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CIVIL SOCIETY ADVOCACY FOR HUMAN RIGHTS AND ENVIRONMENTAL CORPORATE ACCOUNTABILITY:
THE CASE OF THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE

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ACRONYMS

BHR: Business and Human Rights
CCR: Center for Constitutional Rights
CLT: Critical Legal Training
CMR: Conflict Minerals Regulation
CSDDD: Corporate Sustainability Due Diligence Directive
CSR: Corporate Social Responsibility
CSRD: Corporate Sustainability Reporting Directive
CSO: Civil society organisation
ECCHR: European Center for Constitutional and Human Rights
ECCJ: European Coalition for Corporate Justice
ETUC: European Trade Union Confederation
EU: European Union
HRDD: Human Rights Due Diligence
ICA: International Crimes and Accountability
ILO: International Labour Organization
INLI: Institute for Legal Intervention
LkSG: Lieferkettensorgfaltspflichtengesetz
mHRDD: Mandatory human rights due diligence
mHREDD: Mandatory human rights and environmental due diligence
MNCs: Multinational corporations
NGO: Non-governmental Organisation
NSA: National Security Agency
OECD: Organization for Economic Cooperation and Development
OHCHR: Office of the United Nations High Commissioner for Human Rights
SME: Small and Medium Enterprises
SRSG: Special Representative of the Secretary General
TNCs: Transnational corporations
UN: United Nations
UDHR: Universal Declaration of Human Rights
UNGPs: United Nations Guiding Principles on Business and Human

ABSTRACT

Since the endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council in 2011, several legislative processes have been initiated to make corporate human rights and environmental due diligence mandatory. One of the most recent and significant examples of this is the EU Corporate Sustainability Due Diligence Directive (CSDDD), a framework which aims to create legally binding obligations for companies based or active in the EU regarding the impact of their activities throughout their value chains. This legislative process was formally initiated in February 2022, when the European Commission published a proposal for a Directive. In parallel to this process, civil society organisations (CSOs) have formed a coalition ("Coalition") advocating with EU institutions and representatives to ensure the highest possible level of human rights and environmental protection. This Coalition has expressed concerns regarding the European Commission's proposal and suggested an alternative approach for the Directive. In this context, this thesis presents the European Commission's proposal and the Coalition approach as two different approaches to EU due diligence legislation. It aims to answer the following research question: which of these two approaches constitutes a stronger framework for corporate accountability?

This thesis is based on the experience of a traineeship at the European Center for Constitutional and Human Rights (ECCHR), a member of the aforementioned civil society coalition. It builds on the concept of corporate accountability, which is conceptualised into an analytical framework, based on an existing framework by Bernaz (2020). The concept is broken down into seven dimensions - personal scope, beneficiaries, material scope, legal force, due diligence obligation, enforcement, and reparations. By analysing each approach through the prism of this analytical framework and proceeding to a comparative analysis, this thesis outlines key differences between the two approaches and situates them on a spectrum of corporate accountability. As a background for these analyses, this thesis presents a literature review on the concept of corporate accountability, as well as a state of the evolving policy field of due diligence.

INTRODUCTION

This thesis is based on the experience of a traineeship at the European Center for Constitutional and Human Rights (ECCHR), a non-governmental organisation (NGO) active in litigation and advocacy for human rights. It is informed by first-hand participation in meetings of the coalition, personal notes, and analyses drafted during the traineeship. The context for this thesis is the development of a Corporate Sustainability Due Diligence Directive (CSDDD) by the European Union, a framework which aims to regulate the conduct of multinational corporations regarding human rights and the environment. This legislative process was formally initiated by the European Commission in February 2022, with the publication of its proposal for such a Directive. In parallel to this process, a coalition of civil society organisations (CSOs) formed in 2020 to join efforts on advocacy work with EU institutions and representatives in order to propose an alternative approach for this framework. One concept which captures this form of regulation is that of corporate accountability, generally implying that corporations are accountable not only to their shareholders, but also to society at large.

In this thesis, I will show that the European Commission's proposal and the position of civil society constitute two different approaches to corporate accountability. By presenting them and proceeding to a comparative analysis outlining strengths and weaknesses of the two policy scenarios, I will aim to provide an answer to the following research question: which of these two approaches constitutes a stronger framework for corporate accountability?

To do so, I will first introduce ECCHR and the coalition of CSOs working on corporate accountability at the EU level. Then, I will review existing academic literature on the concept of corporate accountability and look at the evolving policy field of due diligence. Subsequently, I will analyse the proposal for a Corporate Sustainability Due Diligence Directive by the European Commission, as well as the approach by civil society based on the conceptualisation of corporate accountability by Bernaz (2020). Finally, I will compare the two approaches and formulate recommendations for the next steps of the legislative process.

Using direct insights from within civil society, this thesis aims to contribute to the literature on corporate accountability by breaking down silos between political analysis and advocacy. It helps identify challenges, obstacles and learnings from an ongoing legislative process for mandatory human rights and environmental due diligence, which could inform civil society advocating for corporate accountability across the globe.

BACKGROUND

In recent years, the conduct of multinational corporations (MNCs) - or transnational corporations (TNCs) - has increasingly taken more space in the public debate, with dramatic events regularly making front page news. Tragic events such as the Rana Plaza garment factory collapse in 2013 or the Brumadinho dam disaster in 2019 have taken thousands of lives and irreversibly damaged precious natural resources (ILO, 2022; Phillips, 2019). With globalisation reaching ever further, large companies are losing sight of the conditions in which earlier steps of their value chains take place. In many cases, this lack of oversight by 'mother companies' and unfair pricing practices put unreasonable pressure on their daughter companies, suppliers, and subcontractors. This pressure leads to ever harsher competition for low prices, effectively creating a race to the bottom in terms of working conditions, respect for health and safety standards, and environmental protection, amongst others. Too often, workers, communities and ecosystems - especially in the Global South - have to suffer the tragic consequences of such irresponsible behaviours.

Unfortunately, the accountability of multinational corporations in cases of human rights abuses and environmental damage is not guaranteed and legal proceedings often follow investigations and complaints from civil society. This lack of accountability is precisely due to the transnational nature of global value chains. Indeed, the question of which legal regimes apply to a situation where an incident occurs in one country and the mother company is headquartered in another requires complex legal analysis. In many cases, the power of multinational corporations in countries where incidents take place is too great for local authorities to risk engaging in legal proceedings. At the same time, the lack of extraterritorial applicability of legal regimes in countries where corporations have their headquarters prevents legal action. This gap highlights the need for internationally applicable norms on corporate accountability. While international voluntary measures such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises have been the primary form of regulation of corporate behaviour in the last decades, with limited compliance and impact, states and other entities are starting to adopt binding instruments that could substantially speed up the establishment of effective corporate accountability.

On the EU level, the latest major development is the Corporate Sustainability Due Diligence Directive (CSDDD), which is currently being reviewed after the European Commission published its first proposal in February 2022. Focusing specifically on corporate obligations regarding human rights, labour rights, the environment, as well as the climate, the CSDDD carries a significant potential for regulating corporate conduct.

THE EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR)

HISTORY, MISSION, GOVERNANCE AND STRUCTURE

The European Center for Constitutional and Human Rights (ECCHR) is an independent, legal and educational NGO registered in Germany and based in Berlin. It was founded in 2007 by Wolfgang Kaleck and other international human rights lawyers. The foundation of ECCHR was inspired by the Center for Constitutional Rights (CCR), an NGO active in the field of social justice in the United States since 1966, where Wolfgang Kaleck worked between 2004 and 2008 to pursue criminal proceedings against members of the US military, including former US Secretary of Defense Donald Rumsfeld (ECCHR, 2002j). Wolfgang Kaleck is also one of the lawyers of Edward Snowden, the whistleblower who disclosed critical information regarding mass surveillance carried out by the US National Security Agency (NSA).

On its motivations, ECCHR states that it "stands for lived solidarity across geographical, social and cultural borders." (ECCHR, 2022h). The mission of the organisation is to protect and enforce the rights guaranteed by the Universal Declaration of Human Rights, as well as other human rights declarations and national constitutions. In particular, ECCHR seeks justice in cases of torture, war crimes, sexual and gender-based violence, corporate exploitation and fortressed borders. To do so, it partners with affected persons and organisations worldwide, and engages in strategic litigation, a concept which will be presented in further detail later in this thesis (ECCHR, 2022a).

The governance of ECCHR is assumed by a Council,[1] an Emeritus Advisory Board,[2] and an Advisory Board,[3] all composed of internationally renowned human rights experts, academics and practitioners alike. Executive functions are assumed by General Secretary Wolfgang Kaleck and Legal Director Miriam Saage-Maaß. The staff is composed of 31 employees and four consultants dispatched over the five thematic programme areas and departments of the organisation (ECCHR, 2022a).

The different activities of ECCHR are separated into the following five thematic programme areas: International Crimes and Accountability (ICA), Business and Human Rights (BHR), Border justice, Climate, and the Institute for Legal Intervention (INLI), the organisation's internal research institute focusing on critical perspectives on the law, particularly concerning power and power dynamics.[4] Additionally to the five thematic programme areas, ECCHR has a Communications department, which has a crucial role, as communicating on human rights abuses is a central part of ECCHR's work.

[1] The Council is composed of Chairwoman Lotte Leicht, Vice-Chairman Tobias Singelnstein and Council Member Dieter Hummel.
[2] The Emeritus Advisory Board is composed of Theo van Boven and Peter Weiss.
[3] The Advisory Board is composed of Alejandra Ancheita, Priya Basil, Markus N. Beeko, Reed Brody, Andrea Bührmann, Joshua Castellino, Gastón Chillier, Colin Gonsalves, Florian Jeßberger, Bonita Meyersfeld, Manfred Nowak, Jennifer Robinson, Ole von Uexküll, and Vince Warren.
[4] The web pages of the programme areas can be found in the references (ECCHR, 2022b, 2022c, 2022d, 2022f, 2022g).

