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Review paper

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HARMONIZING DUE DILIGENCE IN THE EU: THE UN GUIDING PRINCIPLES (UNGPs) AND THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CSDDD)

ABSTRACT

The UN Guiding Principles on Business and Human Rights (UNGPs), adopted in 2011 by the Human Rights Council in the form of a non-legally binding instrument, are today considered the authoritative international ‘soft’ standard on business and human rights. While the UNGPs generally fall within the category of international ‘soft law’ instruments that, as such, do not create obligations binding under international law, the last decade has witnessed a wave of legal developments inspired by the UNGPs, which attempt to convert soft principles set forth therein into binding law at different regulatory levels. At the EU level, specifically, negotiations are ongoing for an EU-wide Directive on Corporate Sustainability Due Diligence (CSDDD), which would aim to promote responsible behavior by companies across global supply chains by introducing ‘sustainability due diligence obligations’ for certain categories of company domiciled in EU member states and foreign companies active in the EU market. The article explores how the UNGPs have informed relevant aspects of the Directive. To this end, the article provides a preliminary analysis of the substantive alignment between the final text of the draft Directive and the UNGPs.

Keywords: companies, soft law, human rights due diligence, UNGPs, EU CSDDD

1. INTRODUCTION

In 2011, the UN Human Rights Council (HRC) adopted the UN Guiding Principles on Business and Human Rights (UNGPs)¹, the final product of the mandate of the Special Representative of the Secretary-General (SRSG) on the

¹ UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 21 March 2011.

issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie. The UNGPs elaborate on the existing international human rights obligations of states to protect human rights in the context of business activities (Pillar I), on the responsibilities of business actors to respect human rights² (Pillar II), and on the right to effective remedy for victims of corporate-related adverse human rights impacts (Pillar III). Under Pillar II, specifically, companies are expected to respect human rights, that is, to avoid causing or contributing to adverse human rights impacts in the context of their business activities and business relationships. Human rights due diligence (HRDD) is the process envisaged by the UNGPs whereby companies can avoid causing or contributing to adverse human rights impacts.

The UNGPs belong to the category of so-called ‘soft-law’ instruments in the field of business and human rights (BHR)³, that is, non-legally binding instruments which seek to lay down principles of expected behavior rather than placing obligations binding under international law. Notwithstanding this, in recent years, ‘hardening’ processes of elements of the UNGPs have been ongoing at the national level, *inter alia*, in a number of EU jurisdictions⁴. These processes have sought to incorporate into domestic law the core component of the corporate responsibility to respect human rights through a legal requirement placed on companies to exercise human rights due diligence.

At the EU level, too, to avoid the legal fragmentation stemming from individual Member States’ national initiatives on mandatory corporate due diligence, negotiations have been ongoing for a Directive on Corporate Sustainability Due

² The UNGPs provide that ‘because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights’. Principle 12 clarifies that the corporate responsibility to respect refers to, at a minimum, the human rights included in the International Bill of Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.

³ Choudhury, B., «Balancing Soft and Hard Law for Business and Human Rights» in *International and Comparative Law Quarterly*, vol. 67, 2018, p. 968-969.

⁴ Parallel to these developments it should be mentioned that a process to elaborate an international legally binding treaty on business and human rights is ongoing under the auspices of the UN. The treaty process started back in 2014 with the appointment by the UN Human Rights Council (HRC), through Resolution 26/9, of an open-ended intergovernmental working group (OEIGWG) with the mandate to elaborate such instrument. The OEIGWG has so far held nine working sessions and a number of treaty drafts have been negotiated. The latest updated draft of the treaty has been released in July 2023. For an overview of the process see <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

Diligence (CSDDD)⁵, which aims to promote responsible behaviour by companies across global supply chains by introducing ‘sustainability due diligence obligations’ for certain categories of company domiciled in EU member states and foreign companies active in the EU market. The explanatory memorandum for the draft Directive declares that ‘Union legislation on corporate due diligence would advance respect for human rights and [environmental] protection, create a level playing field for companies within the Union and avoid fragmentation resulting from Member States acting on their own’⁶. The final text of the draft Directive has been approved with consensus of the EU Council in March 2024 and has received approval by the EU Parliament in April 2024. Once entered into force, the Directive will require EU Member States to enact national legislation placing on relevant categories of corporations due diligence obligations modelled on principles enshrined in non-binding international instruments in business and human rights, among them, the UNGPs.

The present article explores the final text of the draft Directive, which attempts to harmonize the implementation of the UNGPs at the EU level and to ‘harden’ the UNGPs’ ‘soft’ corporate responsibility to respect human rights by requiring EU Member States to place on certain categories of companies a legal requirement to exercise due diligence under domestic law. Put differently, the article is concerned with the move in the area of business and human rights from international ‘soft’ law to national law. The aim of the article is to illustrate how norms enshrined in international soft law instruments ‘may provide a model for domestic legislation and thus become legally binding internally, while remaining non-binding internationally’⁷, by way of examining the alignment between substantive aspects of the draft Directive and core principles enshrined in the three Pillars of the UNGPs. It is outside the scope of the article to examine whether hard law options are preferable to existing soft law instruments in the area of business and human rights.

