

UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies

June 2020

Foreword

A number of governments have recently either introduced, or have announced their intention to consider the introduction of, legislative regimes to encourage or require companies and corporate groups to carry out mandatory human rights due diligence. There appears to be particular momentum behind these proposals in some European Union (EU) and European Economic Area (EEA) member states and also within EU institutions. The number and range of domestic-level regimes and proposals presently being implemented in, or considered in, EU member states suggests a considerable appetite for reform. The fragility of global supply chains exposed by the COVID-19 pandemic, as well as the extreme vulnerability of many of the people working in them, could increase demands (from trade unions and civil society organisations in particular) for legislation of this kind.

OHCHR welcomes these developments. Mandatory human rights due diligence regimes have a potentially vital role to play as part of a “**smart mix**” of measures to effectively foster business respect for human rights, as called for in the UN Guiding Principles on Business and Human Rights (‘UNGPs’). These regimes are also likely to be a key component of global efforts to **Build Back Better**,¹ in causing companies to embed proper human rights risk management processes right across their operations, and in ensuring that their responses to the COVID-19 pandemic, and its economic consequences, are evaluated through the lens of the “corporate responsibility to respect human rights”.

Working towards more **harmonised approaches** to mandatory human rights due diligence is potentially useful, to reduce the potential for overlapping and inconsistent regulatory requirements, to address the problem of gaps between regimes, and to facilitate business compliance. However, **there is not one, single model for mandatory human rights due diligence regimes**. On the contrary, when it comes to translating the ideas set out in the UNGPs into a legally binding regime, there are many different variants, meaning that when people are discussing mandatory human rights due diligence regimes they are potentially discussing a wide range of legal and regulatory possibilities.

For a productive and meaningful discussion on mandatory human rights due diligence regimes to take place, all actors – policy-makers, legislators, businesses, trade unions, civil society organisations and other stakeholders – **need to be clear about the different design options available** and the trade-offs between different choices, and be prepared to analyse each of these options carefully in order to maximise the positive impact of such regulatory measures while mitigating the risks of any unwanted consequences.

This paper aims to contribute to the present conversation about mandatory human rights due diligence regimes by unpacking some of the **main choices** that policy-makers and legislators will be confronted with in the course of forthcoming consultations and discussions, both at the domestic level and

¹ See for a list of COVID-19 related statements and guidance from UN Human Rights: <https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx>

internationally, and the advantages and disadvantages of each. After a discussion of the **legal and policy background** (sections 1, 2 and 3), and a brief discussion of the main **design challenges** that have been highlighted thus far (section 4) the paper then turns to consider the key areas where there may be different views between stakeholders as to the **preferable design options**, and the implications of these choices (section 5) before turning to consider some issues relating to “**policy coherence**” and **regulatory scope** (section 6). The paper concludes by summarising the **key points** that will need to be addressed as stakeholders working in different jurisdictions consider, prepare and progress their proposals for mandatory human rights due diligence (section 7).

1. Background and key concepts

1.1 What is human rights due diligence?

Human rights due diligence is a critical part of fulfilling the “corporate responsibility to respect” as defined in the UNGPs. Human rights due diligence refers to the processes that all business enterprises should undertake to identify, prevent, mitigate and account for how they address potential and actual impacts on human rights caused by or contributed to through their own activities, or directly linked to their operations, products or services by their business relationships.²

It is an **ongoing, cyclical process** that takes account of the dynamic nature of human rights situations.

Human rights due diligence, as defined in the UNGPs, has four main elements. Business enterprises should

- **Identify and assess** actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships;³
- **Integrate** the findings arising from these assessments across relevant internal functions and processes, and take appropriate action;⁴
- **Track** the effectiveness of their response (e.g. risk management and mitigation efforts);⁵ and
- **Account** for how they address their human rights impacts (e.g., through reporting externally).⁶

1.2 What is “mandatory human rights due diligence”

Mandatory human rights due diligence regimes have a potentially vital role to play as part of a “**smart mix**” of measures to effectively foster business respect for human rights, as called for in the UNGPs.

A number of governments have recently either introduced, or have announced their intention to consider the introduction of, legislative regimes to encourage or require companies and corporate groups to carry out mandatory human rights due diligence (see Box 1 below). There appears to be particular momentum behind these proposals in a number of European Union (EU) and European Economic Area (EEA) member states and also within EU institutions. However, as can be seen from the examples below, similar proposals have also been developed and implemented elsewhere.

² UNGPs 17-21; OHCHR, *The Corporate Responsibility to Respect: An Interpretative Guide*, available at www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf, at pp. 31-63.

³ UNGP 18.

⁴ UNGP 19.

⁵ UNGP 20.

⁶ UNGP 21.

Box 1: Key concepts

The term “**mandatory human rights due diligence**” describes the use of law to compel companies to take proactive steps to identify, prevent, mitigate and account for how they address their adverse human rights impacts.

As elaborated further below (see especially section 5), **mandatory human rights due diligence regimes can vary greatly** in terms of the legal obligations imposed, the scope of these obligations (e.g. the entities and activities to which the due diligence obligations extend), the way the obligations are monitored and enforced, the sectors covered, and the human rights themes and risks targeted (i.e. some may focus on a narrower range of issues and impacts, such as child labour, modern slavery, or sourcing from conflict zones).

Mandatory human rights due diligence regimes are distinguishable from **corporate human rights reporting regimes** (see Box 2 below) by virtue of the presence of explicit legal duties to undertake human rights due diligence activities *and/or* to prevent harm through the exercise of due diligence (see further section 5.3 below). In mandatory human rights due diligence regimes it is these legal duties, rather than the incentives that may be generated by reporting obligations, for instance, that are designed to be the main drivers of corporate action. Under mandatory human rights due diligence regimes, liability attaches to the breach of a legal duty of care (and/or the occurrence of harm) rather than the failure to accurately report, and it is not possible for companies to comply with mandatory human rights diligence regimes merely by reporting on the steps that they did or did not take.

This is not to downplay the significance of human rights reporting regimes. Public reporting is an essential element of “human rights due diligence” as defined in the **UN Guiding Principles on Business and Human Rights**⁷ and is thus a core component of mandatory human rights due diligence regimes and proposals. Moreover, from a practical, compliance standpoint, requiring that companies place information in the public domain with respect to their approaches to managing human rights risks can create significant reputational and commercial incentives to improve underlying performance.⁸

Of the domestic legal regimes that have been introduced thus far, the best known and most far reaching is the **French Corporate Duty of Vigilance Law** (Law 2017-399 of 27 March 2017 related to Duty of Vigilance of Parent Companies and Commissioning Companies).⁹ This law requires larger French-registered companies (i.e. those having 5,000 or more employees, including employees of their French subsidiaries, or 10,000 or more employees worldwide) to prepare a “vigilance plan”. The vigilance plan, which must be made publicly available, must set out the company’s approach to assessing and addressing human rights and environmental risks posed by its own activities, those companies which they control, and the activities of those suppliers or contractors with which they have an established commercial relationship. The vigilance plan is required by statute to cover risk assessment and

⁷ See UNGP 21 and commentary.

