

# ENFORCEMENT OF MANDATORY DUE DILIGENCE:

KEY DESIGN CONSIDERATIONS FOR  
ADMINISTRATIVE SUPERVISION

POLICY PAPER | OCTOBER 2021

*Shift*



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# OBJECTIVES

As the move towards mandatory human rights and environmental due diligence ('HREDD') gathers pace in Europe, it is timely to look ahead to how accountability for new corporate duties may be enforced. A wide range of stakeholders are interested in how to ensure that these new measures have their intended result: that is, that they lead to better outcomes for people and planet. The design of eventual enforcement measures will play a key role in answering this question.

In response to this, Shift and the Office of the UN High Commissioner for Human Rights (OHCHR) decided in early 2021 to collaborate on a project to explore **effective accountability for new mandatory HREDD regimes**, grounded in the UN Guiding Principles on Business and Human Rights ('UNGPs'), through two **complementary approaches: civil liability for certain human rights harms and administrative supervision**. We focused in particular on the **role of administrative supervision** of new corporate duties, which has received less attention in the debate so far yet will clearly form an important part of national approaches under recently adopted legislation in countries like Germany, the Netherlands and Norway, as well as under future European Union ('EU') legislation.

## THIS POLICY PAPER HAS THREE OBJECTIVES:

- 1 **EXPLORING administrative supervision as a complement to civil liability for harms for enforcing corporate duties to do HREDD**, with potential relevance to many jurisdictions, including beyond Europe;
- 2 **LOOKING ahead to how effective enforcement of HREDD can be given strong foundations in new EU legislation to support effective transposition into national laws;**
- 3 **DEVELOPING practical guidance for policy-makers in Europe on how to avoid common pitfalls in other areas of corporate regulation and what needs particular emphasis in designing administrative supervision of new HREDD duties.**

We recognise that there are significant differences between jurisdictions in how existing modes of enforcement operate that will influence future approaches. At the same time, if new due diligence duties are going to help ensure a level playing field – a central objective for many stakeholders from business and beyond – we

believe it is essential to consider how enforcement will work in practice as part of drafting new legislation, including at EU level.

In this paper, we briefly explain the context and the process we have followed (See section "Context and Process"). We then define some key terms we use throughout the paper (See section "Key Terms") before going on to explore:

- the **complementarity** between administrative supervision of new due diligence duties and judicial enforcement through civil liability for certain harms (See section "Administrative Supervision as a Complement to Civil Liability for Harms");
- potential **regulatory objectives of administrative supervision**, grounded in the objective of HREDD to achieve better outcomes for people and planet (See section "Defining Regulatory Objectives for Administrative Supervision"); and
- **critical design features** that flow from these regulatory objectives that we believe any State will want to consider when crafting appropriate roles and powers for administrative authorities (See section "Six Design Features").<sup>1</sup>

This paper is primarily intended for individuals with responsibility for the business and human rights (or responsible business conduct) file at the EU and national levels. They may sit in departments of justice, employment/labour, economics/finance, foreign/external affairs or development. It should also be of interest to members of the EU Parliament and national legislatures that are engaged in these debates, as well as stakeholders from business and civil society.

# CONTEXT AND PROCESS

In its resolution in March 2021, the **European Parliament** recommended civil liability for harms together with administrative supervision to ensure accountability for a new corporate duty to do HREDD.<sup>2</sup> The EU Justice Commissioner, Didier Reynders, has stated that both aspects will be included in the Commission's proposed legislation on corporate due diligence, due later this year.

Meanwhile, several national approaches in Europe already highlight the relevance of considering the complementarity between these approaches. For example:

- In the **Netherlands**, a March 2021 parliamentary proposal for comprehensive due diligence legislation included both civil liability for harms and administrative supervision, and both are expected to feature in the government's 'building blocks' for new legislation, currently in development;
- In **Germany**, the Supply Chain Due Diligence Law allocates new powers to an existing administrative agency (the Federal Office for Economic Affairs and Export Control) to enforce its provisions;<sup>3</sup>
- The **French Government** has indicated that it is considering adding an administrative enforcement aspect to the Duty of Vigilance Law (which establishes corporate civil liability for certain harms), which has raised concerns among civil society about the quality and effectiveness of any such approach;<sup>4</sup>
- In **Norway**, the new Transparency Law (which includes an expectation that companies will carry out due diligence) will rely on an existing administrative authority – the Consumer Protection Authority – as the primary enforcer of the legislation.

This paper draws on OHCHR's work, consultations and official guidance to States on the role of State-based non-judicial mechanisms under OHCHR's wider Accountability and Remedy Project ('ARP').<sup>5</sup> (Throughout, references to 'PO' are to Policy Objectives in OHCHR's 'ARP II' guidance for States.) It also draws on Shift's work exploring accountability for mandatory due diligence regimes (including the role of civil liability for harms as part of a comprehensive approach aligned with the UNGPs),<sup>6</sup> and how administrative authorities can take account of critical 'signals of seriousness' in evaluating the quality of companies' due diligence processes.<sup>7</sup>

This paper was informed by over 15 interviews conducted by Shift between March-June 2021 with experts in the business and human rights field, as well as in related fields of EU law, including trade, consumer protection, data privacy and employment law. It benefitted from input from business, civil society and investor stakeholders involved in the EU debate in two discussions in August and September, and testing with States at a session in September. OHCHR and Shift thank all those who contributed their time and valuable insights to the project. This paper does not seek to reflect a consensus perspective but rather conveys the views of OHCHR and Shift, informed by expert stakeholder inputs.

While stakeholders have varying views about the pros and cons of administrative enforcement, there is a general recognition that this discussion is moving rapidly ahead at the national and regional levels in Europe and would benefit from greater attention. A critical component of that discussion should include consulting with non-EU stakeholders from business, civil society and government to understand their perspectives on the impacts of proposed legislation and how enforcement should be shaped to take appropriate account of these considerations.

## ACCOUNTABILITY

**Formal enforcement by the State** of new corporate due diligence duties through the complementary approaches of:

- **CIVIL LIABILITY FOR HARMS;**
- and **ADMINISTRATIVE SUPERVISION.**

## CIVIL LIABILITY FOR HARMS

**A corporate legal liability under domestic law to provide a remedy for certain human rights harms, which is owed directly to those affected and which is enforceable by private legal action through the courts.**

Domestic law tests for negligence (e.g. under the law of tort) already create possible grounds for civil liability for human rights harms that a company has caused or contributed to if the harm was the result of a failure to conduct human rights due diligence.<sup>8</sup> This is because the question of whether or not a company exercised “due diligence” in the circumstances is of central importance in determining whether the relevant legal standard of care towards the affected individuals has been met, and hence whether civil liability for harms exists.

In their emphasis on what was foreseeable to the company, and reasonable to expect by way of mitigation, these same legal tests also create the possibility of corporate liability for harms caused or contributed to by other entities – for example, by subsidiaries the company controls or exercises de facto control over, or potentially where it holds itself out as exercising such control even if it does not do so in fact.<sup>9</sup> The French Duty of Vigilance Law extends liability to the actions of suppliers and subcontractors where there is an ‘established commercial relationship’.<sup>10</sup>

Theories of secondary liability (e.g. aiding and abetting liability) provide further potential legal grounds for corporate civil liability for harms that a company contributed to but which may have had multiple causes. For example, this could include situations where the primary cause may have been the actions of some other entity in a supply chain but where the company’s own actions have been material to the harm.