The article is structured as follows. Section 2 briefly discusses the emerging trend towards a binding corporate obligation to exercise human rights due diligence under domestic law, highlighting some of the reasons behind the call for binding corporate due diligence obligations. Section 3 illustrates the substantive aspects of the draft Directive. Section 4 examines specific elements

⁵ The Proposal for the Directive was adopted by the EU Commission in February 2022. Text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

⁶ *Ibid.*, p. 3.

⁷ Shelton, D., «Soft Law» in *Handbook of International Law*, Armstrong, D. (ed), Routledge, 2008, at 2. See also Chinkin, C., «The Challenge of Soft-Law: Development and Change in International Law» in *International and Comparative Law Quarterly*, vol. 38, 1989, p. 858.

of principles enshrined in the UNGPs that are reflected in the draft Directive. Section 5 provides concluding remarks.

2. THE TREND TOWARDS MANDATORY CORPORATE HUMAN RIGHTS DUE DILIGENCE UNDER NATIONAL LAW⁸

A trend towards binding corporate obligations to exercise human rights due diligence at the national level has emerged in recent years in response both to poor implementation by companies of their ‘soft’ – that is, non-binding – ‘responsibility to respect’ and to the perceived inadequacy of international ‘soft’ law instruments on business and human rights, specifically the UNGPs, in improving standards of business conduct.

As to the corporate implementation of the ‘responsibility’ to respect human rights, the EU Commission has reported that, ‘despite the influence of the UNGPs, the actual implementation of due diligence for human rights [...] impacts has been very poor in practice’⁹. Recent studies have shown that many companies do not implement at all human rights due diligence as envisaged by the UNGPs, or although purporting to implement it, ‘do not demonstrate practices that meet the [expectations] set by the Guiding Principles’¹⁰. The 2020 Corporate Benchmark Assessment shows that almost half of the 229 companies assessed across all sectors failed to score any points with respect to the exercise of human rights due diligence¹¹. Two years later, in 2022, the same Assessment showed that almost half of the 129 companies examined failed to meet the expectations for the initial steps of the human rights due diligence process envisaged by the UNGPs¹².

⁸ The author has discussed this in Assenza E, ‘From International ‘Soft’ Law to National Law: the UNGPs in Domestic Mandatory Human Rights Due Diligence Legislation’ (2024) 2 Spanish Journal of Business and Human Rights.

⁹ See in this regard European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, p. 243. Available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

¹⁰ See Report by UN Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/73/163, July 2018, para. 25.

¹¹ World Benchmarking Alliance, *Corporate Human Rights Benchmark 2020: Key Findings*, p. 3, available at: <https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf>.

¹² World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, p. 3, available at:

As for those companies that at least purport to implement the responsibility to respect human rights, among weaknesses in corporate human rights due diligence practices the UN Working Group on the issue of human rights and transnational corporations and other business enterprises¹³ has highlighted the lack of understanding by companies that human rights due diligence should focus on the actual and potential risks to rights-holders, rather than to the business¹⁴; the tendency to undertake human rights due diligence processes as a box-ticking exercise, without meaningful engagement of stakeholders, especially vulnerable or at-risk groups¹⁵; and the failure by companies to address risks beyond first-tier companies in their global supply chains¹⁶. Against this background, the Working Group has recommended that states adopt domestic measures to legally require companies to exercise human rights due diligence¹⁷, so as to ‘advance corporate human rights due diligence as part of standard business practice’¹⁸.

This poor implementation of the corporate ‘responsibility’ to respect human rights has been generally attributed to the non-legally binding character of the UNGPs specifically¹⁹. According to many, the UNGPs’ soft corporate responsibility to respect human rights has fallen short of improving the way in which companies identify and address their human rights adverse impacts²⁰ because it does not give rise to any legally binding obligations for companies to exercise human rights due diligence²¹. The lack of legally binding obligations on human rights due diligence is alleged to have ‘allowed corporations to continue

https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf.

¹³ The body of experts established following the adoption of the UNGPs to promote worldwide dissemination and implementation of the instrument.

¹⁴ UN Doc. A/73/163, para. 25(a).

¹⁵ *Ibid.*, para. 25(c).

¹⁶ UN Doc. A/73/163, para. 29.

¹⁷ *Ibid.*, para. 93.

¹⁸ *Ibid.*

¹⁹ See in this regard European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, p. 141, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

²⁰ Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check*, (2020), p. 6.

²¹ European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, p. 243. See also Deva, S., «Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?» in *Leiden Journal of International Law*, 2023, p. 10: ‘as business responsibility to respect human rights under Pillar II is voluntary, conducting HRDD is also non-obligatory for businesses. This is a major limitation because market pressures or courts of public opinion do not always work against all enterprises’.

to disregard appalling human rights abuses [...] taking place throughout their global value chains'²². In light of this, it has been argued that introduction of legal obligations is necessary in the area of human rights due diligence, 'where progress resulting from voluntary measures has been slow'²³. The UN Working Group has observed that voluntary instruments are inadequate to address existing weaknesses in business human rights due diligence practices, and has highlighted the need for 'enhanced [...] regulatory action to address business-related human rights impacts across sectors and global value chains', for instance through mandatory human rights due diligence requirements²⁴.