⁸ See Shift, *Human Rights Reporting in France: Two Years In: Has the Duty of Vigilance Law Led to More Meaningful Disclosure?*, available at shiftproject.org/resource/human-rights-reporting-in-france-two-years-in-has-the-duty-of-vigilance-law-led-to-more-meaningful-disclosure/.

⁹ La loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et entreprises donneuses d’ordre.

screening, a risk mitigation strategy, an “alert system” (to be developed in collaboration with representatives of trade unions) and a risk monitoring scheme (i.e. to verify the effectiveness of measures taken). An overview of the company’s implementation of its vigilance plan is required to be communicated publicly via the company’s annual report. These obligations are subject to civil enforcement, whereby interested persons (defined to include people who have been harmed by corporate failures to observe human rights due diligence standards) can make applications to judicial authorities requesting companies to correct problems with compliance. The law also provides for the possibility of orders for financial compensation in cases where it can be demonstrated that non-compliance with the law has resulted in harm.

However, there are also a number of other domestic regimes which contain mandatory human rights due diligence elements. Under the **2019 Dutch Child Labour Due Diligence Act**,¹⁰ companies providing goods or services to Dutch consumers are required to exercise due diligence to determine whether there is a reasonable suspicion that such goods or services have been created using child labour and, if so, to implement a plan of action in response. The **European Union’s Conflict Minerals Regulation**¹¹ (which must be transposed into Member States’ laws) requires certain entities importing tin, tungsten, tantalum and/or gold into the EU to conduct and report on due diligence on their supply chain; “supply chain due diligence” in this case being legally defined to include internal management standards together with risk management standards comprising identifying and assessing risks, implementing a strategy for risk management, carrying out third party audits, and reporting annually on policies and practices for responsible sourcing. The standards set out in this regulation are further supplemented by non-binding guidance.¹²

In 2015 the **Indonesian government** introduced a new regulation designed to create a human rights certification system for Indonesian fishing enterprises wishing to operate in Indonesian waters.¹³ This was followed up in early 2017 with a **Regulation on Fisheries Human Rights Certification Requirements and Mechanism** which requires fishing industry operators to put in place and maintain a human rights policy, and a due diligence and remediation system to address cases of human rights violations.

In the **United States of America**, under a law which came into force in March 2015, certain government contractors are required to carry out due diligence before confirming that neither they, nor their subcontractors or agents, have engaged in human trafficking-related violations (including forced labour).¹⁴ Further legislative proposals that involve the creation of positive legal duties to manage and address adverse human rights impacts associated with business activities are presently under

¹⁰ Wet van 24 oktober 2019 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), available at www.eerstekamer.nl/9370000/1//j9vkvfj6b325az/v13khw8f3a00/f=y.pdf.

¹¹ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

¹² Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council.

¹³ See ILO, *Working Paper: Indonesia’s fisheries human rights certification system: assessment, commentary, and recommendations* (2019), available at www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_713924.pdf.

¹⁴ Federal Acquisition Regulation: Ending Trafficking in Persons (2015), available at www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons.

consideration in a number of European jurisdictions, including **Switzerland**,¹⁵ **Norway**¹⁶ and **Germany**¹⁷.

Box 2: Examples of human rights reporting regimes

The **EU Non-financial Reporting Directive**¹⁸ requires EU member States to enact legislation requiring certain large public interest entities to report annually on non-financial issues including human rights.

The **Californian Transparency in Supply Chains Act** requires certain businesses to disclose (on an annual basis) the efforts they are making to eradicate human trafficking and slavery from their supply chains.

The **US Dodd-Frank Act Section 1502** imposed a disclosure requirement on certain companies (“issuers”) to report any findings that their products may contain conflict minerals from the Democratic Republic of Congo to the SEC. Guidance issued by the SEC under the rule requires companies to publish annual reports on their due diligence and to have their reports independently audited.

The 2015 **UK Modern Slavery Act** obliges certain commercial organisations (i.e. which have an annual turnover of £36m or more, that carry on a business in the UK, and supply goods or services) to publish and prominently display a “modern slavery statement”, signed by a director (or equivalent) setting out the steps taken to ensure that modern slavery is not taking place in their business or supply chains (or to state that no steps have been taken). The Act is supported by further statutory guidance.¹⁹

The 2018 **Australian Modern Slavery Act** creates reporting obligations for certain companies based or operating in Australia relating to the risk of modern slavery in the operations and supply chain of a reporting entity (and its owned and controlled entities), as well as the steps it has taken to respond to the risks identified.

1.3 Other legal levers for encouraging human rights due diligence

While human rights due diligence is conceived under the UNGPs as an aspect of “a global standard of expected conduct for all business enterprises” which “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations,”²⁰ there are many potential linkages between

¹⁵ See www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative.

¹⁶ www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee-part-i.pdf.

¹⁷ www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies.

¹⁸ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

¹⁹ www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide.

²⁰ UNGP 11, commentary.

human rights due diligence and legal standards.²¹ In October 2017, pursuant to resolution 32/10 of the Human Rights Council,²² OHCHR convened a multi-stakeholder consultation to explore the different ways in which the exercise of human rights due diligence and corporate legal liability may interrelate, and how to ensure greater policy coherence from States in their approaches to access to remedy and human rights due diligence. In its report to the Human Rights Council on the outcomes of that consultation,²³ OHCHR concluded that “[w]hile the responsibility of business enterprises to respect human rights (of which human rights due diligence is an integral part) is theoretically distinct from issues of legal liability, there are many ways in which the two concepts can interact in practice.”²⁴ The OHCHR report then goes on to highlight “the various strategies States could adopt to articulate this connection more clearly and to encourage greater use of human rights due diligence”, including

- Mandating human rights due diligence activities under threat of legal liability;
- Evaluating the standard of care in negligence claims by reference to human rights due diligence standards;
- Permitting a human rights due diligence defense to certain offenses in appropriate cases;
- Considering the extent to which human rights due diligence was conducted when evaluating claims based upon theories of secondary liability; and
- Taking into account a company’s exercise of human rights due diligence when determining the type and severity of sanctions and remedies if liability is established.²⁵

Finally, the OHCHR report calls on States to ensure that, whatever approach is taken, legal regimes to encourage human rights due diligence should be informed by “clear policy aims”, a “key goal” of which “must be the encouragement of *meaningful* human rights due diligence by companies *in the spirit of the UNGPs*.”²⁶

In 2018, the UN Working Group on Business and Human Rights delivered a report to the UN General Assembly,²⁷ setting out the outcomes of further research and consultations with respect to human rights due diligence.²⁸ As part of a series of recommendations made at the conclusion of that work, the UN Working Group called on all States to

use all available levers to address market failures and governance gaps to advance corporate human rights due diligence as part of standard business practice, ensuring alignment with the Guiding Principles, including by ... [u]sing legislation to create incentives to exercise due diligence, including through mandatory requirements, while

²¹ See Groulx Diggs, Regan and Parance, *Business and Human Rights as a Galaxy of Norms*, 50 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 309 (2019).

