 2005 Worldwide*, HITACHI (Dec. 1, 2003), http://www.hitachi.com/New/cnews/031201.html. *Top 15 Semiconductor Sales Leaders—2018F*, ANYSILICON (Nov. 12, 2018), https://anysilicon.com/top-15-semiconductor-sales-leaders-2018f/.

[88] Cited in Bradford, "*The Brussels Effect*," 214. (Katja Biedenkopf, E-Waste Governance Beyond Borders—Does the EU Influence US Environmental Policy? 15 (2010) [https://perma.cc/HX6P-ERHK])

[89] *RoHS Compliance / Lead Free*, FUJITSU, http://www.fujitsu.com/us/about/local/corporate/subsidiaries/fcai/rohs/ [https://perma.cc/57GD-QFNT]; *Oracle Global Position on Restriction of Hazardous Substances (RoHS)*, ORACLE, http://www.oracle.com/us/products/applications/green/rohs-position-185078.pdf

[90] Cited in Bradford, "*The Brussels Effect*," 214 (Katja Biedenkopf, Institute for European Studies, Policy Recycling? The External Effects of EU Environmental Legislation on the United States, 241 (2011). *EU RoHS II (Restriction of Hazardous Substances Directive)*. SAMSUNG, [https://perma.cc/ZM4T-YC2Z])

[91] Diarmuid Torney, *"European Climate Leadership in Question: Policies Toward China and India"* (Cambridge, MA: MIT Press, 2015): 39-40.

[92] Bradford, "*Brussels Effect*," 223.

[93] CAL. HEALTH & SAFETY CODE §§ 25214.9–.10.2 (West 2003)

[94] CAL. PUB. RES. CODE §§ 42460–42486 (West 2004)

which were modelled on and incorporated EU standards. Strikingly, the California RoHS has been drafted to ban those electronic devices that cannot be sold according to the EU RoHS and automatically incorporate any further EU amendments.[95] Other states in the US, including New Jersey, Indiana, Minnesota, Illinois, New York, Wisconsin, and Rhode Island, have adopted rules in line with the EU's RoHS. Similarly, South Korea adopted the Act on the Resource Circulation of Electrical and Electronic Equipment and Vehicles, which aim to ban substances in the production of cars while enhancing recycling processes. On the country's ministry website, the regulation was described as: "EU RoHS + WEEE + ELV, etc = Act on the Resource Circulation of Electrical and Electronic Equipment and Vehicles,"[96] clearly demonstrating the influence of EU regulation on other jurisdictions.

With regard to animal welfare, the Union adopted some legislative acts on animal-tested cosmetics and slaughtering procedures which had a wide-reaching impact on companies and foreign jurisdictions. Housing some of the world-leading cosmetic companies, the EU is an "undisputed regulatory hegemon" in the cosmetic industry,[97] and following its new rules on the halt of animal-tested cosmetics in 2013, [98] world corporations such as Shisheido,[99] Kao,[100] and Kose[101] stopped testing their products on animals to sell products in the EU. This also compelled companies operating in China, which requires animal testing for market access, to create two separate production lines to sell their products in both markets. Nevertheless, China abolished such requirements in 2014, allowing companies to sell the same products in both markets. Moreover, the EU's directive on the Protection of Animals at the Time of Slaughter or Killing (1993),[102] which requires stunning of animals before slaughter,

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[95] CAL. PUB. RES. CODE, *supra* note 147, at §§ 42463, 42465.2(b); CAL. HEALTH & SAFETY CODE § 25214.10(b) (West 2006); Joanne Scott, "From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*," American Journal of Comparative Law 57* (2009)*:* 897, 942.
[96] Bradford, "*The Brussels Effect*," 224.
[97] David Bach & Abraham L. Newman, "Governing Lipitor and Lipstick: Capacity, Sequencing, and Power in International Pharmaceutical and Cosmetics Regulation," *Review of International Political Economy 17* (2010): 665, 685.
[98] Milestones in improving animal welfare, EUR. COMMISSION (2012) https://perma.cc/33C9-GHUV
[99] Shiseido to Abolish Testing Cosmetics on Animals*, Japan Times*.
[100] Koa, including Biore, Curel, and Nivea products, halted animal testing in 2015. *"*Kao Group Confirms Its Policy of "Neither Conducting Nor Outsourcing Animal Testing in Cosmetics," *Animal Rights Center*. http://www.arcj.org/en/animals/animaltesting/00/id=608
[101] Kose issued a similar statement in 2014. *"*Kose Group Promotes Alternatives to Animal Testing," *Beauty Packaging*. https://www.beautypackaging.com/contents/view_breaking-news/2014-10-16/kose-group-promotes-alternatives-to-animal-testing/.
[102] Council Directive 93/119/EC, of 22 December 1993 on the Protection of Animals at the Time of Slaughter or Killing, 1993 O.J. (L 340) 21.

applied to both domestic and imported meat, leading slaughterhouses around the world (Brazil, Thailand, Namibia, and Canada) to follow EFSA's stunning methods.[103] Other EU directives include the 1997 ban on veal crates (i.e. battery cages)[104] which prompted US veal meat producers towards group housing raising methods. Additionally, the 2007 Broiler Directive,[105] set maximum stocking densities, feeding, cleaning and other raising policies, leading Argentinian and Thai producers to align with Europe's demands. Finally, the 2005 Regulation on the Protection of Animals during Transport[106] also had a significant impact. In the Zuchtvieh-Export case, which involved the transport of cattle on a truck from Germany to Uzbekistan, the ECJ ruled out that the EU Regulation applies to other countries as long as the trip began in the EU. This ruling exemplifies what Joanne Scott referred to as the territorial extension theory,[107] which allows the Union to extend its jurisdiction insofar as there is a relevant territorial connection. Furthermore, Professor Bradford also identifies the influence of technical non-divisibility, meaning the territorial connection has allowed the EU to gain extraterritorial norm-setting power. These examples illustrate how the Union's animal welfare regulations have influenced world producers' practices.

As more and more companies began to comply with European norms, several countries enacted similar legislation. The European Parliament argued that the EU Directive banning hen barren battery cages "led to a great improvement in hen welfare and has had much influence around the world. Similar legislation and retail company standards are now in place in New Zealand, India, Taiwan, and Australian state, and several states of the U.S.A."[108] In the same way, the EU Directive on pig raising

[103] European Parliament Directorate-General for Internal Policies, *Animal Welfare in the European Union*, EUR. PARLIAMENT 32 (2017), http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf [https://perma.cc/K4WE-2B8Y]; *see also Beef—Market Report*, Government of Canada (2014) https://web.archive.org/web/20180807135043/http://www.canadainternational.gc.ca/eu-ue/policies-politiques/reports_beef-boeuf_rapports.aspx?lang=eng

[104] Directive 97/2/EC first phased out the use of veal crates and regulated the diets of calves, and was replaced by Council Directive 2008/119/EEC, of 18 December 2008. Council Directive 97/2/EC, 1997 O.J. (L 25) 24; Council Directive 2008/119/EC, 2009 O.J. (L 10) 7.