3. THE DRAFT EU CSDDD

As mentioned, the final compromise text of the EU Corporate Sustainability Due Diligence Directive²⁵ was approved with consensus of the EU Council in March 2024. The Directive recognizes the behaviour of companies across all sectors of the economy as 'key to success in the Union's sustainability objectives'²⁶. It highlights how, under existing international standards on business and human rights, among others the UNGPs, companies are expected to exercise human rights due diligence by identifying, preventing and mitigating the adverse impacts of their operations on human rights and by accounting for how they address those impacts²⁷. The main objective of the Directive is to 'better exploit[ing] the potential of the single market to contribute to the transition to a sustainable economy and contributing to sustainable development through the prevention and mitigation of potential or actual human rights and environmental adverse impacts in companies' chains of activities'²⁸. Accordingly, the Directive highlights the potential risk of legal fragmentation stemming from the national

²² Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check*, (2020), p. 4.

²³ World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, p. 5. Available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf. See also Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check*, (2020), p. 6.

²⁴ Press Release, UN OHCHR, «UN experts welcome new study on corporate human rights due diligence», March 2020, available at <https://www.ohchr.org/en/press-releases/2020/03/un-experts-welcome-new-study-corporate-human-rights-due-diligence?LangID=E&NewsID=25758>.

²⁵ Draft text available at: <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf>

²⁶ EU CSDDD, Recital 4.

²⁷ *Ibid.*, Recital 5.

²⁸ *Ibid.*, Recital 71.

initiatives on mandatory human rights due diligence of individual Member States, and the need for action at Union level²⁹.

The Directive provides rules for EU Member States regarding obligations for companies to exercise human rights and environmental due diligence with respect to their own operations, the operations of their subsidiaries and the operations of their business partners in their chains of activities³⁰. It also provides rules for civil liability for companies that violate the aforementioned obligations³¹, as well as obligations related to climate change mitigation³².

It applies to EU companies with more than 1000 employees and a net global turnover of more than EUR 450m³³, as well as non-EU companies with a net global turnover of more than EUR 450m generated in the EU³⁴. Under the Directive EU Member States are required to place on these relevant categories of companies an obligation to conduct risk-based human rights and environmental due diligence³⁵. To say that companies shall exercise due diligence is to say that, as provided for in the Directive, companies shall integrate due diligence into their policies and risk management systems; they shall identify and assess actual and potential adverse impacts; they shall prevent and mitigate potential adverse impacts, while bringing actual adverse impacts to an end; they shall establish a notification mechanism and complaints procedure; they shall monitor and track the effectiveness of their due diligence policies and measures; and they shall publicly communicate how they exercise due diligence. These substantive elements of the due diligence process are dealt with in separate provisions of the draft Directive, as follows.

The first requirement of the due diligence process is the integration of due diligence into the company's policies and and risk management systems³⁶. Moreover, companies should have in place a due diligence policy containing, among others, a description of the company's approach to due diligence³⁷ and a

²⁹ *Ibid.* The objective of the Directive 'cannot be sufficiently achieved by the Member States acting individually or in an uncoordinated manner, but can rather, by reason of the scale and effects of the actions, be better achieved at Union level'.

³⁰ EU CSDDD, Article 1(1)(a).

³¹ *Ibid.*, Article 1(1)(b).

³² *Ibid.*, Article 1(1)(c). For the purpose of the present contribution, the climate aspect of the Directive will not be examined. The focus is on human rights and environmental due diligence obligations that the Directive requires Member States to place on relevant categories of companies under domestic law.

³³ EU CSDDD, Article 2(1)(a).

³⁴ *Ibid.*, Article 2(2)(a).

³⁵ EU CSDDD, Article 4.

³⁶ EU CSDDD, Article 5(1).

³⁷ *Ibid.*, Article 5(1a)(a).

description of the processes necessary ‘to integrate due diligence into the relevant policies and to implement due diligence’³⁸.

The second requirement of the due diligence obligation that Member States shall place on relevant companies under domestic law is the identification and assessment, through appropriate measures, of actual and potential impacts in their own operations and in the operations of their subsidiaries and business partners in the chains of activities³⁹. In order to do so, companies would be required to map their own operations, as well as the operations of their subsidiaries and business partners in their chain of activities ‘in order to identify [...] where adverse impacts are most likely to occur and to be most severe’⁴⁰. Based on the findings of the mapping of these operations, companies would then be required to ‘carry out in-depth assessment’ of these same operations where adverse impacts have been identified⁴¹. The Directive acknowledges the reality of the difficulties encountered by companies in addressing all adverse impacts identified. In this regards, it provides that where it is not possible to address all identified adverse impacts, companies shall prioritize identified adverse impacts ‘based on the severity and likelihood of the adverse impacts’⁴². Once these prioritized adverse impacts are addressed, companies ‘shall address less severe and less likely adverse impacts’⁴³.

