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Environmental Due Diligence in EU Law

Considerations for Designing EU (Secondary) Legislation

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On behalf of the German Environment Agency

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Abstract: Environmental Due Diligence in EU Law

The debate on sustainability related corporate due diligence obligations in global value chains has recently gained considerable momentum, in particular at EU level. However, so far, it has been dominated by the focus on *human rights* due diligence. By contrast, relatively little attention has been paid to the specifics of a stand-alone *environmental* due diligence obligation. In this respect, the main challenge remains to define a substantive normative environmental standard ("material scope"), which the due diligence obligation aims to promote.

This paper examines how *environmental* due diligence can be designed and integrated in EU legislation applicable to undertakings in the European Union. It provides an overview of conceivable concepts for designing environmental due diligence's "material scope". Namely, these include a *positive* and a *negative* general clause and various ways of referencing substantive environmental norms (international environmental agreements, local law at the "place of effect", home state law, and soft law). Subsequently the paper examines how the issue has been solved in the Draft for a *Directive on Corporate Due Diligence and Corporate Accountability* adopted by the European Parliament on March 10th, 2021: The relevant provision can be categorized as a combination of referencing international (hard and soft) law instruments and EU environmental norms that shall be listed in an annex. This legislative approach represents a significant shift from what was proposed by the Rapporteur in the original draft report (a *negative general clause*). However, the paper suggests to combine both approaches rather than choosing one of them.

Kurzbeschreibung: Die Gestaltung einer umweltbezogenen Sorgfaltspflicht im EU-Recht

Die Debatte über nachhaltigkeitsbezogene Sorgfaltspflichten von Unternehmen in globalen Wertschöpfungsketten hat in letzter Zeit erheblich an Dynamik gewonnen, insbesondere auf EU-Ebene. Allerdings wurde sie bislang von der Konzentration auf *menschenrechtliche* Sorgfaltspflichten dominiert. Den Besonderheiten einer eigenständigen *umweltbezogenen* Sorgfaltspflicht wurde dagegen vergleichsweise wenig Aufmerksamkeit geschenkt. In dieser Hinsicht besteht die größte Herausforderung weiterhin darin, einen materiellen normativen Umweltstandard („materieller Gegenstand") zu definieren, auf den sich die Sorgfaltspflicht bezieht.

In diesem Bericht wird untersucht, wie eine umweltbezogene Sorgfaltspflicht für Unternehmen in der Europäischen Union gestaltet und im EU-Recht verankert werden kann. Der Bericht skizziert überblicksartig denkbare Konzepte zur Ausgestaltung des „materiellen Gegenstandes" einer umweltbezogenen Sorgfaltspflicht. Dazu gehören im Einzelnen eine positive und eine negative Generalklausel sowie verschiedene Arten der Bezugnahme auf materielle Umweltnormen (internationale Umweltabkommen, lokales Recht am Erfolgsort, heimatstaatliches Recht und *soft law*). Anschließend wird untersucht, wie die Problematik in dem vom Europäischen Parlament am 10. März 2021 verabschiedeten Entwurf für eine Richtlinie über die Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen gelöst wurde: Die entsprechende Vorschrift kann dabei als eine Kombination aus Verweisen auf internationale (Hard- und Soft-)Law-Instrumente sowie auf EU-Umweltnormen eingeordnet werden, die jeweils in einem Anhang zur Richtlinie aufgelistet werden sollen. Dieser Ansatz stellt eine wesentliche Änderung gegenüber dem von der Berichterstatterin im ursprünglichen Berichtsentwurf vorgeschlagenen Ansatz (einer negativen Generalklausel) dar. Dieser Bericht schlägt jedoch vor, anstatt sich für eine der beiden Grundkonzepte zu entscheiden, beide miteinander zu kombinieren.

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Art.	Article/Articles
BMZ	Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (Federal Ministry for Economic Cooperation and Development)
BREF	Best Available Techniques Reference document
DROI Committee	European Parliament's Subcommittee on Human Rights
ECJ	European Court of Justice
EU	European Union
EUTR	EU Timber Regulation
HRDD	Human Rights Due Diligence
JURI Committee	Committee on Legal Affairs of the European Parliament
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OECD Guidelines for MNE	OECD Guidelines for Multinational Enterprises
OJ	Official Journal of the European Union
Sec.	Section/Sections, §/§§
TFEU	Treaty on the Functioning of the European Union
UNGP	United Nations Guiding Principles on Business and Human Rights

Summary

The debate on sustainability related corporate due diligence obligations in global value chains has recently gained considerable momentum, in particular at EU level. However, so far it has been dominated by the focus on *human rights* due diligence. By contrast, relatively little attention has been paid to the specifics of a stand-alone environmental due diligence obligation for undertakings.[1]

This paper examines how *environmental* due diligence can be designed and integrated in EU secondary legislation applicable to undertakings domiciled (or even just doing business) in the European Union. It pays particular attention to a draft for a *Directive on Corporate Due Diligence and Corporate Accountability* (hereinafter: "Draft Directive") adopted by the European Parliament on March 10th, 2021[2] and examines how some key aspects raised in the design of an (environmental) corporate due diligence obligation are addressed in the draft. The paper draws on insights gained in the course of a recent study concerning options for regulating environmental due diligence in *German* law commissioned by the German Environment Agency.[3] From the analysis it can be concluded that most of the considerations developed in the course of the mentioned research with regard to the German legal order may, in general, be equally applicable to EU secondary legislation – with a caveat to the specific requirements of German constitutional law that may differ from what EU constitutional law may require.

First, the paper briefly examines some of the fundamental aspects that may arise in EU secondary legislation when designing a corporate due diligence obligation with regard to global value chains, but which are not specific to the distinctive features of an *environmental* due diligence.[4] These include: Due diligence as a general regulatory concept regarding sustainability issues in global value chains;[5] due diligence's reach in the global value chains even beyond the obliged undertaking's own operations and sphere of direct control;[6] the proportionality principle's function with regard to the extensive reach in the value chain and a broad cross-industry comprehensive regulatory approach;[7] and the distinction between such a – preferable – cross-industry comprehensive approach (potentially complemented by industry, product, issue, or otherwise more specific approaches) on the one hand, and, on the other hand, a number of independent stand-alone regulations specifically drafted for certain industries, products, issues or other aspects of global value chains.[8]

The focus, however, is set on the main challenge regarding the legal design of environmental due diligence: defining a substantive normative environmental standard which the corporate due diligence obligation aims to promote ("material scope").[9] There is a fairly high degree of

[1] Infra (1).

[2] European Parliament, Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), P9_TA-PROV(2021)0073, including the Annex with recommendations for drawing up a *Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability*.

[3] Krebs, David, Remo Klinger, Peter Gailhofer, and Cara-Sophie Scherf. Von der menschenrechtlichen zur umweltbezogenen Sorgfaltspflicht, Aspekte zur Integration von Umweltbelangen in ein Gesetz für globale Wertschöpfungsketten, UBA Texte 49/2020, March 2020, https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2020-03-10_texte_49-2020_sorgfaltspflicht.pdf; cf. also the ongoing research project on *International Corporate Liability for Environmental Harm* commissioned by the German Environment Agency (Umweltbundesamt – UBA, FKZ 37 18171000), the study will be forthcoming in 2021.

[4] Infra (2).

[5] Infra (2.1).

[6] Infra (2.2).

[7] Infra (2.3).

[8] Infra (2.4).

[9] Infra (3).

convergence with respect to *human rights* due diligence tending towards a single, relatively uniform legislative approach: Almost all approaches chose to make either explicitly or implicitly reference to (internationally recognized) human rights, as laid down in human rights treaties.[10] By contrast, in the case of *environmental* due diligence obligations the range of conceivable and indeed proposed and discussed approaches is considerably broader.[11] The approaches of designing environmental due diligence considered by lawmakers and scholars may be divided into two groups: broadly drafted general clauses on the one hand[12] and more specific references to existing substantive environmental norms on the other[13].

The first group may be subdivided into a *negative* general clause on the one hand and a *positive* one on the other. While a negative general clause aims at preventing and avoiding the impairment of certain protected goods, a *positive* general clause aims at compliance with an environmental standard of conduct that is outlined in a rather abstract manner. The second group of legislative design approaches to environmental due diligence references existing substantive environmental norms in order to determine its "material scope". This group may be subdivided into four subtypes: referencing international environmental agreements, local law at the "place of effect", home state law, and soft law. The paper finds that all four subtypes of this second group of approaches are generally conceivable as complements to a positive or negative general clause. However, referencing international environmental agreements and the local law of the "place of effect" is particularly suitable for the comprehensive cross-industry due diligence obligation. By contrast, referencing (specific) norms of home state environmental law or environmental "soft law" seems particularly suitable for industry-, product-, issue or otherwise specific concretizations of the general duty of care.

In the context of the previously outlined framework, the paper analyses the approaches chosen in the pre-draft directive (Wolters' Report)[14] and the Draft Directive[15]. While the pre-draft directive's approach can be categorized within the first group as an example of the subtype *negative* general clause, the Legal Affairs Committee and the Plenary adopted significant amendments: The adopted text now contains a remarkable combination of references to international (hard and soft) law and to EU home state law, that shall be listed in an annex to the Directive. However, while these approaches as such are clearly outlined in the Draft Directive, the design of the annex and thus the exact content of the environmental due diligence obligation is left to the discretion of the Commission. It is therefore difficult to make a conclusive assessment of the European Parliament's proposal.

Finally, the paper touches very briefly on the enforcement of environmental due diligence obligations.[16] It focuses on one question, that is specifically interesting regarding potential differences between national and EU approaches: civil liability. In this regard the EU's legislative competence is of particular interest. The final Draft Directive contains quite far-reaching obligations for the Member States to provide for civil liability. While the legal basis in EU primary law for such obligations of EU Member States has been contested, this paper takes the stance that Articles 50 and 114 TFEU provide for a sufficient legal basis.

[10] Infra (3.1).

[11] Infra (3.2).

[12] Infra (3.2.1.1).

[13] Infra (3.2.1.2).

[14] Infra (3.2.2.1).

[15] Infra (3.2.2.2).

[16] Infra (4).

Zusammenfassung

Die Debatte über nachhaltigkeitsbezogene Sorgfaltspflichten von Unternehmen in globalen Wertschöpfungsketten hat in letzter Zeit erheblich an Dynamik gewonnen, insbesondere auf EU-Ebene. Bislang wurde sie jedoch durch einen starken Fokus auf die *menschenrechtliche* Sorgfaltspflicht dominiert. Demgegenüber wurde den Besonderheiten einer eigenständigen *umweltbezogenen* Sorgfaltspflicht relativ wenig Aufmerksamkeit geschenkt. [17]

Dieser Bericht untersucht, wie eine umweltbezogene Sorgfaltspflicht gestaltet und in das europäische Sekundärrecht integriert werden kann. Besondere Aufmerksamkeit widmet er einem Entwurf für eine *Richtlinie über die Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen*, den das Europäische Parlament in einer Resolution vom 10. März 2021 mit großer Mehrheit beschlossen hat.[18] Er untersucht dabei insbesondere wie einige Schlüsselfragen, die die Gestaltung einer umweltbezogenen Sorgfaltspflicht aufwirft, im Richtlinienentwurf behandelt werden. Der Verfasser stützt sich dabei insbesondere auf Erkenntnisse aus einer Studie über Möglichkeiten der Gestaltung einer umweltbezogenen Sorgfaltspflicht im *deutschen* Recht, die sie kürzlich im Auftrag des Umweltbundesamtes bearbeitet haben.[19] Der Bericht kommt zu dem Ergebnis, dass die meisten der Überlegungen zur einer umweltbezogenen Sorgfaltspflicht auf Ebene des nationalen (deutschen) Rechts sich auch auf das EU-Sekundärrecht anwenden lassen (mit Ausnahme spezifischer Anforderungen des deutschen Verfassungsrechts, die von den Anforderungen des EU-Verfassungsrechts abweichen können).

Zunächst werden einige der grundlegenden Fragen untersucht, die bei der Konzipierung einer unternehmerischen Sorgfaltspflicht für globale Wertschöpfungsketten im EU-Sekundärrecht aufgeworfen werden können, die aber nicht spezifisch für Besonderheiten einer *umweltbezogenen* Sorgfaltspflicht sind. [20] Dazu zählen: das allgemeine Regelungskonzept der Sorgfaltspflicht für Nachhaltigkeitsaspekte in globalen Wertschöpfungsketten;[21] die Reichweite der Sorgfaltspflicht in der globalen Wertschöpfungskette auch über die eigene Geschäftstätigkeit und den direkten Kontrollbereich des verpflichteten Unternehmens hinaus; [22] die Bedeutung des Grundsatzes der Verhältnismäßigkeit im Hinblick auf die große Reichweite in der Wertschöpfungskette und einen breiten, branchenübergreifenden und umfassenden Regelungsansatz;[23] und schließlich die Unterscheidung zwischen einem solchen – vorzugswürdigen – branchenübergreifenden umfassenden Ansatz (ggf. ergänzt durch branchen-, produkt-, themenbezogene oder anderweitig begrenzte Konkretisierungen) einerseits und andererseits einer Reihe voneinander unabhängiger, eigenständiger Regelungen, die speziell für bestimmte Branchen, Produkte, Themen oder andere Aspekte globaler Wertschöpfungsketten ausgearbeitet worden sind. [24]

[17] Unten (1).