In this paper, we assume that new EU legislation will include an explicit expectation that Member States provide for civil liability for harms that a company (or a company it controls) causes or contributes to, in line with the European Parliament’s March 2021 resolution.<sup>11</sup>

## ADMINISTRATIVE SUPERVISION

**The use of monitoring, investigation and enforcement powers by competent national authorities to ensure all companies that are subject to the regulatory regime comply with the new duty.**

In this paper, we explore the role of administrative authorities in ensuring accountability where a company has failed to meet the due diligence duty, *whether or not* harm has occurred. We also consider the potential for administrative supervision to regulate a much broader range of situations and business relationships than those likely to be covered by conventional tests for civil liability for harms, including situations where a company’s operations, products or services are linked to risks or actual impacts through its business relationships.

# KEY TERMS

Administrative authorities typically have a range of **sanctioning powers**, including:

- issuing administrative orders to companies to take certain action,
- revoking permits or licenses,
- issuing non-criminal penalties such as fines,
- the ability to apply to a court to issue non-criminal penalties against a company or injunctions to prevent future harm.

Some administrative authorities can initiate criminal prosecutions against companies. They may have dedicated criminal investigation units, or rely on collaboration with an existing prosecutorial authority that has the relevant powers and expertise. In this paper, we focus on administrative authorities' non-criminal sanctioning powers in line with the European Parliament's focus in its March resolution.<sup>12</sup>

Finally, administrative authorities often have a key **educational and advisory function** in supporting companies' understanding of the legal standard that they are expected to meet, which can include developing guidance materials or providing targeted advice to companies.

# ADMINISTRATIVE

# SUPERVISION AS A

# COMPLEMENT TO CIVIL LIABILITY FOR HARMS

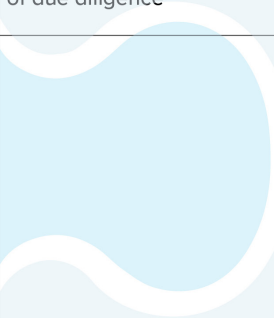
The UNGPs set out the potential complementarity between both modes of enforcement in meeting the State duty to protect. They stress both the State's preventative role in enforcing laws that require businesses to respect human rights (in Guiding Principles 1 and 3) and the need for the State to ensure appropriate access to remedy where harm has occurred, including through judicial proceedings (in Guiding Principles 25 and 26). The complementarity is also emphasised in OHCHR's ARP II guidance.<sup>13</sup>

New corporate duties to do HREDD will need appropriate accountability measures. In our view, **civil liability for harms** has a specific role to play in ensuring corporate accountability for existing duties of care, as well as new due diligence duties, by defining the precise legal relationship between two private parties (ie, a company and an affected stakeholder) and enabling remedy for victims of harm in certain cases.<sup>14</sup> **Administrative supervision** can play an important and complementary role by ensuring broader corporate compliance with new duties and by proactively addressing high-risk companies, commodity chains or sectors.

In the graphic on the following page, we set out some of the other ways in which these two forms of accountability can interact with and complement each other. In our view, designing an effective accountability approach is not about creating a hierarchy between these forms of accountability or requiring stakeholders to turn to them in a particular sequence; rather, it is about recognising the distinct roles, advantages and disadvantages of each, and building space for both into a coherent national approach. Indeed, recent business statements broadly supporting the development of EU mandatory due diligence laws recognise that both types of accountability are likely to have a role in future enforcement.<sup>15</sup>

This complementarity can be further enhanced by other policy measures. This could include the role of **State-based non-judicial grievance mechanisms** in offering another route to remedy for victims in certain cases. For example, the Nordic ombudsman model includes both administrative supervision and acting as a grievance mechanism for complaints.<sup>16</sup> National Human Rights Institutions that have a mandate to address business-related harms, and OECD National Contact Points with access to mediation expertise, may also have roles to play in this regard.

Other policy measures could include a role for **criminal prosecution** in the case of persistent and willful non-compliance by a company with administrative orders, as explained above.

	ENFORCEMENT THROUGH CIVIL LIABILITY	ENFORCEMENT THROUGH ADMINISTRATIVE SUPERVISION
<b>ROLE REGARDING PREVENTION</b>	<ul style="list-style-type: none"> <li>Civil liability for certain cases helps signal that a new due diligence obligation should be taken seriously</li> </ul>	<ul style="list-style-type: none"> <li>Risk-based, proactive monitoring and sanctioning can complement civil liability in encouraging compliance</li> <li>Education and advice can support better quality due diligence processes</li> </ul>
<b>ROLE REGARDING REMEDY</b>	<ul style="list-style-type: none"> <li>Provides enforceable remedy where harm has occurred in certain cases</li> </ul>	<ul style="list-style-type: none"> <li>Strengthens companies' role in providing or enabling remedy as part of due diligence</li> </ul>
<b>ADVANTAGES?</b>	<ul style="list-style-type: none"> <li>Courts are familiar with assessing the appropriateness or quality of due diligence duties of care</li> <li>Clearly providing for/defining liability can increase legal certainty</li> <li>Civil litigation has established rules for handling cross-border cases</li> </ul>	 <ul style="list-style-type: none"> <li>Can address greater scale (number of companies) and scope (business relationships throughout value chain, not only those giving rise to liability)</li> <li>Can incentivize companies to take full scope of duty seriously if liability for harms is more circumscribed</li> <li>Can develop deep expertise in the general standard of conduct and on specific issues/sectors</li> </ul>
<b>LIMITATIONS?</b>	<ul style="list-style-type: none"> <li>Encourages companies to focus on the (relatively small) circle of business relationships that may give rise to liability</li> <li>Resources needed to bring civil case may be significant</li> </ul>	<ul style="list-style-type: none"> <li>May have limited ability to ensure remedy for complainants</li> <li>Typically lack powers and capacities in cross-border cases which can limit insight into impacts on the ground</li> </ul>

## DEFINING REGULATORY

## OBJECTIVES FOR

# ADMINISTRATIVE SUPERVISION

The ultimate goal of HREDD is to achieve **better outcomes for people and planet**; this must therefore also be the goal of new HREDD legislation. In designing an effective approach to accountability for new due diligence duties, we believe it is essential to start by identifying regulatory objectives for the role of administrative supervision that support this goal.

**Clear regulatory objectives** can help manage the tension between the need for regulators to have appropriate **flexibility** in carrying out their work (given the diversity of companies and issues that will be involved) and the common desire expressed by business and civil society stakeholders alike for **certainty** about how administrative supervision will operate. Clear objectives will also be essential in **evaluating** whether administrative authorities are effectively carrying out their roles in practice.