After the identification and assessment of actual and potential adverse impacts takes place, the third due diligence requirement is the prevention and mitigation of potential adverse impacts through the adoption of appropriate measures⁴⁴. When choosing the appropriate measures to address identified potential adverse impacts, companies should consider their degree of involvement in the adverse impact. Three degrees of involvement in adverse impacts are referenced in the Directive: (1) the company might cause the adverse impact by itself (causing); (2) the company might cause the adverse impact together with a subsidiary or a business partner in its chain of activities (contribution); and (3) the company

³⁸ *Ibid.*, Article 5(1a)(c).

³⁹ EU CSDDD, Article 6(1). The ‘chain of activities’ includes the activities of the company’s upstream business partners, as well as the activities of the company’s downstream business partners. See Article 3(g).

⁴⁰ *Ibid.*, Article 6(1a)(a).

⁴¹ *Ibid.*, Article 6(1a)(b).

⁴² *Ibid.*, Article 6a(1) and Article 6a(2). The Directive provides that ‘the severity of an adverse impact should be assessed based on the scale, scope or irremediable character of the adverse impact, taking into account the gravity of the impact, including the number of individuals that are or will be affected [...] and the limits on the ability to restore affected individuals [...] to a situation equivalent to their situation prior to the impact within a reasonable period of time. See Recital 32.

⁴³ *Ibid.*, Article 6a(3).

⁴⁴ EU CSDDD, Article 7(1).

might be directly linked to a business partner in its chain of activities which causes the adverse impact (direct linkage)⁴⁵. In the first and second scenarios, companies should take appropriate measures to address and mitigate the adverse impacts⁴⁶. In the third scenario, companies should ‘still aim to use their influence to prevent or mitigate the adverse impact caused by their business partners or to increase their influence to do so’⁴⁷. In this scenario, in order for measures adopted to prevent and mitigate potential adverse impacts to be effective, the Directive requires Member States to ensure that companies ‘prioritize engagement with business partners in their chain of activities’, instead of terminating the business relationship⁴⁸. As a last resort shall companies ‘refrain from entering into new or extending existing relations’ with business partners in their chain of activities⁴⁹. Where there is a ‘reasonable prospect of change’, companies shall temporarily suspend the business relationship with the business partner⁵⁰. This is supposed to increase their leverage over the business partner as well as the chances that the adverse impact is addressed by the business partner. In cases where there is ‘no reasonable expectation that these efforts would succeed, companies should be required to terminate the business relationship with respect to the activities concerned’⁵¹. In this respect, Member States should provide for ‘an option to terminate the business relationship in contracts governed by their laws’⁵².

While identified potential adverse impacts should be prevented and, where it is not possible to prevent them, mitigated, the fourth due diligence requirement is to bring identified actual adverse impacts to an end or to minimize their extent⁵³. With respect to bringing actual adverse impacts to an end, the appropriate measures to be adopted by companies vary according to the three degrees of involvement referenced in the Directive and above. In the first and second scenarios, companies should take appropriate measures to bring to an end or minimize the extent of adverse impacts⁵⁴. In the third scenario, that is, direct linkage to business partners in the chain of activities causing the adverse impacts, companies should ‘use their influence to bring to an end or minimise

⁴⁵ *Ibid.*

⁴⁶ EU CSDDD, Recital 33.

⁴⁷ *Ibid.* The Directive defines ‘influence’ as the company’s ‘ability to persuade the business partner to prevent adverse impacts [...] and the degree of influence and leverage that the company could reasonably exercise’.

⁴⁸ *Ibid.*, Recital 36.

⁴⁹ EU CSDDD, Recital 36.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ EU CSDDD, Article 8(1).

⁵⁴ EU CSDDD, Recital 38.

the extent of the adverse impact caused by their business partners or to increase their influence to do so⁵⁵. In this context, too, in order for measures adopted to bring to an end and minimize actual adverse impacts to be effective, the Directive requires Member States to ensure that companies ‘prioritize engagement with business partners in their chain of activities’, instead of terminating the business relationship⁵⁶. As a last resort shall companies ‘refrain from entering into new or extending existing relations’ with business partners in their chain of activities⁵⁷. Where there is a ‘reasonable prospect of change’, companies shall temporarily suspend the business relationship with the business partner⁵⁸. This is supposed to increase their leverage over the business partner as well as the chances that the adverse impact is addressed by the business partner. In cases where there is ‘no reasonable expectation that these efforts would succeed, companies should be required to terminate the business relationship with respect to the activities concerned’⁵⁹. As part of the due diligence requirement to bring actual impacts to an end and, where it is not possible, to minimize their extent, the Directive requires Member States to ensure that companies provide remediation for actual adverse impacts caused individually or jointly with their subsidiaries and business partners⁶⁰. In cases where the actual adverse impact is caused only by the company’s business partner, remediation by the company can be provided on a voluntary basis⁶¹. The company is in any case allowed to persuade its business partner to provide remediation⁶².