[18] Entschließung des Europäischen Parlaments vom 10. März 2021 mit Empfehlungen an die Kommission zur Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen (2020/2129(INL)), P9_TA-PROV(2021)0073, einschließlich eines Anhangs mit ausführlichen Empfehlungen zum Inhalt des verlangten Vorschlags einer *Richtlinie über die Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen;* der Berichtsentwurf der Berichterstatterin Wolters vom 11.09.2020, JURI_PR(2020)65719, https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_DE.pdf, wird nur insoweit berücksichtigt, wie der vom Plenum final angenommene Richtlinienentwurf von diesem abweicht und für die hier diskutierten Fragen insoweit relevant ist.

[19] Krebs et al. 2020 (oben Fn. 3); cf. siehe auch das noch nicht abgeschlossene Forschungsprojekt *International Corporate Liability for Environmental Harm* im Auftrag des Umweltbundesamtes (UBA, FKZ 37 18171000), dort insb. Kapitel 5 zur umweltbezogenen Sorgfaltspflicht; der Abschlussbericht wird im Laufe des Jahres 2021 erscheinen.

[20] Unten (2).

[21] Unten (2.1).

[22] Unten (2.2).

[23] Unten (2.3).

[24] Unten (2.4).

Der Schwerpunkt des Berichts liegt jedoch auf der zentralen Herausforderung bei der rechtlichen Ausgestaltung der *umweltbezogenen* Sorgfaltspflicht: die Definition eines materiellen normativen Umweltstandards, auf den sich die Sorgfaltspflicht bezieht („materieller Gegenstand"). [25] Bei der *menschenrechtlichen* Sorgfaltspflicht besteht ein ziemlich hoher Grad an Konvergenz, die zu einem relativ einheitlichen legislativen Ansatz tendiert: In fast allen Ansätzen wird – explizit oder implizit – auf die (international anerkannten) Menschenrechte Bezug genommen, wie sie in den wichtigsten Menschenrechtsverträgen festgelegt und anerkannt sind. [26] Im Gegensatz dazu ist bei *umweltbezogenen* Sorgfaltspflichten die Palette der denkbaren und tatsächlich vorgeschlagenen und diskutierten Ansätze wesentlich breiter.[27]

Die von Gesetzgebern und Wissenschaftlern in Betracht gezogenen Ansätze zur Ausgestaltung der umweltbezogenen Sorgfaltspflicht lassen sich dabei in zwei Gruppen einteilen: weit gefasste, generalklauselartige Formulierungen einerseits[28] und spezifischere Verweise auf bestimmte materielle Umweltnormen andererseits[29].

Die erste Gruppe kann unterteilt werden in eine negative Generalklausel einerseits und eine positive andererseits. Während eine negative Generalklausel auf die Verhinderung und Vermeidung der Beeinträchtigung bestimmter Schutzgüter abzielt, zielt eine positive Generalklausel auf die Einhaltung eines eher grob umrissenen umweltbezogenen Verhaltensstandards. Die zweite Gruppe von gesetzgeberischen Ansätzen zur Ausgestaltung des „materiellen Gegenstandes" umweltbezogener Sorgfaltspflichten verweist auf bestehende materielle Umweltnormen. Die Verweisungsmöglichkeiten in dieser zweiten Gruppe kann wiederum in vier Subtypen unterteilt werden: internationale Umweltabkommen, lokales Recht am „Erfolgsort", heimatstaatliches und Soft Law. Der Bericht kommt zum Ergebnis, dass alle vier Subtypen grundsätzlich als Ergänzung zu einer positiven oder negativen Generalklausel denkbar sind. Der Verweis auf internationale Umweltabkommen und das lokale Recht des „Erfolgsortes" eignet sich jedoch besonders für eine umfassende, branchenübergreifende Sorgfaltspflicht. Demgegenüber erscheint die Verweisung auf (spezifische) Normen des heimatstaatlichen Umweltrechts oder des umweltrechtlichen „soft law" besonders geeignet für branchen-, produkt-, themen- oder sonstwie spezifische Konkretisierungen der allgemeinen Sorgfaltspflicht.

Vor dem Hintergrund des zuvor skizzierten Analyserahmens denkbarer Ansätze untersucht der vorliegende Bericht die im Vorentwurf für die Richtlinie (im *Wolters Bericht*) und im endgültigen Richtlinienentwurf des Parlaments gewählten Ansätze. Während der Ansatz im Vorentwurf als Beispiel für den Subtyp der *negativen Generalklausel* in die erste Gruppe von möglichen Ansätzen eingeordnet werden kann, haben der Rechtsausschuss und das Plenum wesentliche Änderungen vorgenommen: Der verabschiedete Text enthält nun eine bemerkenswerte Kombination von Verweisen auf internationales Recht (*hard und soft law*) und auf das heimatstaatliche EU-Recht, jedoch jeweils nur soweit es in einem Anhang zur Richtlinie aufgeführt ist. Während diese Ansätze als solche im Richtlinienentwurf klar umrissen sind, ist die Ausgestaltung des Anhangs und damit der genaue Inhalt der umweltbezogenen Sorgfaltspflicht jedoch dem Ermessen der Kommission überlassen. Daher ist es schwierig, den Vorschlag des Europäischen Parlaments abschließend zu bewerten.

[25] Unten (3).

[26] Unten (3.1).

[27] Unten (3.2).

[28] Unten (3.2.1.1).

[29] Unten (3.2.1.2).

Abschließend wird die Durchsetzung (umweltbezogener) Sorgfaltspflichten angesprochen. Dabei wird hier jedoch allein die Frage Gesetzgebungskompetenz der EU für ein zivilrechtliches Haftungsregime diskutiert. Der endgültige Richtlinienentwurf enthält recht weitreichende Verpflichtungen für die Mitgliedsstaaten, eine zivilrechtliche Haftung vorzusehen. Zwar ist umstritten, ob das EU-Primärrecht für derartige sekundärrechtliche Verpflichtungen der EU-Mitgliedstaaten im Bereich der zivilrechtlichen Haftung eine ausreichende Kompetenzgrundlage enthält. Der vorliegende Bericht vertritt jedoch die Ansicht, dass sich aus Artikel 50 und 114 AEUV eine solche Rechtsgrundlage ableiten lässt.

1 Introduction

The legal, political, and scholarly[30] debate on regulating corporate due diligence obligations with regard to sustainability issues in global value chains has recently gained considerable traction, most recently in particular at EU level,[31] but also at national level namely in Germany[32] and the Netherlands[33].[34]

However, the debate has traditionally been dominated by the focus on *human rights*. By contrast, the environmental dimension of corporate due diligence and accountability has been often left aside or treated as a mere annexure to the focus on the human rights predicament. The recent draft of the German Federal Government illustrates this phenomenon at first sight by not even mentioning environmental protection in the Act's official title *Act on Corporate Due Diligence for Avoiding Human Rights Violations in Supply Chains (Due Diligence Act)* [35]*.* While there is undeniably a large overlap of environmental harm and human rights violations, even massive environmental destruction does not necessarily imply direct human rights impacts.

Consequently, especially civil society is increasingly calling for regulating an *independent* environmental corporate due diligence obligation as complement to human rights protection in global value chains.[36]

This paper undertakes to examine some of the core questions how such an *environmental* corporate due diligence obligation could be designed at the level of EU law. For this purpose, it draws on insights of a recent study concerning options for regulating environmental due

[30] Cf. some recent studies on the issue with respect to EU level: Navarra, Cecilia. Corporate Due Diligence and Corporate Accountability: European Added Value Assessment, PE 654.191. EPRS: European Parliamentary Research Service, October 2020; Krajewski, Markus, and Beata Faracik. Substantive Elements of Potential Legislation on Human Rights Due Diligence: Briefing N°1. Edited by European Parliament. LU: Publications Office, 2020; Methven O'Brien, Claire, and Olga Martin-Ortega. EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims. BRIEFING No2. Edited by European Parliament, 2020; McCorquodale, Robert, and Martijn Scheltema. Core Elements of an EU Regulation on Mandatory Human Rights and Environmental Due Diligence, August 2020.

[31] Cf. inter alia the European Parliament's Resolution of 10 March 2021 (supra fn. 2) with recommendations for drawing up a *Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability* which is discussed in this paper, the recent public consultation for an Initiative on Sustainable Corporate Governance by the Commission (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance), the program of the "Trio Presidency" of Germany, Portugal and Slovenia (July 2020-December 2021, 8086/1/20 REV 1), and the *Council Conclusions on Human Rights and Decent Work in Global Supply Chains* of December 1rst, 2020 (https://www.consilium.europa.eu/media/46999/st13512-en20.pdf), in particular para. 46.

[32] Official draft of the Federal Government of March 3rd, 2021: *Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten*, including in Article 1 *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Sorgfaltspflichtengesetz) [„Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (Due Diligence Act)", henceforth cited as "Draft Due Diligence Act"],* published in Bundestags-Drucksache 19/28649 of April 19th, 2021.

[33] Dutch private members' bill of March 11th, 2021: Kamerstuk 35761, nr. 2, *Voorstel van wet van de leden Voordewind, Alkaya, Van den Hul en Van den Nieuwenhuijzen houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen)* [*A bill introduced by the members Voordewind, Alkaya, Van den Hul and Van den Nieuwenhuijzen providing for rules regarding due diligence in value chains to combat violations of human rights, labour rights and the environment in the conduct of foreign trade (the Responsible and Sustainable International Business Conduct Act*], an unauthorized translation can be found here: https://www.mvoplatform.nl/en/wp-content/uploads/sites/6/2021/03/Bill-for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf.

[34] Cf. for a comprehensive overview of the various enacted pieces of legislation and further political developments at EU and Member State level: European Coalition for Corporate Justice (ed.). Evidence for mandatory Human Rights Due Diligence Legislation, Background Note, January 2021.

[35] Supra fn. 32.

[36] European Coalition for Corporate Justice (ed.). An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment, September 2020; Initiative Lieferkettengesetz (ed.), Rechtsgutachten zur Ausgestaltung eines Lieferkettengesetzes, February 2020, p. 12; Bund für Umwelt und Naturschutz Deutschland e.V. (BUND) (ed.). Kommt ein deutsches Lieferkettengesetz? Informationen mit Fokus auf umweltbezogene Sorgfaltspflichten für Unternehmen; Verheyen, Roda. Lieferkettengesetz ohne eigenständige Umweltpflichten – reicht das? Greenpeace (ed.), October 2020.

diligence in *German* law commissioned by the German Environment Agency.[37] However, many relevant aspects regarding the regulation of (environmental) corporate value chain due diligence – inter alia in relation to civil liability as means of enforcement, extraterritoriality and jurisdictional issues, and WTO law – cannot be discussed here.[38]

The following considerations examine in particular certain elements of the draft for a *European Corporate Due Diligence and Accountability Directive*[39] (hereinafter: "*Draft Directive*") as most recent and – for the time being – maybe most significant development at EU level. The original draft report by Rapporteur Lara Wolters of September 2020 (hereinafter: "*Wolters' Report" or "pre-draft directive"*)[40] is also taken into consideration as far as it differs from the text finally adopted by the European Parliament's Plenary. Furthermore, this paper takes into consideration some of the insights regarding "Option 4" in the *Study on Due Diligence Requirements through the Supply Chain*[41] commissioned by the EU Commission.

In what follows, a few rather general aspects of regulating corporate due diligence will be pointed out briefly (2). Subsequently, the focus is set on the design of *environmental* due diligence and its "material scope" (3). To conclude, enforcement issues will be dealt with only very briefly (4).

[37] Krebs et al. 2020 (supra fn. 3).

[38] Cf. on these issues the ongoing research project on *International Corporate Liability for Environmental Harm* commissioned by the German Environment Agency (Umweltbundesamt – UBA, FKZ 37 18171000); the report to this project will be forthcoming in 2021.

[39] Supra fn. 2.

[40] DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Committee on Legal Affairs, Rapporteur: Lara Wolters, PE657.191v01-00, 11.09.2020.

[41] Smit, Lise, Claire Bright, Robert McCorquodale, et al., Study on Due Diligence Requirements through the Supply Chain: Final Report. Edited by European Commission. Luxembourg: Publications Office of the European Union, 2020.

2 General aspects of designing due diligence obligations

Many aspects of the legal design of *environmental* due diligence do not differ significantly from corporate due diligence regarding other protection purposes, in particular human rights. However, as some of those general aspects are nevertheless equally crucial to the design of *environmental* due diligence obligations they will be briefly addressed below, before moving on to the core challenge that is at the heart of designing *environmental* due diligence: the definition of environmental due diligence's "material scope" (below 3).

Important aspects of designing corporate due diligence concern inter alia the general concept of due diligence as such (2.1), its reach along the value chain (2.2), the proportionality principle to define an appropriate level of due diligence (2.3), and the distinction between cross-industry comprehensive, general approaches on the one hand and single issue, industry or product specific approaches on the other (2.4).

2.1 Corporate due diligence as a general concept regarding sustainability issues in value chains

Due diligence is a legal term that has been established in different legal fields, with *business law* and *public international law* being the most prominent examples.[42] Despite the uniform terminology, however, it is not a unified, overarching concept that cuts across the different areas of law in which it is used. The UN Guiding Principles on Business and Human Rights' "second pillar" adapted it without clarifying how this legal transplant in its new context relates to its predecessors. While *John Ruggie* has been inspired rather by its use in the *business* context,[43] he points out that the Guiding Principles "establish their own scheme for corporate human rights due diligence".[44] Since its adaptation into the dynamic policy debate and evolving legal field of regulating global value chains of private undertakings with regard to sustainability[45] issues, the concept of due diligence has inspired various soft law instruments but also hard law legislation.

The core elements of *human rights due diligence* outlined in the UN Guiding Principles 17 through 21 consist at least in *identifying* (UNGP 18)*, preventing* and *mitigating* (UNGP 19) and *tracking* and *accounting for* how the undertaking addresses its human rights impacts (UNGP 20 and 21).