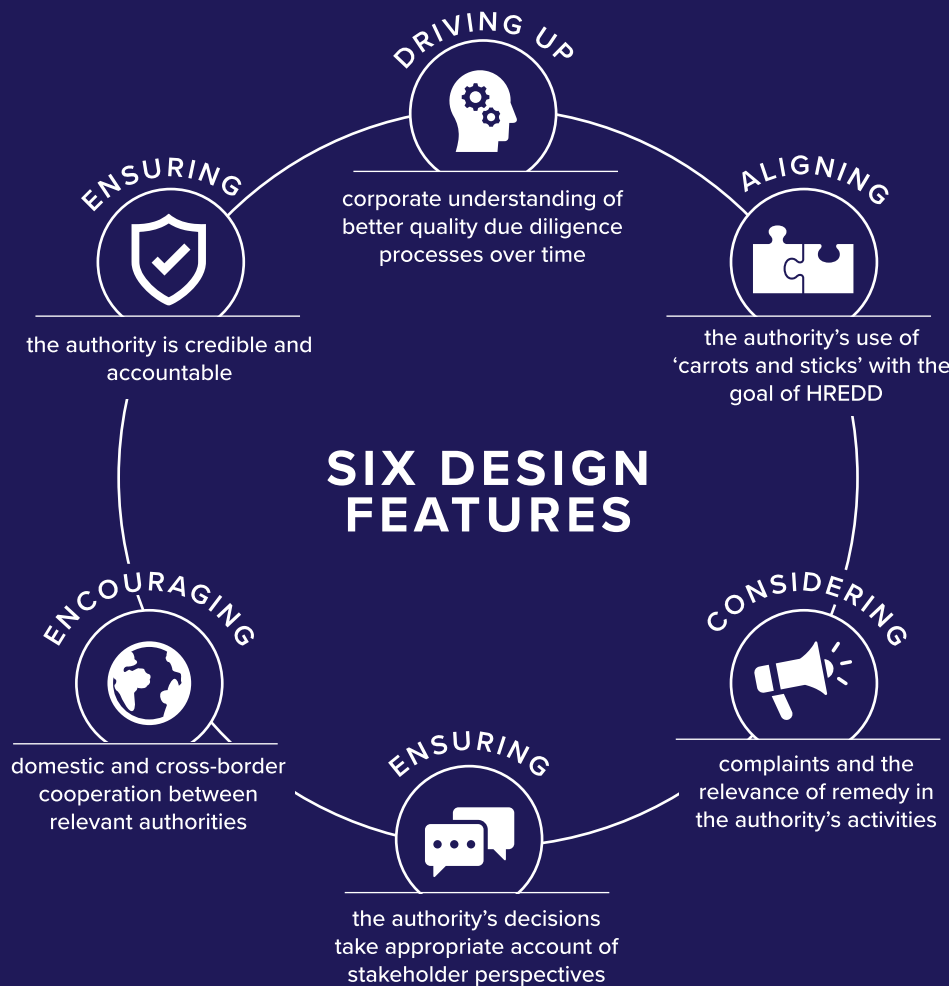
We propose that there should be at least **four clear regulatory objectives** for administrative supervision of new HREDD duties.



# REGULATORY OBJECTIVES

- 1 DRIVING** better human rights and environmental outcomes through greater prevention of risks and remediation of actual harms by companies
- 2 DEMONSTRATING** that non-compliance with due diligence duties is not a viable position for companies
- 3 PROMOTING** the adoption of better quality due diligence processes by companies over time
- 4 ENSURING** stakeholder trust in the relevant authority among both business and civil society stakeholders

Taking these regulatory objectives as our starting point, we can then explore the powers, resources and capacities that will need particular attention when States are designing administrative supervision. At a minimum, authorities will need core powers to monitor, investigate and enforce compliance similar to those that exist in other areas of regulatory oversight (such as labour, consumer protection or financial supervision). This paper builds on these minimum expectations by exploring **six features** that should inform the **design of administrative authorities at the national level for enforcing new HREDD duties**.



In discussing the final feature on encouraging cooperation, we look at some **critical functions that need to be addressed at the EU level** to ensure coherent and consistent approaches to enforcement at the national level.

# SIX DESIGN FEATURES

## 1 ENSURING THE AUTHORITY IS CREDIBLE AND ACCOUNTABLE

While not unique to the business and human rights space, administrative authorities need to be seen as **credible by both business and civil society stakeholders** if they are to be effective. This raises two fundamental structural questions concerning (i) independence and (ii) separating the sanctioning and educational functions.

First, ensuring that the authority is independent from the executive branch of government – and is subject instead to parliamentary oversight – can help build trust in the organisation and enhance its legitimacy, although a complete separation may be difficult to achieve in practice [PO6.1].

The processes for nominating the leadership of the organisation will be important in this regard, requiring open recruitment and clear selection criteria. The authority should also have robust policies and processes for managing potential conflicts of interest [PO6.6]. This is important in helping reassure civil society stakeholders that the organisation is protected against the risks of regulatory capture.<sup>17</sup>

**Second, experience shows that it will be essential to clearly separate the two main functions that administrative authorities typically have: a monitoring/sanctioning function and an educational/advisory function.**

This should help the authority build constructive relationships with business through its educational/advisory arm by creating a space for conversation and engagement that is distinct from the process of investigation and sanctioning non-compliance.

One structural option to consider is whether these functions could in fact be **split between different entities**. For example, there may already be a national help-desk for business that could naturally take some of the educational/advisory role (with appropriate resourcing). This role may also sit well with the ‘proactive agenda’ mandate of National Contact Points in OECD-adhering States, or with the mandate of some National Human Rights Institutions – leaving the monitoring/sanction function as the focus for a new or existing administrative authority.

However, if these functions are split, attention will need to be paid to **regulatory coherence**. It will be important to ensure that they continue to inform one another – for example, that the approach to monitoring and sanctioning also

benefits from a continuous improvement approach. And if more than one authority is tasked with aspects of enforcement, it means that States will need to consider the credibility of each institution with respect to the role it is expected to play. Regardless of the approach adopted, it will be essential for supervisory authorities to respect the results of **social dialogue** in their activities and consider how best to engage with existing tripartite structures.

Other key considerations that can assist in establishing the authority's credibility relate to transparency and to the expertise of its staff.

**Both business and civil society stakeholders see appropriate transparency as fundamental to their confidence in effective administrative supervision and are concerned that this issue in particular receive sufficient attention.**

The authority should be transparent about which companies are covered by its operations; a failure to do so has led to a loss of stakeholder trust in other contexts. The authority should also be transparent about its methodology and approach to enforcement, the pathways for complaints and for review of its decisions, the existence of active investigations, and any formal orders or penalties imposed [PO10]. This is important in helping protect against perceptions that the authority is following political direction, or otherwise not acting on the basis of clear and objective criteria, in implementing its mandate. It will be important to identify and seek to address any existing restrictions in national law that could limit appropriate transparency by the authority.