The fifth due diligence requirement concerns allowing relevant parties to submit complaints to companies when ‘legitimate concerns regarding actual and potential adverse impacts’ arise⁶³. In this respect, companies should establish a ‘fair, publicly available, accessible, predictable and transparent’ procedure to handle complaints and, when complaints are well-founded, the adverse impacts identified should be addressed by companies in accordance with their due diligence obligations provided by the Directive⁶⁴. In addition to a complaints procedure, companies should also establish a notification mechanism for the submission by relevant parties of information regarding actual or potential

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, Recital 41.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ EU CSDDD, Article 8c(1).

⁶¹ *Ibid.*, Article 8c(2).

⁶² *Ibid.*

⁶³ EU CSDDD, Article 9(1).

⁶⁴ *Ibid.*, Article 9(3).

adverse impacts with respect to the operations of the company, the operations of its subsidiaries or business partners⁶⁵.

Under the sixth due diligence requirement, the Directive requires Member States to ensure that companies carry out periodic assessments of their own operations and measures, as well as the operations of subsidiaries and business partners in their chain of activities, 'to assess the implementation and to monitor the adequacy and effectiveness' of the due diligence measures⁶⁶.

The final substantive requirement of the due diligence obligation of the Directive is communication. In this respect, Member States are required to ensure that companies report on how they exercise due diligence and how they address their adverse impacts 'by publishing on their website an annual statement'⁶⁷.

To ensure enforcement of national due diligence obligations placed on companies pursuant to the provisions of the Directive, the instrument requires Member States to 'lay down rules on penalties, including pecuniary penalties and to take all measures necessary to ensure that they are implemented'⁶⁸. Penalties shall be 'effective, proportionate and dissuasive'⁶⁹ and shall be imposed on companies taking into account, among other things, 'the nature, gravity and duration of the infringement, and the severity of the impacts resulting from that infringement'⁷⁰. To ensure access to justice and compensation, the Directive also establishes a civil liability regime, requiring Member States to provide for, under domestic law, the civil liability of a company for damages to natural or legal persons stemming from the company's intentional or negligent failure to comply with its due diligence obligations⁷¹. Civil liability also covers situations of 'contribution' to adverse impacts, that is, 'when the damage was caused jointly by the company and its subsidiary, direct or indirect business partner, they shall be liable jointly and severally [...]'⁷². Civil liability does not extend to situations of 'direct linkage', meaning that 'a company cannot be held liable if the damage was caused only by its business partners in its chain of activities'⁷³. In order to ensure individuals' right to an effective remedy, the Directive touches upon some of the procedural and practical barriers to justice traditionally encountered by victims of corporate-related adverse impacts, including 'difficulties in accessing

⁶⁵ *Ibid.*, Article 9(5).

⁶⁶ EU CSDDD, Article 10.

⁶⁷ EU CSDDD, Article 11(1).

⁶⁸ EU CSDDD, Article 20(1).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, Article 20(2)(a).

⁷¹ EU CSDDD, Article 22(1).

⁷² *Ibid.*, Article 22(3).

⁷³ *Ibid.*, Article 22(1).

evidence, limited duration of limitation periods, the absence of adequate mechanisms for representative actions, and prohibitive costs of civil liability proceedings⁷⁴.

4. THE UNGPs' CONTRIBUTION TO THE CSDDD: A PRELIMINARY ANALYSIS

The aim of the present section of the article is to highlight the extent to which the Directive reflects elements of the UNGPs. To this end, the following subsections examine selected principles enshrined in the three Pillars of the instrument. With regards to Pillar II specifically, they examine how the Directive requires Member States to transform the non-binding corporate responsibility to respect into a binding obligation to exercise due diligence in their respective domestic legal systems.

4.1. Pillar I: The State Duty to Protect

The Directive is informed by core principles belonging to the state duty to protect human rights in Pillar I of the UNGPs. What follows focuses on selected principles.

4.1.1. Principles 1 and 2

Pillar I of the UNGPs elaborates on the existing international human rights obligations binding on states with respect to the conduct of business entities within their territory or jurisdiction. Under international human rights law, states are required to protect human rights against the harmful impacts of corporate activities in their territory and/or jurisdiction. According to Principle 1 in the UNGPs, in order to discharge this obligation, states are required to take appropriate steps to 'prevent, investigate, punish and redress' corporate adverse human rights impacts within their territory or jurisdiction. While states have discretion in deciding which appropriate steps to adopt, they should consider preventative and remedial measures such as 'effective policies, legislation, regulations and adjudication'⁷⁵. The specific requirement to prevent corporate adverse human rights impacts within their territory or jurisdiction entails a positive duty to adopt preventative measures at the domestic level, for instance

⁷⁴ EU CSDDD, Recital 58a.

⁷⁵ Commentary to Principle 1.

the enactment of effective legislation aimed at strengthening business respect for human rights.

The Directive is arguably a tool whereby Member States are required to ensure, under domestic law, that companies respect human rights through the imposition of a legal requirement to exercise due diligence with respect to their operations, the operations of their subsidiaries and business partners in the chain of activities. The Directive highlights that ‘all businesses have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated’⁷⁶.