²² A/HRC/RES/32/10, para. 13.

²³ 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: Report of the United Nations High Commissioner for Human Rights*, A/HRC/38/20/Add.2.

²⁴ *Ibid.*, para. 43.

²⁵ *Ibid.*, para. 44.

²⁶ *Ibid.*, para. 45, emphasis added.

²⁷ Working Group on the issue of human rights and transnational corporations and other business enterprises, *Corporate human rights due diligence – emerging practices, challenges and ways forward*, A/73/163.

²⁸ See further www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx.

*taking into account elements to drive effective implementation by businesses and promote level playing fields.*²⁹

2. Proposals for an EU-wide instrument on mandatory due diligence

Momentum is building within the European Union for an EU-wide approach to mandatory due diligence. The number of domestic-level regimes and proposals presently being implemented in, or considered in, EU member states suggests a considerable appetite for reform. The fragility of global supply chains exposed by the COVID-19 pandemic, as well as the extreme vulnerability of many of the people working in them, could increase demands (from trade unions and civil society organisations in particular) for legislation of this kind.

The European Commission, in its March 2018 Action Plan on Financing Sustainable Growth, signalled the need for a new analytical and consultative process to help shape the EU's policy and legislative response. In order to “promote corporate governance that is more conducive to sustainable investments”, the Commission announced that it would be carrying out “analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest.”³⁰

This was followed by a European Parliament resolution on sustainable finance (of 29 May 2018) which calls upon the Commission to bring forward legislative proposals for the financial sector including “an overarching, mandatory due diligence framework including a duty of care to be fully phased-in within a transitional period and taking into account the proportionality principle”.³¹ In January 2020, the Commission published the outcomes of an extensive independent study of options, entitled *Study on due diligence requirements through the supply chain* carried out in response to those two mandates (the “BIICL study”).³² In April 2020, EU Commissioner for Justice, Didier Reynders, announced his intention to introduce a legislative initiative on mandatory due diligence for companies at a meeting of the European Parliament's Responsible Business Conduct Working Group.³³ The Commissioner for Trade, Mr. Phil Hogan, in a separate set of remarks to a virtual OECD Forum on Responsible Business

²⁹ Working Group on the issue of human rights and transnational corporations and other business enterprises, *Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163)*, available at www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryA73163.pdf.

³⁰ European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Action Plan: Financing Sustainable Growth.

³¹ European Parliament resolution of 29 May 2018 on sustainable finance (2018/2007(INI)), available at www.europarl.europa.eu/doceo/document/TA-8-2018-0215_EN.html, at para. 6.

³² European Commission, *Study on due diligence requirements through the supply chain: Final Report* (2020), available at op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en (hereinafter the “BIICL study”).

³³ responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/.

Conduct in May 2020, signalled the possibility that EU-wide mandatory due diligence legislation may be supplemented by guidelines that adopt a “sector-based” approach.³⁴

3. Why are mandatory human rights due diligence regimes now under consideration?

Different stakeholder groups advance different arguments in favour of mandatory human rights due diligence legislation. Civil society organisations have argued binding approaches are justified and necessary as a result of **continuing failures by companies to identify, mitigate and address human rights risks effectively**. The BIICL study quotes a 2018 investigation and report by the organisation Corporate Human Rights Benchmark as painting a “deeply concerning” picture “with the majority of companies scoring poorly on the Benchmark ... and 40% of companies scoring no points at all across the human rights due diligence section of the assessment.”³⁵ Business enterprises, to the extent that views in favour of mandatory human rights due diligence are expressed, tend to focus on the potential advantages of such legislation in helping to secure a “**level playing field**” for responsible companies (i.e. one that does not give a competitive advantage to companies with poor practices), as well as possible advantages in terms of **enhancing leverage with suppliers** and **legal certainty**. The BIICL study summarises these attitudes (given in response to a separate 2019 survey) as follows:

*The majority of stakeholders indicated that mandatory due diligence as a legal standard of care ... may provide potential benefits to business relating to harmonization, legal certainty, a level playing field, and increasing leverage in their business relationships throughout the supply chain through a non-negotiable standard. The level playing field and legal certainty were amongst the most important considerations for business interviewees, whereas general interviewees highlighted its potential to address the lack of access to remedies for affected parties and improve implementation of due diligence.*³⁶

At a global level, the call for mandatory measures to address the gaps highlighted by benchmarking and ranking initiatives has been echoed by several experts and stakeholders. For example, the UN Working Group on Business and Human Rights, which is mandated by the Human Rights Council to promote the UNGPs, has noted that the BIICL study is fully in line with its own observations on the state of play. In a statement in March 2020, the Working Group highlighted that the study “shines further light on the regulatory action needed to protect workers, communities and consumers affected by business activities across sectors.”³⁷

³⁴ “[Mr Reynders’] preference is for a mandatory, horizontal due diligence legislation with possible sectoral guidelines. He indicated that subject to the results of consultations with stakeholders, the Commission would table legislative proposals in 2021 and I will work closely with him on this, given the strong trade dimension involved.” Introductory Remarks by Commissioner Phil Hogan at OECD Global Forum on Responsible Business Conduct, 19 May 2020, available at ec.europa.eu/commissioners/2019-2024/hogan/announcements/introductory-remarks-commissioner-phil-hogan-oecd-global-forum-responsible-business-conduct_en.

³⁵ See BIICL Study, n. 32 above, at p. 49, quoting Corporate Human Rights Benchmark, *2018 Key Finding - Apparel, Agricultural Products and Extractive Companies* (2018), available at www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf, at p. 5.

³⁶ BIICL Study, n. 32 above, at p. 17.

³⁷ www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25758&LangID=E.

4. Potential pitfalls to be aware of in the design of mandatory human rights due diligence regimes

The concept of “due diligence”, as traditionally understood by corporate lawyers, is fundamentally concerned with the legal, commercial or reputational risks *to the business enterprise*.³⁸ Policy makers and legislators will need to be careful to ensure that the attachment of legal liability to non-compliance does not distract from the fundamental goals of human rights due diligence, which is a set of risk management processes that focus squarely on the human rights risks *to people*, rather than legal, commercial or reputational risks *to the business enterprise*.