In the earlier days of human rights due diligence some authors had reservations as to the term and the concept.[46] However, today – after the more recent political dynamics in several EU

[42] Cf. Bonnitcha, Jonathan, and Robert McCorquodale. "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights." *European Journal of International Law* 28, no. 3 (November 13, 2017): 899–919; Koivurova, Timo. Due Diligence, in: The Max Planck Encyclopedia of Public International Law, Vol. 3 [DE-FE], 2012, p. 236; Krieger, Heike/Peters, Anne/Kreuzer, Leonhard (eds.): Due Diligence in the International Legal Order, 2020.

[43] Cf. the SRSG's Senior Legal Advisor: Sherman, John F. III, Corporate Duty to Respect Human Rights: Due Diligence Requirements, November 30, 2007, https://media.business-humanrights.org/media/documents/files/reports-and-materials/Sherman-Corporate-Duty-to-Respect-30-Nov-2007.pdf.

[44] Ruggie, John Gerard, and John F Sherman. "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale." *European Journal of International Law* 28, no. 3 (November 13, 2017): 921–28 at 924 f.

[45] Broadly understood as including inter alia *human rights* and *environmental* aspects; cf. in this direction the definition in Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ L 317, 9.12.2019, p. 1, Art. 2 para. 24: "'sustainability factors' mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

[46] Cf. Deva, Surya. "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles." In Human Rights Obligations of Business, edited by Surya Deva and David Bilchitz, 78–104. Cambridge: Cambridge University Press, 2013; Bonnitcha/McCorquodale (supra fn. 42), the reply by Ruggie, John Gerard, and John F Sherman. "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale." *European Journal of International Law* 28, no. 3 (November 13, 2017): 921–28; and the rejoinder Bonnitcha, Jonathan, and Robert McCorquodale. "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A

Member States and the European Union as well as some third countries – this debate appears quite outdated. Meanwhile, a strong global and quite consolidated consensus on what elements should be included in an undertaking's *due diligence* concept concerning sustainability issues along its value chains can be observed.[47] A pragmatic and target oriented approach to regulating global value chains may harness this consensus.

Indeed the Draft Directive invokes inter alia Ruggie's "*Protect, Respect and Remedy*" Framework and the UNGP's second pillar,[48] the OECD Guidelines for MNE (2nd edition of 2011) and the subsequent Guidances, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2017);[49] furthermore it cites existing EU[50] and Member State[51] legislation as well as ongoing debates on the introduction of similar legislative approaches in numerous Member States[52].

Unlike the proposal in the Wolters' Report the Draft Directive does not contain any definition of the term "due diligence" in Art. 3. However, Art. 1 para. 2 sentence 2 Draft Directive spells out that the exercise of due diligence "requires undertakings to identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate the potential and/or actual adverse impacts on human rights, the environment and good governance that their own activities and those of their value chains and business relationships may pose".

The Draft Directive makes it sufficiently clear that *due diligence* in this sense does not consist in mere box-ticking exercises or any other plain process without any implications with regard to necessary changes in business operations.[53] This is in line with an understanding probably most stakeholders meanwhile agree upon.[54] Furthermore, it is also largely in line with what the Commission refers to as "due diligence duty" in its Inception Impact Assessment[55] and its public consultation questionnaire[56] launched in October 2020.

Rejoinder to John Gerard Ruggie and John F. Sherman, III." European Journal of International Law 28, no. 3 (November 13, 2017): 929–33.

[47] Sherman III, John. Beyond CSR: The Story of the UN Guiding Principles on Business and Human Right. Harvard Kennedy School Working Paper No. 71, March 2020, p. 1: "global authoritative standard".

[48] Cf. recitals (2) and (3) Draft Directive.

[49] Cf. recital (3) Draft Directive.

[50] Cf. recital (6) and (7) Draft Directive, citing the Timber Regulation, the Conflict Minerals Regulation, and the Non-Financial Reporting Directive.

[51] Cf. recital (8) Draft Directive, citing the Dutch Child Labour Due Diligence Act and the French Law on a duty of vigilance of parent and ordering companies (supra fn. 61).

[52] Recital (8) cites Germany, Sweden, Austria, Finland, Denmark, and Luxembourg as Member States "currently considering the adoption of such legislation".

[53] Cf. recital (34) of the Draft Directive: "Due diligence should not be a 'box-ticking' exercise but should consist of an ongoing process and assessment of risks and impacts, which are dynamic and may change on account of new business relationships or contextual developments. Undertakings should therefore in an ongoing manner monitor and adapt their due diligence strategies accordingly. (…)".

[54] Cf. Smit et al. 2020 (supra fn. 41), pp. 250-269.

[55] European Commission, Inception Impact Assessment, Sustainable Corporate Governance, Ref. Ares(2020)4034032 – 30/07/2020, p. 3: "a legal requirement for companies to establish and implement adequate processes with a view to prevent, mitigate and account for human rights (including labour rights and working conditions), health and environmental impacts, including relating to climate change, both in the company's own operations and in the company's the supply chain."

[56] European Commission, Consultation Document Proposal for an Initiative on Sustainable Corporate Governance, accessible via https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance.

Notwithstanding some terminological nuances in the policy debate ("due diligence duty"[57], "mandatory due diligence"[58], "mandatory due diligence duty"[59], "due diligence duty of care"[60], "duty of vigilance"[61], "duty to exercise due diligence of care"[62]), it is clear that in an EU directive *due diligence* would serve as a binding legal standard of care.[63] The Draft Directive uses mostly the plain term "due diligence"; however when defining the Directive's scope it uses the term "due diligence obligations" (Art. 1 para. 2 sentence 1 Draft Directive).

Certainly, corporate (value chain) due diligence *does* have procedural character; however, the procedural elements are closely intertwined with the context-dependent substantive obligations that can be concretized only by carrying out due diligence processes.[64] Any kind of mere "box-ticking" would evidently fail the obligation.[65]

Against this backdrop the "due diligence strategy" as it was originally outlined in Art. 4 of the pre-draft directive contained some unintended ambiguity: Art. 4 para. 4 pre-draft directive could have been misread in a way that it only obliges to *establish* and *disclose* a due diligence strategy (but not to adhere to it). This ambiguity is avoided by the improved text as adopted by the Plenary. Art. 4 para. 4 sentence 1 Draft Directive stipulates that undertakings shall "establish and effectively implement a due diligence strategy" (emphasis added), unless the risk analysis does not uncover any potential or actual adverse impacts. Moreover, Art. 4 para. 5 Draft Directive clarifies that *undertakings shall ensure that their business strategy and their policies are in line with their due diligence strategy*.

This is in line with the view expressed for instance in the 2018 *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*[66] as well as in a recent open letter to Commissioner Reynders issued by the Working Group[67]: The findings of the risk analysis and assessment must be integrated across the undertaking's relevant business processes and appropriate action must be taken by the undertaking; the effectiveness of the these measures must be tracked.

2.2 Due diligence's reach in the value chain

Another distinctive feature of *human rights due diligence* as spelled out in the UNGP is its far-reaching scope potentially including the undertaking's entire value chain: According to UNGP 17 due diligence should not be limited to the undertaking's *own* operations but should consider all

[57] European Commission, Consultation Document Proposal for an Initiative on Sustainable Corporate Governance, accessible via https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance.

[58] Cf. e.g. recitals (7) and (9) pre-draft directive.

[59] Cf. Smit et al. 2020 (supra fn. 41), pp. 154, 263, 268 et sq.

[60] Cf. Smit et al. 2020 (supra fn. 41), pp. 251 and 269.

[61] As in the French Duty of Vigilance Law (LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017).

[62] Cf. Smit et al. 2020 (supra fn. 41), p. 250.

[63] Cf. Smit et al. 2020 (supra fn. 41), pp. 260 et sqq.

[64] Cf. for a differentiated approach to the distinction and the interplay of procedural and substantive elements of due diligence: Gailhofer, Peter, Rechtsfragen im Kontext einer Lieferkettenregulierung, Umweltbundesamt 2020.

[65] Cf. Smit et al. 2020 (supra fn. 41), pp. 263 et sqq.

[66] UN General Assembly, The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/73/163, para. 10, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement.

[67] Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Letter of October 22nd, 2020, to Commissioner Reynders, p. 4, https://www.ohchr.org/Documents/Issues/Business/EU_Directive_on_HR.pdf.

adverse human rights impacts which may be *directly linked* to the undertaking's operations, products or services *by its business relationships*.

Also, in this regard most legislative proposals on (sustainability) due diligence are clearly inspired by the UNGP's broad approach. So is the Draft Directive. It proposes a due diligence obligation that covers the entire value chain – upstream *and* downstream: Recital (29) notes that violations and adverse impacts can be the result of the undertaking's *own activities or of those of their business relationships, in particular suppliers, sub-contractors and investee undertaking*. Therefore, the recital further states that undertakings' due diligence should encompass the *entire value chain*.

This approach is also reflected (more clearly than it was in Art. 4 para. 1 *pre*-draft directive) in the Draft Directive's Art. 1 para. 1:

> "This Directive is aimed at ensuring that undertakings (…) and **do not cause or contribute** to potential or actual adverse impacts on human rights, the environment and good governance **through their own activities** or **those directly linked to their operations, products or services by a business relationship or in their value chains**, and (…)." (emphasis added)

Art. 1 para. 2 sentence 2 Draft Directive reiterates this aspect:

> "(…) The exercise of due diligence requires undertakings to identify, assess, prevent, cease, (…) the potential and/or actual adverse impacts (…) that their **own activities** and those of their **value chains and business relationships** may pose." (emphasis added)

Art. 3 para. (5) defines "value chain" broadly as

> "all activities, operations, business relationships and investment chains of an undertaking and includes entities with which the undertaking has a direct or indirect business relationship, **upstream and downstream**, and which either:
>
> (a) supply products, parts of products or services that contribute to the undertaking's own products or services, or
>
> (b) receive products or services from the undertaking;" (emphasis added)

The term "business relationship" is also defined, in Art. 3 para. 2 Draft Directive:

> "'business relationships' means subsidiaries and commercial relationships of an undertaking throughout its value chain, including suppliers and sub-contractors, which are directly linked to the undertaking's business operations, products or services"

Hence, the corporate due diligence obligation shall cover the entire value chain, upstream and downstream. However, it can be noted that the "cross reference" in the definitions of the term *business relationships* on the one hand and *value chain* on the other, risk containing a (partially) circular definition.

The Draft Directive sometimes refers to the undertaking's "business relationships" (Art. 4 paras. 1 through 4 (i), and 8), sometimes to the undertaking's "value chains" (Art. 1 para. 3, Art. 4 para. 4 (ii) and para. 7), and, finally, sometimes to both business relationships *and* value chains (Art. 1 paras. 1, 2 Draft Directive). The resulting ambiguities could be clarified if not avoided using a single, comprehensive concept, be it business relations, the value chain or the life cycle.

In order to achieve a high degree of coherence throughout the EU legal system, it could be considered to include in the definition of the term value chain the "life cycle" concept as it is established in Art. 2 para. 1 no. (20) of the Public Procurement Directive[68].[69]

Limiting the scope in the value chain exclusively to *direct contractual* relationships, the first (or any other fixed) tier upstream and downstream[70] has significant flaws and risks failing the regulation's policy goal. Such an approach creates incentives to design the business model and the contractual relations in a way that hazardous operations are relocated just beyond this narrow sphere of responsibility. However, the official German Draft Due Diligence Act[71] does limit due diligence's scope generally to the *upstream* first tier and extends it *only* to tiers beyond if the undertaking has some knowledge of certain issues in the value chain. This mechanism creates problematic incentives to avoid or cease any kind of risk analysis and investigations beyond tier 1.[72]

The Draft Directive distinguishes between *causation, contribution* and *direct links* of their operations or business relationships to adverse impacts (e.g. Art. 1 para. 1 Draft Directive). Unlike the pre-draft that distinguished only between causation and contribution,[73] the Draft Directive adopts the "classic" threefold distinction of the UNGP (cf. UNGP 13). However, in general, it does not impose different *legal consequences* depending on the form of involvement. The only exception to this rule can be found in Art. 10 para. 1 Draft Directive, pursuant to which the undertaking shall *provide for or cooperate with the remediation process* in case of causation or contribution to adverse impacts, while it shall cooperate with the remediation process only to *the best of its abilities* if it is only directly linked to such impacts.

Apparently, the purpose of the repeated mentioning of causation, contribution and directly linked consists almost exclusively in the clarification that also mere contributions or direct links suffice to trigger further due diligence obligations. Therefore, an alternative to three seemingly distinctive categories could be a *single* (broad) category of involvement; in this case, different degrees of involvement could be considered as elements of a proportionality test.[74]

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[68] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 094 28.3.2014, p. 65), Art. 2 para. 1 no. (20) Directive 2014/24/EU: "'life cycle' means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation".

[69] This approach was adopted by the internal draft proposal of the German Federal Ministry of Economic Cooperation and Development (BMZ): The "Gesetz zur Regelung menschenrechtlicher und umweltbezogener Sorgfaltspflichten in globalen Wertschöpfungsketten (Sorgfaltspflichtengesetz - SorgfaltspflichtenG)" (hereinafter cited as "BMZ-pre-draft Due Diligence Act") (accessible at https://www.business-humanrights.org/sites/default/files/documents/SorgfaltGesetzentwurf_0.pdf; a non-authorized English translation – with unclear source – is accessible at: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/DueDiligenceLawGermany.pdf) defines in Sec. 3 no. 2 the value chain as *the creation of value comprising the entire life cycle of a product or service, i.e. all stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product, works or service, from raw material acquisition or generation of resources to disposal* – a definition evidently inspired by the Public Procurement Directive.