As part of their duty to protect, Principle 2 in the UNGPs provides that states should ‘set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’⁷⁷. The UNGPs provide that, while home states⁷⁸ are ‘not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction’, ‘there are strong policy reasons for home States to set out clearly the expectation that businesses [domiciled in their territory and/or jurisdiction] respect human rights abroad’⁷⁹. One approach adopted by states to ‘set out clearly the expectation that businesses respect human rights throughout their operations’ is the enactment of ‘domestic measures with extraterritorial implications’⁸⁰. Examples include domestic legislative measures that place on parent companies obligations to report in the regulating state on the global activities of the entire enterprise⁸¹, therefore including the activities of entities potentially located and operating on the territory of states other than the regulating state.

The Directive requires Member States to adopt domestic measures with extraterritorial implications mentioned in the commentary to Principle 2. Member States shall ensure that companies falling within the scope of the Directive exercise due diligence not only with respect to their own operations, but also with respect to the operations of subsidiaries and the operations of their business partners in their chain of activities, irrespective of where these entities are located and operate. In other words, companies falling within the scope of the

⁷⁶ EU CSDDD, Recital 6a. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. The Directive attempts to transform this responsibility into an obligation binding on certain categories of companies under domestic law.

⁷⁷ UNGPs, Principle 2.

⁷⁸ The home state of a corporation is generally the state of domicile of that corporation.

⁷⁹ Commentary to Principle 2.

⁸⁰ Commentary to Principle 2.

⁸¹ *Ibid.*

Directive are expected to exercise due diligence to identify, assess, prevent and mitigate adverse impacts arising from the operations of entities potentially domiciled and operating outside the respective regulating Member States, which is to say extraterritorially.

4.1.2. Principle 3

Principle 3 of the UNGPs elaborates on the exercise by states of their regulatory and policy functions in meeting their obligation to protect human rights. In general, the commentary suggests that, in meeting their obligation to protect human rights against corporate adverse impacts, states should consider ‘a smart mix of measures’, including national mandatory measures, aimed at fostering business respect for human rights⁸². Principle 3 of the UNGPs also suggests that, among measures adopted to operationalize the state duty to protect, states should consider ‘encourag[ing], and where appropriate require[ing], business enterprises to communicate how they address their human rights impacts’⁸³. According to the commentary to Principle 3, state encouragement or binding obligations placed on companies to communicate how they address their adverse impacts, including by way of formal public reporting, are key to foster respect for human rights by business enterprises⁸⁴.

The Directive arguably reflects elements of Principle 3 in the UNGPs. It places an obligation on Member States to adopt national mandatory measures aimed at fostering corporate respect for human rights through a legal requirement to exercise due diligence. The Directive also requires Member States to place on companies an obligation to communicate on how they address their adverse impacts, that is, how they exercise their due diligence under domestic law.

4.2. Pillar II: The Corporate Responsibility to Respect

Pillar II of the UNGPs elaborates on the corporate responsibility to respect human rights, that is, a responsibility for companies to avoid causing or contributing to adverse human rights impacts stemming from their own activities⁸⁵, and to prevent adverse impacts directly linked to their operations, products or services by their business relationships with other entities⁸⁶. The tool

⁸² UNGPs, Commentary to Principle 3.

⁸³ UNGPs, Principle 3.

⁸⁴ Commentary to Principle 3.

⁸⁵ UNGPs, Principle 13(a).

⁸⁶ UNGPs, Principle 13(b).

envisaged by the UNGPs to help businesses meet their responsibility to respect human rights is HRDD, a process or risk-management tool⁸⁷ whereby companies can identify, prevent, mitigate and account for adverse human rights impacts⁸⁸.

The Directive requires Member States to incorporate into domestic law core principles belonging to the corporate responsibility to respect human rights in Pillar II of the UNGPs. What follows focuses on selected principles.

4.2.1. Principle 17

Guiding Principle 17 provides that, in order to meet their responsibility to respect human rights, businesses should exercise human rights due diligence. HRDD enables companies to identify, prevent, mitigate, and account for how they address adverse human rights impacts⁸⁹.

Companies can cause or contribute to adverse human rights impacts either through their own activities, or through their business relationships. In light of these different degrees of involvement in adverse human rights impacts, Principle 17(a) provides that due diligence processes ‘should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’. ‘Business relationships’ are understood to encompass ‘relationships with business partners, entities in [the company’s] value chain, and any other non-State or State entity directly linked to its business operations, products or services’⁹⁰, with no restriction as to where these entities are located.

The Directive requires Member States to ‘harden’ at the domestic level Principle 17 of the UNGPs by placing a legal obligation binding on certain categories of companies to exercise due diligence. Along the lines of Principle 17 in the

⁸⁷ The notion of due diligence as a risk management tool is familiar to business actors. In commercial contexts, a company engage in due diligence to prevent entering into transactions that might result in unfavorable or disadvantageous consequences for the company itself. See Bjorn Fasterling and Geert Demuijnck, “Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights” *Journal of Business Ethics* 116 (2013): 809. The fundamental distinction is that under the UNGPs due diligence serves the purpose of preventing adverse human rights impacts to individuals and communities, while, in commercial transactions, due diligence is concerned solely with protecting the business interests of the company.

⁸⁸ UNGPs, Principle 17.

⁸⁹ UNGPs, Principle 17.