More broadly, it will also be necessary to ensure that the design of the regime is capable *in practice* of delivering on the key aim of strengthening human rights due diligence by companies so as to prevent and address business-related human rights harms. Participants in the OHCHR multi-stakeholder consultation on human rights due diligence and corporate legal liability (Geneva, October 2017),³⁹ highlighted a number of ways on which poor design of these regimes might actually undermine these objectives. In its final report, OHCHR summarised these various considerations as follows:

“16. Such laws can give companies clarity with respect to the human rights due diligence activities they are required to perform. This could help create a level playing field for companies, give human rights due diligence clear legal force, educate stakeholders and the wider public about company activities, and ultimately reduce risks of adverse human rights impacts from occurring.

17. At the same time, States should be careful to guard against unintended consequences of legal interventions. Participants at the Geneva meeting discussed possible disadvantages of “over-regulation;” for instance, the possibility that overly detailed and proscriptive legal regimes could discourage innovation and proactive behavior by companies and encourage narrow, compliance-oriented, “check box” human rights due diligence processes. On the other hand, too much flexibility may not provide sufficient levels of legal certainty for companies (especially if criminal sanctions are to be applied) and could make the regime difficult to enforce.

*18. This balance can be difficult to strike in practice, and States should give careful thought to the policy aims of legislation when reconciling these competing considerations”.*⁴⁰

5. Design choices and their implications

When people talk about “mandatory human rights due diligence” regimes, they are potentially discussing a wide range of different legal and regulatory possibilities. This creates the risk of misunderstandings between different stakeholder groups as to what is intended and their respective positions in relation to different proposals; it is possible to be in favour of “mandatory human rights due diligence” in principle, for instance, yet to have concerns about certain aspects of regulatory design

³⁸ See A/HRC/38/20/Add.2, para. 8.

³⁹ See section 1.3 above.

⁴⁰ See A/HRC/38/20/Add.2, paras. 16, 17 and 18.

or implementation. This section seeks to unpack some of the main choices that policy-makers and legislators will be confronted with as they work to develop suitable and impactful mandatory human rights due diligence regimes for the future.

5.1 Who should be the duty-bearer?

5.1.1 Primary duty-bearer

In this section, the “duty-bearer” is the entity to which the regulation is targeted, and on which the main burden of compliance will fall. The “duty-bearer” will be subject to sanctions or required to make reparations of some kind (see further section 5.4 below) in the event of non-compliance. The primary duty-bearers under regimes of this kind are corporate entities. However, the regime may be bolstered by further provisions imposing obligations (and also legal sanctions) on natural persons, such as directors.⁴¹

5.1.2 Jurisdictional issues

The corporate entities that are the main duty bearers under these regimes invariably have some form of connection with the regulating State. However, States have not confined the application of their regimes to companies incorporated within their jurisdictions. In practice, regulating States have based their regimes on a range of connecting factors, including companies “doing business in” the jurisdiction of the regulating States, depending on the objectives underlying the regimes. This potentially gives these types of regimes a very broad reach, with implications for the scope of human rights due diligence exercises that potentially extend (especially in the case of regimes based on “doing business” connections) to foreign-owned groups (see further section 6.2 below).

Many mandatory human rights due diligence regimes and proposals take an “enterprise” approach in which a “controlling” or “organising” corporate entity (e.g. a parent company of a corporate group, or a company at the top of a supply chain) is made responsible for designing and implementing a human rights due diligence system that covers the entire group (see section 5.2 below for a more detailed discussion of what is meant by “group” in this context). In such a system, corporate subsidiaries or suppliers to corporate groups are not subject to direct legal obligations as regards human rights due diligence; their human rights performance is regulated indirectly through the legal duties placed on their parent companies (or companies at the top of a franchise, distribution or supply network in the case of contract-based groups). Where subsidiaries, suppliers or contractors are located in other countries, this is an instance of “domestic measures with extraterritorial implications”, discussed in the commentary to UNGP 2.⁴² The French Corporate Duty of Vigilance Law is a good example of this approach.

5.1.3 Considerations of cost, benefit, “regulatory burden” and proportionality of regulatory responses for small and medium-sized enterprises

Mindful of the potential regulatory and cost burdens on smaller and medium-sized companies, many regimes relating to human rights due diligence (including those which focus on reporting obligations, see Box 2 above) are confined in their application to only the largest of companies and corporate groups.

⁴¹ See for example the 2019 Dutch Child Labour Due Diligence Act which provides for criminal liability and imposition of criminal penalties (up to 5 years imprisonment) for directors of companies that violate a non-compliance finding by the supervisory authority two times in 5 years.

⁴² “There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation. States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications.” See UNGP 2, commentary.

Some of these regimes (and particularly those based on corporate reporting) are limited to publicly owned-companies.

Beyond the need to ensure access to accurate risk information by investors, there are two main rationales for limiting the application of these laws in this way: the first is that these larger companies are the ones that typically present the most significant human rights-related risks, and the second is that imposing measures designed for large scale businesses on smaller enterprises is disproportionate and, where these measures may threaten the economic viability of enterprises, self-defeating. A legitimate counter argument, however, is that the business activities of privately-owned enterprises and small and medium-sized enterprises are also capable of generating serious human rights impacts⁴³ and thus, if the ultimate aim of the legislation is to protect people from harm, there is no justification in limiting the scope of mandatory human rights due diligence regimes in this way.

5.1.4 Finding the right regulatory balance

Based on regulatory practice in other areas, it may be possible to identify workable compromises around these difficult dilemmas regarding scope and application, for instance by providing regulators with the discretion to adopt a “risk-based” approach to regulation, prioritising resources so that those companies and sectors posing the highest levels of risk fall under the closest scrutiny, while those apparently posing lower levels of risk are subject to “lighter-touch” regulation. This kind of “graduated” approach would appear to be aligned with UNGP 14, which states that

*The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.*⁴⁴

The commentary to Guiding Principle 14 further acknowledges that

*the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms.*⁴⁵

It would also seem aligned to UNGP 17 which states that human rights due diligence “[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations”.⁴⁶ Guiding Principle 24 is also relevant, highlighting the need for prioritisation by business enterprises in cases where they are not able to address all actual or potential adverse human rights impacts simultaneously, starting with “those that are most severe or where a delayed response could make them irremediable”.⁴⁷

⁴³ “[S]ome small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character”. UNGP 14, commentary.

⁴⁴ UNGP 14.

⁴⁵ UNGP 14, commentary.

⁴⁶ UNGP 17(b).

⁴⁷ UNGP 24 and commentary.