[70] As it had been suggested in some of the discarded amendments proposals in the Legal Affairs Committee, cf. amendment proposals 264, 268, 300, 302, 344, and 400 in European Parliament, Committee on Legal Affairs, Amendments 201-400, 2020/2129(INL), PE658.902v01-00, https://www.europarl.europa.eu/doceo/document/JURI-AM-658902_EN.pdf; furthermore amendment proposals 403, 464, and in particular 472 and 479 in European Parliament, Committee on Legal Affairs, Amendments 401-600, 2020/2129(INL), PE658.905v01-00, https://www.europarl.europa.eu/doceo/document/JURI-AM-658905_EN.pdf.

[71] Supra fn. 32.

[72] Cf. for a critical assessment: Krebs, David: Immerhin ein Kompromiss: Der Entwurf für ein Lieferkettengesetz, VerfBlog, 2021/2/21.

[73] Recitals (18) and (33), Art. 1 para. 1 and Art. 4 paras. 2 and 3 and Art. 10 para. 1 pre-draft directive; cf. also items B and E, no. 1, 12 and 13 of the Corporate Due Diligence Draft Report.

[74] Cf. Sec. 6 para. 4 and para. 2 sentence 2 of the draft for a German *Act on Corporate Obligations to Exercise Human Rights Due Diligence (HRDD Act)* on behalf of German NGOs in 2016 (hereinafter cited as "German NGO-draft HRDD Act"), an English translation by James Patterson and Darrell Wilkins can be found in Amnesty International et al. (eds.). Legislative Proposal: Corporate Responsibility and Human Rights – Legal Text and Questions and Answers on the Human Rights Due Diligence Act proposed by

2.3 Proportionality principle

Especially a due diligence obligation that applies to the entire value chain including adverse impacts caused by third parties into which the undertaking merely indirectly involved must contain some kind of proportionality test.

Such an element allows for flexibly determining the individual level of due diligence efforts which are required throughout t value chain with respect to the specific circumstances of the individual situation and the tier on a case-by-case basis. It thereby defines – in an abstract manner – a level of due diligence that may not be undercut in order to discharge the undertaking's legal obligations. On the other hand, if this level is met and the undertaking therefore may be deemed to have acted with all due care this *does* discharge the undertaking of all its obligations. In other words: Undercutting the required level of due diligence may subject the undertaking to sanctions and other enforcement measures including liability as set out in the law; however, if the required level is met, no further action nor any kind of sanctions may be legally imposed on the respective undertaking.

As the Commission's Due Diligence Study puts it: "The required level of due diligence which the company would need to demonstrate in its defence to escape liability could be phrased as, for example, adequate due diligence, appropriate due diligence, or reasonable due diligence." [75]

An explicit proportionality test is particularly important to a broadly drafted, cross sectoral instrument defining an overarching general due diligence requirement; to a lesser extent it is crucial when drafting a rather narrowly designed single issue and industry or product specific due diligence obligation.[76] In the latter case matters of proportionality can already be pondered and considered in the legislative process when specifying more exactly the steps and measures that must be taken.[77]

More decisive than the technical term used to label the test – be it reasonableness, adequacy, appropriateness or proportionality – is its design and definition. Most proposals and comments on this aspect argue, that the relevant factors to determine the sufficient level of due diligence can and should be outlined in the law be it in an illustrative or an exhaustive list.[78] The proposed lists include aspects like country- and industry-specific risks, severity and likelihood of possible impacts, "distance" in the value chain, size of the undertaking, actual and/or potential leverage of the undertaking over third parties directly causing the impact etc.

German NGOs, 2017, https://corporatejustice.org/news/mhrdd_lawproposal_and_faq.pdf; the German original draft (Gesetz über die unternehmerische Sorgfaltspflicht zum Schutz der Menschenrechte (Menschenrechtsbezogene Sorgfaltspflichten-Gesetz – MSorgfaltsG)) is included in Klinger, Remo, Markus Krajewski, David Krebs, and Constantin Hartmann. Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht: Gutachten. Berlin: Amnesty International et al. 2016, https://www.germanwatch.org/sites/germanwatch.org/files/publication/14745.pdf, pp. 38 et sqq.

[75] Smit et al. 2020 (supra fn. 41), p. 250. Even though the study spells this explicitly out for *liability* this applies equally to all other sanctions and enforcement mechanisms (maybe except for mere disclosure requirements), cf. Krebs et al. 2020 (supra fn. 3), pp. 28 et sq.

[76] Cf. Ministry of Economic Affairs and Employment of Finland (ed.): Judicial Analysis on the Corporate Social Responsibility Act, Helsinki 2020, https://julkaisut.valtioneuvosto.fi/handle/10024/162411, pp. 61 et sqq.

[77] However, the more specifically certain steps and measures of due diligence are spelled out, the greater the risk of imposing largely ineffective mere box-ticking exercises.

[78] Cf. Principle 7 (b) UNGP; sec. 5 para. 2 sentence 2 BMZ-pre-draft German Due Diligence Act (supra fn. 69); sec. 4 para. 2 item a) sentence 2 of the Austrian draft for an *Act on Compliance with Corporate Social Responsibility (Social Responsibility Act - SZVG)* [translation by the author, original title: Gesetz zur Einhaltung unternehmerischer Sozialverantwortung (Sozialverantwortungsgesetz – SZVG)], 579/A XXVII. GP – Initiativantrag vom 25. Mai 2020, https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_00579/index.shtml]; sec. 6 para. 2 sentence 2 of the German NGO-draft HRDD Act (supra fn. 74); Krebs et al. 2020 (supra fn. 3), p. 28; Initiative Lieferkettengesetz 2020 (supra fn. 36),p. 53 et sq; Leupold, Petra. Entwurf eines Gesetzes zur Einhaltung unternehmerischer Sozialverantwortung (Sozialverantwortungsgesetz – SZVG). Rechtsgutachten erstellt im Auftrag des Bundesministeriums für Arbeit, Soziales und Konsumentenschutz, June 2017.

Recitals (18) and (20) Draft Directive point out the principle of proportionality as core element of due diligence:

> *"(18) Proportionality is built into the due diligence process, as this process is contingent on the severity and likelihood of adverse impacts that an undertaking might cause, contribute to or be directly linked to, its sector of activity, the size of the undertaking, the nature and context of its operations including geographic, its business model, its position in the value chain and the nature of its products and services. (…)."*
>
> *"(20) For the purposes of this Directive, due diligence should be understood as the obligation of an undertaking to take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts (…)"*

Recitals (30), (32), (42), and (44) reprise the proportionality principle. These considerations are reflected inter alia in Art. 4 para. 7 Draft Directive:

> "*Undertakings shall carry out value chain due diligence which is proportionate and commensurate to the likelihood and severity of their potential or actual adverse impacts and their specific circumstances, particularly their sector of activity, the size and length of their value chain, the size of the undertaking, its capacity, resources and leverage.*"

However, it could be clarified whether the catalogue is merely illustrative or exhaustive. Of course, an exhaustive list risks overlooking crucial factors.

2.4 Cross-industry comprehensive vs. industry, product, issue specific, or otherwise limited approaches

Mandatory due diligence may be regulated in an overarching, comprehensive, and general piece of EU legislation (directive or regulation) that includes all human rights and the environment and covers all[79] undertakings of all industries "domiciled"[80] or even just "doing business" on EU territory.[81] Practical examples of similarly comprehensive approaches can be found in the French *Duty of Vigilance Law*[82] but also in the NFRD[83]. A similar approach is being proposed in the Draft Directive.

The opposite approach – narrowly addressing due diligence only for a single industry, product, sustainability issue or otherwise limited topic – has been more frequently adopted so far.[84] Examples can be found at EU level[85] and in several jurisdictions[86] around the world. There may

[79] A different question is whether the personal scope should be subject to certain minimum size requirements.

[80] I.e. having its statutory seat, central administration or principal place of business on EU territory.

[81] Cf. in more detail on this approach referred to as "suboption 4.1" Smit et al. 2020 (supra fn. 41), pp. 253 et sq.

[82] Supra fn. 61.

[83] 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 (OJ L 330, 15.11.2014, p. 1).

[84] Cf. in more detail "suboption 4.2" in Smit et al. 2020 (supra fn. 41), pp. 254 et sqq.

[85] Conflict Minerals Regulation (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 (OJ L 130, 19.5.2017, p. 1); Timber Regulation (Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance (OJ L 295, 12.11.2010, p. 23) and potentially a future EU Anti Deforestation Regulation (cf. European Parliament resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)), P9_TA-PROV(2020)0285, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.pdf).

[86] Dutch Child Labour Due Diligence Act of 2019 (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) [Act of October 24, 2019, introducing a due diligence to prevent the supply of goods and services created with the aid of child labour (Child Labour Due Diligence Act)] Staatsblad 2019 no. 401 of November 13, 2019) and various anti-slavery laws:

be several advantages of such single-issue approaches. Often, they address issues that are politically rather uncontroversial and tackling them is widely accepted by the vast majority of society (e.g. child labor, slavery). Also, issue or product specific regulations can be designed in a much more specific manner.

However, legal advantages with respect to the achievable specificity can be achieved just as good through industry, product or issue specific concretizations – be it by non-binding guidelines (as suggested in Art. 14 Draft Directive) or binding delegated acts. The major advantage of an overarching, comprehensive and general due diligence obligation is that it will provide for a long-term consistency of industry or issue specific obligations.[87] Therefore, a comprehensive approach covering human rights and the environment (ideally complemented by certain concretizations with regard to certain products, industries or issues) is superior to an approach that continues to add more mono-issue regulations before creating the overarching "umbrella".

California Transparency in Supply Chains Act of 2010 (Senate Bill No. 657, CHAPTER 556, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB657), UK Modern Slavery Act 2015, c. 30, more recently the Australian Modern Slavery Act 2018, No. 153, 2018, https://www.legislation.gov.au/Details/C2018A00153, the New South Wales Modern Slavery Act 2018 No 30, https://www.legislation.nsw.gov.au/#/view/act/2018/30.

[87] Krebs et al. 2020 (supra fn. 3), pp. 31 et sq.

3 Defining environmental due diligence's "material scope"

A core issue of designing a corporate due diligence obligation in global value chains with regard to environmental matters consists in determining its "material scope".[88] Due diligence obligations as discussed in the context of global value chain regulation are featured by certain *procedural*[89] elements. Any value chain due diligence obligation, however, must also specify a substantive normative standard or level of protection it aims to secure (the "material scope"[90]). Regarding the design of *human rights* due diligence, existing laws, drafts, and other proposals have been converging in a concept closely inspired by the UNGP's second pillar (3.1). By contrast, in the case of *environmenta*l due diligence the range of potentially conceivable solutions is broader (3.2.)

3.1 *Human rights* due diligence: reference to international human rights treaties

There is relatively little controversy how to specify the referenced normative standard of a *human rights* due diligence obligation both in national and EU legislation.

Typically, reference is made to internationally recognized human rights instruments either implicitly by just mentioning *human rights*[91] or *explicitly by* including an illustrative or exhaustive list of referenced human rights instruments[92].[93] These approaches appear to be inspired by the UNGP's second pillar, in particular Principle 12.

The same approach has been chosen by the European Parliament for the Draft Directive. Art. 3 para. (6) defines "potential or actual adverse impact on human rights" as

> "any potential or actual adverse impact that may impair the full enjoyment of human rights by individuals or groups of individuals in relation to human rights, including

[88] Cf. in more detail on the issue Krebs et al. 2020 (supra fn. 3), pp. 35-47, with particular respect to chemicals and biodiversity: Henn, Elisabeth and Jannika Jahn, Rechtsgutachten Zulässigkeit und Gegenstand umweltbezogener Sorgfaltspflichten in einem deutschen LieferkettenG – unter besonderer Berücksichtigung von Chemikalien und Biodiversität –, BUND (ed.), July 2020, pp. 36-55.

[89] However, this does not imply that *due diligence* is a mere *procedural* or even "box-ticking" exercise; procedural elements are crucial; however, *if* relevant risks occur due diligence goes definitely beyond mere procedural steps and results in substantive duties to do no harm, to remediate harm already occurred, etc.

[90] Cf. rather briefly on the matter: Smit et al. 2020 (supra fn. 41), pp. 277 et sqq.

[91] E.g. French Duty of Vigilance Law (supra fn. 61) and the Swiss Popular Initiative („Konzernverantwortungsinitiative": The German text proposed by the initiative can be downloaded at: https://konzern-initiative.ch/wp-content/uploads/2019/11/kvi_factsheet_5_d_911pdf.pdf. An English courtesy translation is available at: https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf.).

[92] Cf. sec. 3 no. 1 and Annex BMZ-pre-draft German Due Diligence Act, cf. supra fn. 69); sec. 3 para. 3 item (A) of the discussion draft (https://docs.house.gov/meetings/BA/BA16/20190710/109770/BILLS-116pih-corphuman.pdf) in the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets (Committee on Financial Services) on July 10, 2019; sec. 3 no. 1 and Annex in the German NGO-draft proposal for an HRDD Act (supra fn. 74); sec. 3 item d) of the proposal for a Norwegian *Act relating to transparency regarding supply chains, the duty to know and due diligence* ("'Fundamental human rights' means the internationally recognised human rights as expressed in the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the ILO's fundamental conventions on fundamental rights and principles at work."). The draft has been published in the *Report from the Ethics Information Committee*. Supply Chain Transparency, Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence, November 2019, [original title of the draft legislation: Åpenhet om leverandørkjeder - Forslag til lov om virksomheters åpenhet om leverandørkjeder, kunnskapsplikt og aktsomhetsvurderinger, https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/195794-bfd-etikkrapport-web.pdf], an English translation of the report including the draft legislation has been provided by the Norwegian Government at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

[93] Recently, the approach has been discussed in a Study commissioned by the Ministry of Economic Affairs and Employment of Finland (ed.): Judicial Analysis on the Corporate Social Responsibility Act, Helsinki 2020, https://julkaisut.valtioneuvosto.fi/handle/10024/162411, p. 66.