⁹⁰ *Ibid.*

UNGPs, the Directive references three different degrees of corporate involvement in adverse impacts, distinguishing between situations where the company might cause the adverse impact by itself (causing), situations where the company might cause the adverse impact together with a subsidiary or a business partner in its chain of activities (contribution), and situations where the company might be directly linked to a business partner in its chain of activities which causes the adverse impact (direct linkage). In light of these degrees of involvement, companies would be required, under domestic law, to identify, assess, prevent and mitigate adverse impacts that might be caused by the company alone or jointly with subsidiaries and business partners, as well as adverse impacts they might be directly linked to through the operations of business partners in their chain of activities.

4.2.2. Principles 18, 19 and 20

The elements of the human rights due diligence process envisaged by the UNGPs are respectively dealt with in separate principles under Pillar II. Principle 18 expects businesses to identify and assess any actual or potential adverse human rights impacts in the context of their own business activities or their business relationships. Principle 19 states that, in order to prevent, mitigate and cease any adverse human rights impacts identified, businesses should integrate the findings of their human rights impact assessments across relevant internal functions and processes and take appropriate action. Such action will vary according to whether the company has caused or contributed to the adverse impact or is involved 'solely because the impact is directly linked to its operations, products or service by a business relationship'⁹¹. According to Principle 20, in order to verify whether they are addressing any adverse impacts identified, businesses should track the effectiveness of their response.

These elements of the due diligence obligation enshrined in the CSDDD generally reflect the core elements of the human rights due diligence process envisaged by the UNGPs.

In line with Principle 18 of the UNGPs, Article 6 of the Directive requires Member States to ensure that companies take appropriate measures to identify and assess actual and potential adverse impacts stemming from their own operations, the operations of their subsidiaries and those of their business partners in their chain of activities. In line with Principle 19 of the UNGPs, Article 7 of the Directive requires Member States to ensure that companies take

⁹¹ UNGPs, Principle 19(b).

appropriate measures to prevent and mitigate potential adverse impacts. Article 8 requires Member States to ensure that companies take appropriate measures to bring actual adverse impacts to an end. In both cases, the Directive clarifies that, when deciding the appropriate measures to be taken, companies should take into account their degree of involvement in the adverse impact and the ability of the company to influence the entity causing the adverse impact. With respect to this, the Principle 19 provides that appropriate action will vary according to the company's degree of involvement in the adverse impact, as well as 'the extent of its leverage in addressing the adverse impact'. Finally, in line with Principle 20 of the UNGPs, Article 10 of the Directive requires Member States to ensure that companies assess the implementation of measures adopted to address adverse impacts, while tracking their adequacy and effectiveness.

4.2.3. Principle 21

Principle 21 of the UNGPs provides that 'in order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders'⁹². The commentary explains that 'the responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice'⁹³. Communication by companies on how they address their adverse human rights impacts can provide 'a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders'⁹⁴. Communication can take the form, *inter alia*, of formal public reporting, which is especially expected 'where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts'⁹⁵.

In line with the expectations of Principle 21 of the UNGPs, a core component of the due diligence obligation eshrined in the Directive is the requirement for Member States to ensure, under domestic law, that companies communicate on how they exercise due diligence, among other things. Specifically, Article 11 of Directive requires Member States to ensure that companies publicly report on the matters covered by the instrument by publishing an annual statement on their website.

⁹² UNGPs, Principle 21.

⁹³ Commentary to Principle 21.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

4.2.4. Principle 24

Principle 24 of the UNGPs focuses on the issue of prioritization of adverse impacts, recognizing that ‘while business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously’⁹⁶. It specifically provides that ‘where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable’. The EU Directive interestingly adopts the UNGPs’ approach to prioritization when exercising due diligence. Article 6a requires Member States to ‘ensure that, where it is not feasible to [address] all identified adverse impacts at the same time to their full extent, companies prioritize adverse impacts [...]’ for the purpose of fulfilling their due diligence obligations⁹⁷. According to Article 6a, the prioritization of identified adverse impacts ‘shall be based on the severity and likelihood of the adverse impacts’⁹⁸.

4.3. Pillar III: Access to Remedies

Pillar III elaborates on the roles of states and corporations in ensuring that victims of corporate-related adverse human rights impacts have access to an effective remedy when adverse impacts occur. Core foundational and operational principles enshrined in Pillar III inform the Directive. What follows focuses on selected principles.

4.3.1. Principles 25 and 26

Guiding Principle 25 provides that states are required to ‘take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy’⁹⁹. Unless states take steps ‘to investigate, punish and redress’ the adverse human rights impacts of businesses, the international obligation of states to protect human rights can become ‘weak or even meaningless’¹⁰⁰. Remedies can be provided by State-based or non-State-

⁹⁶ Commentary to Principle 24.

⁹⁷ EU CSDD, Article 6a(1).

⁹⁸ *Ibid.*, Article 6a(2).

⁹⁹ UNGPs, Principle 25.

¹⁰⁰ Commentary to Principle 25.

based, judicial or non-judicial, mechanisms¹⁰¹. Principle 26 provides that ‘states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses’. The commentary to Principle 26 places state-based judicial mechanisms ‘at the core of ensuring [victims’] access to a remedy’¹⁰².