The authority will need to **hire staff that have expertise in business and human rights**, and specifically with implementing the UNGPs and OECD Guidelines.<sup>18</sup> It will also need staff with experience engaging with business and with civil society stakeholders. Business stakeholders have stressed the importance of the authority being able to differentiate among companies, assess where they are at in their understanding of these new expectations and identify what kinds of guidance, capacity-building and other advice may be helpful, including in relation to small and medium-sized enterprises ('SMEs'), if it is to be seen as credible by business. Several stakeholders cited the example of financial supervision authorities as having both the resources and necessary expertise in this regard.

Administrative authorities will just as importantly need the ability to challenge companies' performance where that is warranted through their monitoring/sanctioning functions. They will need an 'open door' policy, accompanied by a clear mandate – and the skills – to meaningfully engage with civil society. Given that affected individuals and civil society organisations will have far fewer resources than business to proactively engage with supervisory authorities, the authorities themselves will need to address this through their own engagement approaches, including targeted outreach through established structures such as trade unions [PO2.3 and 7.1].

Finally, the **authority needs to be accountable**. Both business and civil society stakeholders want to know that they have appropriate pathways to challenge the authority's approach in specific cases [PO 6.3]. This includes having appropriate internal appeal procedures, as well as the ability to bring a complaint against the authority if it has acted or failed to act appropriately, for example in handling information about potential breaches. This review could occur via a parliamentary or public sector Ombuds mechanism where that exists. Judicial review of the authority's decisions under administrative law should always be an option [PO1.4 and PO6.4].<sup>19</sup>

Appropriate accountability includes evaluating the authority's overall performance against the regulatory objectives set out above. This could occur for example through scrutiny of an annual report by the authority to parliament on its activities, as is common in other regulatory areas, provided the report meets certain quality criteria.

Clearly, all these building blocks for ensuring that the authority is seen as credible and accountable by both business and civil society have **resource and budget implications**.

**Administrative authorities which are insufficiently resourced to discharge the regulatory mandate that has been entrusted to them, and which do not enjoy clear political support, will not engender the stakeholder trust needed for them to operate effectively and to meet their regulatory objectives.**

Stakeholders from both business and civil society are concerned that States should not give the appearance of creating solutions to business-related human rights harms without adequate attention to appropriate implementation and resourcing of new laws.

## 2

## DRIVING UP CORPORATE UNDERSTANDING OF BETTER QUALITY DUE DILIGENCE PROCESSES OVER TIME

Creating purely paper compliance is a risk with any new legislative regime; but there is a shared concern among many business, civil society, investor and other stakeholders about the importance of preventing ‘tick-box’ compliance in relation to new HREDD duties and ensuring a focus on actual outcomes for people and planet. An important way of addressing this is ensuring that administrative supervision should help drive up what is required to meet the expected standard of conduct by all companies over time.<sup>20</sup>

For example, in their educational/advisory role, administrative authorities should help companies understand how they can **improve the quality of their due diligence processes** and move towards leading practice. The ability to conduct sector-focused inquiries, as competition authorities do for example, can help in identifying and cultivating leading practice.

In their monitoring/sanctioning role, administrative authorities will need to decide **which companies to prioritise for assessment**, and then **assess whether they are meeting the duty in practice**. As in other areas of regulation, decisions about which companies to scrutinise, and whether their due diligence is adequate, will need to be risk-based. (We discuss the decision about where to focus further under Design Feature 4 below.) National authorities are likely to be constrained in terms of time and resources from looking at everything a company is doing, so their assessments will necessarily have to consider a sample of the whole of a company’s efforts.

At the moment, external assessments of corporate due diligence efforts tend to focus on the “observable basics” of what a company has in place, such as the existence of a human rights policy, staff with responsibility for human rights, internal training, clauses in contracts with business partners or a grievance mechanism.

While an authority will certainly need to look at these more easily observable elements, it will also need to consider how well a company works to meet the standard of due diligence in practice.

**Administrative supervision will need to pay attention to key features of HREDD that are indicative of the seriousness of a company’s efforts. These offer important signals of whether there is an authentic and consistent intent and effort within a company to both find and reduce risks to workers, communities and other affected stakeholders, as well as to the environment.**

Existing **authoritative general and sector-specific due diligence guidance** will be an important resource for administrative authorities to draw on, in particular, guidance developed by OHCHR and the OECD.<sup>21</sup> Courts will of course have an essential role to play in determining whether a company has met the standard of conduct of due diligence in their **judgments in specific cases** (i.e. for the purposes of applying the relevant legal tests for civil liability for harms). Administrative authorities will naturally take note of, and likely draw on, such judgments to inform and reinforce their own decisions.

In addition, Shift has proposed a number of **'signals of seriousness'** with regard to human rights due diligence that could inform national authorities' assessments of the quality of a company's processes.<sup>22</sup> Not all of these features need to be present to judge due diligence to be meaningful or serious, yet where few of them are present, it is unlikely that corporate efforts to meet the standard of conduct will achieve their purpose in practice. In cases where **systemic impacts** are involved, and seeking to address them will take time, these kinds of signals of more serious practices and behaviours will be particularly important in assessing the credibility of a company's approach. Some of them – such as the use of outcome-based targets – are being considered in the context of the revision of the EU Corporate Sustainability Reporting Directive ('CSRD') and development of EU reporting standards. If adopted, they could help provide administrative authorities with more useful information to evaluate company performance, at least among companies subject to the CSRD.

Business stakeholders have emphasised the relevance of collaborative industry initiatives and public-private partnerships as part of the 'ecosystem' of implementing new due diligence laws and the need for administrative authorities to have appropriate regard to them when considering a company's overall approach – while recognising that they cannot be seen as a substitute for company-level due diligence.

Civil society stakeholders have stressed that company participation in such initiatives cannot function as a 'safe harbor'.<sup>23</sup> They have also raised questions about reliance by administrative authorities on the results of social audits and certification schemes without closer examination of their alignment with the expectations of HREDD.

**The educational/advisory function performed by administrative authorities can also play an important role in progressively raising corporate performance over time by highlighting and encouraging leading practice.**

This function may take a variety of forms including outreach to parts of the business community (potentially working with trade/industry bodies), facilitating dialogue between industry and civil society experts on human rights issues, providing or sign-posting practical examples of good practice on specific aspects

of due diligence, and issuing warnings or time-sensitive guidance on emerging issues or high-risk country situations. In the EU context, both business and civil society stakeholders have stressed the need to avoid 27 different versions of what human rights due diligence means in practice by ensuring that authoritative and binding guidance on due diligence is produced or agreed to at the EU, rather than national, level and that it is aligned with existing OHCHR and OECD guidance (this is discussed further under Design Feature 6 below).

The importance of considering the quality of due diligence processes relates to the next design consideration as well.

## 3

## ALIGNING THE AUTHORITY'S USE OF 'CARROTS AND STICKS' WITH THE GOAL OF HREDD

Most administrative enforcement approaches use some combination of incentives and penalties. When enforcing a new corporate due diligence duty, national authorities should consider how their use of both types of approaches aligns with and advances their regulatory objectives, as proposed above. There will be multiple ways in which this can be done; here we highlight some of the key challenges we see and possible approaches to resolving them.