[105] Council Directive 2007/43/EC, 2007 O.J. (L 182) 19.

[106] Council Regulation (EC) No. 1/2005 of 22 December 2004 on the Protection of Animals During Transport and Related Operations and Amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, 2005 O.J. (L 3) 1.

[107] Joanne Scott, "Extraterritoriality and Territorial Extension in EU Law," *American Journal of Comparative Law* 62 (2013): 87.

[108] European Parliament Directorate-General for Internal Policies, "Animal Welfare in the European Union," *European Parliament* (2017): 31.

methods led to several legislative emulations in New Zealand, Australia, and many US states.[109]

Finally, the EU's attempt to expand the reach of its emission trading scheme (ETS) to the aviation industry provides another example of the Brussels Effect.[110] In 2008, due to the International Civil Aviation Organisation's (ICAO) failure to regulate CO2 emissions in aviation activities as provided by the Kyoto Protocol, the EU resorted to unilateralism by requiring planes taking off and landing in the EU to acquire emission permits for the entire flight. This was an attempt to extend its jurisdiction worldwide. However, this move faced opposition from other states, such as China, which cancelled Airbus aircraft orders and prohibited national airlines from taking part in the EU ETS in 2012.[111] India also contested the EU's unilateral imposition of its ETS and hosted a meeting where 26 countries signed the "Delhi Declaration." This was followed by another meeting in Moscow, where 23 countries, including China and India, signed the "Declaration on Inclusion of International Civil Aviation in the EU-ETS," which "reject[ed] the EU's move as unilateral, and called on the EU to reverse its decision."[112] Consequently, the Union decided to halt the Aviation Directive implementation until 2016, contingent on ICAO reaching a global agreement on the issue. This resulted in the creation of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), an emissions trading scheme with special provisions for small or less developed countries.[113] Furthermore, it is noteworthy that several countries have implemented their ETS domestically, [114] with China establishing the world's second-largest ETS in 2017. [115] Most importantly though, this case highlights how the Brussels Effect can facilitate international treaties.

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[109] Bradford, *"Brussels Effect,"* 226

[110] Directive 2008/101/EC, of the European Parliament and of the Council of 19 November 2008 Amending Directive 2003/87/EC So as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, 2009 O.J. (L 8) 3

[111] Torney, *"European Climate Leadership in Question: Policies Toward China and India"*: 134

[112] Torney, *"European Climate Leadership in Question: Policies Toward China and India"*: 134

[113] ICAO, "*Historic Agreement Reached to Mitigate International Aviation Emissions*," (Oct. 6, 2016), https://www.icao.int/Newsroom/Pages/Historic-agreement-reached-to-mitigate-international-aviation-emissions.aspx [

[114] Jan H. Jans & Hans H.B. Vedder, "European Environmental Law: After Lisbon," *European Law Publishing* (4th ed., 2012): 435.

[115] Cited in Bradford, *"The Brussels Effect,"* 221 (*ETS Detailed Information: China*, ICAP 1, https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems[]=55 [https://perma.cc/FR8F-FT4K])

## 3.5 The new black?

The theoretical framework developed by Professor Anu Bradford provides a useful tool to understand the potential Brussel Effect of any piece of legislation. In this case, we will use this framework to evaluate the potential externalisation of the Corporate Sustainability Due Diligence Directive (CS3D), which is undergoing scrutiny by the two chambers of the EU legislature. Hence, the question we will attempt to answer to is *whether the EU due diligence directive meets the necessary conditions to become a global standard*.

The directive is anticipated to meet all necessary conditions for several reasons. Firstly, the directive is supported by both the EU's market size and regulatory capacity. The Brussels Effect refers to the externalization of domestic regulations through market forces by conditioning access to the EU internal market. In this case, market access would be conditioned upon compliance with due diligence requirements across companies' value chains, and companies would either bear the adjustments costs of due diligence or exit the market. Moreover, the directive would be effectively enforced by the designated national and European bureaucracies. While decentralised enforcement may create differential enforcement outcomes if countries compete by offering company-friendly supervision in their jurisdiction,[116] effective supervision of environmental and human rights violations will be carried out by Europe's advanced regulatory capacity.[117]

Secondly, the directive introduces the most stringent standard globally. Due diligence legislation has been recently adopted in France (2017), the Netherlands (2019), Germany (2021), and Norway (2021). However, Section 1.3 highlighted how these legislations differ in scope, obligations, and enforcement measures. While this directive introduces compliance and potential liability costs for companies, it also provides them with a unique standard to operate in any member state, as well as around the globe insofar as it remains the world's most stringent standard.

Thirdly, the directive addresses inelastic targets. As mentioned in Section 2.3, the consumer market is the foremost example of an inelastic target. Regardless of their

[116] Remarks by Paul Davies, ecgi conference on the CS3D ( https://www.youtube.com/watch?v=qe8QMgRh28g )
[117] Remarks by Paul Davies, ecgi conference on the CS3D ( https://www.youtube.com/watch?v=qe8QMgRh28g )

state of incorporation, the companies within the scope of the directive would have to respect the required environmental and human rights standards to sell products or services to European consumers. These are inelastic targets as they cannot be relocated to more favourable, less stringent jurisdictions. It follows that corporations would either decide to bear the adjustment costs of the directive or simply direct their business towards other consumers. However, the European market is the only one offering a large pool of affluent consumers. We can, therefore, conclude that companies would likely decide to bear the directive's costs.

Finally, the EU directive would entail legal, technical, and economic non-divisibility. Domestic laws become global standards only when companies decide to voluntarily apply them to their global operations. This occurs when due to the economies of scale the benefits of using a single standard outweigh "the costs of forgoing lower costs in less regulated markets."[118] Companies deciding not to extend this due diligence standard to their entire value chain might face numerous challenges. Firstly, they would bear more production and compliance costs. Product customisation reduces the benefits arising from economies of scale as it involves the creation of different production lines, compliance units, and advertising campaigns. Companies would not exploit the economies of scale arising from producing and promoting their product globally. Due to the contractual cascading nature of the directive, companies would have to create different and separate production lines from the gathering of raw materials to the advertising of the final product. For example, a giant confectioner such as Nestlé would have to create two production lines for Europe and China. To launch its European production line, Nestlé would have to ensure its chocolate bean suppliers do not employ child labour, its subsidiaries and (established) business partners comply with the directive, and ultimately, cover the product's advertising in Europe. For the Chinese market instead, Nestlé would follow other, if any, due diligence requirements. Therefore, to ensure compliance with the directive, Nestlé would have to maintain strict separation between the raw material suppliers, production processes, and advertising services of products destined for the Chinese and European markets, leading to increased production, compliance, and advertising costs, as well as an increased risk of liability for non-compliance. Secondly, non-compliance would prevent companies from diverting exports in case of shortages. The production of a