In line with Principle 25, to ensure victims’ access to justice and compensation, the Directive establishes a civil liability regime, requiring Member States to provide for, under domestic law, the civil liability of a company for damages to natural or legal persons stemming from the company’s intentional or negligent failure to comply with its due diligence obligations¹⁰³. Civil liability also covers situations of ‘contribution’ to adverse impacts, that is, ‘when the damage was caused jointly by the company and its subsidiary, direct or indirect business partner, they shall be liable jointly and severally [...]’¹⁰⁴. Civil liability does not extend to situations of ‘direct linkage’, meaning that ‘a company cannot be held liable if the damage was caused only by its business partners in its chain of activities’¹⁰⁵. In order to ensure individuals’ right to an effective remedy, the Directive touches upon some of the procedural and practical barriers to justice traditionally encountered by victims of corporate-related adverse impacts, including ‘difficulties in accessing evidence, limited duration of limitation periods, the absence of adequate mechanisms for representative actions, and prohibitive costs of civil liability proceedings’¹⁰⁶.

4.3.2. Principles 28 and 29

The UNGPs encourages states to ‘consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms’¹⁰⁷. As specified in the commentary to Principle 28, ‘one category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a

¹⁰¹ For the purposes of the UNGPs, a grievance is understood as ‘a perceived injustice invoking an individual’s or a group’s sense of entitlement’. A grievance mechanism is therefore understood as a process through which grievances concerning corporate adverse human rights impacts can be raised and remedy can be sought. See Commentary to Principle 25.

¹⁰² Commentary to Principle 26.

¹⁰³ EU CSDDD, Article 22(1).

¹⁰⁴ *Ibid.*, Article 22(3).

¹⁰⁵ *Ibid.*, Article 22(1). In this case, voluntary remediation may be provided by the company. See Recital 41.

¹⁰⁶ EU CSDDD, Recital 58a.

¹⁰⁷ UNGPs, Principle 28.

multi-stakeholder group'¹⁰⁸. These are referred to as operational-level grievance mechanisms.

With respect to these, Principle 29 provides that, 'in order for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who might be adversely impacted'. Such mechanisms are administered at company level and 'can engage the business enterprise directly in assessing the issues and seeking remediation of any harm'¹⁰⁹. According to the commentary to Principle 29, operational-level grievance mechanisms might play an important role with respect to the corporate responsibility to respect human rights because they provide a channel for individuals and communities affected by the activities of the company 'to raise concerns when they believe they are being or will be adversely impacted'. This contributes to support the identification by the company of adverse human rights impacts, as part of its ongoing human rights due diligence¹¹⁰. Once grievances are identified, these mechanisms make it possible for the company to address them and to remediate early adverse impacts, 'thereby preventing harms from compounding and grievances from escalating'¹¹¹.

Aspects of Principles 28 and 29 of the UNGPs are reflected in the Directive. As part of the due diligence obligations enshrined, Member States are required to ensure that companies provide the possibility for persons and organizations to submit complaints when 'legitimate concerns regarding actual and potential adverse impacts' arise¹¹². In this respect, companies should establish a 'fair, publicly available, accessible, predictable and transparent' procedure to handle complaints and, when complaints are well-founded, the adverse impacts identified should be addressed by companies in accordance with their due diligence obligations provided by the Directive¹¹³. In addition to a complaints procedure, companies should also establish a notification mechanism for the submission by relevant parties of information regarding actual or potential adverse impacts with respect to the operations of the company, the operations of its subsidiaries or business partners¹¹⁴.

¹⁰⁸ Commentary to Principle 28.

¹⁰⁹ Commentary to Principle 29.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² EU CSDDD, Article 9(1).

¹¹³ *Ibid.*, Article 9(3).

¹¹⁴ *Ibid.*, Article 9(5).

5. CONCLUSION

When business and human rights emerged as an area of academic research, 'human rights and business were commonly still seen as two entirely separate domains'¹¹⁵. Over the last three decades, however, consensus has coalesced around the idea that, more than a concern just for states, human rights are a fundamental part of the responsibilities of business actors like corporations¹¹⁶. Even more so, since the adoption of the UNGPs, consensus is now building around the idea that human rights are not merely part of the responsibilities of corporations but, more significantly, of national obligations for these actors.

At the EU level, too, consensus has built on the necessity of placing horizontal due diligence obligations on companies active in the EU market. This necessity stems partly from the poor implementation by companies of their soft responsibility to respect human rights and partly from the the perceived inadequacy of international 'soft' law instruments on business and human rights, specifically the UNGPs, in improving standards of business conduct. Against this background, the EU CSDDD aims to regulate corporate conduct through requirements placed on EU Member States to ensure that companies exercise due diligence under domestic law with respect to their operations, the operations of their subsidiaries and those of their business partners in their chain of activities.

The present article has attempted to examine how norms enshrined in international soft law instruments, specifically the UNGPs, have provided a model for domestic legislation. This is evident in a number of substantive aspects of the Directive, which reflect relevant aspects of Principles enshrined in the three Pillars of the UNGPs.

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