5.2 What kinds of relationships and activities might give rise to legal liability?

In some cases, it may be relatively easy to determine where mandatory human rights due diligence responsibilities should lie and thus where the outer perimeters of the “group”, for the purposes of mandatory human rights due diligence regimes, should be. However, in many cases it will not. Although equity-based multinational groups (parent company + wholly-owned or majority-owned subsidiaries) are by no means obsolete as an organisational model, modern global business activity relies on vast and complex, and often interlocking value chains, making the identification of discrete “multinational business enterprises” an often impossible task.

Clearly some legal definition of the scope of mandatory human rights due diligence obligations will be necessary. However, in defining the kinds of relationships and activities that might give rise to legal liability, policy-makers are presented with a dilemma. If the definition of the group is constructed too flexibly, then the primary duty-bearer (see section 5.1.1 above) may not have the level of legal certainty it will need to be able to tell whether, at any point in time, it is compliant or not. On the other hand, very prescriptive definitions (e.g. based on shareholdings or percentages of overall business) are unlikely to capture the many and varied types of relationships that may result in a company “becoming involved” in actual or potential adverse human rights impacts.⁴⁸

The UNGPs calls for action from business enterprises in relation to *both* adverse human rights impacts that a business enterprise has itself caused or contributed to, *and* to impacts that are “directly linked to its operations, products or services by its business relationship with another entity”; however, the action required differs depending on the nature of involvement and the ability of the relevant actor(s) to exercise leverage.⁴⁹ Domestic legislative regimes, and especially those carrying the possibility of criminal, quasi-criminal or civil sanctions (see further section 5.6 below), will need to define these business relationships and entities (i.e. for which the primary duty bearer will have “due diligence” obligations) more precisely.⁵⁰

5.3 What kinds of legal obligations are imposed?

5.3.1 Fundamentals

Drawing from recent OHCHR research into the legal dimensions of human rights due diligence⁵¹ it is possible to divide legal regimes relevant to human rights due diligence into three main types, based on the nature of the obligations imposed and the way they are structured. These are:

- **Category 1:** regimes that require companies to prevent harm through the exercise of human rights due diligence (for which the occurrence of harm is a key element of the breach);

⁴⁸ “In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships”. UNGP 18 and commentary.

⁴⁹ See further UNGPs 19 and 22, and commentaries.

⁵⁰ “Certainty is a particularly important consideration where the consequences of a breach are potentially serious for a company and its directors. In these circumstances, considerations of justice and fairness would tend to favour a simpler, though perhaps more arbitrary, definition of the relevant ‘control’ relationships”. Zerk, *Multinationals and Corporate Social Responsibility* (2006), at p. 53. Note that the link between the certainty of obligations and the sanctions that can be imposed was considered by the French Constitutional Court in relation to the French Corporate Duty of Vigilance Law. “The French Constitutional Court held that authority in the statute for a court to impose a civil penalty of between €10-€30 million was unconstitutional because the scope of the duty was not sufficiently precise as the basis of a fine”. See Groulx Diggs et al., n. 21 above, at p. 313.

⁵¹ A/HRC/38/20/Add.2.

- **Category 2:** regimes that require companies to carry out human rights due diligence (i.e. liability arises from the failure to exercise human rights due diligence, and whether or not that failure has resulted in actual harm is immaterial to establishing non-compliance); and
- **Category 3:** regimes that contain no explicit requirement to carry out human rights due diligence but which create strong incentives in that direction (e.g. regimes that permit the company to use the fact that it had carried out human rights due diligence as a defence to legal liability for causing harm, or which permit levels of compliance with human rights due diligence standards to be taken into account “in mitigation” in deciding on an appropriate sanction for a legal breach).

The French Corporate Duty of Vigilance Law potentially straddles both category 1 and category 2; while enforcement action does not require applicants to show actual harm stemming from a failure by a company to put in place a “vigilance plan” or to implement it correctly, it also provides for the possibility of actions for compensation in the event of actual harm. The 2019 Dutch Child Labour Due Diligence Act arguably falls in category 2. Category 3 potentially covers civil liability regimes that use concepts of “negligence” to attribute liability, and also “strict liability” regimes which hold a company automatically liable on the occurrence of certain harms (in this case the occurrence of human rights abuses connected in some way to the company’s business activities) but which then shifts the burden of proof onto a company to prove that it should not be held liable for that harm in the particular circumstances (in this case on the basis that the company had exercised human rights due diligence).⁵²

For regimes that fall within categories 1 and 3, consideration may need to be given to whether the relevant legal duties are owed to “the world at large”, or to specific groups of people. Civil liability regimes that use concepts of “negligence” to attribute liability, for instance, use the idea of a “duty of care” to limit the scope of persons to whom legal duties are owed. The extent of this duty of care may be defined by one or more legal tests, such as whether the loss or harm that was eventually suffered was, or ought to have been, foreseeable. The question of whether a person comes within the ambit of any legal duties created by the law may have implications for who is entitled to take enforcement action (see section 5.6 below).

5.3.2 Clarifying standards through further instruments and initiatives

Whichever of the three models is selected, legislators and policy makers will need to give careful consideration to the level of detail that needs to be provided about the practical content of human rights due diligence in different sectors and contexts in order for the relevant obligations to be implemented as intended and fairly enforced. In some cases, the requirements may be set out in detail in the law itself (as has been done, to some degree, in the EU’s Conflict Minerals Regulation), and in some cases further guidance may be needed (as has been recognised in relation to the French Corporate Duty of Vigilance Law).⁵³

As discussed above, the level of detail and prescription must be carefully calibrated in light of the aims of the regulation, as well as a thorough understanding of the various legal, reputational and commercial drivers that may already be at work. As was observed in the 2018 report from the OHCHR to the Human Rights Council on this topic:

⁵² Ibid, paras. 25-29.

⁵³ *Ministre de l’économie et des finances, Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mar 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, November 2019.

*States should be careful to guard against unintended consequences of legal interventions. Participants at the Geneva meeting discussed possible disadvantages of “over-regulation;” for instance, the possibility that overly detailed and proscriptive legal regimes could discourage innovation and proactive behavior by companies and encourage narrow, compliance-oriented, “check box” human rights due diligence processes. On the other hand, too much flexibility may not provide sufficient levels of legal certainty for companies (especially if criminal sanctions are to be applied) and could make the regime difficult to enforce ... This balance can be difficult to strike in practice, and States should give careful thought to the policy aims of legislation when reconciling these competing considerations.*⁵⁴

5.3.3 Further guidance on framing legal obligations

OHCHR’s report at the conclusion of the first phase of its Accountability and Remedy Project includes a number of “Policy Objectives” and “Elements” that are relevant to the framing of legal obligations in mandatory human rights due diligence regimes. Relevant extracts from this report are set out in Box 4 below.