[118] Bradford, *"The Brussels Effect,"*54.

single product allows companies to divert exports as demand fluctuates across different markets. In this way, companies would not need to exactly predict demand which can swiftly change due to economic malaise, a shift in consumer preferences, or distribution issues, allowing for adjusting to changing market conditions. Market-customised products cannot be easily transferred to other markets in case of changing demand, leading to possible supply bottlenecks. Coming back to the Nestlé case, the company could not divert the China-destined products to the European market in case of increased demand for chocolate bars in Europe. Thirdly, deciding not to engage in due diligence might involve reputational risks. A company's global reputation can easily be tarnished by environmental or human rights violation scandals, risking consumers to divert towards other more sustainable producers. Moreover, consumer awareness is further enhanced when companies engage in conduct which has been banned in other countries and is sanctioned with generous awards.[119] For example, the American confectioner Nestlé has been widely criticised for employing child labour in Africa and South America, leading to serious consumer concerns.[120] Therefore, despite the costs of compliance, companies would likely decide to comply with the directive also to reap its financial and reputational benefits.

More importantly, the directive would also eliminate the divisibility of labour standards, representing a clear example of a globalisation-driven regulatory race to the top.[121] Labour standards are characterised by non-divisibility as corporations can easily incorporate in less stringent jurisdictions or change their production location. Yet, addressing the production processes of services and products circulating in Europe, the directive is insensitive to the state of incorporation and production location, eliminating labour standards divisibility. Initially, the idea was that globalisation creates a race to the bottom, where states lower their regulatory standards to attract firms and capital. This results in convergence towards lower regulatory

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[119] Bradford, "*The Brussels Effect,"* 62.

[120] Joe Sandler Clarke, "Child Labour on Nestle Farms: Chocolate Giant's Problems Continue*," Guardian* (2015), https://www.theguardian.com/global-development-professionals-network/2015/sep/02/child-labour-on-nestle-farms-chocolate-giants-problems-continue

[121] For an overview of the impact of globalisation on regulatory standards, see Bruce Carruthers & Naomi Lamoreaux, *"*Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards,*" Journal of Economic Literature 54* (2016): 52. Daniel Drezner*, "*Globalization and Policy Convergence*," International Studies Review 3* (2001): 53, 57–58. David Vogel & Robert A. Kagan, "Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies," *University of California Press,* (2004): 13. On labour standards, see Brian Greenhill et al., *"*Trade-Based Diffusion of Labor Rights: A Panel Study, 1986–2002*," American Political Science Review* 103 (2009): 669, 678–80.

standards. However, empirical studies have questioned the extent of this phenomenon. Some literature suggests that globalization has instead led to a race to the top, with countries elevating their regulatory standards in response to the introduction of stringent regulatory standards by first-mover regulators. In short, while labour standards are often seen as divisible as companies can easily relocate to company-friendly jurisdictions, the European directive would operate a trade-based diffusion of due diligence globally, increasing environmental and human rights due diligence.

To conclude, the directive appears to satisfy Bradford's conditions, and consequently, to have a potential Brussels Effect. Overall, compliance with the mandatory due diligence provisions would involve some adjustment costs. However, it would also allow companies (i) to continue operating in the EU's large and affluent market, (ii) reap the financial benefits of applying a single standard to their entire production line, (iii) avoid the compliance costs ensuing from product customisation, and (iv) reduce compliance and reputational risks. Therefore, we conclude that the directive has the potential to set a global due diligence standard.

# 4. For a rebalanced social contract

Empirical research has demonstrated the failure of voluntary human rights due diligence and the need for mandatory provisions to make businesses accountable. In the following sections, we will examine the empirical studies showing (i) the failure of voluntary standards, (ii) the inefficiencies of the market-based oversight enshrined in disclosure requirements, and (iii) the need for and efficacy of mandatory due diligence to enhance corporate accountability in addressing environmental and human rights abuses across their value chains.

## 4.2 The failure of voluntary due diligence

Recent research has demonstrated that *voluntary* human rights due diligence, while an emerging concept, is still in an embryonic stage of development.[122] Voluntary guidelines inherently lack any form of enforcement which may incentivise companies to address human rights and environmental abuses linked to their global operations, leading to little social progress.[123]

The implementation of HRDD in practice has been examined by several empirical research studies, which coherently demonstrate the limits of voluntary measures. A study carried out in 2018 found that only 37% of 350 businesses were undertaking dedicated HRDD, with only half covering the entire value chain.[124] A second study in 2020 by the Corporate Human Rights Benchmark ('CHRB'), which provides annual data on large companies' respect for human rights and their responses to allegations of abuses, concluded that 'only a minority of companies demonstrate the willingness and commitment to take human rights seriously… [and highlighted] the

[122] McCorquodale and Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' *Netherlands International Law Review* (2021) 68: 466. See also European Coalition for Corporate Justice (ECCJ), Corporate Responsibility (CORE) Coalition (2020), "Debating mandatory human rights due diligence legislation: a reality check." Brussels: 5-6. http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf

[123] Smit L, Bright C, McCorquodale R et al., *"Study on due diligence requirements through the supply chain, at the request of the European Commission*" (2020): 49-50. https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[124] Smit L, Bright C, McCorquodale R et al., *"Study on due diligence requirements through the supply chain,"* 49-50.

disconnect between commitments and processes on the one hand and actual performance and results on the other'.[125]

Furthermore, the German government commissioned three studies. In December 2019, a study revealed that out of the 3,300 companies contacted only 460 responded, with between 17% and 19% of these companies able to document adequate HRDD practices.[126] In July 2020, another study showed that only 455 out of 2,200 contacted companies responded, with only 22% found to be in compliance with HRDD requirements.[127] Finally, another study conducted in October 2020 found that only 13-17% of businesses in Germany with more than 500 employees address human rights and environmental abuses in the absence of mandatory obligations.[128] As a result, the German government approved the Supply Chain Act in 2021, which introduces mandatory provisions to ensure due diligence across companies' value chains.

A report by the Danish Institute for Human Rights found that twenty of the Danish largest companies do not demonstrate alignment with the UNGPs, and three-quarters of them score below 50%.[129] A 2019 report by the Alliance for Corporate Transparency drew a similar conclusion, showing that only 22.2% of the 1000 companies analysed report on human rights.[130] Finally, a study by the European Commission on due diligence requirements through the supply chain also pointed in the same direction, finding that only 37% of the businesses surveyed currently undertake due diligence covering environmental and human rights, and only 16% covered the entire value chain.[131] In addition, the study highlighted that 68% of

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[125] World Benchmarking Alliance (2020) Corporate Human Rights Benchmark Key Findings Report. https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf

[126] Initiative Lieferkettengesetz, *"Deutsche Unternehmen bei Menschenrechts-Test durchgefallen – Katastrophales Ergebnis macht Lieferkettengesetz unumgänglich" (*2019). https://lieferkettengesetz.de/pressemitteilung/deutscheunternehmen-bei-menschenrechts-test-durchgefallen-katastrophales-ergebnis-macht-lieferkettengesetz-unumgaenglich

[127] Initiative Lieferkettengesetz, ""Ergebnis ist ein Offenbarungseid": Stellungnahme der Initiative Lieferkettengesetz zur Menschenrechts-Befragung deutscher Unternehmen" (2020). https://lieferkettengesetz.de/pressemitteilung/stellungnahme-zur-menschenrechts-befragung-deutscher-unternehmen.