**Positive incentives** will be important not only in encouraging compliance but also continuous improvement over time. For example, where the authority has to make decisions about prioritising resources, the authority may decide to devote **greater resources and scrutiny towards identifying and monitoring laggards that are clearly failing to comply with the HREDD duty where the risk of severe harms is likely to be greater**, and apply a 'lighter touch' approach to leading companies that can demonstrate the seriousness of their due diligence efforts.

**Whatever approach is taken, the authority's mandate should set out the basis on which these monitoring decisions are made, and how they align with the risk-based approach underpinning HREDD – meaning an approach that focuses on the severity of risks to people and planet. This can help ensure that consistent decisions are made over time and that stakeholders have confidence in the criteria being used.**

Administrative authorities will need to consider how they can help incentivise greater disclosure of risks by companies since the identification and prioritisation of salient human rights issues is central to robust HREDD processes in line with the UNGPs and OECD Guidelines. Enhanced EU non-financial reporting requirements are likely to be important in requiring a growing number of companies to disclose specific information, which should include their principal sustainability risks. But if increased disclosure leads only or primarily to negative attention from stakeholders, this dynamic could be undermined. Administrative supervision could help address this by clearly sanctioning non-disclosure of known human rights and environmental risks. It could also encourage greater disclosure by allowing companies that proactively identify and disclose certain breaches a period in which to address the breach and any harms involved. This would draw on current practice in the area of consumer protection, but would require careful consideration about which kinds of breaches it could appropriately apply to, given the broad scope of HREDD duties.

Given the regulatory objectives proposed above, one credible approach would be to focus sanctions on laggards and ensure they are truly dissuasive, as



the European Parliament proposed in its March resolution.<sup>24</sup> Experience from other areas of administrative enforcement of corporate duties shows that **financial penalties** need to be significant enough to get companies' attention while meeting the proportionality test under EU law.<sup>25</sup> A number of existing approaches are based on a company's turnover. For example, under the EU General Data Protection Regulation ('GDPR'), the maximum fine is 4% of a company's global turnover. The new German Supply Chain Law provides for fines of up to 2% of a company's annual turnover, and the Dutch Child Labor Law for fines of up to 10% of annual turnover (or EUR 750,000).<sup>26</sup> One tool already used in the Dutch context that is particularly relevant to the goal of HREDD is an "order subject to a penalty for non-compliance", which is a fine that incentivises improvement by accruing daily until the company aligns its behaviour with the expected standard of conduct.

**Civil society and business stakeholders have different views on the role of fines. From the business perspective, some have argued that fines should be seen as a last resort to encourage businesses to improve before being penalised; from a civil society perspective, some have argued that they should be used more widely to drive attention by companies to the consequences of non-compliance, and not just in the most egregious cases.**

The risk that some companies may simply absorb fines as a cost of doing business is a real one, borne out by experiences with enforcement under the EU timber regime. Regardless of the level of fines needed to be properly dissuasive, administrative bodies will be expected to be **transparent** about their approach to the imposition of different types of sanctions – and financial penalties in particular – through the publication of relevant policies such as enforcement guidelines. This sends a strong signal of the body's commitment to fair and predictable enforcement processes and decision-making, which is vital for maintaining credibility and stakeholder trust (as explained under Design Feature 1 above).

**Other forms of penalty** which could be considered, and covered in enforcement guidelines, include: stopping sales; confiscating products connected to an identified breach of due diligence (with important connections to related EU policy discussions on potential **import restrictions** on products connected to severe human rights abuses such as forced labor); and suspending licenses where they are required for companies to operate in certain sectors. The European Parliament's March report also highlights the importance of considering what the UNGPs call the "**State-business nexus**" via **sanctions such as temporary or indefinite exclusion from public procurement, State aid or export credit or loan support**, and many stakeholders have stressed the potential relevance of such measures. There is also an opportunity to think about how the regulatory objectives of new due diligence regimes could be supported

through careful use of positive incentives – for example, in the weightings used in public procurement tender processes – and the connections to administrative supervision in this regard.

It will be important for States to consider the position of SMEs in designing appropriate approaches to accountability for meeting HREDD duties, including giving due attention to how to address any genuine lack of capacity (for example through technical assistance).<sup>27</sup> As with larger companies, it will be important to consider what combination of sanctions and incentives is going to be most likely to lead to actual behavior change.

**Crucially, across all these different measures, administrative authorities will need to consider the real risk that companies may simply exit business relationships with entities found to be involved in human rights harms to avoid the risk of financial or other sanctions. This is important because ‘cutting and running’ when problems are found is the opposite approach to that envisaged in the UNGPs (and OECD Guidelines), which instead expect companies to engage and use leverage to prevent, or seek to prevent, impacts.**

The authority should consider whether a company can show (a) that it took appropriate account of the severity of the actual or potential impacts, (b) that it sought to use and build leverage through a range of creative approaches in order to change a business partner’s behaviour before it exited a relationship, and (c) that it carefully considered the impacts that doing so would have on human rights. This will require a sophisticated understanding within the authority about the role of **responsible exit** as part of a company’s leverage strategy, and the ability to withstand political and/or public pressure that favours ostensibly easier solutions.

## 4

## ENSURING THE AUTHORITY'S DECISIONS TAKE APPROPRIATE ACCOUNT OF STAKEHOLDER PERSPECTIVES

The UNGPs and OECD Guidelines establish meaningful stakeholder engagement as a core component of due diligence. While there may be some tension between an open approach to stakeholder engagement and the enforcement role that administrative authorities are intended to play, there is a significant opportunity for innovative approaches in this area, which stakeholders also highlighted as crucial to engendering trust in the relevant authorities.

**We see at least two ways in which the design of administrative supervision can integrate an emphasis on stakeholder engagement: first, in how the authority decides where to focus its enforcement efforts; and second, in how the authority seeks insight into situations on the ground, particularly in other countries.**

With regard to the first way, in order to align with the regulatory objective of prevention of human rights harms, administrative authorities should take account of where the most severe risks to people and planet can occur in deciding on their **thematic or sectoral priorities**. The authority's mandate should make clear that stakeholder input will be essential in making credible decisions in this regard. This input could take a number of forms.<sup>28</sup> For example, the authority could bring stakeholders together on an annual basis to consult on its overall strategy, or it could establish a standing stakeholder advisory group or specific 'stakeholder challenge groups' to test the robustness of proposed regulations.

There are a number of examples from different EU Member States of stakeholder consultation, including in the approaches of the Irish Commission for Regulation of Utilities;<sup>29</sup> the French Agency for Food, Environmental and Occupational Health and Safety;<sup>30</sup> and the Netherlands Environmental Assessment Agency.<sup>31</sup> The German government is considering establishing an advisory body to the administrative authority charged with oversight of the new Supply Chain Due Diligence Law. Whatever approach is adopted, it should recognise and respect the particular role of trade unions and of existing social dialogue structures.

The second way in which administrative authorities can emphasise stakeholder engagement in their processes relates to how the authority can access **information about outcomes on the ground** in assessing the reasonableness of a company's due diligence efforts. Before exploring this implication further, we think it may be helpful to briefly explain why considering outcomes can be relevant to implementing a conduct-based standard.