The Business and Human Rights (BHR) Programme Area

In the section presenting its BHR programme area, ECCHR's website states: "Companies are responsible for implementing human rights; this is not a question of voluntary diligence. Corporations, subsidiaries and suppliers that put their own profit before human rights, that displace, exploit or endanger people's lives, have to be held legally liable." (ECCHR, 2022h). The kind of cases that the BHR team works on ranges from corporate support of criminal activities by dictatorial regimes, violations of land rights and Indigenous rights, unlawful appropriation of natural resources, to exploitation and neglect of workers and communities in supply chains.

One of the most prominent and well-known cases that ECCHR has worked on is the financing of terrorist activities in Syria by French cement producer Lafarge (Business and Human Rights Resource Centre, 2022b). In collaboration with former employees of Lafarge in Syria and French NGO Sherpa, ECCHR filed a criminal complaint before French courts against the company. Lafarge is currently charged with financing terrorism and complicity in crimes against humanity. Following ECCHR's action, the case was later taken to a federal court in the USA, where Lafarge pleaded guilty of financing terrorism in October 2022 (Cohen & Freifeld, 2022).

The advocacy work done by ECCHR on the EU due diligence framework is carried out by members of the BHR team, as it concerns the development of legislation aimed at avoiding human rights abuses by multinational corporations.

The Critical Legal Training (CLT) Programme

The organisation has a programme titled the Critical Legal Training (CLT), which offers the possibility to young lawyers and legal activists to participate in the innovative work of ECCHR. The central axes of the CLT are training, networking, and collaborative learning (ECCHR, 2022e). The CLT typically lasts 3 months and can be completed as an academic internship or as part of the German legal training (*Rechtsreferendariat*). At the beginning of their traineeship, trainees are assigned a supervisor based on their thematic interests and prior knowledge. The CLT offers a great amount of flexibility, as trainees are free to discuss their involvement in specific projects with their supervisor and other staff members. The specific tasks assigned to trainees differ depending on the project(s) they work on, but typically consist of legal and factual research, as well as casework for the programme area they are part of. Additionally, trainees may work on project-related communication, such as writing position papers, translating documents, and participating in the organisation of events. Once a week, trainees and trainers meet for a CLT discussion, which allows them to exchange thoughts and ideas on given readings, films, or exhibitions. At the end of their traineeship, trainees hold a presentation for other trainees and staff members to share the work they have done and moderate a discussion based on their presentation. In general, trainees are fully integrated into ECCHR's day-to-day activities and are welcome to participate in almost all staff meetings. With this training, ECCHR hopes to convey its values and methods to the next generation of human rights professionals and further progressive human rights work.

During my time in the CLT programme, my supervisor was the Senior Legal Advisor responsible for advocacy on the EU due diligence framework. He represents ECCHR and plays a leading role in the CSO coalition presented below. As such, my work consisted in research, analysis, and the formulation of advocacy arguments related to the EU due diligence framework. I participated in defining ECCHR's position on the European Commission's proposal for a CSDDD, which in turn informed the coalition's position.

STRATEGIC LITIGATION

One of the major specificities of ECCHR compared to many human rights NGOs is that engaging in legal action in direct cooperation with affected persons constitutes a large part of its activities. Instead of reporting and documenting crimes, ECCHR partners with investigation NGOs and uses the evidence they provide to initiate legal proceedings before courts of law at different levels - be it regional, national, or international. To ensure the active involvement of affected persons and collect the necessary information on abuses, ECCHR either invites representatives of those groups to their office in Berlin, or sends lawyers to meet them in their country of residence, thereby forming transnational networks of activism.

Strategic litigation is the *modus operandi* of ECCHR. In the field of human rights, individual abuses are often symptoms of broader injustices and structural problems, which have the potential of leading to more abuses if left unaddressed. As such, these individual abuses may be seen as opportunities to identify their root causes and create lasting systemic change. As stated by ECCHR, "[s]trategic litigation aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics." (ECCHR, 2022i). Concretely, this means that when selecting which legal avenue is most relevant to deal with a given human rights abuse, the lawyers in charge will not only take the case to the court where victory is the most likely. Instead, they will aim to maximise the impact of the case and influence jurisdictions, policy, and the general public.

This strategy stems from the fact that, while international law currently focuses mainly on states, the question of subjecting multinational corporations to international legal obligations is gaining momentum. In an article on corporate accountability, Wolfgang Kaleck and Miriam Saage-Maaß (2010) stated:

> "As international criminal law - and notably the field of corporate liability for international crimes - is a rapidly evolving one, it is particularly important to initiate cases in a carefully considered, strategic manner. This means evaluating the case not only by its chances of winning in court but also taking into consideration whether this case stands for a number of other similar cases that concern a typical or even systematic problem of corporate involvement in international crimes. Even unsuccessful court cases can trigger a significant public debate and lead to law reforms and other social changes, illustrating that the consequences of this strategic litigation can transcend a specific case. Finally, legal disputes can indeed be considered fora for social and political dialogue, due to their ability to trigger widespread learning and mobilization." (pp. 723-724).

As such, ECCHR aims to create legal precedents in order to correct the conduct of multinational corporations. In doing so, the organisation "seeks not only to ensure justice for victims, but also to emphasize the inequalities and abuses generated by neoliberal economics and the power of corporations," as pointed out by Grosescu (2019, p. 406).

As a continuation of its use of strategic litigation, ECCHR also engages in strategic advocacy, with a view to influencing legislation in the direction of stricter rules on the conduct of multinational corporations. Since 2020, ECCHR is an active member of the Coalition and participates in the advocacy work done at the EU level to ensure the adoption of a due diligence law with the highest standard possible. The adoption of a CSDDD would constitute a new avenue through which ECCHR can exercise strategic litigation.

THE CSO COALITION ADVOCATING FOR CORPORATE ACCOUNTABILITY AT THE EU LEVEL

In April 2020, EU Commissioner for Justice Didier Reynders announced that the European Commission was committed to introducing rules on mandatory human rights and environmental due diligence. Less than a year later, the European Parliament adopted a resolution with recommendations to the Commission on corporate due diligence and corporate accountability (Business and Human Rights Resource Centre, 2020). Throughout the process leading to the formal proposal for a Directive, a coalition of CSOs formed around the European Coalition for Corporate Justice (ECCJ) to formulate demands and advocate for certain standards with EU institutions and members of the European Parliament.[5]

This newly formed ad hoc coalition ("Coalition") is composed of organisations with different backgrounds, each focusing on specific issues, such as human rights, labour rights, or environmental protection. The Coalition has had different compositions at different stages of the legislative and advocacy process, often organised around a core group. Throughout the process, the Coalition has published a number of letters, statements, and even recently launched a public campaign. To get a representative view of the Coalition's demands, this thesis will focus on two of these publications.

The first one is a document from September 2020 titled 'An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment' outlining the principal elements needed at minimum to ensure that the legislation will be effective.[6] This document based on international standards aimed to give European legislators input from civil society at an early stage of the legislative process. It includes seven clear points regarding the contents of the future framework, including the scope, the obligations, the

[5] It should be noted that the ECCJ and the CSO coalition ("Coalition") are different entities, the ECCJ being only one of the CSOs represented in the Coalition.

[6] For the publication of this document, the Coalition was composed of ActionAid International, Amnesty International, Anti-Slavery International, Clean Clothes Campaign, ClientEarth, CIDSE, ECCHR, ECCJ, FIDH, Friends of the Earth Europe, Global Witness, and Oxfam.

due diligence process, remediation procedures, and enforcement (ActionAid International et al., 2020).

The second useful document for the purpose of this thesis is a statement released in May 2022, following the publication of the European Commission's proposal (ECCJ, 2022). This statement signed by over 220 CSOs outlined the flaws of the proposal and proposed changes in the Directive to ensure that it provides for a sound and effective legal framework, as opposed to a box-ticking exercise for corporations. This statement was published as a result of several meetings of the Coalition's core group, the first of which I attended as part of my traineeship in March 2022.[7]

Now that ECCHR and the Coalition have been introduced, a literature review on corporate accountability will be presented to gain a better understanding of the concept.

[7] During this meeting, the core group was composed of the following organisations: ECCHR, Clean Clothes Campaign, ClientEarth, ECCJ, Friends of the Earth Europe, Anti-Slavery International, Oxfam International, Global Witness, CIDSE, FIDH.

DEFINING CORPORATE ACCOUNTABILITY

To fully understand the demands of civil society and the proposed legal framework that is the CSDDD, a literature review of the concept of corporate accountability is necessary. Indeed, this concept lies at the very heart of both the European impulse for the introduction of a due diligence framework and the stated mission of the Coalition. For instance, the European Parliament resolution, which called upon the European Commission to propose a Directive on these issues was titled 'resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (European Parliament, 2021). While the term does not appear in the title of the proposal itself, it still remains present as an overarching aim of the framework. Indeed, the proposal published by the European Commission in February 2022 states in its explanatory memorandum that the Directive will "increase corporate accountability for adverse impacts, and ensure coherence for companies regarding obligations under existing and proposed EU initiatives on responsible business conduct" (European Commission, 2022c, p. 3).