Box 4: Extracts from OHCHR’s report at the conclusion of the first phase of the Accountability and Remedy Project relevant to the design of mandatory human rights due diligence regimes⁵⁵

Policy objective 1: Domestic public law regimes that are relevant to the respect by business enterprises of human rights (“domestic public law regimes”) are sufficiently detailed and robust to ensure that there is both effective deterrence from and effective remedy in the event of business-related human rights abuses

1.4 Domestic public law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

1.5 Domestic public law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take appropriate account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

1.6 Domestic public law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention

⁵⁴ A/HRC/38/20/Add.2, para. 17.

⁵⁵ OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, Annex. Further explanation as to the extracts found in Box 4 can be found in OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*, A/HRC/32/19/Add.1. Additionally, OHCHR has shared illustrative examples of each policy objective found in Box 4 in the document *Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse*, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.pdf.

and mitigation of any human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies practices or operations.

Policy objective 3: The principles for assessing corporate liability under domestic public law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

3.1 Domestic public law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

3.2 Domestic public law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

3.3 Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

3.4 Enforcement agencies and judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Policy objective 11: Sanctions and other remedies that may be imposed following a determination of corporate legal liability in cases of business-related human rights abuse offer the prospect of an effective remedy for the relevant loss and/or harm

11.2 In each case, the sanctions imposed on companies: (a) are proportional to the gravity of the abuse and the harm suffered; (b) reflect the degree of culpability of the relevant company (e.g. as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company had responded adequately to warnings and other relevant factors).

Policy objective 12: Domestic private law regimes that regulate the respect by business enterprises of human rights ("domestic private law regimes") are sufficiently robust to ensure that there is both proper deterrence from and effective remedy in the event of business-related human rights abuses

12.3 Domestic private law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take proper account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

12.4 Domestic private law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention

and mitigation of human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies, practices or operations.

Policy objective 14: The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

14.1 Domestic private law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

14.2 Domestic private law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

14.3 Domestic private law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

14.4 Judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Policy objective 19: Private law remedies consequent upon a determination of corporate legal liability offer the prospect of an effective remedy for the relevant abuse and/or harm

19.2 In each case, the private law remedies awarded to claimants: (a) are proportional and appropriate to the gravity of the abuse and the extent and nature of the loss and/or harm suffered; (b) may, to the extent permitted by the relevant domestic legal system, reflect the degree of culpability of the defendant company (e.g. as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company responded adequately to warnings and other relevant factors).

5.4 Comprehensive or issues-based regimes?

Should the mandatory human rights due diligence regime seek to cover *all* internationally recognized human rights? Or should it focus on specific areas of human rights (e.g. child labour, modern slavery)? There are strong arguments to be made in favour of general human rights regimes, covering all internationally recognized human rights, based on the universality, interrelatedness and indivisibility of human rights.⁵⁶ The growing body of research into the problem of “intersectionality” – which refers to the way in which different forms of disadvantage (associated with race, religion, gender, age, disability, sexual orientation, class, etc.) combine and intersect in a way that further undermines enjoyment of human rights – provides further arguments against “siloeing” different kinds of rights protections within different regimes.

On the other hand, very broad mandatory human rights due diligence regimes, which seek to address the full range of human rights impacts of business activity, may be extremely complex, costly and

⁵⁶ OHCHR, *What are human rights?*, available at www.ohchr.org/en/issues/pages/whatarehumanrights.aspx.

resource-intensive to administer and enforce in practice. There is a danger that they may prove overwhelming for corporate duty-bearers, or that implementation efforts may be “spread too thin”. Over-ambitious regimes which lack credibility with stakeholders (and particularly with business) cannot be relied upon to drive the changes in business behaviours necessary to reduce business-related human rights harms in any meaningful and lasting way. These calculations may direct policy-makers and legislators to favour more targeted approaches that focus on specific areas of human rights harm, where the impacts of regulatory efforts can be more readily identified, tracked and communicated to different stakeholder groups (including tax-payers).

The UNGPs acknowledge that there may be a need for prioritisation based on the human rights issues that stand out as being most “salient” in the context of the relevant business operations, both in terms of risk assessment and analysis⁵⁷ and also in terms of actions needed to address those risks and impacts.⁵⁸ The UNGPs make clear “that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise;” however, “the most salient rights will logically be the ones on which it concentrates its primary efforts.”⁵⁹

5.5 Should the regime seek to apply to all business activity – or be sector-based?

A further scope-related issue for policy-makers and legislators to consider is whether the regime should be aimed at all business activities, or targeted towards specific sectors of industry or activities that pose particular human right-related risks. Again, it is legitimate to raise concerns about limiting the scope of regimes to specific sectors based on the universality of human rights. Moreover, it is clear that “businesses can have an impact on virtually the entire spectrum of internationally recognised human rights”.⁶⁰ It may be argued that focusing on specific sectors and activities create the risk of patchiness in corporate compliance and performance; people’s enjoyment of human rights should not depend on nature of the business interests of the companies they come into contact with. The UNGPs state that “[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure”.⁶¹

However, the UNGPs also acknowledge that “the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts”.⁶² For reasons similar to those outlined in section 4.4 above, policy-makers and legislators may favour sector-based approaches over comprehensive ones, which lend themselves to the possibility of bespoke provisions and guidance, tailored to the relevant industry, and oversight by specialist regulators with in-depth knowledge of the operational context, including relevant legal, reputational, commercial and structural issues that have a bearing on human rights risks and their proper management.

5.6 What should be the consequences of non-compliance?

The examples of mandatory human rights due diligence regimes discussed above (see section 1.2) display a range of approaches to enforcement, including the use of civil liability provisions (under the

⁵⁷ See UNGP 17 and commentary.

⁵⁸ See UNGP 24, and commentary.

⁵⁹ OHCHR, *The Corporate Responsibility to Respect: An Interpretative Guide*, available at www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf, at p. 8.

⁶⁰ UNGP 13 and commentary.

⁶¹ UNGP 14.

⁶² Ibid.

French law) and administrative enforcement by regulatory institutions (which may take the form of a declaration of non-compliance, which is then enforceable by the courts, as is the case under the Dutch Child Labour Law). Criminal and quasi-criminal penalties are increasingly becoming a feature of these types of regimes; although previously largely confined to reporting regimes, they are now beginning to appear in proposals for mandatory due diligence regimes as a sanction for failures to comply with core human rights due diligence requirements.