> social, worker and trade union rights, **as set out in Annex xx to this Directive**." (emphasis added).

Recital (21) spells out in more detail what content can be expected in Annex xx:

> "Annex xx sets out a list of types of business-related adverse impacts on human rights. To the extent that they are relevant for undertakings, the Commission should include in that Annex the adverse impacts on human rights expressed in the international human rights conventions that are binding upon the Union or the Member States, the International Bill of Human Rights, International Humanitarian Law, the United Nations human rights instruments on the rights of persons belonging to particularly vulnerable groups or communities, and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as well as those recognised in the ILO Convention on freedom of association and the effective recognition of the right to collective bargaining, the ILO Convention on the elimination of all forms of forced or compulsory labour, the ILO Convention on the effective abolition of child labour, and the ILO Convention on the elimination of discrimination in respect of employment and occupation. They further include, but are not restricted to, adverse impacts in relation to other rights recognised in the Tripartite of principles concerning multinational enterprises and social policy (MNE declaration) and a number of ILO Conventions, such as those concerning freedom of association, collective bargaining, minimum age, occupational safety and health, and equal remuneration, and the rights recognised in the Convention on the Rights of the Child, the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and national constitutions and laws recognising or implementing human rights. The Commission should ensure that those types of impacts listed are reasonable and achievable."

Hence, in comparison to the original proposal in the Wolters' Report the amendments are of rather editorial character. The literal wording of Art. 3 para. 1 indent 8 pre-draft directive has been largely moved to recital (21) of the Draft Directive.

It is not entirely clear, whether the list of referenced human rights instruments in the Annex xx shall have mere illustrative character (as it has been proposed in Art. 3 indent 8 of the pre-draft directive) or should be exhaustive. The fact that an amendment proposal[94] tabled in the Legal Affairs Committee requested using the explicit term "exhaustive list" was not adopted, may be interpreted as an indicator that the list in the Draft Directive should be viewed as rather illustrative.

[94] Cf. amendment 491 (European Parliament, Committee on Legal Affairs, Amendments 401-600, 2020/2129(INL), PE658.905v01-00, that proposes to replace Art. 3 indent 8 by the following language: "'human rights risk' means any potential or actual adverse impact that may impair the ***fulfilment*** of human rights ***of*** individuals or groups of individuals in relation to ***the*** internationally recognized human rights instruments ***listed in Annex I. The Commission is empowered to adopt delegated acts in accordance with Article 18(a), to amend this exhaustive list.***"

3.2 *Environmental* due diligence: A broader spectrum of conceivable approaches

In contrast to the relative convergence of approaches to mandatory *human rights* due diligence, the spectrum of conceivable and indeed discussed approaches regarding the design of mandatory *environmental* due diligence is significantly broader.[95]

In the following the conceptual framework of conceivable approaches is outlined (3.2.1). Subsequently, the concepts chosen in the Wolters' report (pre-draft directive) and in the Draft Directive are discussed in the context of this framework (3.2.2).

3.2.1 The conceptual framework of legislative design options for environmental due diligence's "material scope"

The reason for the relatively broad range of conceivable approaches for designing environmental due diligence legislation may be inter alia the lack of a multilaterally recognised comprehensive document comparable to the UN Guiding Principles for Business and *Human Rights* that would provide for a globally accepted regulatory model for the protection of environmental matters in global value chains. Apparently, the OECD Guidelines' sixth chapter (Environment) does not (yet) have the same converging impact as the UNGP's second pillar had on legislative developments.

The range of conceivable approaches can be outlined as follows.[96] Basically, there are two fundamentally different strategies for defining the "material scope", i.e. a normative, substantive environmental standard at which corporate due diligence aims: Firstly, this substantive standard could be outlined by a "general clause" or "catch-all-clause" in a rather abstract manner (3.2.1.1). The approach in the rapporteur's original pre-draft for the JURI committee can be classified in this category. According to a second category of defining due diligence's material scope, however, the substantive, normative standard at which due diligence aims can be defined more specifically through reference to certain environmental *norms*. A subset of this approach has been adopted by the JURI Committee and the plenary (3.2.1.2). Both approaches may be employed as stand-alone solutions or in a combination. Either the general clause may serve as "starting point" that is subsequently concretized by means of referencing specific substantive environmental norms or the principle rule consists of such specific references and only remaining gaps are filled by a broadly drafted general clause/catch-all provision.

The following table provides an overview of the framework of design options for the material scope of environmental due diligence and how the Draft Directive and the original pre-draft can be categorized within this framework:

[95] As the recent Finnish study summarizes: "Human rights are defined in international agreements. The environment can be defined in many different ways." (Ministry of Economic Affairs and Employment of Finland (ed.): Judicial Analysis on the Corporate Social Responsibility Act, Helsinki 2020, https://julkaisut.valtioneuvosto.fi/handle/10024/162411, p. 70).

[96] Cf. in more detail on the following: Krebs et al. 2020 (supra fn. 3), pp. 36-47.

Table 1: Overview: A framework of design options for the material scope of environmental due diligence

Main Approach	**General Clause**		**Reference to existing norms**			
Subtype	**Positive**	**Negative**	**International law**	**International soft law**	**host state/ "place of effect" law**	**EU law (home state law)**
Characteristic Feature: Due Diligence aims at…	… **compliance** with certain abstract standards of protection.	… avoiding the impairment of certain **protected goods**	…compliance with certain (specific) **substantive environmental norms** from…			
			international environmental agreements	international soft law norms	local laws at "place of effect"	EU law

Source: author's compilation

3.2.1.1 General clauses

Traditionally in most of the few examples of existing laws or draft proposals for environmental due diligence in global value chains the standard approach has been a general clause. Those approaches may be divided into *positive* and *negative* ones. Most common is the negative approach, where due diligence is directed at *avoiding* the impairment of certain protected goods (3.2.1.1.1). *Positive* general clauses, by contrast, aim at abiding by a certain, rather abstract substantive environmental standard (3.2.1.1.2).

3.2.1.1.1 Negative approach

According to the negative approach, the due diligence obligation aims at preventing and avoiding the impairment of or harm to certain protected goods, which can be more (clean air, water, forests, biodiversity, ecosystems etc.) or less ("the environment") specified.

The most prominent example of a negative general clause may be identified in Art. L. 225-102-4 of the French Commercial Code (as amended by the *Duty of Vigilance Law*[97]). According to para. 1, subpara. 3 Commercial Code the vigilance plan must include appropriate monitoring measures to identify and prevent "risks of serious harm to the environment"[98]. Arguably, this mere mentioning of the "environment" may be the leanest possible legislative technique to describe the protected good. However, it may raise difficult questions when being practically interpreted and applied and thereby create (undue) leeway to undertakings.

Therefore, a more detailed catalogue of protected goods (sub-elements of the "environment") seems preferable. Such catalogues of protected goods can be inspired by other environmental legislation in order to achieve a high degree of consistency.

A comprehensive catalogue of protected goods suggests itself. However, it also might be conceivable to single out one or more specific protected goods, exempt it/them from the general corporate due diligence obligation and subject it/them to a special regime. For example, this could be considered for the issue of deforestation in case the recently published JURI Committee's draft report and call for an EU legal framework to halt and reverse EU-driven global

[97] Supra fn. 61.

[98] *„… mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers (…) l'environnement…"*.

deforestation99 results in an EU Anti-Deforestation-Regulation. Of course, an overall consistency between the general due diligence obligation on the one hand and good or issue specific special regimes should be ensured.[100]

If the negative general clause approach is adopted, it should be considered to include some kind of de minimis or relevance threshold that could define irrelevant minor impacts.[101] For instance, the French *Duty of Vigilance Law*[102] aims exclusively at the prevention of *severe injuries* ("atteintes graves") of inter alia the environment.

On the one hand, abstaining from such a limiting criterion could be justified with the practical highly relevant phenomenon of *cumulative* impacts (e.g. by emissions). On the other hand, this approach might make it challenging to distinguish acceptable levels of adverse impacts from impacts that require further preventive action (such as reducing or ceasing emissions) and mitigation action.

The Draft Directive attempts to tackle these problems by including *a de minimis* reservation in the definition of the concept of contribution. Pursuant to Art. 3 para. 10 sentence 2 Draft Directive "contribution has to be substantial, meaning that minor or trivial contributions are excluded."

3.2.1.1.2 Positive approach

By contrast, following a *positive* approach due diligence does not aim at *avoiding* an *impairment of certain protected goods*. Instead, it is directed at promoting compliance with an abstract positive substantive environmental standard of conduct.

A variation of this approach consists in referring to the company's emissions or otherwise polluting activities, instead of the environmental impacts caused or contributed to.[103] Inter alia this could be done through referring to the use of *best available technique.*[104] However, in the case of *positive* approaches that aim at compliance with a certain positive environmental standard the line between a clear *general clause-like* wording and a more specific reference to certain norms is somewhat blurry: While due diligence aiming at compliance with "best available technique" could be read as *general clause* with considerable openness to interpretation, it could also be regarded as a case of referencing the respective technical BAT reference documents (BREFs), as defined under the Industrial Emissions Directive (2010/75/EU)[105].

3.2.1.2 Referencing more specifically substantive environmental norms

The second major category of approaches to determining the "material scope" of environmental due diligence consists in referencing specific existing substantive environmental norms. An advantage of this legislative technique would be the higher level of certainty and specificity that can be potentially achieved.

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[99] European Parliament resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)), P9_TA-PROV(2020)0285, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.pdf.

[100] Cf. supra 2.4.

[101] Cf. Krebs et al. 2020 (supra fn. 3), p. 47.

[102] Supra fn. 61.

[103] Cf. in this direction Initiative Lieferkettengesetz 2020 (supra fn. 36), p. 44.

[104] Cf. sec. 3 no. 8 item c) BMZ-pre-draft German Due Diligence Act (supra fn. 69).

[105] Cf. Art. 3 (11) Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17.

However, it is noteworthy that referencing substantive environmental norms for the purpose of determining the "material scope" of corporate due diligence does not – in and of itself – imply that the undertakings subject to the due diligence obligation are themselves directly bound to the referenced substantive norms.[106] Due diligence is principally a duty of conduct (not of result).[107] It does *aim* at promoting compliance with certain substantive norms even with regard to actions of third parties and events that take place somewhere in the value chain *beyond* the obliged undertaking's own operations. However, due diligence requires only such measures that are commensurate – inter alia – to the undertaking's leverage and potential influence on the direct perpetrator in the value chain.[108]

Substantive environmental norms to which reference could be made can be found at national, EU or international level in form of international agreements, local law at the place of effect, home state law and soft law.

It should be noted that the substantive norms described in the following may be consulted and considered in order to interpret a general clause, as outlined above, even if no explicit reference is made. The fundamental difference consists in the considerable leeway that a mere general clause leaves to the obliged undertakings and the somewhat higher degree of legal uncertainty.

3.2.1.2.1 International agreements

Referencing international agreements in order to determine due diligence's material scope is a relatively straightforward approach.

In case of *human rights,* it is a widely accepted and often proposed technique.[109] The Swiss National Council's (original) indirect counterproposal to the Swiss people's initiative proposed the approach also regarding environmental matters by referring (exclusively) to the respective international provisions that are binding on Switzerland.[110] An extremely narrow variation of this approach can be found in the German Draft Due Diligence Act[111]: Sec. 2 para. (3) in conjunction with No. 12 and 13 of the annex refer exclusively to the Minamata and the Stockholm-Convention on Persistent Organic Pollutants. The explanatory memorandum does not provide any explanation on what considerations this choice has been based.

However, such reference to international *environmental* agreements is less straight forward than it might seem at first glance. Given the fact that international environmental agreements constitute a highly patchy and at best fragmentary legal order, [112] relying solely on references to those results in a just as patchy environmental due diligence obligation.[113] Unlike in the domain

[106] Cf. on this issue: Gailhofer, Peter. Rechtsfragen im Kontext einer Lieferkettenregulierung, Umweltbundesamt 2020, in particular pp. 5 – 8.

[107] Verheyen, Roda. Ein deutsches Lieferkettengesetz: Echte Chance für den Umweltschutz. Stellungnahme mit Schwerpunkt auf materiellen Sorgfaltspflichten und Umsetzung am Beispiel besonders gefährlicher Chemikaliengruppen (Textilindustrie). Im Auftrag von Greenpeace e.V., August 2020, p. 15.

[108] Cf. Art. 4 para. 7 Draft Directive.

[109] Cf. above 3.1.

[110] The wording of the original National Council's ("*Nationalrat*") indirect counter proposal (as adopted on June 14th, 2018, https://www.parlament.ch/centers/documents/de/dok-gegenentwurf-mm-rk-n-2018-05-04.pdf) for a new *Art. 716a^{bis} 2a Obligationenrecht* reads: „Wo das Gesetz auf die Bestimmungen zum Schutz der Menschenrechte und der Umwelt auch im Ausland hinweist, sind damit die entsprechenden für die Schweiz verbindlichen internationalen Bestimmungen gemeint." [„Where the law refers to the provisions for the protection of human rights and the environment, including abroad, this refers to the corresponding international provisions that are binding on Switzerland."]; however, this version of the indirect counter proposal failed in the Council of States ("*Ständerat*") and was subsequently abandoned by the National Council.