The concept of corporate accountability is not an easy one to define. Indeed, the term can refer to a host of rules, norms, and ideals that differ greatly from one another, depending on the perspective and the angle it is given. As stated by Baumann-Pauly and Nolan (2016), "the term 'accountability' means dramatically different things to different people" (p. 239, as cited in Bernaz, 2020, p. 47). According to the Merriam-Webster dictionary, whereas responsibility "implies holding a specific office, duty, or trust," accountability "suggests imminence of retribution for unfulfilled trust or violated obligation" (Merriam-Webster, 2022). While the difference between the two terms is the subject of much debate, this thesis will argue that the existence of a sanction mechanism holding corporations to effective account is the central difference between corporate responsibility and corporate accountability. More generally, Morgera (2020) defined accountability as "the way in which public and private actors are considered answerable for their decisions and operations, and are expected to explain them when they are asked by stakeholders." (p. 19). The following conceptions of corporate accountability are based on articles by Valor (2005), Utting (2008), and Ochoa (2009), Yan & Zhang (2020), and Morgera (2020). Note that while they differ in some aspects, these conceptions are not mutually exclusive and contribute to a wider understanding of corporate accountability.

CORPORATE ACCOUNTABILITY AS CORPORATE CONTROL

The first step to getting closer to a working definition of corporate accountability is to answer the following question: what are multinational corporations accountable for ? In the context of this thesis, the focus will be on human rights abuses and environmental damage resulting from the actions of corporations. Indeed, in the many steps of their value chains, the conduct of corporations may lead to disastrous consequences for workers, communities, and ecosystems, as mentioned in the introduction. Therefore, any such damage, which can be directly or indirectly attributed to a company falls within the scope of accountability.

The second question, which can help further advance in the quest for a working definition is the following: who are multinational corporations accountable to ? In a traditional view of private companies, the executive board is accountable only to the shareholders, who are all represented and given a voice within an institution of the company, the shareholders' assembly. However, alternative forms of corporate governance, such as corporate social responsibility (CSR) and corporate citizenship have gradually contributed to changing this narrative. In a 2005 paper engaging in the debate on corporate accountability, Valor states that "[b]y claiming that companies are accountable for the creation of organizational wealth for its multiple constituents, these concepts oppose the neoclassical notion of shareholders as the only legitimate agent to sanction corporate results." (Valor, 2005, p. 197).

According to Morgera (2020), "corporate accountability implies [...] widening the scope of stakeholders within a company beyond shareholders, so as to include all interest groups affected by the company's activities, such as: governments, employees, boards of directors, investors, consumers, suppliers, local communities in and around areas where the company operates, civil society, and the public at large." (p. 19). To take this evolution of corporate constituency even further, given the global reach of value chains and the negative knock-on effects associated with environmental damage, it can be argued that anyone could potentially be affected by the actions of multinational corporations. As such, instead of being accountable only to shareholders, companies become subject to public scrutiny under corporate accountability. Valor even goes as far as saying that "corporate accountability could be understood as corporate control; that is, the establishment of clear means for sanctioning failure." (Valor, 2005, p. 196). Subscribing to this view on corporate accountability, Yan & Zhang (2020) define it as the ability of those affected by a corporation to control the corporate behaviour," wherein - as argued above - "those affected by a corporation" can potentially be extended indefinitely (Yan & Zhang, 2020, p. 44).

For this control to be effective, however, Valor argues that there are two conditions to fulfil. The first condition is that changes need to happen in the system, using market logic to incentivise corporations to adopt certain values. She notes that "[o]nly when values change at the bottom of society and are incorporated into economic decisions will companies change their behavior to reflect these social values." (Valor, 2005, p. 197). Currently, this first condition is largely fulfilled, as citizens worldwide demand increased ethical standards when consuming goods and services. A recent study shows that over a third of global consumers are willing to pay more for more sustainable products (Simon-Kucher & Partners, 2021). However, this first condition of public opinion and stakeholder pressure does not suffice to hold companies to account. Indeed, another study by Amengual et al. (2022) has shown that "the court of public opinion may not always be an effective mechanism to align decision-making with legal and ethical standards." This means that for the "social control of companies" (Valor, 2005, p. 2015) - and therefore corporate accountability - to be achieved, there also needs to be a switch to a different system.

The second condition, Valor argues, is a system change, i.e., switching to one that is not based solely on market instruments, and whereby corporations have to accept "that the common good is more important than the right to receive a dividend, and that social and environmental performance must be balanced with economic performance." (Valor, 2005,

p. 204). When considering human rights and the environment as the focus for this system change, this would equate to putting people and planet before profit in business priorities, as is often demanded by civil society. In order to be fulfilled, this "paradigm of the firm" should not only be adopted by companies and their shareholders, but Valor insists that "[r]egulation should provide citizens with political means to sanction corporate social and environmental failure." (Valor, 2005, p. 204). This can be interpreted as the need for legal frameworks to impose binding rules to corporations in order for them to be considered accountable to society at large. This would elevate the values mentioned in the first condition from the status of bottom-up demands from stakeholders to top-down obligations from states and legal institutions. Despite not making direct reference to the concept of due diligence, the phrase "corporate social and environmental failure" is a particularly adequate one, as - this will be further explained later - the CSDDD foresees the liability of companies for their failure to exercise their human rights and environmental due diligence.

CORPORATE ACCOUNTABILITY AS AN ALTERNATIVE TO CSR

Whereas Valor (2005) considers CSR as a concept contributing to the achievement of corporate accountability, Utting (2008) sees the rise of the "corporate accountability movement" as a form of contestation of the mainstream CSR agenda, involving direct confrontation with corporations and their conduct (p. 960). Yan & Zhang (2020) echo this vision when explaining the fundamental difference between corporate responsibility and accountability. According to them, "[c]orporate responsibility is focusing on voluntary approaches to engage with social/environmental issues, while corporate accountability is more about the confrontational or enforceable framework of influencing corporate behaviour." (Yan & Zhang, 2020, p. 44). In his view, the rise of this movement in the context of a well-established CSR agenda - consisting of voluntary initiatives by multinational corporations to mitigate their poor social and environmental performance - is surprising. Indeed, he argues that CSR had partly managed to tame activism and "recast the responses of civil society" in cases of corporate misconduct (Utting, 2008, p. 961). However, while corporations engaged in CSR schemes to reduce the occurrence of "shocking events" that had traditionally been the cause of civil society responses, Utting notes that the very same corporations were making use of their instrumental, discursive, and structural power to spread and embed neoliberal policies and ideas (Utting, 2008, p. 963). He explains that "[t]he rise of contestation centred on TNCs, then, derives in part from concerns about the ways in which global corporations are implicated in global injustice, and the absence of laws and institutions that can effectively regulate corporate globalization." (p. 963). Essentially, the mainstream CSR agenda had fulfilled Valor's (2005) first condition for corporate accountability, with moral values having made their way from consumers to executive boards, but not the second condition requiring adequate regulation and effective control over companies.

On the difference between CSR and corporate accountability, Utting (2008) states:

> "Whereas CSR is very much about voluntarism, in the dual sense of both individual agents taking action and voluntary initiatives, corporate accountability redirects attention to the question of corporate obligations, the role of public policy and law,

> the imposition of penalties in cases of non-compliance, the right of victims to seek redress, and imbalances in power relations." (p. 965)

While Utting's (2008) views on the relationship between the two concepts differ from those of Valor, Utting also argues that the aim of corporate accountability is to assert "social control over corporate capitalism" (p. 961).

With this different, more ambitious approach, Utting notes that significant regulatory progress has already been achieved by the corporate accountability movement. He mentions three developments particularly relevant to the present thesis. The first one pertains to the movement's deconstruction of the dominant view that voluntary initiatives by corporations "are a preferred substitute for binding legalistic regulation" (p. 969). This approach not only reasserts the importance of legal provisions in the fields of human rights and the environment, but also allows for a hybrid form of regulation, whereby international voluntary initiatives result in parliaments and other institutions inscribing them as national or international laws (p.969). This form of regulation, namely converting existing soft-law principles into legally binding provisions, is exactly the type of dynamic that could make the EU corporate due diligence law effective. Indeed, while some international soft-law frameworks, such as the UNGPs, do not foresee sanction mechanisms, many of the principles they contain are largely praised by civil society. As such, if the practice of due diligence described in the UNGPs were to be used in the EU due diligence law and given 'teeth' by sanctioning non-compliance, then the framework could prove effective for implementing corporate accountability.

Secondly, the corporate accountability movement has also contributed to challenging the traditional focus of international law, namely defining the responsibilities and obligations of states. By recalling the need for international laws targeting multinational corporations as fully-fledged actors of international relations, the corporate accountability agenda is giving rise to the legalisation of a field previously largely considered as a space for self-regulation (Utting, 2008, p. 969). Finally, the corporate accountability movement has enabled the use of so-called 'subaltern legality' or 'counter-hegemonic legality,' an arena of law, whereby "social groups, individuals and communities whose livelihoods, identity, rights and quality of life are negatively affected by states and corporations [...] use the existing legal apparatus to seek redress for injustice and participate in struggles and processes associated with accountability." (Utting, 2008, p. 970). The author further notes that "a key feature of such struggles is transnational activism that connects actors at local, national, regional and global levels." (Utting, 2008, p. 970). This form of legal activism is reminiscent of the concept of strategic litigation presented above, which lies at the centre of the activities and philosophy of ECCHR, where the idea for this thesis initially started.

With such collaborative approaches to establishing corporate accountability, Utting (2008) observes that "new coalitions and alliances may be overcoming the fragmentation and tensions that have divided civil society actors concerned with TNCs." (p. 971) By bringing together NGOs, trade unions, and groups of affected persons from the Global North and the Global South, civil society is able to unite in stronger groups, allowing them to gain legitimacy and capability. One example of such an alliance cited by the author is the Clean Clothes Campaign, which has been an active member of the CSO coalition working on the EU due diligence framework. With the presence of previously established thematic

coalitions, such as the Clean Clothes Campaign and the European Trade Union Confederation (ETUC) in the CSO coalition, it appears that the corporate accountability movement is further broadening its support base and evolving to an even higher level of legitimacy and representation.