Where “private” or “civil” enforcement is contemplated, the regime should set out clearly who will have “standing” to bring a relevant legal action (which could conceivably include a claim for damages for harm arising from a breach of standards, as is the case under the French Corporate Duty of Vigilance Law). There are a variety of options that could potentially be considered, ranging from limiting this right to persons who can show that they have directly suffered harm and/or people who can show the breach of a legal duty that was owed to them (see section 5.3.1 above), to creating a “right of action” for people able to demonstrate an “interest” in the matter (such as a trade union or a civil society organisation with an established interest in the human rights issues raised by the case), to opening up the possibility of civil enforcement by any person (e.g. on grounds of the public interest involved).

To illustrate the range of enforcement possibilities that are theoretically available, a very generic “menu of options” is shown in Table 1 below, along with some further observations relating to regulatory design.

Table 1: Menu of enforcement and sanctions options in relation to mandatory human rights due diligence regimes

| Type of enforcement | By whom? | Possible outcome | Observations |
|-----------------------|--|---|---|
| Civil enforcement | Any person / Interested parties / affected stakeholders | Financial compensation for harm. Changes to corporate policies and processes. | Enforcement is heavily reliant on resources of civil society organisations, trade unions and others to mobilise and bring claims. |
| Civil enforcement | Any person / Interested parties / affected stakeholders | Injunction / declaration of non-compliance | Enforcement is heavily reliant on resources of civil society organisations, trade unions and others to mobilise and bring claims. |
| Administrative action | Regulator (either on own initiative or on application by interested parties / affected stakeholders) | Declaration of non-compliance / order to make improvements (which may be subsequently enforceable in court) | Can be useful as a way of clarifying technical requirements for companies and the standards that will be applied to determine whether or not there has been a legal breach which could then be enforced through civil or other proceedings. |
| | | | |

| | | | |
|--|--|---|---|
| Administrative penalties | Regulator (either on own initiative or on application by interested parties / affected stakeholders) | Fines (small) | Regulator's ability to levy fines is likely to be circumscribed (subject to a monetary limit). |
| Criminal and quasi-criminal sanctions | Law enforcement agencies / regulatory agencies | Fines (larger). Imprisonment (e.g. of directors). | More usually associated with reporting regimes (e.g. as a sanction against misleading statements), but starting to become a feature of mandatory human rights due diligence regimes and proposals. May not be suitable for regimes where there is a large amount of flexibility of interpretation of the nature of obligations (see discussion in section 5.2 above). |
| Other (e.g. administrative, commercial) consequences | Various | Exclusion from public procurement regimes Exclusion from overseas investment support | Requires attention to policy coherence and linkages with other areas of law and regulation (see further section 6 below). |

5.7 What supporting regulatory institutions and arrangements may be needed?

In addition to the issues touching on enforcement (see section 5.6 above), policy-makers and legislators will need to discuss with stakeholders the various institutions, resources and other arrangements that will be needed to ensure that the regime is a successful and effective one for promoting human rights due diligence by companies.

The regime should be structured in such a way as to be responsive to changing circumstances with implications for the management of business-related human rights risks, such as those arising from, and exacerbated by, the COVID-19 pandemic. A reasonably common way of providing this flexibility is by way of “umbrella” legislation, which can be supplemented (perhaps on a sector-by-sector basis, see section 5.5 above) with further regulations and guidance as needed. Guidance can be binding, or non-binding, or can be used to create a presumption of compliance with the regime (i.e. companies complying with the guidance will be presumed to be in compliance unless the contrary is shown). A particular need for guidance has been noted in the context of mandatory human rights due diligence legislation, especially where the underlying standards are “expressed in broad and general terms” and require some translation to the corporate context.⁶³

⁶³ “[H]uman rights typically are expressed in broad and general terms ... While there are egregious cases of clear rights violations, a company otherwise may find it difficult to know whether its operations contravene its duty to respect human rights.” Groulx Diggs et al., n. 21 above, at p. 317.

Whichever regulatory structure is eventually preferred (see sections 5.1-5.6 above), some form of supervisory institution is likely to be needed to help support implementation and compliance, through educational and capacity building work with companies, for example. These kinds of supporting institutions also have potentially important roles to play vis-à-vis liaison with stakeholder groups, monitoring evaluating regulatory impacts and effectiveness, engaging with other State agencies (see further section 6 below), reporting progress and contributing to regulatory development and law reform.

6. The wider regulatory landscape

6.1. The wider domestic landscape

The issue of how mandatory human rights due diligence proposals interrelate with other regulatory initiatives (including those beyond the territorial jurisdiction of the regulating State) needs much more attention than it currently receives. This understanding is relevant to achieving the aim of “policy coherence” as explained in the UNGPs.⁶⁴

Because of the breadth of subject matter potentially covered by mandatory human rights due diligence laws, and particularly those that are designed to be broad and comprehensive in scope (as opposed to those focusing on specific risk areas, particular stakeholders or particular sectors, see sections 5.4 and 5.5 above) there are potential points of interconnection with many other domestic law regimes. Recent OHCHR research for the third phase of the Accountability and Remedy Project has identified numerous areas of domestic law that are potentially relevant to the effective functioning of company-based remedial mechanisms (which have a potentially vital part to play in human rights due diligence, both as an “early warning” system of problems and as a source of continuous learning),⁶⁵ including contract law, competition law, laws on recognition of arbitration awards, laws protecting fundamental labour rights, consumer law, environmental law, privacy laws, immigration law, laws on equality and anti-discrimination, laws on whistle-blower protection and laws on freedom of information.⁶⁶

There may be areas, too, where regulatory effectiveness and leverage can be enhanced, for example by linking compliance to mandatory human rights due diligence regimes (or non-compliance) to access to (or sanctions under) other schemes, such as public procurement schemes and other agencies that may provide support and services to business activities, such as export credit agencies, official investment insurance of guarantee agencies, development agencies and development finance institutions.⁶⁷ In the European context, policy-makers will want to analyse carefully the various points of connection with the implementation of the “European Green Deal”.⁶⁸

It will be important to ensure that mandatory human rights due diligence regimes can benefit from, and do not interfere with or undermine these wider regimes. A review process is likely to be needed to identify any areas of tension or overlap (as well as possible opportunities arising from collaboration),

⁶⁴ “Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.” UNGP 8, commentary.

⁶⁵ See UNGP 31 (g – h).

⁶⁶ OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms: explanatory notes*, A/HRC/44/32/Add.1, para. 8.

⁶⁷ See UNGP 4 and commentary.

⁶⁸ ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

and the appropriate accommodations, consistent with the aims and proposed structure (see section 5 above) of the regime under consideration.

Preliminary work connected with the proposals for an EU-wide approach to mandatory human rights due diligence appears to recognise this need; highlighting, in particular, the importance of ensuring a sensible interface between mandatory human rights due diligence regime proposals and pre-existing laws on directors' duties and corporate reporting, including under general corporate law.