Under the UNGPs, human rights due diligence is a standard of conduct – a level of behaviour that we expect companies to meet, reasonably adapted to the specific human rights risks connected to their operations and value chain relationships. The *intent* of this standard is to prevent and address harms to people; due diligence is the *means* through which the UNGPs expect companies to achieve that objective. In other words, HRDD aims to avoid specific harms and should be appropriately adapted to that task. However, due diligence may not always be successful in preventing harm: there will be situations where due diligence is judged to be appropriate – it may even have been considerable and extensive – but impacts still occur. So due diligence must manifestly aim at achieving the outcome of no harms; however, the occurrence of a harm is not in itself sufficient evidence that the due diligence was inadequate.<sup>32</sup> For these reasons, it will be important for administrative authorities to consider actual outcomes for people as a relevant element in forming their assessments.

When carrying out their monitoring and sanctioning function, administrative authorities will therefore need insight into whether harms have actually occurred, and whether they are ongoing, on the basis of **independently verifiable information**. Within their own jurisdictions, such authorities should have the power to carry out on-site visits without warning. However, outside their jurisdiction, and certainly where harms have occurred outside the EU, gaining insights into the situation on the ground becomes much more challenging. Investigating cross-border situations can be much harder for administrative authorities than for courts, where there are established rules for such cooperation in both civil and criminal cases. For administrative bodies, it can be difficult to identify an appropriate counterpart in another jurisdiction, and there may be limitations in the authority's mandate and/or in its resources for managing any such engagement (which is important to reduce potential tensions over competing claims of jurisdiction).

To address this, there may be existing networks of relevant authorities on specific topics or there may be logical forums for interaction between such authorities (like the European Labor Authority with respect to EU rules on labor mobility). There may be some aspects where technology can help. For example, in the EU timber regime, regulators assess deforestation through satellite imagery; some similar tools exist for analysing certain sites of potential modern slavery (such as satellite imagery of locations of unregulated brick kilns, or sudden expansion of agricultural fields). It will also be important to consider how authorities could make appropriate use of data gathered via credible 'worker voice' tools, in ways that ensure the protection of workers.<sup>33</sup>

**In addition to these approaches, it will be critical for the authority itself to be able to seek insights from affected stakeholders into conditions on the ground. National administrative authorities should be able to call upon their home State embassies or consular offices in third countries to provide support in this regard [PO13.5].**

There is some experience with this in the National Contact Point (NCP) system. For example, the German embassy in India reached out to workers and their representatives in a case before the German NCP to gather information about impacts. The experience of obtaining expert input from the ILO in a dispute under the US-Mexico-Canada Agreement about alleged violations of workers' rights in Mexico also provides a useful example. ILO country offices would be a natural source of credible insight for administrative authorities into the local context with regard to labour rights, and potentially into specific situations.

National authorities could build on these kinds of approaches where stakeholders are located outside their jurisdiction. They can also place emphasis on the need for companies to involve affected stakeholders in tracking the effectiveness of their efforts – an often overlooked expectation in the UNGPs. The authority can also ensure that this aspect is considered in the authority's own use of tools or third party assessments.

## 5

## CONSIDERING COMPLAINTS AND THE RELEVANCE OF REMEDY IN THE AUTHORITY'S ACTIVITIES

In addition to their own powers to launch investigations, administrative authorities should be able to **receive information from any person** with information about suspected corporate non-compliance with the due diligence duty. Where the complaint is well-founded, this should trigger an investigation by the authority. In our view, the ability to make a complaint should exist not only where harm has in fact occurred but also where there is a credible risk of harm occurring or otherwise of a breach of the HREDD duty, since part of the value of such information can be to encourage action by the authority before risks escalate. The authority should allow for **confidential reporting and appropriate protection of complainants** that may be at risk of retaliation, including whistleblowers [PO7.10, 7.12]. The authority should also be transparent about how complaints are handled and how any information provided to the authority will be used.

There are diverging views among stakeholders about the role that administrative authorities should play in handling disputes between affected stakeholders and companies. Some authorities do have grievance procedures with appropriate powers to question parties and run administrative hearings. Others may be able to provide mediation in disputed cases. For authorities that do have such mandates, OHCHR has provided clear guidance in ARP II on how the effectiveness criteria in Guiding Principle 31 should be applied to this part of their role.<sup>34</sup>

But even if supervisory authorities are not directly involved in resolving disputes, this does not mean that remedy is not relevant to their work. There was strong support from civil society and academic stakeholders for exploring creative approaches in this regard, although some business stakeholders cautioned against anything that might replace the appropriate role of courts in regulating relationships between third parties.

**There are several ways in which a supervisory authority's mandate could be structured to encourage consideration of remedy.**

For example, the authority should clearly have the power **to require certain remedial actions as part of requiring corrective orders** to companies that have not met the due diligence duty (for example, requiring restitution of something that was improperly taken, requiring support for physical or mental rehabilitation or issuing a formal apology).<sup>35</sup> The authority's decision about the content of such orders should be informed, wherever possible, by the perspectives of those affected [PO11.5].

There is also scope to explore **how the authority's power to issues fines could be relevant to the delivery of other forms of remedy**, such as compensation and restitution to those affected.<sup>36</sup> For example, in the US, where the Securities and Exchange Commission imposes civil penalties on companies that have defrauded investors, a substantial portion of the funds can be distributed to individual investors who were victims of the fraud under the 'Fair Funds for Investors' provision of the Sarbanes-Oxley Act. The UK Compensation Principles for overseas victims of economic crimes provides another interesting example, as they potentially allow for fines to be redirected to the overseas victims of corporate offences under, for example, the UK Bribery Act. While this has often been used to channel funds to foreign governments or institutions deprived of legitimate revenue, the model could be adapted to focus on individuals in the case of harms under mandatory HREDD legislation.

Another approach could be to direct fines to a fund to support official EU or State programming in third countries where harms have occurred, for example to support the operation of an effective national labour rights inspectorate. While this may not result in remedy for those harmed directly, it may help prevent future harms.

Administrative authorities can also help ensure remedy, as well as effective enforcement more generally, through their **relationship with judicial mechanisms** [PO3]. For example, an administrative authority may:

- **SEEK** assistance from judicial mechanisms as part of its own investigations or in enforcing its own administrative orders or fines;
- **REFER** or **RECOMMEND** the referral of complaints to the courts or to other law enforcement bodies, taking due account of complainants' needs and preferences;
- **PLAY** a role in the implementation of remedial outcomes of judicial processes, for example by playing a monitoring or capacity-building role as part of a settlement agreement or as part of a judicial decision imposed on the parties in the context of an application for an injunction or as a final determination of a claim; and/or
- **HAVE** its **DECISIONS CONSIDERED** as admissible evidence in court claims, and be requested or required to appear as expert witnesses in such claims.

On this last point, there was a shared concern among some business and civil society stakeholders about how findings by administrative authorities on corporate compliance with HREDD duties would be treated by courts considering civil claims for harm, with some expressing the view that such findings should not be seen as conclusive evidence in judicial proceedings. This concern may be addressed in part as stakeholder confidence in a particular authority's work increases.