CORPORATE ACCOUNTABILITY AS THE ERA OF LAW AND LEGAL INSTITUTIONS

While the struggle for corporate accountability may seem long and tenuous, looking at it in its historical scope does provide reasons to remain hopeful. As formulated by Ochoa (2009), "[o]ne can think of the issue of business and human rights as occupying essentially three eras: the era of impunity, the era of civil society and self-regulation, and the era of law and legal institutions." (p. 291). In this analogy, the eras outlined by Ochoa (2009) can be linked to the general frameworks referred to by Valor (2005) and Utting (2008). The era of impunity corresponds to the period preceding the introduction of the first initiatives for corporate responsibility, when corporate abuses were largely undocumented and definitely unsanctioned. The era of civil society and self-regulation, arising in this vacuum, covers the period characterised by the rise of the CSR agenda, which both Valor (2005) and Utting (2008) refer to, although in different terms. Ochoa (2009) defines this era as being marked by "notable examples of responsive corporate self-regulation and also in mounting pressure from interested parties on international financial organizations and the United Nations to facilitate global dialectical engagement on the intricate nexus of business and human rights." (p. 292). Despite that, she notes that efforts by international organisations in this endeavour were "sporadic and relatively discrete" (Ochoa, 2009, p. 292).

In a way that is closer to Valor's conception of the relationship between CSR and corporate accountability, Ochoa (2009) notes that some initiatives undertaken during the era of civil society and self-regulation paved the way for the next era, that of law and legal institutions. In particular, she points to the work of the Special Representative of the Secretary-General (SRSG) on the issue of business and human rights, John Ruggie, which consisted in "mapping the multitude of interested parties, organizing the prolific and dispersed dialogues on business and human rights, and channeling that discourse into the three now-familiar pieces of the framework he has provided." (Ochoa, 2009, p. 292). The framework referred to is the so-called 'Protect, Respect, Remedy' framework, which was later adopted in the form of the UNGPs.

At the time of writing, Ochoa (2009) considers that the era of law and legal institutions is yet to come. For this transition to take place, she considers that states "have to play a leadership role in negotiating the needs of interested parties." (p. 292). Indeed, she argues that "this work, which states are uniquely well positioned to perform, is a mandatory element of the law-making and institution-building project that lies ahead." (Ochoa, 2009, p. 292). In addition to potential new solutions arising from states assuming a leadership role, she recalls that many policy proposals already exist in the form of calls by the human rights community urging states to "take the steps necessary to transform existing international codes, guidelines, and norms into binding standards and definitive legal guidance for businesses and affected communities on the responsibilities of businesses for human rights harms." (Ochoa, 2009, p. 293). Building on the need for the establishment of

national and international legally binding frameworks, it can be said that this third and last era amounts to the achievement of corporate accountability.

THE EVOLVING POLICY FIELD OF DUE DILIGENCE

As seen above, the use of due diligence as a tool for ensuring corporate respect for human rights and the environment is fairly recent. This section will serve as a review of the concept of due diligence in existing frameworks, particularly its path from voluntary to mandatory frameworks. As such, the first policy document to be presented will be the UNGPs, which served as a blueprint for putting due diligence in the spotlight in the regulation of corporate conduct. Then, I will look at two examples of existing mandatory due diligence legislation in Europe, namely the French 'Loi de vigilance' and the German Lieferkettensorgfaltspflichtengesetz, to see how the concept of due diligence was translated into mandatory measures. Note that, while there is currently an ongoing process to translate the UNGPs into a legally binding instrument, the so-called 'Binding Treaty', Bright (2018) states that "obtaining a consensus on meaningful legal obligations for businesses at the international level might prove difficult and attempts in this respect have failed in the past." (p. 10). For this reason and because this thesis focuses on the European context, I will not go into further detail on this process, which is currently at the stage of drafts. After introducing these frameworks, I will present business arguments supporting the introduction of legally binding measures for corporate due diligence. Finally, I will present existing frameworks at the EU level that aim to regulate corporate conduct regarding sustainability issues.

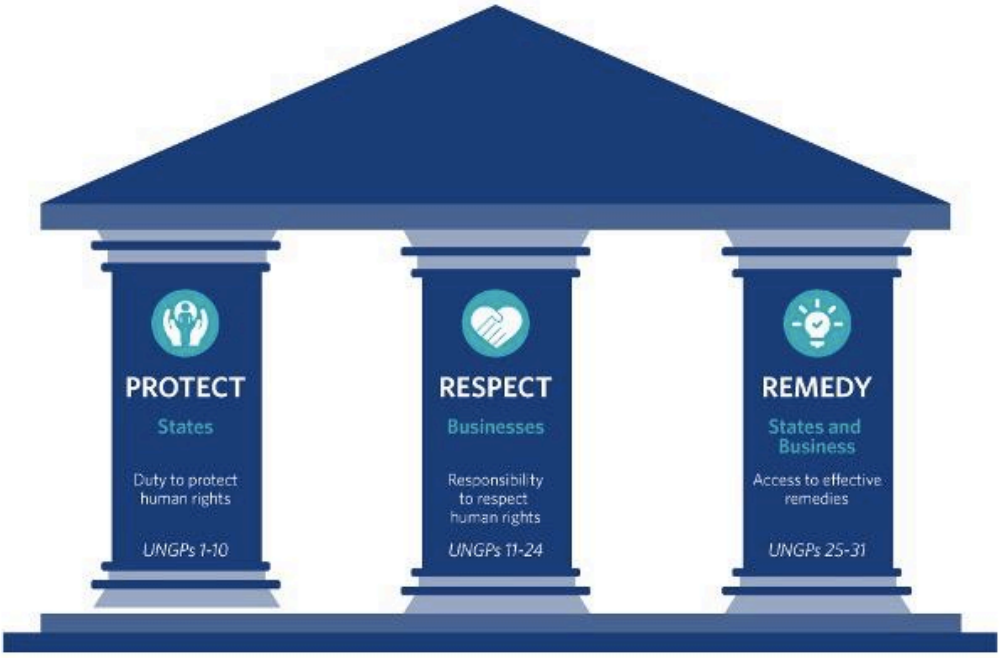
THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

As a central concept in the type of legislation at hand, it is worth exploring the origins and different conceptions of due diligence. Having emerged around the turn of the 21st century and originally limited to financial and commercial risk assessment, due diligence started being used notably by the OECD to establish standards regarding anti-corruption. Since then, however, the concept has also played a central role in the development of standards aiming to regulate corporate conduct in relation to human rights (Martin-Ortega, 2014). This is notably the case in the UNGPs.

The UNGPs are a set of 31 non-binding guidelines outlining the roles and responsibilities of States and businesses in the implementation of the 'Protect, Respect, Remedy' framework. This framework is reflected in the three-pillar structure of the UNGPs. The first pillar recalls the duties that States already have under international law to protect universally recognised human rights. The second pillar establishes the corporate responsibility to respect human rights and lays out concrete steps that businesses should take to meet this responsibility. The third pillar relates to the duties of States and businesses in providing access to remedy for people affected by human rights abuses by corporate actors. It includes State-based judicial and non-judicial mechanisms, as well as introduces criteria for non-State-based grievance mechanisms as a form of remediation. The text was unanimously endorsed by the Human Rights Council of the UN in 2011, making it the first international standard on corporate conduct relating to human rights with global legitimacy. However, it must be noted that the introduction of this framework did not aim to impose additional obligations on corporations, but rather to propose "a new standard for a new

responsibility" (Martin-Ortega, 2014, p. 56). In fact, the preamble of the UNGPs even states that "[n]othing in these Guiding Principles should be read as creating new international law obligations" (United Nations, 2011, p. 1). Morgera (2020) even frames the adoption of the framework as having "emerged from the rejection of the idea that there are direct legal obligations arising of international law for companies" (p. 16). As such, using the distinction described above, the UNGPs themselves do not provide greater corporate accountability, but rather build on the premise of corporate responsibility.

Figure 1 : The three pillars of the 'Protect, Respect, Remedy' framework as presented in the UNGPs



Source : Herbert Smith Freehills (2021)

This hybrid approach to standard-setting has many implications as to how the UNGPs are implemented. First of all, the non-binding nature of the principles implies that businesses have the freedom to decide whether or not to take steps to comply with them. On the one hand, this could mean that the framework is ineffective if large players with significant potential for adverse impacts do not take the UNGPs into account. On the other hand, it also means that businesses deciding to comply on a voluntary basis could be disadvantaged compared to other companies engaging in business as usual, as will be explained later. Another downside of this approach is the big potential for corporate capture. In fact, while the UN has leadership on discussions happening around the framework, it is keen on giving corporate actors a central role. This is most apparent at the UN Forum on Business and Human Rights, organised each year to host discussions on

implementation, where UN officials, government representatives, and executives of multinational corporations share the stage.[8]

Perhaps the most innovative contribution of the UNGPs to the field of human rights is the reliance on the concept of due diligence as the central mechanism in the second pillar, the corporate responsibility to respect human rights (Martin-Ortega, 2014). In the document, due diligence is defined as the process by which businesses "identify, prevent, mitigate and account for how they address their adverse human rights impacts" (United Nations, 2011, p.17). While developing his framework, the SRSG took particular care in using intelligible language for all actors concerned. In fact, Martin-Ortega (2014) notes that the framework "aimed to use terminology familiar in both human rights law and business management practices. It translated the due diligence that companies were accustomed to performing in commercial relations and transactions into the sphere of human rights." (pp. 50-51).