Policy-makers and legislators may need to extend this analysis into less obvious territory, for instance to cover areas of law where there may be incentives running counter to the objectives of mandatory human rights due diligence regimes, such as may exist under laws of civil liability, and consider how any unhelpful divergences in approach may be bridged (e.g. between regulatory approaches that seek to encourage companies to more proactively investigate human rights abuses in supply chains and judicial approaches to liability that may operate in such a way as to deter this).

In its report to the Human Rights Council at the conclusion of phase I of the Accountability and Remedy Project, OHCHR highlights the importance of proper alignment between “[t]he principles for assessing corporate liability under domestic private law regimes” and “the responsibility of companies to exercise human rights due diligence across their operations”.⁶⁹ The point is reinforced in phase III of the Accountability and Remedy Project, in which it is noted that “the legal implications of establishing [grievance] mechanisms, for business enterprises in particular, may be shaped by the operation of laws of much broader application, such as those relating to civil liability”.⁷⁰

6.2 The wider international landscape

Where the mandatory human rights due diligence regime potentially extends to business activities in other jurisdictions – either directly, as a result of assertions of jurisdiction over companies incorporated elsewhere with connections to the regulating State, or indirectly as a result of foreign business activities falling within the scope of activities covered by a parent company's legal duties – policy-makers and legislators will also need to be mindful of the potential for inconsistencies between different domestic laws and approaches in the manner in which they seek to implement different types of mandatory human rights due diligence regimes (see section 6.1 above), including the various ways in which compliance with international standards is encouraged and enforced.

The potential for overlap and inconsistencies between different domestic regimes (i.e. relevant to business and human rights standards and human rights due diligence in particular) is much increased by differences of approach (both actual and likely in future) between different States as regards matters such as the definition of the duty bearer (see section 5.1 above) and the extent and types of legal obligations imposed (see sections 5.2 and 5.3 above). Careful consultation with affected stakeholders, civil society and businesses will be necessary, ensuring that opportunities for participation are not confined to those representing only perspectives and interests of actors located in the “regulating” State. Neither should policy-makers overlook the need for consultation with regulatory agencies in other States (e.g. “home States” for foreign subsidiaries and key components of global value chains) – to

⁶⁹ OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, Annex.

⁷⁰ A/HRC/44/32/Add.1, para. 8.

ensure that possible areas of inconsistency, duplication, confusion and perhaps even tension, are identified and appropriately addressed.

7. Key points to explore and take into account in future discussions

The term “mandatory human rights due diligence” potentially covers a range of different regimes, each presenting a number of options as regards their design and implementation. Much of the present discourse around mandatory human rights due diligence glosses over these differences. This creates the risk that different stakeholder groups may be speaking at cross-purposes when they support (or express concerns about) mandatory human rights due diligence. Many of the reservations that are expressed by some stakeholders about mandatory human rights due diligence regimes (see section 4 above) can be addressed through good and thoughtful design, for instance. This paper has sought to unpack the main issues that will need to be addressed as stakeholders working in different jurisdictions consider, prepare and progress their proposals for mandatory human rights due diligence.

With a view to encouraging a robust, constructive and ultimately productive dialogue between stakeholders, a list of key items to consider and take into account in future engagement on these important issues is set out below.

Item 1. A threshold question to be considered (because it is likely to have many implications for the regime’s design, development and implementation) is whether the regime will be general in nature (i.e. would seek to apply to all sectors and all types of human rights abuses) or

- Would be limited to specific (e.g. “high-risk”) sectors or business activities (see section 5.5); and/or
- Would focus on specific human rights issues and themes, or focus on severity (see section 5.6).

Item 2. In order to ensure that legislative proposals are implementable and meet stated policy goals, policy makers and legislators will need to consult widely with stakeholders on a range of issues related to the design of the proposed regime (*taking care to communicate clearly the various trade-offs that may be involved*),⁷¹ and in particular

- The types of companies to which the primary mandatory human rights due diligence legal obligations will apply (see section 5.1.1 above);
- The nature of the legal obligations to be imposed (see section 5.3);
- The extent of the legal obligations to be imposed (i.e. geographical, and also as regards the types and nature of business activities and relationships that the primary duty bearer will be responsible for, see section 5.2 above);
- The manner in which the legal standards will be enforced (including, if civil or criminal enforcement is contemplated, the range of persons who will be accorded “standing” to take legal action, see section 5.6);
- The types of sanctions for non-compliance (e.g. criminal, quasi-criminal, declaratory remedies, loss of access to government schemes etc., see section 5.6);

⁷¹ E.g. the likely need for greater clarity (and less flexibility) as regards the scope and nature of obligations if the possibility of criminal sanctions is being contemplated (see further 5.2 and 5.6 above), or the need to balance the advantages of the simpler implementation of a “sector-specific” regime against the possible disadvantages of its more limited scope.

- The “regulatory architecture”; i.e. the structure of the regime, and the supporting institutions, services and arrangements (including supporting regulations, types and format of guidance, etc.) that will be needed, especially with regard to abuse in international supply chains;
- The approach to regulation and enforcement (e.g. proactive or reactive, “risk-based”, “light-touch”, company response + clearance models, graduated responses, etc.).

Item 3. Policy-makers and legislators should conduct a thorough review of the wider “regulatory ecosystem” in which the mandatory human rights diligence regime will sit, with a view to identifying areas where reforms or amendments to laws may be needed, in order to ensure

- that the mandatory human rights due diligence regime is able to capitalise on opportunities that may be presented by existing regimes (e.g. in the form of leverage or incentives to enhance the commercial or reputational drivers for carrying out human rights due diligence activities to a high standard),
- a smooth interface between the mandatory human rights due diligence regime and other legal regimes,
- that the new regime is capable of meeting its regulatory objectives, that the risks of any negative unintended consequences are identified and addressed, and that businesses are not subjected to any compliance dilemmas (e.g. in the form of conflicting requirements), and
- the general aim of ensuring “policy coherence”.

Item 4. While international human rights norms apply in all jurisdictions, the manner in which these will be given effect as a matter of domestic law, including the regulatory techniques and institutions used, can vary greatly. Therefore, where the regime is proposed to have potential extraterritorial reach, careful consultation with affected stakeholders, civil society, businesses and regulatory agencies *in all relevant jurisdictions* will be necessary to ensure that possible areas of inconsistency, duplication, confusion and perhaps even tension, are identified and appropriately addressed.

Item 5. Policy-makers and legislators should consider the different ways in which further training and capacity building could help to facilitate smooth implementation of new mandatory human rights due diligence regimes (e.g. of legal practitioners, regulators and the judiciary as regards the key elements of human rights due diligence and the ways in which it is distinctive from other kinds of due diligence in its focus on risks *to people* rather than legal risks to the company).