## 6

**ENCOURAGING DOMESTIC AND CROSS-BORDER COOPERATION BETWEEN RELEVANT AUTHORITIES**

Cooperation between administrative supervisory bodies is important for a number of reasons. **Cooperation between different national authorities** can help ensure domestic policy coherence as well as the efficient use of resources among organisations with different information, skills and mandates. Cooperation with peer authorities in other countries can improve regulatory effectiveness, and can also be a source of information should a cross-border investigation be needed. Liaising with other EU-based national regulators responsible for implementing new EU legislation will be particularly important for coherence and for avoiding regulatory fragmentation and conflicting standards. However, there are real questions about the extent to which authorities in the EU will be able easily to cooperate with relevant counterparts in third countries, as we discuss below.

Enforcing a corporate HREDD duty raises significant issues in terms of **connections to, and overlap with, existing areas of national regulation of corporate behaviour**, including labour rights, environmental harms, consumer protection, financial reporting, data protection and competition law. States will need to consider which other domestic regulators or agencies the supervisory authority should coordinate with, and in what ways, while taking appropriate account of the need to protect confidential information about complainants and companies [PO1.3]. As OHCHR has highlighted, regulatory cooperation can be institutionalised in various ways, including through:

- an obligation or the discretion to share information with other agencies;
- specific requirements for handling information relating to possible criminal wrongdoing (where the authority itself does not have the power to bring criminal proceedings); or
- participation in national or cross-border networks and initiatives.<sup>37</sup>

**In our view, there is an essential role for a coordinating body at the EU level. This view was supported by a number of stakeholders from both business and civil society who are concerned about the risk of fragmentation in interpretation of the standard of conduct expected of companies under new EU due diligence laws, and about the variable quality of enforcement at the national level. An EU level body will be critical in at least two respects.**



First, an EU body is needed to provide authoritative guidance and **drive harmonisation in how the standard of due diligence is interpreted at the national level**. It can also help ensure that interpretation is aligned with the UNGPs and OECD Guidelines – as the key international standards informing new legal expectations – and that it takes account of developments in knowledge, awareness, capabilities and technologies over time.<sup>38</sup> It should carry out this role in collaboration with OHCHR and the OECD (as the organisations with authority for the underlying standards) in order to ensure that developments in Europe do not undermine global coherence and can benefit from developments in other regions in turn.

Second, an EU body will be important in **convening and coordinating national authorities**. This includes enabling the sharing of best practices and monitoring of peer performance [PO5.2; PO 6.5], as recommended by the European Parliament in its March resolution.<sup>39</sup> It could also include coordinating enforcement efforts between national authorities, as in the role played by the Consumer Protection Cooperation Network or by the European Labour Authority in relation to certain areas of labour law.

The experience so far in setting up the **European Labour Authority** ('ELA') offers useful lessons here. The ELA can help officials from one Member State identify who the competent authority is in another State (since it is not always the same entity with responsibility for different aspects of labour law) and help them connect, including where there are language barriers or where there is a lack of resources to send staff across borders. The ELA is also competent to assist Member States in cross-border recovery of fines from companies (although this is not the same as delivering remedy by ensuring unpaid wages are actually paid to workers). Every Member State has a mandated contact point or liaison officer inside the authority. Once a cross-border case commences, the first step is for the relevant officers to begin working together. Since each officer brings detailed knowledge about their respective states' legal systems, this can significantly help streamline the process.

An EU body could involve stakeholders in reviews of the effectiveness of enforcement at the Member State level and in advice to the Commission – as, for example, in the model of the Commission Expert Group/Multi-Stakeholder Platform on Protecting and Restoring the World's Forests, including the EU Timber Regulation and the FLEGT Regulation.

The European Data Protection Board ('EDPB') and Body of European Regulators of Electronic Communication are examples of institutions that carry out aspects of both these functions – i.e., developing guidance and driving harmonisation as well as supporting coordination among national authorities. This can help enhance **regulatory transparency**. For example, the EDPB has issued clarifications on the interpretation of the relevant EU regulation,<sup>40</sup> and binding decisions in cases involving multiple national authorities where other authorities have challenged the approach of the 'lead' national authority.<sup>41</sup>

An EU-level body could also have a role in **direct enforcement**, for example by carrying out investigations or enforcement actions in complex, multi-jurisdictional cases. There are EU bodies with direct enforcement powers in a number of policy areas, including fisheries, medicines, banking supervision and financial markets, and a number of stakeholders felt that such a role would add value. At the same time, they recognised that this function would require significant resources and lobbying, and felt that the two functions identified above were also important and more clearly achievable in the short to medium-term.

Whatever functions an EU-level entity has, it will be important to consider modes of cooperation with **existing EU institutions** with relevant mandates like the EDPB and ELA, as well as other potentially relevant structures like the consultative bodies and mechanisms established under the labour, environment and sustainable development chapters of EU trade agreements. It will also be important to consider where, if resources and political will do not allow for the creation of an entirely new entity, existing entities could take on new functions. For example, the EU Fundamental Rights Agency could play a role on issues of interpretation, working together with the OHCHR and OECD. The European Network of National Human Rights Institutions (ENNHRI) may also have a role to play, for example in reviewing the calibre of national supervisory bodies, building on ENNHRI's annual reports on the state of the rule of law in Europe.

As noted above, cooperation with **authorities in countries outside the EU** raises particular challenges. In designing their approaches, European States should consider the actual capacities of counterparts in key third countries, informed by stakeholder perspectives, to help ensure that any proposed cooperation regime is realistic. In some cases, investment in capacity-building and technical support for counterparts in those countries may be needed in order to develop and support the efficient and well-functioning working relationships that will be required to implement these aspects of the proposed HREDD regime.

**In our view, it is vital that EU and national policy-makers consider what needs to exist at the EU level as part of a coherent architecture for administrative supervision – and as a complement to civil liability for harms in certain cases – as an integral part of the design of an EU level due diligence law.**

# CONCLUSION

In conclusion, there are important lessons to be learnt from other areas of regulation of corporate conduct. There are also significant opportunities to integrate what is unique about human rights and environmental due diligence into the design of administrative supervision of new HREDD laws. It is essential that any new laws contribute to better outcomes for people and planet, while also ensuring a level playing field for business. To achieve this, policy-makers need to **set clear regulatory objectives for administrative supervision and consult with stakeholders, including about the design considerations highlighted in this paper, in determining the way forward.**

## ***Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision***

Shift and Office of the UN High Commissioner for Human Rights.  
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### **ABOUT SHIFT**

Shift is the leading center of expertise on the UN Guiding Principles on Business and Human Rights. Shift's global team of experts works across all continents and sectors to challenge assumptions, push boundaries and redefine corporate practice in order to build a world where business gets done with respect for people's dignity. We are a non profit, mission-driven organisation headquartered in New York City.

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# ENDNOTES

1 In this paper, we focus primarily on enforcement of the human rights aspects of new corporate duties, however many of the points would be relevant to other aspects of new HREDD or 'sustainability due diligence' duties.