[128] German Federal Foreign Office, *"Monitoring the National Action Plan for Business and Human Rights (NAP)",* (2020). https://www.auswaertiges-amt.de/d e/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoringnap/2131054.

[129] The Danish Institute for Human Rights, *"Documenting business respect for Human Rights - A snapshot of large Danish companies,"* (2020).

[130] Alliance for Corporate Transparency, *"2019 Research Report: An analysis of 43 the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive"*, (2020). EC, "*Study on due diligence requirements through the supply chain",* (2020).

[131] Lise Smit, Claire Bright, Robert McCorquodale, et al. "Study on Due Diligence Requirements Through the Supply Chain," *at the request of the European Commission*" (2020) https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

consulted stakeholders believe voluntary measures to be inefficient to address adverse impacts, and acknowledged that voluntary measures are expected to have "very small or no social impacts […] as they lack enforcement mechanisms and are dependent on company willingness to comply and transparently share procedural details".[132] In summary, all these studies demonstrate that voluntary measures are inefficient to prevent and mitigate adverse impacts across companies' value chains, and thus, call for enforceable measures.

## 4.3 The inefficiencies of market-based oversight

Several HRDD laws rely on corporate disclosure which is expected to empower stakeholders, such as investors, consumers, and civil society organisations (CSOs) to make businesses accountable for adverse human rights impacts.[133] The rationale behind these rules is that stakeholders would penalise businesses engaged in adverse impacts by not purchasing their products and securities or by running awareness campaigns on their abuses, resulting in a "market-based" oversight regime where market pressure is anticipated to enhance companies' practices and processes on human rights. However, market pressure is often exclusively exercised by civil society organisations which "monitor companies' compliance and initiate the complaint procedures available under the law."[134] Therefore, while disclosure requirements are a crucial step towards corporate accountability, they are poorly enforced due to a lack of state intervention.

Several laws require businesses to disclose their HRDD policies and actions, including the EU's Conflict Minerals Rule (2012), the US state of California's CTSCA

[132]Lise Smit, Claire Bright, Robert McCorquodale, et al. *"Study on Due Diligence Requirements Through the Supply Chain,"* 556.
[133] UK Home Office, *"Modern Slavery and Supply Chains Consultation"* 1, 8, 13 (2015) ("We believe that once it is made clear what activity major businesses are undertaking to ensure slavery and human trafficking is not taking place in their supply chains or own business, pressure from consumers, shareholders and campaigners and competition between businesses will encourage those who have not taken effective steps to do so." The document continues, "[i]nstead of relying on heavy-handed regulation, this measure will encourage businesses to do the right thing, by harnessing consumer and other stakeholder pressure, which will encourage and influence businesses to do more.").
[134] Chambers, Rachel and Vastardis, Anil Yilmaz, "Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability," *Chicago Journal of International Law* 21 no. 2, Article 4 (2021): 336.

(2012), the EU's Non-Financial Reporting Directive (NFRD) (2014),[135] the UK's Modern Slavery Act (2015),[136] the EU's Regulation for Importers of Tin and other materials (2017), France's Duty of Vigilance Law (2017),[137] and the Australian Modern Slavery Act (2018). Overall, these regulations predominantly rely on the "market" to hold businesses accountable as they lack (i) specific obligations on the content of disclosures, (ii) regulatory state intervention to ensure compliance and (iii) a common repository of companies' reports. For example, the NFRD requires companies of a certain size in the EU to report on human rights and related matters, including their HRDD processes and the corresponding outcome. The directive follows a "comply or explain" approach, meaning that companies can choose to comply with the directive by making the required disclosures or by providing an explanation for why they have decided not to do so. It is up to each EU member state to determine whether to require verification of reports by an independent assurance service provider and whether to have a sanctions regime for companies that fail to report adequately. While member states vary in the checks they have in place, it has largely fallen to the market to oversee reporting. Similarly, the French Duty of Vigilance Law, which positively "moves away from exclusively relying on market-based oversight" by attaching sanctions to disclosure requirements, [138] has been criticised for its high coverage threshold, weak sanctions, and lack of government monitoring. In short, these laws exclusively or predominantly rely on market-based oversight, leading to inefficiencies and impunity.

With the absence of content disclosure obligations, state intervention, and a common repository, three weaknesses arise. Firstly, the absence of content disclosure allows companies to simply describe their commitment and processes to address human rights leaving little space, if any, for substantial issues and specific risks to employees. This fails to provide the public with the kind of meaningful information to rely on in making an investment decision and often allows companies to create a misleading narrative of their human rights performance. Secondly, the lack of state

[135] Directive No. 2014/95 of the European Parliament and of Council of 22 October 2014 amending Directive No. 2013/34 as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 57 (EU).
[136] Modern Slavery Act 2015, c. 30 §§ 1–62, § 54 sched. 1–5 (U.K.)
[137] Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette Of France], Mar. 28, 2017.
[138] Chambers and Vastardis, *"Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability,"* 336.

intervention leads to poor compliance in companies' disclosure as they do not feel compelled to disclose information in the absence of active monitoring and enforcement by regulatory authorities. This leads to a phenomenon of unpunished lack of disclosure, inadequate disclosure, or faulty disclosure. Moreover, lacking state intervention, civil society organisations are often the only entities (unrealistically) overseeing corporate's conduct and compliance with the law. Thirdly, the lack of a common repository makes it difficult for the state and civil society to access and compare information disclosed by companies, limiting controls. Therefore, the authors suggest that while disclosure requirements are a crucial step towards corporate accountability, they often rely on an inefficient market-based oversight regime. To be efficiently enforced, disclosure obligations should demand specific and meaningful information and be enforced through the state's bureaucracy.