[111] Supra fn. 32.

[112] Cf. Sand, in: Rehbinder/Schink (eds.), Grundzüge des Umweltrechts, 2018, para. 124; Grosz, Umweltschutz als Aspekt der Unternehmensverantwortung im internationalen Kontext, URP (7)2017, 641-661 at 656.

[113] Cf. the environmental agreements that are listed in the explanatory memorandum of the counter proposal [Zusatzbericht der Kommission für Rechtsfragen vom 18. Mai 2018 zu den Anträgen der Kommission für einen indirekten Gegenentwurf zur

of human rights, the global *environmental* legal order lacks a comprehensive canon of internationally at least largely recognized agreements in the environmental field that regulate the protection of the environment thoroughly and conclusively. However, this does not lead to an argument against this regulatory approach as such; it just points out that an approach that relies exclusively on substantive norms from international environmental agreements might prove often largely ineffective. This observation suggests that it should be complemented by other points of reference or at least a catch-all provision as discussed above [114].

Furthermore, certain aspects regarding the legislative technique should be considered:

Firstly, the vast number of international environmental agreements may make it challenging to explicitly enumerate all referenced agreements in an annex. Nevertheless, technically it would be possible to do so. Even if such an annex would comprise several pages and dozens or even hundreds of environmental agreements,[115] navigating such a list would still prove to be more user friendly than a general reference to all environmental agreements ratified by Member States. A non-exhaustive, illustrative list could be another option.

Secondly, referring to environmental treaties in order to define the "material scope" of environmental due diligence can be more complex compared to referencing human rights treaties. It is generally clarified how human rights obligations that bind traditionally only States can be "translated" into substantive norms for non-state actors.[116] In comparison to human rights treaties environmental treaties appear in a wider variety.[117] While referencing *substance-* or *activity-related bans* and *technical regulations*[118] in a corporate due diligence obligation would not pose any major difficulties, it is more challenging to translate broader environmental obligations of states such as target standards (in particular overall reduction targets of certain emissions, e.g. greenhouse gas) into obligations at the level of individual polluters.

Thirdly, it has been challenged whether a general reference to entire environmental treaties would be constitutional with respect to legal certainty (under German constitutional requirements).[119] Certainly, German constitutional standards cannot be simply transferred to EU constitutional requirements. However, even if they could, this view applies constitutional requirements that have been developed for directly binding substantive rules and prohibitions. Yet, a *due diligence* obligation that aims at promoting compliance with certain substantive norms in particular by third parties in the value chain, must be distinguished from substantive rules and prohibitions a person is directly bound to itself.[120] Consequently, the violation of a

Volksinitiative «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt» im Rahmen der Revision des Aktienrechts, p. 10, https://www.parlament.ch/centers/documents/de/bericht-rk-n-16-077-2018-05-18-d.pdf]: Montreal Protocol on Substances that Deplete the Ozone Layer, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, International Convention on Civil Liability for Oil Pollution Damage, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, and Stockholm Convention on Persistent Organic Pollutants.

[114] Cf. supra 3.2.1.1.

[115] Cf. the ecolex database (www.ecolex.org) to browse and filter the relevant agreements.

[116] This is the widely accepted UNGP's stance, where human rights obligations of States are „translated" in a general „corporate responsibility to respect" human rights. Of course, this responsibility in the UNGP is not conceptualized as a legal duty. However, notwithstanding the non-binding nature of this „responsibility" it is clear that from the UNGP's point of view all human rights can be potentially relevant for business operations; cf. furthermore: Monash University Castan Centre for Human Rights Law (ed.), Human Rights Translated – A Business Reference Guide, 2nd ed. 2017.

[117] For a differentiated typology of environmental treaties cf. Buck/Verheyen, § 1 Umweltvölkerrecht, in: Koch et al. (eds.), Handbuch Umweltrecht, 5. edition, 2018, paras. 48-74.

[118] Cf. Buck/Verheyen, § 1 Umweltvölkerrecht, in: Koch et al. (eds.), Handbuch Umweltrecht, 5. edition, 2018, paras. 48, 52 et sqq., and 60 et sqq.

[119] Cf. Henn/Jahn (supra fn. 88), pp. 27 and 43.

[120] Cf. Gailhofer, Peter. Rechtsfragen im Kontext einer Lieferkettenregulierung. Umweltbundesamt 2020, pp. 5 – 8.

substantive norm (by a third party) does not automatically imply a violation of the *due diligence* obligation referring to the said norm. Therefore, the strict constitutional certainty requirements for directly binding substantive rules and prohibitions cannot be simply transferred to the determination of the substantive reference standard of a due diligence obligation. Also, it should be noted that in comparison to a mere general clause – as employed or proposed in most existing laws and drafts on environmental due diligence – any reference to international environmental agreements would still significantly improve the general clause in terms of certainty.

As a result, an implicit or explicit reference to international environmental treaties seems feasible; however, in order to avoid major gaps and loopholes, this should not be the only reference point.

3.2.1.2.2 Local law at the "place of effect"

A second approach would consist in referencing national/local environmental law applicable at the place where the environmental harm occurs ("place of effect"[121]).[122]

Referencing locally applicable laws at the place of effect is an established regulatory approach that can be found e.g. in the EU Timber Regulation (EUTR).[123] Moreover, this approach can invoke the OECD Guidelines' for MNE.[124]

Nonetheless, the approach is often criticized as being too weak. It is argued that this type of regulation "would not itself add any new legal obligations, as companies are in any event already required to comply with those laws of the countries where they operate."[125] However, if due diligence is designed in a far-reaching manner that covers the entire value chain and includes indirect effects of third parties' operations in the value chain a more positive assessment is justified. *De lege lata* there is a legal obligation to take care of compliance with local laws *by third parties* only in exceptional cases such as the EUTR-regime. Traditionally, it has been asserted that businesses may trust that their legally independent business partners and even more third parties in their value chains act in full compliance with applicable law.[126] By contrast, a value chain overarching due diligence obligation would clarify that such a trust is not generally justified, and due diligence must be exercised also with regard to compliance of third parties. Hence, even referencing mere local laws as point of reference for due diligence can have a positive impact. On the other hand, the approach is pointless if the local legal order does not suffer a mere *enforcement* deficit but (also) a *regulatory* deficit[127].

[121] There is no clearly established terminological convention for this issue. The frequently used term *host state* law (e.g. Smit et al. 2020, supra fn. 41, p. 278) is too narrow if it is understood in its original technical meaning (referring to transnational corporate investments). It would be challenging to apply it to mere supply chain chases where there aren't any corporate ties between the companies involved. Therefore, I prefer the term "place of effect" as the place where (environmental) harm occurs. The term is borrowed from the conflict of laws doctrine where the term „place of effect" is used in international private law to describe the locus damni, i.e. the place where the damage occurred.

[122] An example can be found sec. 3 no. 8 item a) BMZ-pre-draft German Due Diligence Act (supra fn. 69).

[123] Art. 2 item f) EUTR defines "legally harvested" as timber harvested in accordance with the *applicable legislation in the country of harvest*; conversely, "illegally harvested" timber has been harvested *in contravention of the applicable legislation in the country of harvest* (Art. 2 item g) EUTR).

[124] Chapter VI („Environment") first sentence reads: "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, (…)".

[125] Smit et al. 2020 (supra fn. 41), p. 278.

[126] Cf. Wagner, Gerhard. Haftung für Menschenrechtsverletzungen, RabelsZ 80 (2016), 717–782 at 757 et sqq.

[127] Cf. for an example from the human rights debate: Marx, Axel, Claire Bright, Nina Pineau, Brecht Lein, Torbjörn Schiebe, Johanna Wagner, and Evelien Wauters. *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries*, European Parliament (ed.), 2019, p. 98 citing the *„Vinci Case"* in Quatar; cf. furthermore with regard to environmental liability rules in home vs.

The major advantage of this approach, however, is its technical simplicity combined with a high degree of detail of the referenced substantive norms.

As result, the approach does have its advantages and may be suitable in *some cases*, while it will prove largely ineffective in other cases (depending on the country, the industry, the type of harm involved, and whether a local regulatory deficit or an enforcement deficit exists). Therefore, it is certainly a conceivable approach; however, an ambitious proposal should not rely on it exclusively but should be complemented by other approaches that apply where local laws do not exist or where they are too weak (regulatory deficit).

3.2.1.2.3 Home State law

A more powerful "sibling" of the aforementioned approach consists in referencing substantive environmental norms of the obliged undertaking's *home state law.*[128]

Generally, it is assumed that environmental law in (industrialized) home states of (multinational) enterprises tend to be stricter and thus providing higher levels of environmental protection.[129]

Therefore, it may be assumed that this approach results in a higher level of environmental protection through corporate due diligence obligations. In an ideal world, the approach would lead to an indirect "exportation" of stricter environmental norms from corporate *home states* and subsequent technology transfer to production sites in countries with lower standards. Although referencing substantive environmental home state law in a due diligence rule does not legally bind the undertaking itself nor third parties in the value chain directly to those norms, companies subject to the due diligence regime would still be required to use their leverage to influence third parties in their global value chain to abide by those stricter environmental norms.

Yet, in the real world the approach may be more complex and more challenging than it might be in theory. This is especially true if a corporate due diligence obligation would reference the *entire* environmental home state law in a general manner. The risk of possibly unintended negative side effects (such as impeding foreign direct investments in and development chances of third countries) is difficult to estimate; however, it should be taken into consideration.

In order to avoid such side effects and to take possible legal objections into consideration it has been suggested to *combine* a general reference to substantive environmental home state law with an opening clause that allows for a deviation if a sufficient justification can be provided.[130]

A somewhat more cautious alternative could be to avoid a *general* reference to the entire body of environmental home state law, but rather allow for explicit references to specific environmental rules in industry or issue specific complementary due diligence rules or guidelines.[131]

host states: Anderson, Michael. "Transnational Corporations and Environmental Damage: Is Tort Law the Answer." *Washburn Law Journal* (41) 2002, 399 at 415-418.

[128] Arguing for this approach recently in particular: Verheyen, Ein deutsches Lieferkettengesetz, 2020 (supra fn. 107).

[129] Cf. Anderson, Michael. "Transnational Corporations and Environmental Damage: Is Tort Law the Answer." Washburn Law Journal (41) 2002, 399 at 415-418.

[130] Verheyen, Ein deutsches Lieferkettengesetz, 2020 (supra fn. 107); Initiative Lieferkettengesetz 2020 (supra fn. 36), p. 50.

[131] In this direction: Krebs et al. 2020 (supra fn. 3), p. 41.

3.2.1.2.4 Soft law

Soft law, in particular international or regional (EU) standards, are a fourth group of existing sets of substantive environmental standards a corporate due diligence obligation could reference.

However, several aspects should be taken into consideration: If the due diligence standard makes a very general reference to "environmental soft law standards", it should be clear that those standards are not legally binding but serve as a mere source for guidance when interpreting the due diligence law. A binding reference is only lawful, if the referenced soft law standard is exactly specified. Also, the binding reference to soft law standards is only lawful in a static manner to a specific version ("as last amended on…") of the norm. By contrast, a dynamic reference to a soft law standard (in its current version including future amendments) would be inconsistent with (German) constitutional principles of democratic legitimization[132]: The legislator would "blindly" adopt substantive norms that have been issued by democratically hardly – if at all – legitimized bodies.[133] Whether this applies equally to the EU's constitutional standards would need to be further clarified.

As a result, it is safe to say that soft law may be used as "target norm", as long as the reference is static and the target norm is exactly specified. However, such an approach seems appropriate rather in the case of industry, product, issue or otherwise specific concretizations of environmental due diligence and not for the design of a general, cross sectoral overarching due diligence umbrella standard. Hence, just as in the case of home state law as target standard, a future EU directive could provide for the possibility of concretising due diligence with respect to certain industries, products, issues etc. by adopting non-binding guidelines or delegated acts that reference specific soft law standards.

3.2.2 Approach in the European Parliament's resolution on corporate due diligence and corporate accountability (2020/2129(INL))

Against the backdrop of this framework of design options for environmental due diligence we will now turn to the European Parliament's recent Draft Directive. It contains currently one of the most detailed proposals for an explicit stand-alone *environmental* due diligence obligation. While the original proposal in the Wolters' Report suggested a negative general clause (3.2.2.1), the Draft Directive adopted by the Plenary chose to explicitly reference international and home state law (3.2.2.2).

[132] A similar reasoning can be based on EU constitutional law in particular Art. 10 TEU.

[133] Krebs et al. 2020 (supra fn. 3), p. 41; from the German Federal Constitutional Court's case law: FCC, order of 26.01.2007 - 2 BvR 2408/06, para. 12; cf. in more detail on the issue: Friedrich, Jürgen. International Environmental "Soft Law": The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law. Springer Science & Business Media, 2013, pp. 298 et sq., 402 et sqq.