2 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available [here](#). See particularly Articles 12, 13, 18 and 19. Note also the paper commissioned by the Parliament's Subcommittee on Human Rights by Methven O'Brien and Martin-Ortega, "EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims", June 2020, available [here](#).

3 The law does not include new civil liability provisions.

4 See Sherpa, "Creating a Public Authority to Enforce the Duty of Vigilance Law: A Step Backwards?", April 2021, available [here](#).

5 See [https://www.ohchr.org/EN/Issues/Business/Pages/ARP\\_IL.aspx](https://www.ohchr.org/EN/Issues/Business/Pages/ARP_IL.aspx). The first phase of ARP involved recommendations on strengthening judicial remedy.

6 See <https://shiftproject.org/resource/accountability-mhrdd/>.

7 See <https://shiftproject.org/resource/signals-draft1/>.

8 See OHCHR, "Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability", June 2018, UN Doc No A/HRC/38/20/Add.2.

9 There are different approaches to determining whether the necessary form of relationship exists in such cases, which go beyond the scope of the current discussion. Useful references include: Enneking et al, "Zorgplichten van Nederlandse Ondernemingen Inzake Internationaal Maatschappelijk Verantwoord Ondernemen", December 2015 (explaining the current approach under Dutch law); Geisser and Mueller, "The Swiss Responsible Business Initiative (RBI)" (originally published in German in 2017, English version available [here](#)); Bueno and Bright, "Implementing Human Rights Due Diligence Through Corporate Civil Liability", 2020, 69(4) International & Comparative Law Quarterly.

10 See, for example, Savourey and Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption", 2021, 6 Business and Human Rights Journal pp 141-152.

11 See note 2 above, Article 19. Some civil society organisations have argued that this proposal does not go far enough and advocate for a wider scope of civil liability for harms.

12 For a detailed discussion of what an approach combining both criminal and civil penalties would look like, see Chambers, Kemp and Tyler, "Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence Law", August 2020, available [here](#).

13 As the guidance recognizes, in some cases judicial recourse will be essential to enabling access to remedy, for example, because of the severity of the harm and the nature of the company's involvement in it [PO3.1].

14 See, eg, OHCHR, "EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission", July 2021, pp 5-6, available at [here](#); Shift, "Submission to the EC Consultation on EU Sustainable Corporate Governance", February 2021, p 20, available [here](#).

15 See the statement by AIM available [here](#). See also the statement by a group of cocoa companies and NGOs available [here](#).

16 See Saloranta, 'Establishing a Corporate Responsibility Ombudsman: Enhancing Remedy through State-based non-judicial mechanisms?', 2021, 28(1) Maastricht Journal of European and Comparative Law, pp 102-122.

17 By regulatory capture we mean when a public body that is intended to hold private sector entities accountable is overly influenced by those same private entities.

18 In their commissioned advice for the Dutch government, van Dam and Scheltema emphasise the need for sufficient expertise to be built up in one body as a strong argument for having a single lead regulator: Van Dam and Scheltema, "Options for Enforceable IRBC Instruments", April 2020, available [here](#), p 30.

19 Under EU law, individuals may be able to bring proceedings against a Member State that fails to implement effective enforcement approaches in an area of EU law where an individual can show that they were harmed.

20 This is emphasised in the concept of 'dynamic enforcement' in the advice by van Dam and Scheltema, note 18 above. In their report, the authors contend that (p 10): "It is pivotal public supervision does not focus on mistakes made by companies (road to the bottom) but on the contrary incentivizes companies to continuously improve (road to the top) and, thus, elicits as much as possible positive changes in corporate behaviour... Dynamic supervision is based on existing best practices in markets which have at least partially matured. It is dynamic as these best practices are not fixed but change over time. It incentivizes the desired continuous improvement."

21 See <https://www.ohchr.org/EN/Issues/Business/Pages/Resources.aspx> and <https://mneguidelines.oecd.org/duediligence/>.

22 See note 7 above.

23 In general, the UNGPs do not see HRDD as creating a 'safe harbour' for companies (meaning that HRDD cannot act as a complete bar to a complainant bringing a case). The commentary to GP 17 states 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. However, 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.”

24 See note 2 above, Article 18.

25 The European Court of Justice expects Member States to implement enforcement measures that have a ‘genuine deterrent effect’ while remaining proportionate to the harm being addressed.

26 As is also the case in EU competition law, see, eg, [https://ec.europa.eu/competition-policy/system/files/2021-01/factsheet\\_fines\\_en.pdf](https://ec.europa.eu/competition-policy/system/files/2021-01/factsheet_fines_en.pdf).

27 For some perspectives from SMEs on levers that they would like to see governments use to advance respect for human rights see section 6 of this workshop report: <https://shiftproject.org/wp-content/uploads/2020/01/index.pdf>.

28 This point is strongly made, together with multiple examples, in a study of the UK context in Chambers, Kemp and Tyler, note 12 above.

29 The Commission is Ireland’s energy and water regulator. It holds stakeholder consultations on specific issues and also has a Consumer Stakeholder Group, which meets quarterly and offers a platform for the Commission to present updates and receive feedback, as well as for stakeholders to raise concerns directly.

30 The agency works with external experts on specific topics as well as organizing dialogue committees with stakeholders which include representatives from industry and NGOs.

31 The agency has detailed guidance on stakeholder engagement for staff working on projects to help ensure that the agency benefits from diverse inputs that can strengthen the quality of its advice to the Dutch cabinet, parliament and wider society: see [here](#).

32 But this becomes more challenging if harms recur or persist. On the relationship between due diligence as a standard of conduct and the outcomes of due diligence, see [here](#).

33 On the use of these tools in HRDD see [here](#).

34 See UN Doc No A/HRC/38/20, pp. 12-16; UN Doc No A/HRC/38/20/add.1, pp. 11-16.

35 In South Africa, the statutory powers granted to the specialist Equality Courts, which are established under the Equality Act with streamlined procedures to make them more accessible, include a number of remedial options that the courts can choose from (see section 21(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, available [here](#)). While this is a precedent from a judicial context, it may be interesting to consider in designing regulations governing national supervisory authorities in the mandatory HREDD context.

36 The UNGPs identify a number of different forms that remedies for human rights abuses can take, including, apologies, restitution, rehabilitation, compensation and punitive sanctions (whether criminal or administrative such as fines), as well as prevention of future harm through, for example, injunctions or guarantees of non-repetition (commentary to GP 25).

37 See OHCHR, “State-based non-judicial mechanisms for accountability and remedy for business-related human rights abuses: Supporting actors or lead players?”, 2017, p 21.

38 As proposed in the European Parliament’s resolution note 2 above, Article 14.

39 See the proposal for a ‘European Due Diligence Network’ in note 2 above, Article 16.

40 See, eg, <https://privacyinternational.org/news-analysis/2713/edpb-reminds-national-data-protection-authorities-exercise-their-powers>.

41 See, eg, [https://edpb.europa.eu/news/news/2021/edpb-requests-irish-sa-amends-whatsapp-decision-clarifications-transparency-and\\_en](https://edpb.europa.eu/news/news/2021/edpb-requests-irish-sa-amends-whatsapp-decision-clarifications-transparency-and_en).