Furthermore, even when companies fulfil their disclosure obligations, doubts remain about their effectiveness. Empirical research indicates that human rights disclosure is "more symbolic than substantive,"[139] and stakeholders often do not know about such disclosures. It follows that consumer changing behaviour due to the information contained in such disclosures is "inconsistent, at best"[140] as "supply chain disclosures are unlikely to be understood and used by consumers making purchasing decisions."[141] As a result, Chambers et al. suggest that

"human rights due diligence and disclosure requirements must be accompanied by rules establishing: (1) a formal list of businesses covered by the requirements and a publicly accessible repository for storing annual disclosures; (2) an institutional structure to exercise oversight; and (3) enforcement functions. The institutional structure should have subject matter expertise, in order to provide training and guidelines to ensure accuracy and completeness of disclosures."[142]

However, the regulatory body designed to oversee corporate compliance might face a huge task in supervising the reports of all companies falling within the scope of

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[139] Rachel N. Birkey et al., Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010, *Journal of Business Ethics* 152 (2018): 827, 837.
[140] Marcia Narine, "Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts," *Columbia Human Rights Law Review* 47 (2015): 147.
[141] Adam S. Chilton & Galit A. Sarfaty, "The Limitation of Supply Chain Disclosure Regimes," *Stanford Journal of International Law* 53 no. 1, (2017): 12.
[142] Chambers and Vastardis*, "Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability,"* 355.

the laws of disclosure. Nevertheless, this obstacle might be overcome by controlling only some annual random samples while focusing on some specific cases prompted by investors and civil society organisations. In this way, oversight would no longer be entirely dependent on the voluntary actions of investors and civil society organisations, but on an efficient central regulatory body. This solution allows for combining transparency with efficient enforcement and calls on states to adopt mandatory due diligence provisions.

## 4.4 The social benefits of mandatory due diligence

Although many national laws and some sector-specific initiatives in the European Union require companies to carry out due diligence, such as the French Duty of Vigilance Law, Dutch Law on Child Labour, UK Modern Slavery Act, EUTR, and Conflict Minerals Regulation, post-implementation evaluations are rarely conducted. This is primarily due to the recent implementation of these measures and the challenge of assessing their impact on the ground, which stems from the broad scope of these obligations and the requirement to take action in third countries where a company's operations, subcontractors, and suppliers are located. Nevertheless, some recent research has demonstrated the positive impact of mHRDD, and we will attempt to answer the question of *whether the mHRDD enhances respect for environmental standards and human rights.*

First of all, it is worth mentioning that stakeholders and companies believe that mHRDD would have a more positive impact than previous voluntary standards. The majority of respondents of the European Commission's study on due diligence requirements through the supply chain believe in the positive impact of new mHRDD respectively on human rights (67.6%) and the environment (52.9%). The Commission has also concluded that due diligence regulation is likely to increase labour conditions in third countries.

Furthermore, as highlighted by the EU's study on corporate due diligence, the cases of the Better Work Programme and the Accord on Fire and Building Safety in Bangladesh offer some insights into the potential impact of due diligence. While these two are not proper cases of due diligence obligations, they share useful similarities

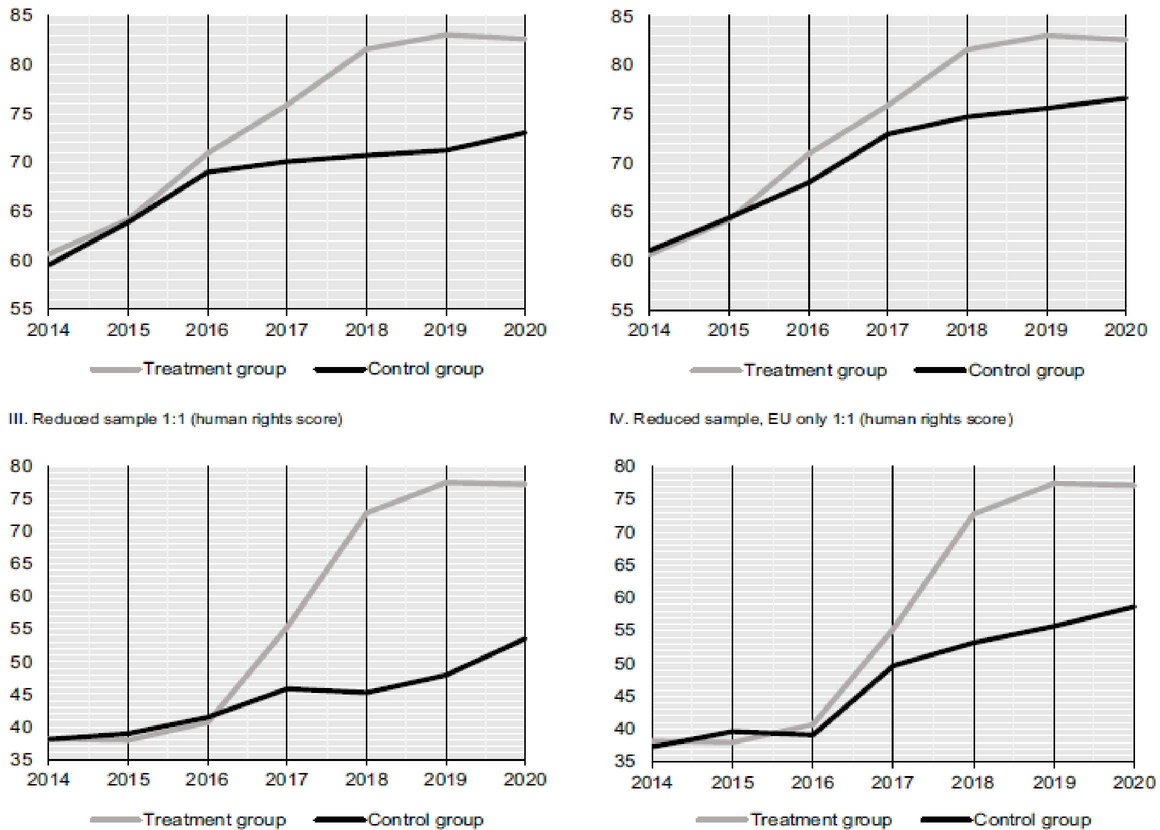
which allow for some qualitative conclusions. The Better Work Program, a joint ILO and IFC/WB initiative, aims to improve workplace conditions by influencing upstream companies' behaviour in the textile and garment value chain and has established a binding partnership model with global brands to mitigate the harm resulting from non-compliance in their supply chains. The participating factories have shown improvements in compensation, contracts, occupational safety and health, working time, and reduction in forced labour and coercive practices, leading to an overall compliance improvement of 4.3%. Similarly, the Accord on Fire and Building Safety in Bangladesh and the Alliance for Bangladesh Worker Safety were established to address problems in factories from which global retailers and brands sourced their garments, after the 2013 Rana Plaza disaster. These agreements have been successful in improving workplace safety, with over 90% of safety issues addressed in Bangladeshi factories covered by the accord. However, limitations exist because manufacturers subcontract to companies may not be covered by the accord. The impact of participation in the accord (and/or Alliance) has been substantial in terms of many indicators of working conditions, but there has not been a significant impact on wages. The positive changes have been attributed to pressures by the buyer, indicating the effective incentive that the accord provided, through enforceability, for buyer companies to properly assess risks in the workplace. In short, these programmes "provide examples of positive consequences on fundamental labour rights and working conditions in factories being embedded in responsible value chains."[143]