All in all, while the UNGPs do not provide for corporate accountability as defined above, they certainly set the scene for due diligence obligations to be used in legally binding national and supranational legislation, as argued by Ochoa (2009). Indeed, the UN Working Group on Business and Human Rights has been welcoming initiatives to make the due diligence as laid out in the UNGPs mandatory through national and supranational legislation. In a 2018 report to the UN General Assembly, it references existing legislative processes for the adoption of mandatory human rights Due Diligence (mHRDD), regarding them as positive developments for the field of business and human rights (United Nations, 2018). The report welcomes amongst others the French 'Loi de vigilance' adopted in 2017, as well as the German discussions on a supply chain due diligence law and the EU Conflict Minerals Regulation, which were in development at the time. As a general principle, the Working Group states that "[t]he most important element when considering legislation on human rights due diligence or disclosure is to build on the Guiding Principles and minimize any differences." (United Nations, 2018, p. 18). In general, it can be said that legislation transcribing international standards to make them mandatory maximises its impact when remaining as close as possible to the original standard, as it allows for a harmonised enforcement. Additionally, the Working Group notes that further legislative proposals should promote "[r]obust human rights due diligence as opposed to 'tick box' approaches, as prevention and implementation must be the end goal" (United Nations, 2018, p. 19). In that sense, the Working Group clearly states its intention for the UNGPs to inspire legally binding mechanisms at different levels, ultimately delivering effective corporate accountability.

'LOI DE VIGILANCE' IN FRANCE

One prime example of national legislation for mandatory due diligence is the French so-called 'Loi de vigilance' (in full: 'Loi relative au devoir de vigilance des sociétés mères et

[8] During a previous internship in 2019, I participated in the UN Forum on Business and Human Rights and attended panel discussions with representatives of large multinational corporations with a history of human rights and environmental harm, such as Pepsico, Nestlé, and Total, amongst others.

entreprises donneuses d'ordre').[9] This law imposes a duty to take adequate steps to identify, prevent and mitigate environmental and human rights harm that could be caused by their subsidiaries or through their business relationships. As such, the French law imposes mandatory human rights and environmental due diligence (mHREDD). This is done through the publication of an annual 'vigilance plan', wherein companies must show that they have evaluated and addressed risks of human and environmental damage in their global operations. Although it is the first law of its kind and establishes significant obligations for corporations, civil society has expressed its discontent with the scope of application. Indeed, it applies to all companies headquartered in France with more than 5,000 employees in France or 10,000 employees worldwide, which represents far fewer companies than those whose value chains have a high potential for human rights and environmental adverse impacts (ActionAid France et al., 2017). However, the fact that the 'Loi de vigilance' engages the civil liability of businesses that fail to comply with their due diligence obligation constitutes a significant leap in the achievement of corporate accountability. Legal proceedings using this law have already been initiated, but none has led to a verdict.

One of these cases was initiated in 2017 by ECCHR and partner Mexican human rights organisation ProDESC against French energy company EDF for not complying with its duty of vigilance in the lead up to the establishment of a giant wind farm in Mexico. Indeed, the complainants claimed that the company had violated the right to free, prior and informed consent of a local Indigenous community, on whose territory the wind farm was to be erected (ECCHR et al., 2020). In 2021, the Paris civil court confirmed the competence of the judicial court in matters relating to the 'Loi de vigilance' (Business and Human Rights Resource Centre, 2022a). Before a verdict was pronounced, the Mexican state-owned company that signed a contract with EDF in 2019 decided to cancel it in June 2022 as a "result of a court ruling" with no further details (Azzopardi, 2022). This shows that the law, while not having yielded court decisions, could prevent other projects from violating Indigenous and other rights in their implementation and serve as a precedent for similar cases. As such, in its relatively short time in force, the 'Loi de vigilance' has been described as "a historic step forward for the corporate accountability movement, and a testament of the importance of civil society participation in the law-making process" (Cossart et al., 2017).

LIEFERKETTENSORGFALTSPFLICHTENGESETZ IN GERMANY

The German supply chain due diligence law is another, more recent example of national legislation for mandatory due diligence.[10] This law will come into force on 1st January, 2023 for companies headquartered in Germany with more than 3,000 employees, and on 1st January, 2024 for companies with more than 1,000 employees. Strictly from this perspective, it can already be noted that this law is more ambitious than the 'Loi de vigilance'. However, the estimated number of companies included in the scope of the LkSG, around 3,500 in total, is still very low (Koos, 2022). While the content of the law

[9] The text of the law can be found here (in French): https://www.legifrance.gouv.fr/download/pdf?id=9aawcYcwvkntYs2UUCMWL4iX_erjixoTD_Jy3AVXRFk=

[10] The text of the law can be found here (in German): https://www.buzer.de/s1.htm?g=LkSG&f=1

focuses particularly on human rights, Koos argues that environmental standards "are relevant to human rights because they affect people's immediate lives in the environment of production and trade and are covered by the law on the recording of human rights violations as a result of severe environmental damage and on the imposition of environmental obligations." (Koos, 2022, p. 111). As such, this law also imposes mHREDD obligations.

Although this law constitutes an attempt at implementing the UNGPs through national legislation, it fails to impose a due diligence process as extensive as the one present in the 'Protect, Respect, Remedy' framework. Indeed, the LkSG limits the due diligence obligation to direct suppliers only, whereas the UNGPs aimed for the value chain as a whole (both upstream and downstream activities) to be taken into account (Koos, 2022). This restricted application has been the subject of civil society criticism, as human rights abuses and environmental damage typically happen at the sub-supplier level (Koos, 2022). In addition to this major shortcoming, the LkSG also does not provide for civil liability claims, contrary to its French counterpart. Instead, the enforcement in this law is done through administrative supervision by the Federal Office for Economic Affairs and Export Control (BAFA). However, this power of intervention by the BAFA can be exercised both "at the request of affected persons or *ex officio*" (Koos, 2022, p. 113). This means not only that affected persons will be given a legal avenue to file complaints in cases of corporate abuse, but also that the authority has the possibility of initiating investigations on its own initiative.

Given a recent wave of recruitment for specialists on the LkSG at BAFA, there is hope that it will put in place a system for verifying compliance and take administrative action from the moment the law enters into force.[11] Since the LkSG is not in force yet, there are currently no ongoing procedures related to the corporate due diligence obligations it sets out.

THE BUSINESS CASE FOR MANDATORY DUE DILIGENCE

As mentioned above, the support for legally-binding duties relating to human rights due diligence does not only come from civil society, but also from the private sector. In a study based on surveys of business actors, Smit et al. (2020) found that a majority of businesses are favourable to the introduction of such obligations, for two major reasons.

The first one is legal certainty and clarity. Indeed, the businesses surveyed showed an overall dissatisfaction with currently applicable legal norms on due diligence, stating that they are inefficient, ineffective, and incoherent. (Smit et al., 2020, p. 269). As such, the introduction of laws clarifying the expected conduct of corporations and the standards they must comply with could rectify this legal confusion for European businesses. Given that companies that may have negative human rights and environmental impacts typically operate in many countries, having to adapt to the legal standards of each individual state requires considerable effort on their part. Therefore, if the same due diligence rules applied in all of the EU, companies would have to comply with one single framework, instead of potentially 27 different ones.

[11] Personal communication with a Senior Legal Advisor at ECCHR, 2nd December, 2022.

The second reason relates to competition with other firms. Indeed, with a CSR-based approach to human rights and the environment, companies would voluntarily take steps to put in place a due diligence mechanism as set out in the UNGPs. Those businesses were potentially running the risk of losing competitiveness compared to other companies, as preventing adverse effects might entail raising costs to ensure sustainable sourcing, good working conditions, and environmental protection, amongst others. Therefore, a harmonised due diligence framework within the EU would create a level playing field and ensure that sustainability commitments do not place certain businesses at a disadvantage. (Smit et al., 2020, p. 269)

For these two reasons, an EU-wide framework carries a significant potential, as it could centralise rules on the conduct of corporations and ensure that all companies play by those same rules within the EU single market.

DUE DILIGENCE IN THE EUROPEAN UNION

At the level of the European Union, the Corporate Sustainability Due Diligence Directive is not the first attempt at introducing sustainability rules for corporations. It is true, however, that previous measures either had a narrower scope, or more limited practical means.

One good example of a measure with a narrower scope is the Conflict Minerals Regulation (CMR), which entered into force in 2021. As its name suggests, this Regulation aims to prevent the contribution of European businesses to perpetuating armed conflict, violence and human rights abuses through their sourcing of minerals. In particular, the Regulation focuses on so-called 'conflict minerals', namely tin, tungsten, tantalum, and gold - also shortened as 3TG. In this case, the text is directly meant to implement an existing international standard - the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas - and inscribe it in European law (European Commission, 2021). As such, the Regulation aims to ensure that European companies importing and smelting 3TG meet international responsible sourcing standards set out in the OECD Guidance. This document contains a five-step framework for risk-based due diligence in the mineral supply chain (OECD, 2016). The five steps are: "establish strong company management systems; identify and assess risk in the supply chain; design and implement a strategy to respond to identified risks; carry out an independent third-party audit of supply chain due diligence, and; report annually on supply chain due diligence." (OECD, 2016, pp. 17-19). This framework is inspired by the due diligence process described in the UNGPs, which also informed the framework contained in the CSDDD. Despite the potential of this Regulation, however, it lacks an enforcement mechanism to guarantee corporate compliance with it. Indeed, the only consequences foreseen in the CMR for cases of non-compliance are warnings by Member States and the imposition of deadlines to address the issue (OECD, 2016). As such, not only is the CMR limited in scope, it also fails to provide sufficient coercive measures to reach its goals.