Table 2: Material scope of environmental due diligence in the Draft Directive and the pre-draft

Main Approach	**General Clause**		**Reference to existing norms**			
Subtype	**positive**	**negative**	**international environmental law**	**international soft law**	**host state/ "place of effect" law**	**EU law (home state)**
Draft Directive (03/2021): key concept "adverse impact on the environment"			Art. 3 (7) Draft Directive defines "potential or actual adverse impact on the environment" as "any violation of **internationally recognised** and Union **environmental standards,** as set out in Annex xxx to this Directive." "internationally recognised" environmental "standards"[134] can be found in international agreements or international soft law			Art. 3 (7) Draft Directive defines "potential or actual adverse impact on the environment" as "any violation of internationally recognised and **Union environmental standards**, as set out in Annex xxx to this Directive."
Pre-Draft Directive (09/2020): key concept "environmental risk"		Art. 3 indent 9 pre-draft directive defines "environmental risk" as "any potential or actual adverse impact that may impair the right to a healthy environment, whether temporarily or permanently, and of whatever magnitude, duration or frequency. These include, but are not limited to, adverse impacts on the **climate, the sustainable use of natural resources, and biodiversity and ecosystems.** These risks include climate change, air and water pollution, deforestation, loss in biodiversity, and greenhouse emissions."				

Source: author's compilation

[134] The terminology in the Draft Directive differs a bit from the terminology in this paper. What the Directive refers to as "standards" is labelled "norms" in this paper in order clarify the distinction between the more abstract "standards" which are used in general clauses and the more specific norms that may be referenced in the alternative approach.

3.2.2.1 The approach in the "Wolters' Report": A broad general clause in Art. 3 indent 9 pre-draft directive

In the "Wolters' Report" it was suggested that due diligence obligations in Art. 4 shall aim at dealing with "environmental risk". The pre-draft proposed to define this concept in Art. 3 indent 9 as follows:

> "'environmental risk' means any potential or actual adverse impact that may impair the right to a healthy environment, whether temporarily or permanently, and of whatever magnitude, duration or frequency. These include, but are not limited to, adverse impacts on the climate, the sustainable use of natural resources, and biodiversity and ecosystems. These risks include climate change, air and water pollution, deforestation, loss in biodiversity, and greenhouse emissions."

Several elements of this definition were noteworthy: In particular the impairment of the "right to a healthy environment" as a centerpiece of environmental risks (3.2.2.1.1) and the illustrative list of environmental risks (3.2.2.1.2).

3.2.2.1.1 Impairment of the *right to a healthy environment*: An anthropocentric restriction?

The "*right to a healthy environment*" forms a centerpiece of the definition provided in Art. 3 indent 9 pre-draft directive: An adverse impact is only relevant as long as it may impair the "right to a healthy environment".

The *Report by the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*[135] recommends that the UN General Assembly should formally recognize the *human right to a safe, clean, healthy and sustainable environment*. Although, such formal recognition has not yet been achieved, it is perfectly acceptable for the European Union to anticipate such a recognition by endorsing and adopting such a right unilaterally.[136] This would be in line with numerous regional (human rights and environmental) treaties, national constitutions, and environmental laws,[137] as well as the recommendation in the Special Rapporteur's report.[138]

However, in the way it is used in the definition in Art. 3 indent 9 pre-draft directive it should be noted that notwithstanding the *prima facie* progressive stance of the approach the element could be interpreted as a somewhat restrictive, "anthropocentric filter".

On the other hand, such an interpretation could be challenged with regard to rather extensive concepts of the human right to a healthy or decent environment. Though, Art. 3 indent 9 pre-draft directive uses the seemingly narrow term right to a *healthy* environment (what could imply a necessary impairment of *human health*), the corresponding recital (19) uses the broader formulation of the *right to a safe, clean, healthy and sustainable environment.* Furthermore, the current UN Special Rapporteur clarified that the human right to a of a safe, clean, healthy and sustainable environment includes inter alia „healthy biodiversity and ecosystems".[139] Indeed, such a broader, rather eco-centrist reading of the concept of a human right to a healthy

[135] *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, July 19th, 2018, A/73/188, https://undocs.org/A/73/188.

[136] Recital (18) adopts the *Special Rapporteur's* rather progressive stance.

[137] Cf. *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, July 19th, 2018, A/73/188, https://undocs.org/A/73/188, paras. 28 et sqq. and 54.

[138] Cf. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, July 19th, 2018, A/73/188, https://undocs.org/A/73/188, para. 58.

[139] Right to a healthy environment: good practices, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, December 30th, 2019, A/HRC/43/53, para. 2.

environment is supported by the explicit mentioning that adverse impacts on biodiversity and ecosystems shall be included (Art. 3 indent 9 sentence 2 pre-draft directive):[140] This would be difficult to reconcile with a narrow concept of a human right to a healthy environment.

As a result, it is not entirely clear whether the requirement of an impairment of the right to a healthy environment in Art. 3 indent sentence 1 pre-draft directive is supposed to restrict environmental due diligence's focus or to widen it.

In order to avoid these ambiguities the amendment proposal 499 in the Committee of Legal Affairs suggested to clarify that the definition of the concept of an "environmental impact" follows an *ecocentric* approach:

> *"'environmental impact' means any violation of internationally recognized environmental standards, any adverse impact on the environment,* ***regardless of whether this adverse impact has directly affected humans or human rights****. (…)"*[141] (emphasis added)

Instead of making the impairment of the right to a healthy environment an (indispensable ?) element of relevant environmental impacts, such impairment is rather regarded as qualifying element for "particularly serious" impacts:

> "*Environmental impacts that may* ***impair the right to a healthy environment****, whether temporarily or permanently, and of whatever magnitude, duration or frequency* ***shall be considered as particularly serious****."*[142] (emphasis added)

However, these amendment proposals were not adopted by the Committee and the Plenary.

The requirement that the adverse impact must potentially *impair the right to a healthy environment* is further qualified in the sense that a *temporary* impairment is sufficient and that there is no minimum threshold regarding magnitude, duration and frequency. In other words: there is – explicitly – no *de minimis* threshold criterion applied to the impairment of the right to a healthy environment. Again, this seems to indicate that the criterion was not intended to function as "filter".

However, the Committee and the Plenary dropped the explicit reference to the right to a healthy environment in the definition of "adverse impact on the environment". Now, this right is only briefly mentioned in recital (22) of the adopted text[143].

3.2.2.1.2 The illustrative lists of protected goods and environmental risks

Finally, the definition in Art. 3 indent 9 sentence 1 pre-draft directive was complemented by two sets of illustrative lists: Sentence two illustrates a number of protected goods ("*objects of protection*") that may typically be exposed to *adverse impacts*: "the climate, the sustainable use of natural resources, and biodiversity and ecosystems". Sentence three illustrates typical

[140] On biodiversity as a human right cf. the recent study requested by the European Parliament's DROI subcommittee: Morgera, Elisa. *Biodiversity as a Human Right and its implications for the EU's External Action,* April 2020 -PE 603.491.

[141] Amendment proposal 499 in European Parliament, Committee on Legal Affairs, Amendments 401-600, 2020/2129(INL), PE658.905v01-00, https://www.europarl.europa.eu/doceo/document/JURI-AM-658905_EN.pdf.

[142] Amendment proposal 499 in European Parliament, Committee on Legal Affairs, Amendments 401-600, 2020/2129(INL), PE658.905v01-00, https://www.europarl.europa.eu/doceo/document/JURI-AM-658905_EN.pdf.

[143] "Environmental adverse impacts are often closely linked to human rights adverse impacts. The United Nations Special Rapporteur on human rights and the environment has stated that the rights to life, health, food, water and development, as well as the right to a safe, clean, healthy and sustainable environment, are necessary for the full enjoyment of human rights. Furthermore, the United Nations General Assembly has recognised, in Resolution 64/292, the right to safe and clean drinking water and sanitation as a human right. The COVID-19 pandemic has underlined not only the importance of safe and healthy working environments, but also that of undertakings ensuring they do not cause or contribute to health risks in their value chains. Consequently, those rights should be covered by this Directive."

environmental risks: "climate change, air and water pollution, deforestation, loss in biodiversity, and greenhouse emissions".

The corresponding recital (19)[144] argues that in order to enhance internal coherence of EU legislation as well as legal certainty, the illustrative list of environmental risks is based on Regulation (EU) 2020/852[145] (dubbed „Taxonomy Regulation") and that undertakings may find guidance therein for the assessment of their risks. Certainly, the quest for legal coherence and legal certainty does not require any further justification. However, two questions may be raised: First, it is not entirely clear in which way the list of environmental risks is based on the Taxonomy Regulation. The Regulation does not contain any explicit catalogue of „environmental risks", but operates with the concept of "environmental objectives". Pursuant to Art. 3 an economic activity qualifies as environmentally sustainable if four elements are met: it should substantially contribute (in accordance with Art. 10 to 16) to at least one of the environmental objectives; secondly, it should not significantly harm any of them (in accordance with Art. 17); thirdly, the economic activity must be carried out in compliance with minimum safeguards as laid down in Art. 18; *and,* fourthly, it must comply with certain technical screening criteria established by the Commission.

It could be argued that recital (19) of the pre-draft directive made reference to the second criterion of environmentally sustainable activities („significant harm", Art. 3 item (b)[146], Art. 17 of the Regulation).

Finally, the legislative technique of using illustrative lists indeed facilitates the coherent interpretation of relatively broad catch-all-clause-style definitions as the one provided in Art. 3 indent 9 sentence 1 pre-draft directive. However, the parallel listing of environmental *objects of protection* (sentence 2) and environmental *risks* (sentence 3) may appear redundant to certain extent (cf. in particular the repeated mentioning of climate (change) and (loss in) biodiversity in sentences 2 and 3) and therefore somewhat confusing.

The leaner wording of the text adopted by the Plenary avoids these problems. However, the general concept of promoting coherence between the environmental due diligence standard in the directive and the Taxonomy Regulation is still addressed in recital (23).[147]

3.2.2.2 The Plenary's approach: References to EU and international law in Art. 3 para. (7) Draft Directive

The original proposal of the Wolters' Report was significantly amended by the JURI Committee and subsequently adopted in this amended version by the Plenary.

According to Art. 4 Draft Directive undertakings shall carry out due diligence with respect to "adverse impacts" (rather than "risks" – as in the pre-draft) inter alia "on the environment". Art. 3 para. (7) of the Draft Directive defines the concept of "potential or actual adverse impact on the environment" in a rather lean style as

[144] „19. This Directive establishes a non-exhaustive list of environmental risks. To contribute to the internal coherence of EU legislation and to provide legal certainty, this list is based on Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment in which undertakings may find guidance for assessing their risks."

[145] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43.

[146] Art. 3 item (b): „For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity: (…) does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17".

[147] "(…) To contribute to the internal coherence of Union legislation and to provide legal certainty, this list is drawn up in line with Regulation (EU) 2020/852 of the European Parliament and of the Council".

> "any violation of internationally recognised and Union environmental standards, as set out in Annex xxx to this Directive."

Hence, the Directive's "material scope" regarding environmental matters will depend very much on the Annex xxx to which the definition of *adverse impacts on the environment* refers. Still, some observations can be made regardless of the exact contents of the Annex:

The twofold reference to "*internationally* recognised and *Union* environmental standards" combines two of the above-mentioned subtypes of referencing existing substantive environmental norms (cf. supra 3.2.1.2).

However, taking the relevant recital (23) into consideration the interpretation of Art. 3 para. (7) and what to expect from the Annex xxx is less clear. While the wording of Art. 3 para. (7) suggests that the Annex xxx will contain environmental "standards" (i.e. norms) from international hard and/or soft law as well as EU law, recital (23) does not mention such standards but speaks more vaguely of "business-related impacts on the environment" that are described with regard to certain issues (production of waste, diffuse pollution, greenhouse emissions, deforestation etc.) rather than normative standards:

> "23. Annex xxx sets out a list of types of business-related adverse impacts on the environment, whether temporary or permanent, that are relevant for undertakings. Such impacts should include, but should not be limited to, production of waste, diffuse pollution and greenhouse emissions that lead to a global warming of more than 1,5°C above pre-industrial levels, deforestation, and any other impact on the climate, air, soil and water quality, the sustainable use of natural resources, biodiversity and ecosystems. The Commission should ensure that those types of impacts listed are reasonable and achievable. To contribute to the internal coherence of Union legislation and to provide legal certainty, this list is drawn up in line with Regulation (EU) 2020/852 of the European Parliament and of the Council."

It is not entirely clear how a list "of types of business-related adverse impacts on the environment" would look like. Interestingly, recital (23) "reuses" partly the language of the former Art. 3 indent 9 pre-draft directive (cf. supra). This is relevant because the approach in Wolters' original draft version of the report adopted clearly a general clause style. On the other hand, the parallel recital (21) on adverse human rights impacts mentions similarly a "list of types of business-related adverse impacts on human rights" that shall be contained in Annex xx but the rest of the recital indicates that this language can also refer to a listing of norms such as international human rights treaties.[148]

The wording adopted by the JURI Committee and the Plenary can be traced back to a compromise between amendment proposals 499 and 502. Amendment proposal 499 read:

[148] Recital (21) reads: "Annex xx sets out a list of types of business-related adverse impacts on human rights. To the extent that they are relevant for undertakings, the Commission should include in that Annex the adverse impacts on human rights expressed in the international human rights conventions that are binding upon the Union or the Member States, the International Bill of Human Rights, International Humanitarian Law, the United Nations human rights instruments on the rights of persons belonging to particularly vulnerable groups or communities, and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as well as those recognised in the ILO Convention on freedom of association and the effective recognition of the right to collective bargaining, the ILO Convention on the elimination of all forms of forced or compulsory labour, the ILO Convention on the effective abolition of child labour, and the ILO Convention on the elimination of discrimination in respect of employment and occupation. They further include, but are not restricted to, adverse impacts in relation to other rights recognised in the Tripartite of principles concerning multinational enterprises and social policy (MNE declaration) and a number of ILO Conventions, such as those concerning freedom of association, collective bargaining, minimum age, occupational safety and health, and equal remuneration, and the rights recognised in the Convention on the Rights of the Child, the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and national constitutions and laws recognising or implementing human rights. The Commission should ensure that those types of impacts listed are reasonable and achievable."

