Corporate Sustainability Due Diligence

Anne Lafarre, 28 March 2022, ECGI
What is HR(E)DD?

- UNGPs, Pillar II
- OECD Guidelines (2011) incl. NCP
- OECD guidance (2018)

→ risk based: severity and likelihood
Further guidance

- OECD guidance at the sector level
- Multi-stakeholder initiatives
**Call for binding framework to bring along the laggards**
See: EC (2020); SER (2020); NAP Germany (2020)

**Binding national initiatives:**

<table>
<thead>
<tr>
<th>National law</th>
<th>Scope</th>
<th>Size</th>
<th>Enforcement</th>
<th>Topic</th>
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</thead>
<tbody>
<tr>
<td>French ‘Loi Vigilance’ (2017)</td>
<td>“established commercial relationship”</td>
<td>5,000 or 10,000 employees</td>
<td>Civil (injunction, liability)</td>
<td>HR, environment</td>
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<tr>
<td>Dutch ‘Wet zorgplicht kinderarbeid’ (2019)</td>
<td>Full chain</td>
<td>Supplying goods/services to Dutch end-users</td>
<td>Administrative and criminal (fines, sanctions)</td>
<td>Child labour</td>
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<td>German ‘Sorgfaltspflichtengesetz’ (2021)</td>
<td>Full chain but large focus on direct suppliers</td>
<td>3,000 (2024: 1,000) employees</td>
<td>Administrative (fines)</td>
<td>HR, environment</td>
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<td>Norwegian Transparency Act (2021)</td>
<td>Full chain</td>
<td>Covered by s.1-5 Accounting Act or meet 2/3 criteria: 50 employees + NOK 70m revenue + NOK 35m balance sheet</td>
<td>Administrative (fines, injunction)</td>
<td>HR</td>
</tr>
</tbody>
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See: Enneking (2019), Mittwoch (2021), Krajewski, Tonstad and Wohltmann (2021), Savourey and Brabant (2021)
Effects of the French law

Full matched sample

‘Laggards’ matched sample

Lafarre and Rombouts (forthcoming)
Clear need for a European initiative …

Preconditions:

1. There needs to be a very close, and preferably full, alignment with the UNGPs and OECD guidelines;
2. The initiative should stimulate a pro-active attitude of companies and no box-ticking compliance;
3. Complementary administrative supervision and civil liability including a ‘smart mix’ of instruments.

EC proposal falls short
1. Full alignment with UNGPs and OECD Guidelines

Proposal:
‘established business relationships’ (leverage perspective)

Responsibility should be:
- Focusing on prioritization based on severity and likelihood of adverse impact (risk-based approach);
- Different from liability.

‘Established business relationship’ =
‘a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain’.

‘business relationship’ =
a relationship with a contractor, subcontractor or any other legal entities (‘partner’) (i) with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or (ii) that performs business operations related to the products or services of the company for or on behalf of the company;

See SHIFT (2022)
2. Pro-active attitude, no box-ticking

Proposal:
Large reliance on contracts including model clauses

Considerations:
- Leverage in a broader sense;
- Including contracts, but also trainings, commercial incentives, collective action to establish leverage, etc;
- Danger of model clauses.


Articles 7(2)(b) and 8(3)(c): “seek contractual assurances”

Articles 7(4) and 8(5): “For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification”

“When contractual assurances are obtained from, or a contract is entered into, with an SME, the terms used shall be fair, reasonable and non-discriminatory.”

Article 12: model contractual clauses
3. Complementary enforcement, ‘smart mix’

Proposal:
Lacks emphasis on smart mix, further clarification needed

Considerations:
- Emphasis on learning-process;
- Advisory vs. sanctioning role;
- Focus on administrative supervision, liability at company level.


Article 14: Accompanying measures

Article 17-21: administrative supervision
Including: article 18(4): “Taking remedial action does not preclude the imposition of administrative sanctions or the triggering of civil liability in case of damages, in accordance with Articles 20 and 22, respectively.”

Article 22: Civil liability

Article 25: Directors’ duty of care
Thank you for your attention!

email: A.J.F.Lafarre@uvt.nl