Another example of previous sustainability legislation at the EU level is the recent Corporate Sustainability Reporting Directive (CSRD), adopted by the European Parliament

on 10th November, 2022 (Council of the European Union, 2022a). This law introduces detailed sustainability reporting requirements - such as environmental rights, social rights, human rights and governance factors - for large companies and listed SMEs. While this Directive aims to ensure sustainable finance rather than sustainable activities in general, it shows that the EU is conscious that a transition to a sustainable Union requires raising expectations for the private sector. Still, this view of sustainability based on finance and accounting allows corporations to relegate crucial issues to a simple reporting exercise, as opposed to adopting far-reaching and transversal policies at top-management level.

As such, the CSDDD, with its more ambitious scope and the possibility for legal consequences in cases of non-compliance, shows a higher transformative potential.

AN ANALYTICAL FRAMEWORK FOR CORPORATE ACCOUNTABILITY

Now that the concept of corporate accountability has been defined in more detail, it needs to be operationalised in order to analyse the proposed European due diligence law. In an article from 2020, Bernaz (2020) conceptualises corporate accountability into an analytical framework based on the conception of accountability developed by Gupta and van Asselt (2019). This framework breaks down corporate accountability into seven questions listed in the table below (Table 1). This framework was developed in the context of the elaboration of a legally binding instrument for human rights due diligence at the level of the UN. The article presents four models of corporate accountability that such a treaty would offer, including two based on existing UN references for human rights - The UNGPs and the Universal Declaration of Human Rights (UDHR) - and two proposals formulated by the author herself, the progressive model and the transformative model. She assesses the strength of these models based on specific characteristics, such as material scope, obligations, and enforcement.

Table 1 : Analytical framework for corporate accountability developed by Bernaz (2020), adapted from Gupta & van Asselt (2019)

1. Who is to be held to account?
2. Accountable to whom?
3. What is the expected behaviour?
4. What is the standard's legal force?
5. What is the process by which to assess if standards are being met?
6. What remedial processes are in place?
7. What forms of reparation are available to victims?

Models of corporate accountability based on existing systems

<u>The UNGPs model</u> :
According to Bernaz, the UNGPs only allow for a weak model of corporate accountability. The author cites two main reasons for this. The first one is that the material scope of the UNGPs undermines the indivisibility and interrelatedness of all human rights, by mentioning the rights of certain vulnerable groups as mere add-ons, and not as part of the main body of references. The second one is that the framework does not foresee any specific enforcement mechanism, and as a result does not guarantee compliance with its principles. The only stated advantage of the UNGPs model is that it would bring coherence to the business and human rights regulatory landscape (Bernaz, 2020, p. 52).

<u>The UDHR model</u> :
Bernaz argues that the model of corporate accountability based on the Universal Declaration of Human Rights is also weak. This is mainly because it does not contain an enforcement mechanism, rendering it as ineffective as the UNGPs model. However, she does note that this model would have a symbolic weight, as the UDHR has been a political

and legal reference for over 70 years (Bernaz, 2020, pp. 53-54). Nonetheless, this model remains weaker than the UNGPs model, as the UDHR contains no specific information on business and human rights or due diligence.

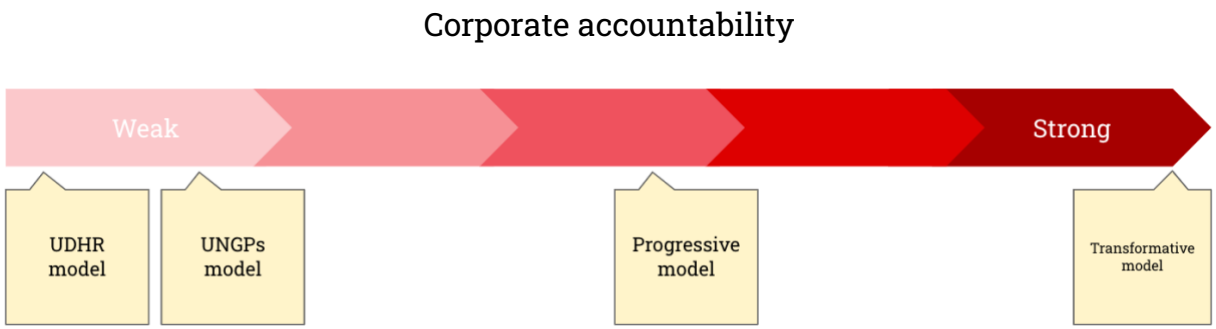
Models of corporate accountability proposed by Bernaz (2020)

The progressive model :
This model proposed by Bernaz is relatively strong compared to the ones presented above. Indeed, it contains clear obligations for companies to respect human rights and for states to facilitate the redress of human rights abuses when they happen. Additionally, one key innovation of this model is that it recognises direct binding human rights obligations for corporations, whereas existing models only impose them on states. The Achilles' heel of this model, however, is that it only foresees domestic enforcement, making it almost entirely reliant on state performance. At the level of the UN and its 193 Member States, this would likely lead to significant discrepancies in enforcement (Bernaz, 2020, p. 56).

The transformative model :
The last model was developed by Bernaz as idealistic, but potentially the strongest one, as it marks a clear break from existing international law. Indeed, not only does it establish corporate human rights obligations as is the case in the progressive model, but it also foresees corporate criminal liability for international crimes. Furthermore, these stricter obligations would be complemented by international enforcement mechanisms, ensuring the coherence and replicability of enforcement. However, this proposed model comes with a host of legal challenges, including the question of complementarity between international and other courts, as well as that of the distinction between state responsibility and corporate liability in cases where abuses are committed jointly by states and companies (Bernaz, 2020, p. 58).

Based on their level of strength, the four models of corporate accountability presented above can be placed on a spectrum ranging from weak to strong. This spectrum will also be useful to situate the two approaches to corporate accountability, which will be presented in the analysis below.

Figure 2 : Corporate accountability strength spectrum



The seven questions asked by Bernaz to assess models of corporate accountability can also be formulated as dimensions of corporate accountability, as shown in Table 2 below. These dimensions form a prism through which the two approaches to corporate accountability presented in the analysis will be analysed.

Table 2 : The dimensions of corporate accountability, based on Bernaz (2020)

Question	Dimension
1. Who is to be held to account?	A. Personal scope
2. Accountable to whom?	B. Beneficiaries
3. What is the expected behaviour?	C. Material scope
4. What is the standard's legal force?	D. Legal force
5. What is the process by which to assess if standards are being met?	E. Due diligence process
6. What remedial processes are in place?	F. Enforcement
7. What forms of reparation are available to victims?	G. Reparations

For the sake of clarity, I will define some of the terms used as dimensions of corporate accountability. The term 'personal scope' is used to designate the subjects of a certain framework. In the analysis, I will use it to designate the companies to which the due diligence obligations apply. The term 'material scope' refers to the body of applicable rules in the context of a framework. In the analysis, it will designate the international treaties used as bodies of reference by the two approaches, i.e., the rules that businesses included in the personal scope are obliged to comply with. Finally, the term 'enforcement' refers to the legal means used to ensure the implementation of a framework. In this case, the term will be used to designate the legal avenues foreseen by the two approaches in cases where the due diligence obligations are breached.

Now that the analytical framework has been presented, I will introduce and analyse two approaches to corporate accountability, namely the European Commission's proposal for a Corporate Sustainability Due Diligence Directive and the Coalition's approach.

TWO APPROACHES TO CORPORATE ACCOUNTABILITY

To assess the potential of the European Commission's proposal for a Corporate Sustainability Due Diligence Directive and put it into perspective based on the Coalition's demands, two approaches to corporate accountability will be presented below. The first one will be based on the proposal published by the European Commission in February 2022. The second approach will be based on the demands of the Coalition, aggregated from two publications, covering a period from September 2020 to September 2022. To do so, I will analyse these two approaches through the prism of the seven dimensions of corporate accountability presented in the section above. After analysing each approach, I will present a table summarising their characteristics, as well as an overall evaluation of the approach.

THE EUROPEAN COMMISSION PROPOSAL APPROACH

In general, this approach represents a significant step forward in mHREDD legislation, but contains major shortcomings that greatly diminishes its potential for achieving effective corporate accountability.[12]

This proposal is the result of a long internal process within EU institutions, following the announcement by the European Commission in 2020 that it was committed to delivering a human rights and environmental due diligence framework (Business and Human Rights Resource Centre, 2020). In March 2021, the European Parliament adopted a resolution with recommendations to the European Commission regarding the establishment of such a law and recalling existing international standards in the field of business and human rights, including the UNGPs and the OECD Guidelines for Multinational Enterprises. Just under a year later, on 23rd February 2022, the European Commission published this 70-page document as the first step of the ordinary legislative procedure in the European Union. This means that before any version of the CSDDD can come into force, this text will have to go through negotiations within and between the Council of the European Union - composed of relevant ministers from Member States - and the European Parliament.

As a trainee at ECCHR, I was tasked with analysing this proposal against the positions of the Coalition on mandatory due diligence legislation. My traineeship having started a week after the European Commission's proposal was published, I started analysing the document as soon as I got acquainted with the Coalition's position on mandatory due diligence legislation. As such, the analysis presented below uses elements of internal documents I drafted for ECCHR and the Coalition.

A. Personal scope

One of the essential elements to consider when looking at the European Commission's proposal is its personal scope. As is the case in the French and German due diligence laws,

[12] Unless indicated otherwise, all information on the European Commission's CSDDD proposal is taken directly from the text (European Commission, 2022c).

the Commission used the number of employees as a criterion for inclusion in the scope, but divided the companies concerned into two distinct groups. Group 1 consists of companies with 500 employees or more and a net annual turnover of more than EUR 150 million. Group 2 consists of companies active in sectors that are considered as high-risk. For this group, the threshold is lower, as companies with 250 or more employees with a net annual turnover of more than EUR 40 million are covered. The Directive would apply to Group 2 only two years after its entry into force. Despite using lower thresholds than the French and German laws, the proposed Directive only covers a small minority of the estimated 26 million companies based in the EU (Eurostat, 2022). In addition to those businesses based in the EU, this proposal would also apply to companies based outside of the EU, so as not to put EU-based companies at a competitive disadvantage in their own single market. For them, the conditions remain the same for both groups, with the exception that only the turnover generated in the EU is counted towards the financial threshold. This proposal excludes small and medium enterprises (SMEs) from the scope of the due diligence obligation altogether, despite the significant risks associated with the value chains of some smaller companies.