> "'environmental **impact' means any violation of internationally recognized environmental standards**, any adverse impact on the environment, regardless of whether this adverse impact has directly affected humans or human rights. Environmental impacts that may impair the right to a healthy environment, whether temporarily or permanently, and of whatever magnitude, duration or frequency shall be considered as particularly serious. These include, but are not limited to, adverse impacts on the climate, the sustainable use of natural resources, and biodiversity and ecosystems. These risks include climate change, air and water pollution, deforestation, loss in biodiversity, and greenhouse emissions."[149] (emphasis added)

Amendment proposal 502 read:

> "'environmental risk' means any potential or actual adverse impact as regards climate change, air and water pollution, deforestation, loss in biodiversity, and greenhouse emissions that may impair the right to a healthy environment, whether temporarily or permanently, and of whatever magnitude, duration or frequency, **in breach of the applicable legal obligations provided for in the Union acts listed in Annex II**. The Commission is empowered to adopt delegated acts in accordance with Article 18(a), to amend this exhaustive list."[150] (emphasis added)

The adopted text thus combines the reference to „internationally recognized environmental standards" from amendment proposal 499 with the listing approach in amendment proposal 502 that references "legal obligations" in "Union acts" of an explicit list in an Annex. Interestingly, the reference to legal obligations from "Union acts" (now: "Union environmental standards") points to probably stricter "home state" law that will provide for higher levels of protection than the alternative benchmark of "*internationally* recognized standards".

3.2.3 Overall assessment and conclusion

Two major avenues for the design of environmental due diligence's material scope have been identified: rather abstract general clauses on the one hand and more specific references to environmental norms on the other. Both of them have pros and cons:

The rather high degree of abstractness in general clauses ensures that all relevant cases can be covered and the policy objective can thereby be achieved quite comprehensively in terms of scope. However, the strength of a general clause is at the same time its weakness. The high degree of abstractness potentially creates a broad margin of discretion and leeway for interpretation. In this regard general clauses may create their own kind of loopholes.

The directive can provide more specific guidance to companies and leaves less leeway if the material scope is designed by means of referencing environmental norms. However, depending on the subtype of this approach (referencing international (soft) law, home or host state law) it can lead to more or less patchy results. Referencing home state law requires a particularly close scrutiny with respect to unintended side effects.

These respective advantages and disadvantages of the two avenues illustrate a trade-off between two competing policy objectives: comprehensively covering all relevant environmental problems in global value chains on the one hand and describing the obligations for companies as specific as possible.

[149] Amendment 499 proposed by Manon Aubry, Charles Goerens, Raphaël Glucksmann, Sirpa Pietikäinen, Helmut Scholz, Aurore Lalucq, Marie Toussaint, Saskia Bricmont, Maria Arena, Heidi Hautala, Anna Cavazzini, Emmanuel Maurel.

[150] Amendment 502 proposed by Axel Voss, Angelika Niebler, Javier Zarzalejos, Ivan Štefanec, Andreas Schwab, Sven Simon, Daniel Caspary, Christian Sagartz.

By combining elements of the two approaches it is possible to feature the best of the two worlds while avoiding the respective weaknesses.[151] Therefore, as the Commission continues its deliberations, it should, rather than putting all eggs in one basket, consider such a combination of elements from both avenues.

[151] Cf. Krebs et al. 2020 (supra fn. 3), pp. 46 et sq.

4 Civil liability as enforcement mechanism: The EU's legislative competence

Beyond the substantive matters discussed in the previous section another key issue for the design of an (environmental) due diligence obligation is enforcement[152]. In this regard, *human rights* and *environmental* due diligence have many things in common. From a policy perspective there is a broad consensus that only a comprehensive ("smart") mix of enforcement mechanisms can secure compliance with a new corporate due diligence obligation and thereby actually change business practices "on the ground".[153] A wide spectrum of potential enforcement mechanisms has been outlined in several studies,[154] considering solutions ranging from rather soft approaches like enhanced (market) transparency[155] or incentive-based approaches, in particular public procurement[156], to stricter approaches such as administrative oversight and enforcement[157] or civil and criminal liability.

However, these issues cannot be discussed comprehensively in this paper. One aspect, nonetheless, is of special relevance for the debate regarding legislative approaches at EU level: the EU's legislative competence of a civil liability mechanism.

The relevant provisions in Art. 19 Draft Directive are remarkable in particular in comparison to the much more reluctant stance in the pre-draft directive. While the latter did urge Member States to adopt legislation ensuring (civil) liability in recital (39)[158], no such obligation was reflected in Art. 20[159] pre-draft directive. However, amendment proposal 787[160] addressed this inconsistency of former Art. 20 and recital (39) pre-draft directive (now recital (58) Draft Directive); it suggested an obligation of Member States to establish a new or amend an existing national liability regime in a way that ensures that undertakings can be held liable for harm caused by companies under their control. Amendment proposal 787 has largely been adopted. Art. 19 para. 2 Draft Directive now provides for the mentioned obligation of Member States:

> "(2) Member States shall ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide

[152] Cf. in more detail: Smit et al. 2020 (supra fn. 41), pp. 209 et sqq. and 257 et sqq.

[153] Cf. Methven O'Brien, Claire, and Olga Martin-Ortega. EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims. BRIEFING No2. Edited by European Parliament, 2020, pp. 6 and 11; Krajewski, Markus, and Beata Faracik. Substantive Elements of Potential Legislation on Human Rights Due Diligence: Briefing N°1. Edited by European Parliament. LU: Publications Office, 2020, p. 13.

[154] Cf. Smit et al. 2020 (supra fn. 41), pp. 209 et sqq., 257 et sqq.; Methven O'Brien, Claire, and Olga Martin-Ortega. EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims. BRIEFING No2. Edited by European Parliament, 2020. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603505/EXPO_BRI(2020)603505_EN.pdf; Ministry of Economic Affairs and Employment of Finland (ed.): Judicial Analysis on the Corporate Social Responsibility Act, Helsinki 2020, pp. 80 et sqq.; McCorquodale, Robert, and Martijn Scheltema. Core Elements of an EU Regulation on Mandatory Human Rights and Environmental Due Diligence, August 2020, pp. 19 et sqq.; Krebs et al. 2020 (supra fn. 3), pp. 52-61; Klinger et al. 2016 (supra fn. 74), pp. 68 et sqq.

[155] Cf. Krebs et al. 2020 (supra fn. 3), pp. 53 et sq.

[156] Ibid., p. 60.

[157] Cf. ibid., pp. 54 et sq.

[158] Recital (39) pre-draft directive: "Member States should introduce further legislation to ensure that undertakings can be held liable for damage caused by undertakings under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They should not be held liable however if they can prove that they took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken. When introducing liability regimes, Member States should consider adopting appropriate limitation periods and introducing the loser pays principle."

[159] Art. 20 pre-draft directive read: "The fact that an undertaking has carried out due diligence in compliance with the requirements set out in this Directive shall not absolve the undertaking of any civil liability which it may incur pursuant to national law."

[160] Proposed amendment 787 in: European Parliament, Committee on Legal Affairs, Amendments 601-818, 2020/2129(INL), PE658.906v01-00, https://www.europarl.europa.eu/doceo/document/JURI-AM-658906_EN.pdf.

> remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions."

Moreover, Art. 19 para. 3 Draft Directive implies a shift of the burden of proof towards the undertaking:

> "(3) Member States shall ensure that their liability regime as referred to in paragraph 2 is such that **undertakings that prove** that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, **are not held liable for that harm**." (emphasis added).

In this regard recital (58) explains:

> "(58) Member States should (…) ensure that undertakings can (…) be held liable for any harm arising out of adverse impacts (…) that they (…) have caused or contributed to by acts or omissions, **unless the undertaking can prove** it took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken." (emphasis added).

Hence, the undertaking shall carry the burden of proof that it took "all due care" in line with the directive and for the matter of causation (that the harm would have occurred even if all due care had been taken). Moreover, recital (53) requires a rebuttable presumption as to the question whether an undertaking had control over a third-party causing harm.

However, it has been doubted whether the EU has sufficient legislative competence for providing for a civil liability mechanism.[161] However, while these are difficult questions that have not been concludingly clarified in the ECJ's case law, it may well be argued that Art. 50 and 114 TFEU do provide a sufficient legal basis for the proposed provisions:[162]

Civil liability is generally considered as one of the strongest and in some cases maybe most effective instruments for enforcing due diligence obligations. Maybe that is why it is at the same time one of the politically most controversial issues. Therefore, leaving the issue of civil liability to the Member States' discretion would lead to significantly differing enforcement levels across the internal market. Indeed, the Draft Directive invokes extensively the necessity to create a harmonized level playing field, legal certainty for businesses and the functioning of the internal market in recitals (10) through (13).[163] In particular, recital (11) invokes a causal link between fragmented civil liability regimes and trade barriers:

> "There are significant differences between Member States' legal and administrative provisions on due diligence, including as regards civil liability, that apply to Union undertakings. It is essential to prevent future barriers to trade stemming from the divergent development of such national laws."

[161] Cf. Spitzer, Martin. "Human Rights, Global Supply Chains, and the Role of Tort." Journal of European Tort Law 10, no. 2 (August 13, 2019): 95–107 at 107: "It is all but certain whether the internal market competence would justify legislative action. The same holds true for art 81 TFEU on judicial cooperation in civil matters, as this competence is usually relied on for international private and international civil procedure law."; according to Augenstein and Macchi similar doubts have been raised in the EP's parliamentary process, cf. Augenstein, Daniel and Chiara Macchi, The Role of Human Rights and Environmental Due Diligence Legislation in Protecting Women Migrant Workers in Global Food Supply Chains, Oxfam, ActionAid, May 2021, 37.

[162] Cf. in more detail with similar conclusions: Augenstein and Macchi (fn. 161), 35 – 38.

[163] Cf. Augenstein and Macchi, (fn. 161), 38.

Furthermore, the European legislator could possibly point to the precedents in Directive 2014/104/EU Antitrust Damages Actions[164] that found the legal bases for harmonizing the right to compensation and the liability regime in the "dual legal bases of Articles 103 and 114 TFEU".[165]

The issue of private international law – that generally leads pursuant to Art. 4 para. 1 Rome II Regulation[166] to the application of the tort law of the country where the damage occurred (*lex loci damni*) –[167] is now solved in Art. 20 Draft Directive by requiring Member States to ensure that the relevant provisions of the liability regime are considered *overriding mandatory provisions.* It thereby abandons the approach chosen in the Wolters' report (suggesting an amendment of the Rome II Regulation)[168] and instead adopts an approach that has been proposed inter alia in the German NGO-proposal in 2016.[169] However, Art. 20 Draft Directive does not address the question, as to whether civil liability provisions should be considered overriding mandatory provisions regarding environmental harm or whether these cases should be solved via Art. 7 Rome II Regulation.[170]

[164] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

[165] Recital (8) of the Antitrust Damages Directive: "Undertakings established and operating in various Member States are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively. As the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Articles 103 and 114 TFEU."

[166] REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

[167] Cf. in more detail on the issue: Leonhard Hübner, Unternehmenshaftung für Menschenrechtsverletzungen, Mohr Siebeck forthcoming 2021.

[168] Annex III. RECOMMENDATIONS FOR DRAWING UP A EUROPEAN PARLIAMENT AND COUNCIL REGULATION AMENDING REGULATION (EC) NO 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 JULY 2007 ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II).

[169] Cf. sec. 15 German NGO-draft HRDD Act (supra fn. 74); Klinger et al. 2016 (supra fn. 74), pp. 70-77.

[170] Cf. on this issue Leonhard Hübner, Unternehmenshaftung für Menschenrechtsverletzungen, Mohr Siebeck forthcoming, 2021.

5 Conclusion

The European Parliament's Draft Directive is a strong proposal. It is consciously inspired in many ways by the UNGP's second pillar's approach. This is in line with the view, that the UNGP have been recognized by the EU as the "authoritative policy framework" in addressing corporate sustainability and accountability issues.[171]

However, at least in one aspect the draft goes beyond the UNGP's blue print. This is in the area of environmental protection. The draft does not treat environmental protection as a mere annex to human rights protection, but undertakes to develop an independent concept of an *environmental* due diligence obligation – albeit based on the structure of *human rights* due diligence. The greatest challenge in this respect is to define the material scope of environmental due diligence in such a way that, on the one hand, it is sufficiently specified and, on the other hand, it covers all relevant cases of environmental impairment in global value chains.

The path originally proposed by the Legal Affairs Committee's Rapporteur, *Lara Wolters*, opted for a (negative) "general clause". However, the European Parliament's Legal Affairs Committee and Plenary took a different route and chose to explicitly reference certain norms ("internationally recognised and Union environmental standards") in an annex which can be amended by the Commission. However, a draft for the Annex was not included in the European Parliament's Draft Directive. Therefore, the strength of the Directive's environmental due diligence obligation will depend very much on the exact design of the annex. Although, a complementing "general clause" may be desirable.

This paper outlined the spectrum of conceivable elements of environmental due diligence's material scope it thereby seeks to serve as toolbox for the further deliberations. It groups the various elements into two major avenues (general clauses and referencing substantive environmental norms) with a number of subtypes. The two avenues differ in particular in terms of abstractness and comprehensiveness. In order to gain the advantages of both approaches this paper suggests to combine elements of both of them rather than choosing one avenue (as the Wolters report did) or the other (as the Plenary's Resolution does).

[171] Cf. COMMISSION STAFF WORKING DOCUMENT on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, SWD(2015) 144 final.

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