Moreover, Professors Lafarre and Rombouts have recently conducted the first empirical study assessing the impact of the French Duty of Vigilance Law. They compared the companies falling within the scope of the law (treatment group) and those which are not required to comply with it (control group), and observe the performance of the two groups in the Refinitiv human rights score (0-100) from 2014 to 2020. The data collected demonstrate that "there may be a significant treatment effect resulting from the French vigilance law, particularly for the laggards."[144] There has been both an anticipation effect before the law entered into force in 2014-16, as well as after its implementation in 2017 up to 2020 as companies' ratings steadily increased in the time frame. In short, while further research is needed to establish any

[143] Bradford, *"The Brussels Effect,"* 56.
[144] Anne Lafarre and Bas Rombouts, "Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value Chains," *European Journal of Risk Regulation* 13, no. 4 (2022): 580.

causal relationship, these findings demonstrate that a mandatory duty of care can incentivise corporate decision-makers to address human rights adverse impacts across their value chains. As a result, the authors "recommend that European legislators increase the mHRDD requirements in the CSDDD to further improve the human rights conduct of companies."[145]

***Figure 2 - The impact of the French Duty of Vigilance Law on companies' Refinitiv Human***




*Source: Anne Lafarre and Bas Rombouts, "Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value Chains," European Journal of Risk Regulation 13, no. 4 (2022)*

Finally, we attempted to replicate the research conducted by Professors Lafarre and Rombouts on German companies. As discussed in Section 2.3, the German Parliament adopted a Supply Chain Act in 2021 requiring Germany-incorporated companies with +3.000 employees to conduct due diligence across their global operations.[146] We observed the performance of the Refinitiv human rights score of the companies falling within the scope of the norm, which came into force in January

[145] Lafarre and Rombouts, *"Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value Chains,"* 583.
[146] Germany-incorporated companies with +1.000 employees would be required to conduct due diligence starting from 2024.

2023.[147] On the basis of the data available, we created two samples: a bigger sample gathering the human rights score of 129 companies from 2019 to 2021 and a smaller sample gathering the human rights score of 14 companies from 2020 to 2022. The second sample comprises the companies of the first sample with data available for the time period 2020-22. Our analysis shows that German firms' human rights performance has increased from 61,56 in 2019 to 69,12 in 2021. Moreover, the second small sample shows that companies falling within the scope of the directive, which has been adopted by the Parliament in 2021, continue to increase their human rights score performance peaking at 72,87 in 2022.

However, my research design has three major shortcomings. Firstly, my observation can only look at an anticipation effect supposedly created by the norm, as the latter only entered into force in January 2023. Secondly, my non-experimental research cannot establish any form of causal relationship as it has not been compared to the performance of a control group of companies not complying with the norm. Thirdly, very little data on companies' human rights scores were available in 2022 as enterprises update their data in different months of the financial year. Nevertheless, the value of my research relies on showing that the German corporate community has recently engaged in due diligence efforts, and this may, in part, depend on the adoption and entry into force of mHRDD. This provides an initial insight into the impact of German legislation and calls for further research to establish any form of a causal relationship.

To conclude, while mHRDD is not a panacea to sustainable improvement, it is nonetheless expected to address the (i) lack of obligation for businesses to comply with environmental and human rights standards, as well as (ii) the difficulties to remedy faced by victims of adverse impacts.[148] This would likely enhance the respect for environmental standards and human rights across global value chains.

[147] The data have been directly provided by Refinitiv's Customer Service.
[148] ECCJ and CORE, "Debating Mandatory Human Rights Due Diligence Legislation: A Reality Check." (2020): 31.

*Figure 3 - The Refinitiv Human Rights score of the German companies with +3.000 employees from 2019 to 2021*

| Row Labels | Average of Human Rights Score (FY2019) | Average of Human Rights Score (FY2020) | Average of Human Rights Score (FY2021) |
|---|---|---|---|
| 1&1 AG | 21.76 | 31.16 | 41.30 |
| Aareal Bank AG | 87.10 | 87.40 | 88.69 |
| Adidas AG | 91.14 | 91.41 | 92.48 |
| ADVA Optical Networking SE | 45.28 | 39.29 | 74.34 |
| Aixtron SE | 27.74 | 44.03 | 79.67 |
| All for One Group SE | 31.33 | 97.16 | 95.75 |
| Allane SE | 69.03 | 67.43 | 67.35 |
| Allianz SE | 91.22 | 90.06 | 89.43 |
| alstria office REIT AG | 76.25 | 90.80 | 88.17 |
| AURELIUS Equity Opportunities SE & Co KgaA | 53.42 | 48.41 | 63.10 |
| BASF SE | 92.54 | 92.69 | 93.08 |
| Basler AG | 6.60 | 6.43 | 6.25 |
| Bayer AG | 95.39 | 94.86 | 94.90 |
| Bayerische Motoren Werke AG | 92.04 | 91.67 | 90.83 |
| BayWa AG | 35.51 | 61.82 | 56.17 |
| Bechtle AG | 89.78 | 83.81 | 82.14 |
| Beiersdorf AG | 54.63 | 55.83 | 91.10 |
| Bertrandt AG | 37.99 | 41.67 | 39.56 |
| Bilfinger SE | 79.39 | 77.03 | 79.64 |
| Biotest AG | 82.89 | 80.86 | 79.61 |
| Brenntag SE | 41.99 | 43.84 | 43.85 |
| Cancom SE | 77.33 | 83.81 | 82.14 |
| Carl Zeiss Meditec AG | 82.77 | 77.56 | 71.94 |
| Ceconomy AG | 83.22 | 83.13 | 80.71 |
| Cewe Stiftung & Co KGaA | 32.96 | 36.84 | 35.69 |
| Commerzbank AG | 79.68 | 78.95 | 78.49 |
| CompuGroup Medical SE & Co KgaA | 47.33 | 47.44 | 44.34 |
| Covestro AG | 70.17 | 69.86 | 70.19 |
| Delivery Hero SE | 56.00 | 97.16 | 95.75 |
| Deutsche Bank AG | 95.65 | 95.71 | 95.07 |
| Deutsche Boerse AG | 74.66 | 72.93 | 70.48 |
| Deutsche Lufthansa AG | 97.10 | 96.88 | 95.79 |
| Deutsche Pfandbriefbank AG | 17.74 | 16.89 | 44.64 |
| Deutsche Post AG | 92.86 | 96.23 | 96.88 |
| Deutsche Telekom AG | 91.60 | 90.41 | 89.13 |
| DEUTZ AG | 80.03 | 80.34 | 80.55 |
| DIC Asset AG | 51.97 | 51.16 | 80.20 |
| DMG Mori AG | 41.18 | 37.65 | 36.89 |
| Draegerwerk AG & Co KGaA | 70.59 | 69.23 | 79.44 |
| Duerr AG | 33.44 | 49.40 | 73.57 |