The only high-risk sectors listed in the proposal are garment & footwear, agriculture, and minerals. The explanatory memorandum of the proposal specifies that the sectors to be included in the second group are those for which the OECD has released specific guidance for due diligence (OECD, 2022). However, limiting high-risk sectors in such a way means that small companies in other sectors presenting equally significant risks, such as shipbreaking and electronics, are left out of this Directive completely. Additionally, while the financial sector is covered by specific OECD guidance, the memorandum explains that it is not included in the list of high-risk sectors, owing to its specificities. In addition to being absent from that list, the proposal offers an exemption from the due diligence obligations for companies active in the financial sector (including banks, insurance companies, and investors). Indeed, the present proposal only foresees an *a priori* duty, limited only to direct clients and under specific conditions.

Table 3 : Personal scope of the Corporate Sustainability Due Diligence Directive, excluding financial companies

		EU companies	Non-EU companies	SMEs
Group 1	500+ employees and more than EUR 150M net turnover	+/- 9400 companies	+/- 2600 companies	SMEs are not directly concerned.
Group 2	250+ employees and more than EUR 40M net turnover,* operating in high-risk sectors (rules will apply two years later)	+/- 3400 companies	+/- 1400 companies	

*Worldwide turnover for EU companies and EU turnover for non-EU companies

B. Beneficiaries

The European Commission's proposal for a due diligence Directive does not specify a certain target group that companies should be accountable to. However, the explanatory memorandum does note that the proposal comes as a result of "negative externalities from EU production and consumption [...] being observed both inside and outside the Union" (European Commission, 2022c, p. 2). Additionally, the first recital of the proposed Directive states that the Union's action on the international scene is guided by "the universality and indivisibility of human rights" and that it aims to foster "the sustainable economic, social and environmental development of developing countries" (European Commission, 2022c, p. 27). By extension, since the value chains of companies concerned can potentially have a global reach, and as we have seen that virtually any individual could be affected by negative adverse impacts, the Directive would impose that companies are accountable to society as a whole. The proposal also foresees that companies should consult with stakeholders in certain cases and defines the term as "the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships" (European Commission, 2022c, pp. 52-53).

C. Material scope

In her establishment of models of corporate accountability, Bernaz (2020) answers this question with the body of references and standards businesses are expected to comply with, i.e., the material scope of the document. In this case, the due diligence obligations contained in the proposed Directive are based on a number of international conventions. These conventions listed in the annexes to the Directive are used to define adverse human rights and environmental impacts, which companies must prevent and bring to an end, or at least minimise their extent. However, as it stands, the body of reference texts is insufficient and patchy. While the annexes include relevant international conventions, they leave out other documents, which would give the Directive a higher protection standard.

Annex I 20 rights contained in human rights conventions, which companies must comply with in their activities. While certain human rights are explicitly listed and some labour rights are explained, annex I contains a catch-all clause, stating that the Directive also covers violations of other similar rights by companies, to the extent that they could have reasonably established the risk of such impairments to happen. As such, annex I provides a non-exhaustive list, allowing for a broader interpretation of the due diligence obligation. Such a system is also to be found in other EU legislation, including the Conflict Minerals Regulation. While it aims to allow for a certain flexibility, this system does not provide sufficient legal certainty, which is precisely a key feature of effective mHREDD.

Annex II lists 12 violations of internationally recognised objectives and prohibitions included in certain environmental conventions. In this case, the list of violations prohibited by the Directive is exhaustive and does not allow for broader interpretation. Regarding the impact of businesses on climate change, the Directive only introduces an obligation for companies in Group 1 to "adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the

limiting of global warming to 1.5 °C in line with the Paris Agreement" (European Commission, 2022c, p. 60). However, there is insufficient information on their obligation to implement such a plan and how it is to be monitored. Annex II also fails to include the Paris Agreement in its body of references, despite its high significance and legitimacy in the matter. Furthermore, obligations related to climate change are only limited to administrative supervision and not civil liability, making climate change due diligence both weak and poorly grounded in the present proposal.

D. Legal force

Under the approach to corporate accountability put forward in the European Commission's proposal, companies have direct legally binding obligations. They can be subject to administrative sanctions from EU Member States and their civil liability can be engaged if they fail to comply with their due diligence obligations. Furthermore, the civil liability provisions in the proposal should be considered overriding in cases where harm happened in a country outside of the EU and the law of that country is applicable.

E. Due diligence process

The process by which compliance with those standards is assessed is due diligence. In the proposal, due diligence is based on a 6-step process (Articles 5 to 11 of the proposed Directive). Companies are obliged to 1. Integrate plans to implement the human rights and environmental due diligence process into policies and management systems, 2. Identify actual or potential adverse impacts, 3. Cease, prevent, or mitigate adverse impacts, 4. Establish and maintain a complaints procedure, 5. Monitor the effectiveness of the due diligence policy and measures, and 6. Publicly communicate on due diligence measures.

The question of how far the due diligence obligations reach out from the companies included in the scope holds both positive and negative elements. On the one hand, companies are responsible for exercising their due diligence on their value chain, as opposed to their supply chain. This means that they are responsible for upstream, as well as downstream activities. This could be particularly useful in industries where the use of products could potentially lead to negative adverse impacts (e.g., weapons, chemicals, or the service industry). On the other hand, the application scope of the proposed Directive is built around the concept of 'established business relationship', defined as "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." (European Commission, 2022c, p. 51). This term is not only vague, but it is also previously untested and could open the door to all sorts of claims. Therefore, the Directive potentially excludes other significant parts of the value chain involving subcontractors or informal workers for instance, which are usually associated with a higher level of risk.

In cases where companies identify potential impacts, they must formulate a prevention plan. When an actual adverse impact is identified, they must formulate a correction plan. For the latter measure, the Directive foresees that stakeholders are consulted only "where relevant", without specifying what those relevant situations could be (European Commission, 2022c, p. 54). Additionally, the measures foreseen by the Directive to cease,

prevent or mitigate adverse impacts rely excessively on contracts between business partners. Indeed, contractual assurances and contractual cascading makes up a significant part of step 3 of the due diligence process. For instance, if a potential adverse impact is identified with an indirect business relationship, the Directive instructs companies to conclude direct contracts with that entity. To verify compliance with the contents of the Directive, the proposal foresees the use of third-party verification, as well as multi-stakeholder initiatives. These measures rely excessively on the companies' willingness to engage in a meaningful due diligence process and do not guarantee a thorough analysis of their value chains. As a result, the due diligence process loses sight of the overarching objective to put an end to human rights abuses and environmental damage in value chains. Instead, it turns into a command-and-control, box-ticking exercise, which contradicts the guidance of the Working Group on Business and Human Rights.

In case of an actual adverse impact, if the company could not prevent it, it must temporarily suspend the business relationship, or terminate it when the impact is severe. However, the proposal does not foresee a plan for responsible disengagement of companies in such situations. Indeed, the sudden termination of business relationships could cause even more severe impacts, especially in terms of labour rights or remuneration of workers. Furthermore, companies must provide a complaints mechanism for affected persons, trade unions and other workers' representatives, as well as CSOs where they have legitimate concerns regarding an actual or potential human rights or environmental adverse impact.

Finally, companies included in the scope of the proposal must regularly monitor the effectiveness of their due diligence measures and update their policy when necessary. They must also publish an annual statement on their website regarding their due diligence activities.

F. Enforcement

As stated above, a significant strength of this proposal is that it would impose legally binding due diligence obligations on businesses. Under this approach, the due diligence obligations are to be enforced in two distinct ways. The first one, the public enforcement, foresees the establishment of national supervisory administrative authorities. These authorities are to be set up by Member States and should be empowered to impose effective, proportionate and dissuasive sanctions, such as ordering the cessation of infringements, abstention from any repetition of the relevant conduct and remedial action proportionate to the infringement, imposing pecuniary sanctions, and adopting interim measures to avoid the risk of severe and irreparable harm. This administrative action is to be triggered in cases where substantiated concerns are presented to the national authorities by natural and legal persons "when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply" with the contents of the Directive (European Commission, 2022, p. 63). This means that the burden of proof lies on the affected persons or their representatives when filing a complaint with the relevant national authority. Furthermore, the proposal also foresees the creation of a European network of supervisory authorities to ensure harmony and cooperation in the implementation of the Directive throughout the EU.

The second form of enforcement foreseen in the proposal is the civil liability of companies based on the failure to comply with the due diligence obligations, when this failure leads or could lead to adverse impacts. However, it also provides a special regime for damage to business relationships. Indeed, when companies take so-called 'appropriate measures' to prevent, mitigate, bring to an and or minimise an adverse impact, they are not to be held liable for damages caused by said adverse impact. These measures can be as simple as putting in place contractual cascading and verification measures, or engaging in multi-stakeholder initiatives, which, as seen above, do not guarantee positive outcomes.

As such, the European Commission's proposal incorporates both enforcement mechanisms from the French and German due diligence law, namely civil liability from the 'Loi de vigilance' and administrative supervision from the LkSG. However, both of them are flawed, as civil liability can be lifted relatively easily and both forms of legal action require excessive efforts on the part of complainants.