| | | | |
|---|---|---|---|
| E ON SE | 93.33 | 93.75 | 93.90 |
| Eckert & Ziegler Strahlen und Medizintechnik AG | 50.66 | 47.43 | 46.36 |
| Elmos Semiconductor SE | 27.74 | 25.16 | 66.76 |
| Evonik Industries AG | 92.54 | 92.69 | 93.08 |
| Fielmann AG | 64.34 | 62.27 | 80.71 |
| Francotyp Postalia Holding AG | 87.15 | 87.50 | 86.53 |
| Fresenius Medical Care AG & Co KGaA | 71.28 | 69.67 | 90.36 |
| Fresenius SE & Co KGaA | 90.43 | 90.16 | 90.36 |
| Fuchs Petrolub SE | 92.54 | 92.69 | 93.08 |
| GEA Group AG | 83.75 | 84.05 | 83.62 |
| Gerresheimer AG | 70.59 | 69.23 | 79.44 |
| Gerry Weber International AG | 91.14 | 91.41 | 64.60 |
| Gesco SE | 12.85 | 13.07 | 21.67 |
| GFT Technologies SE | 79.78 | 79.69 | 88.24 |
| H&R GmbH & Co KgaA | 41.99 | 43.84 | 43.85 |
| Hamburger Hafen und Logistik AG | 97.32 | 97.76 | 96.30 |
| Hannover Rueck SE | 91.22 | 90.06 | 89.43 |
| Hapag Lloyd AG | 86.90 | 85.85 | 84.38 |
| HeidelbergCement AG | 81.37 | 92.74 | 93.13 |
| Heidelberger Druckmaschinen AG | 67.65 | 66.31 | 64.80 |
| HELLA GmbH & Co KGaA | 76.11 | 75.81 | 75.92 |
| Hellofresh SE | 10.16 | 92.17 | 92.31 |
| Henkel AG & Co KGaA | 92.54 | 92.69 | 93.08 |
| Hornbach Baumarkt AG | 20.63 | 22.39 | 21.32 |
| HORNBACH Holding AG & Co KgaA | 20.63 | 22.39 | 21.32 |
| Hypoport SE | 83.33 | 63.64 | 61.54 |
| Indus Holding AG | 10.00 | 11.46 | 11.86 |
| Infineon Technologies AG | 77.01 | 72.64 | 66.76 |
| Jungheinrich AG | 33.44 | 30.94 | 48.52 |
| Kloeckner & Co SE | 72.02 | 72.15 | 71.27 |
| Knorr Bremse AG | 92.88 | 92.93 | 92.71 |
| Koenig & Bauer AG | 26.78 | 24.94 | 39.53 |
| Krones AG | 58.67 | 56.59 | 56.13 |
| KWS SAAT SE & Co KgaA | 41.30 | 42.83 | 65.98 |
| Lanxess AG | 83.43 | 84.02 | 84.81 |
| LEG Immobilien SE | 9.27 | 41.20 | 70.97 |
| MBB SE | 32.96 | 36.84 | 35.69 |
| McKesson Europe AG | 15.46 | 16.57 | 14.81 |
| Mercedes Benz Group AG | 92.04 | 91.67 | 90.83 |
| Merck KGaA | 95.39 | 94.86 | 94.90 |
| METRO AG | 47.66 | 92.17 | 92.31 |
| MLP SE | 64.04 | 63.06 | 59.76 |
| MorphoSys AG | 35.87 | 34.43 | 36.00 |
| MTU Aero Engines AG | 80.00 | 77.54 | 81.94 |
| Muenchener Rueckversicherungs Gesellschaft in Muenchen AG | 91.22 | 90.06 | 89.43 |
| Mvv Energie AG | 9.00 | 72.49 | 74.90 |
| New Work SE | 44.22 | 43.89 | 41.29 |
| Nordex SE | 92.88 | 92.93 | 92.71 |

| | | | |
|---|---|---|---|
| Norma Group SE | 92.88 | 92.93 | 92.71 |
| Patrizia SE | 64.61 | 77.31 | 80.20 |
| ProCredit Holding AG & Co KGaA | 61.13 | 59.65 | 63.44 |
| Prosiebensat 1 Media SE | 2.86 | 4.59 | 5.08 |
| PSI Software AG | 14.44 | 12.50 | 11.11 |
| Puma SE | 91.14 | 91.41 | 92.48 |
| Rational AG | 36.11 | 32.65 | 36.89 |
| Rheinmetall AG | 88.33 | 94.93 | 94.44 |
| RWE AG | 48.33 | 35.94 | 43.90 |
| Saf-Holland Se | 65.61 | 65.59 | 65.14 |
| Salzgitter AG | 55.75 | 57.05 | 71.27 |
| SAP SE | 83.33 | 89.91 | 95.75 |
| Sartorius AG | 93.70 | 92.63 | 92.50 |
| Schaeffler AG | 92.04 | 91.67 | 90.83 |
| Scout24 SE | 6.67 | 5.82 | 12.31 |
| SGL Carbon SE | 83.93 | 83.39 | 82.54 |
| Siemens AG | 95.00 | 95.83 | 94.07 |
| Siltronic AG | 51.46 | 44.03 | 40.66 |
| Sixt SE | 9.42 | 8.13 | 18.42 |
| Software AG | 77.33 | 83.81 | 82.14 |
| Stabilus SE | 92.88 | 92.93 | 92.71 |
| Stratec SE | 76.47 | 92.63 | 92.50 |
| Suedzucker AG | 73.43 | 75.19 | 73.89 |
| Symrise AG | 92.54 | 92.69 | 93.08 |
| TAG Immobilien AG | 51.97 | 51.16 | 73.66 |
| Takkt AG | 7.69 | 7.14 | 46.88 |
| Talanx AG | 4.20 | 76.92 | 89.43 |
| TeamViewer AG | 83.33 | 89.91 | 88.24 |
| thyssenkrupp AG | 92.86 | 92.79 | 92.11 |
| Traton SE | 33.44 | 30.94 | 56.13 |
| TUI AG | 42.81 | 42.81 | 35.91 |
| Uniper SE | 78.33 | 78.13 | 80.49 |
| United Internet AG | 30.92 | 26.03 | 27.95 |
| Varta AG | 8.51 | 24.34 | 36.89 |
| Volkswagen AG | 92.04 | 91.67 | 90.83 |
| Vonovia SE | 96.07 | 94.91 | 93.79 |
| Vossloh AG | 16.23 | 29.05 | 28.35 |
| Wacker Neuson SE | 33.44 | 30.94 | 29.49 |
| WashTec AG | 33.44 | 30.94 | 29.49 |
| Zalando SE | 61.78 | 63.21 | 61.44 |
| **Average** | **61.56** | **65.34** | **69.12** |

*Figure 4 - The Refinitiv Human Rights score of the German companies with +3.000 employees from 2020 to 2022*

| German companies with +3.000 employees | Average of Human Rights Score (FY2020) | Average of Human Rights Score (FY2021) | Average of Human Rights Score (FY2022) |
|---|---|---|---|
| All for One Group SE | 97.16 | 95.75 | 95.70 |
| Ceconomy AG | 83.13 | 80.71 | 93.95 |
| CropEnergies AG | 70.73 | 64.15 | 66.04 |
| Heidelberger Druckmaschinen AG | 66.31 | 64.80 | 65.43 |
| HELLA GmbH & Co KGaA | 75.81 | 75.92 | 91.67 |
| Hornbach Baumarkt AG | 22.39 | 21.32 | 20.47 |
| Infineon Technologies AG | 72.64 | 66.76 | 66.39 |
| KWS SAAT SE & Co KgaA | 42.83 | 65.98 | 68.48 |
| METRO AG | 92.17 | 92.31 | 93.46 |
| Siemens AG | 95.83 | 94.07 | 94.44 |
| Siemens Energy AG | 96.34 | 93.40 | 94.34 |
| Siemens Healthineers AG | 92.63 | 92.50 | 92.54 |
| TUI AG | 42.81 | 35.91 | 38.28 |
| Verbio Vereinigte Bioenergie AG | 8.54 | 17.92 | 40.57 |
| **Average** | **68.38** | **68.55** | **72.87** |

# 5. Conclusion

This thesis proposed an assessment of the potential Brussels Effect of the Corporate Sustainability Due Diligence Directive (CS3D), answering the research question: *"does the CS3D have a potential Brussels Effect?"* This assessment involved a review of existing literature on due diligence and the Brussels Effect, followed by both theoretical and empirical analyses. The study first traced the evolution of due diligence from a business concept to a mandatory measure. Subsequently, the study examined the research question from a theoretical perspective by considering Professor Bradford's theory of the Brussels Effect, which describes the EU's power to regulate the global marketplace unilaterally. This theoretical analysis suggested that the Directive meets the necessary conditions (market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility) to influence other jurisdictions.

Furthermore, the study analyses the Directive from an empirical perspective, using recent surveys and empirical research which demonstrate the failure of voluntary measures and the need for mandatory due diligence provisions. Specifically, the study tests the impact of mandatory due diligence legislation introduced in France and Germany showing how these laws are correlated to an increase in companies' Refinitiv human rights score.

In conclusion, this study finds that (i) the Directive meets the theoretical conditions required to become a global standard and that (ii) the introduction of mandatory due diligence is associated with an improvement in companies' Refinitiv human rights score. Therefore, *the study concludes that the Directive is likely to have a significant Brussels Effect, promoting greater respect for environmental and human rights worldwide*. However, the magnitude of this impact depends on the final drafting of the legislation.

# Riassunto

In aprile 2013, il complesso industriale di abbigliamento Rana Plaza collassò in Bangladesh. Oltre 3.000 lavoratori avvertirono una sensazione simile a un terremoto: i pilastri di cemento implosero e il pavimento della fabbrica crollò sotto i loro piedi, causando la morte di più di 1.100 persone. Questa è una storia sul costo, spesso letale, dei vestiti che indossiamo e, più in generale, sull'insostenibilità di alcune attività commerciali. È un tema complesso perché abbraccia tutto il mondo, ma è anche semplice perché rivela le nostre intuizioni di giustizia di come dovrebbe funzionare una società in cui le imprese rispettano la dignità delle persone.

Le multinazionali non sono soggette a regole internazionali obbligatorie che le costringano a prevenire e rimediare i loro impatti negativi sui diritti umani e sull'ambiente. La mancanza di un quadro normativo è stata affrontata per la prima volta nel 2011 attraverso l'adozione dei Principi Guida delle Nazioni Unite sulle Imprese e i Diritti Umani (UNGPs), che hanno fornito un quadro normativo volontario per integrare i diritti umani nelle pratiche aziendali. Tuttavia, l'effetto limitato di misure volontarie permette il ripetersi di situazioni simili a quella di Rana Plaza. Per questo motivo, alcuni stati europei (Francia, Paesi Bassi, Germania e Norvegia) hanno recentemente emanato diverse normative obbligatorie per prevenire tale rischio. Inoltre, l'Unione Europea sta negoziando una direttiva sulla Corporate Sustainability Due Diligence (CS3D), che, come proposto dalla Commissione Europea nel febbraio 2022, mira a garantire che le aziende prevengano ed pongano rimedio ai loro impatti negativi sui diritti umani e sull'ambiente. L'ambito applicativo della direttiva coinvolge sia alcune aziende con sede o operanti nel mercato unico, nonché i loro partner commerciali nelle catene del valore al di fuori dell'Unione.

Questa tesi esamina il concetto di "Brussels Effect", che identifica il potere dell'Unione nel regolamentare in maniera unilaterale il mercato globale, per poi valutare se la direttiva abbia il potenziale per diventare uno standard internazionale. In particolare, questa tesi cerca di rispondere, attraverso un'analisi teorica ed empirica, alla seguente domanda di ricerca: *"La CS3D potrebbe avere un potenziale Brussels Effect?"* Per rispondere a questa domanda di ricerca, la tesi è strutturata per esaminare l'interazione tra l'evoluzione del quadro normativo e il concetto di Brussels Effect. La Sezione II esamina l'evoluzione della due diligence nelle sue tre fasi evolutive: come

concetto aziendale, linea guida volontaria e norma obbligatoria, nonché il testo della direttiva proposta dalla Commissione. La Sezione III esamina invece la nostra domanda di ricerca da una prospettiva teorica. Dopo aver illustrato la teoria della Professoressa Anu Bradford sul Brussels Effect, la sezione valuta se la direttiva soddisfa le caratteristiche teoriche richieste per influenzare unilateralmente altre giurisdizioni. La Sezione IV analizza la direttiva da un punto di vista empirico, mostrando come sondaggi e studi recenti indichino il fallimento delle misure volontarie e chiedano agli Stati di adottare disposizioni obbligatorie in materia di due diligence. Inoltre, la sezione evidenzia un recente studio empirico sull'impatto della legislazione obbligatoria in materia di due diligence in Francia attraverso il punteggio sui diritti umani elaborati da Refinitiv, e conduce uno studio non sperimentale simile per la Germania. La Sezione V conclude.

Questa ricerca mostra che (i) la direttiva soddisfa le condizioni teoriche necessarie per diventare uno standard globale e che (ii) l'introduzione in alcuni stati di normative obbligatorie di due diligence è correlata a un miglioramento del punteggio sui diritti umani Refinitiv delle loro aziende. Pertanto, questa tesi conclude che la direttiva ha il potenziale di diventare uno standard globale, migliorando il rispetto dell'ambiente e dei diritti umani in molti paesi al di fuori dell'Unione. Tuttavia, l'entità di questo impatto dipende in ultima analisi dalla stesura finale della legislazione prevista per il 2024. Infatti, il contenuto di normative obbligatorie di due diligence è importante quanto la loro stessa esistenza. Normative mal redatte non solo saranno incapaci di evitare gli impatti negativi delle aziende, ma addirittura potrebbero impedire di punire i loro responsabili.