G. Reparations

In the description of the due diligence process, the proposal foresees that in cases of actual adverse impacts, companies are required to neutralise them or minimise their extent. This is done through the "payment of damages to the affected persons and of financial compensation to the affected communities. The action shall be proportionate to the significance and scale of the adverse impact and to the contribution of the company's conduct to the adverse impact" (European Commission, 2022c, p. 56). However, the proposal does not provide further details on the amounts to be paid or the recipients of compensation. This means that these forms of reparations are left to the judgement of companies themselves, or potentially to the relevant administrative authority.

Table 4 : The seven dimensions of corporate accountability in the European Commission proposal

Dimensions	European Commission proposal
A. Personal scope	Companies based in the EU with
B. Beneficiaries	Society at large, more specifically stakeholders
C. Material scope	Non-exhaustive list 20 violations of human rights + catch-all clause 12 environmental violations
D. Legal force	Legally binding for companies
E. Due diligence process	Entire value chain (upstream and downstream) Limited to 'established business relationships' Stakeholder consultation where relevant Based on contractual assurances and third-party verification Companies monitor their due diligence process and update their due diligence policy accordingly Companies publish an annual statement on due diligence
F. Enforcement	Administrative supervision and civil liability Burden of proof is on claimants Civil liability does not apply if company took appropriate measures
G. Reparations	Financial and non-financial compensation

Evaluation of the approach

The European Commission CSDDD proposal approach offers both significant advances and major shortcomings. Its personal scope is relatively strong compared to the French and German due diligence laws, but it still only covers a fraction of EU companies. The quasi exclusion of the financial sector and total exclusion of SMEs from the scope are a particularly weak point. Regarding the body of references indicating what standards companies must comply with, the use of a non-exhaustive list fails to provide the legal certainty that many actors were expecting from an EU-wide due diligence framework. Additionally, the lack of real climate due diligence obligations reduces the contribution of the CSDDD to tackling climate change. The conception of due diligence presented in the European Commission's proposal, while having many similarities with the one introduced in the UNGPs, falls short of truly translating its objectives into legally binding obligations. Indeed, the limitation of responsibility to 'established business relationships' creates additional uncertainty, despite the existence of tried and tested language in international standards. The use of this concept excludes short-term business relationships from the scope and could result in increased reliance on smaller, punctual suppliers, increased competition for prices and a race to the bottom for working conditions and the environment. Furthermore, the reliance on private third-party verification for compliance with the due diligence obligations turns them into a box-ticking exercise, which misses the point of due diligence and significantly weakens the Directive. To finish with the due diligence process, the communication requirements do not provide sufficient corporate transparency, as they are unspecified and limited to the due diligence exercise. Finally, the enforcement foreseen in the proposal, although offering two different avenues for legal

action, comes with flaws regarding the burden of proof and the presence of loopholes for civil liability. Overall, this approach offers neither legal certainty, nor harmonious implementation. However, the fact that it imposes direct legally binding obligations on corporations represents a leap from voluntary frameworks, such as the UNGPs. Therefore, it can be argued that the European Commission's CSDDD proposal approach would be a significant contribution to the overall advancement of corporate accountability, but contains flaws that could greatly impede its overall impact.

THE COALITION APPROACH

The Coalition approach is constructed using the two documents mentioned in the introduction, namely 'An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment' (ActionAid International et al., 2020) published in 2020 and the 'Civil society statement on the proposed EU Corporate Sustainability Due Diligence Directive' (ECCJ, 2022). The first one is a 4-page document setting out the Coalition's view on principal elements for effective human rights and environmental due diligence legislation. It was published by 12 CSOs, including ECCHR, as a response to the announcement by the European Commission that the process to draft such a law was in motion. The second one is a 3-page document in the form of a policy statement published in May 2022 and signed by over 200 CSOs. This statement was a reaction to the European Commission's proposal for a due diligence Directive and contains proposed improvements on the existing texts, which serve as recommendations to the co-legislators for the next steps of the legislative process. Indeed, before any framework is adopted, the proposal needs to go through the Council of the European Union and the European Parliament, whose input will greatly impact the final version of the Directive. As such, the 'Civil society statement' can be seen as reinforcing and correcting the European Commission's proposal and thus offering another approach to corporate accountability.

During my traineeship, after I had analysed the European Commission's proposal based on the Coalition's first document outlining elements of effective mandatory due diligence legislation, I started formulating advocacy arguments on behalf of ECCHR, which were later included in the Coalition's response to the proposal. Indeed, the Coalition approach was built using advocacy arguments from all of its members, including ECCHR. As such, I contributed to the civil society response to the European Commission's proposal and development of an alternative approach.

A. Personal scope

The personal scope proposed by the Coalition is a far-reaching one, as it includes "business enterprises, both public and private, including financial institutions, of all sizes and across all sectors, domiciled or based in, operating, or offering a product or service, within the EU." (ActionAid International et al., 2020, p. 4). In that sense, it marks a clear contrast with the three due diligence frameworks seen above, which all had relatively high thresholds in comparison to the scope proposed here. Additionally, the approach taken by the Coalition regarding high-risk sectors is drastically different from that taken by the European Commission. Instead of lowering the threshold for those businesses to be included in the scope - since all companies would already be covered by the due diligence obligations - the

Coalition argues that "[a]lthough cross-sectoral in scope, [the law] should allow for additional measures or specifications for specific sectors, products or activities, especially when they pose high human rights and environmental risk." (ActionAid International et al., 2020, p. 4). Essentially, the Coalition proposes a due diligence framework that is systematic and applies to all companies regardless of their size and does not allow for any exemptions.

B. Beneficiaries

In the statement released following the European Commission's proposal, the Coalition states that the EU framework should aim to have a positive impact on "people, planet and climate" (ECCJ, 2022, p. 1). It further notes that this impact has been "vocally and publicly demanded" by " citizens, workers and communities affected by corporate abuses worldwide" (ECCJ, 2022, p. 1). As such, it can be said that according to the Coalition, all businesses should be accountable to society as a whole, and more specifically to groups that are particularly vulnerable to human rights and environmental harm. The Coalition mentions that rights-holders should benefit from the framework, and specifies that this group includes, but is not limited to "communities, workers, trade unions, civil society and women's organisations, human rights defenders and indigenous peoples." (ActionAid International et al., 2020, p. 2). This definition of rights-holder is much wider than the notion of 'stakeholders' as defined in the European Commission's proposal.

C. Material scope

Regarding the material scope, the Coalition calls for a law that requires corporate compliance with "all internationally recognised human rights, including labour rights, and environmental standards." (ActionAid International et al., 2020, p. 2). Again, the Coalition takes a more systematic approach in this regard than the European Commission. On the body of references contained in the Commission's proposal, the Coalition states that "the corresponding annex would need to be more inclusive in order to integrate all the relevant international instruments and should be updated on a regular basis in order to allow for their further development." (ECCJ, 2022, p. 1). While not specifying the instruments in question, it appears that instead of a non-exhaustive list, the Coalition would favour a version of the material scope that clearly states which instruments are to be respected, all the while allowing additional references to be added to the annex.

Another thing that the Coalition notes as a burning issue in the European Commission's proposal is the complete absence of climate due diligence. In this sense, the annex lacks any reference to international climate agreements, such as the 2015 Paris Agreement, which would make companies responsible for clearly stating how their activities align with the objectives they contain.

D. Legal force

The Coalition supports the adoption of a framework, which imposes direct legally binding human rights and environmental obligations on businesses. These obligations should be subject to both administrative supervision and civil liability, and enforced by Member States, as is the case in the European Commission's proposal. Furthermore, the Coalition

also states that civil liability provisions should be considered overriding in cases where the law of a third country is applicable.

E. Due diligence process

The Coalition pushes for an approach to corporate accountability, where due diligence is used to assess the compliance of businesses with international instruments. Indeed, the Coalition notes that "due diligence has emerged as one of the primary tools for business enterprises, including financial institutions, to live up to their responsibilities towards people and planet." (ActionAid International et al., 2020, p. 1). In accordance with international standards, the Coalition defines due diligence as "a continuous, preventative, risk-based process through which all business enterprises must effectively identify and assess; cease, prevent and mitigate; track and monitor; and communicate and account for specific risks and actual and potential adverse impacts in their operations and along their global value chains and business relationships." (ActionAid International et al., 2020, p. 2). While it may appear similar to the European Commission's conception of due diligence, the process supported by the Coalition contains additional, non-negligible elements.

Regarding the reach of the due diligence obligations, the Coalition insists that the focus of the framework "must be on identifying and mitigating the risks in the entire value chain." (ActionAid International et al., 2020, p. 4). This means that companies should be responsible for potential and actual adverse impacts in the upstream and downstream parts of their value chain, which challenges the view of the European Commission. In its 2022 statement, the Coalition argues that the concept of 'established business relationships' used as a limitation to the due diligence obligations in the Commission's proposal "falls behind international standards and risks generating perverse incentives for companies to restructure their value chains in order to avoid their due diligence obligation." (ECCJ, 2022, p. 1).

While the European Commission's proposal does mention the need for stakeholder consultations 'where relevant', the Coalition states that effective, meaningful and informed consultations must be conducted at all stages of the due diligence process. Once again, the Coalition proposes a more systematic approach than the European Commission. It specifies that such consultations must be conducted "with both affected and potentially affected rights-holders, including but not limited to communities, workers, trade unions, civil society and women's organisations, human rights defenders and indigenous peoples." (ActionAid International et al., 2020, p. 2). Additionally, companies must take the necessary steps to lift any barriers to the participation of stakeholders in these consultations, as well as ensure that they are able to participate safely without fear of reprisal. The Coalition notes that the reason for these consultations is for rights holders to contribute to the shaping of, and have confidence in, the due diligence strategy and its implementation." (ActionAid International et al., 2020, p. 2).

According to the Coalition, the identification or risks in value chains by companies should be adaptive to the diversity of rights-holders, as many of them "face additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, sexual orientation, disability, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, poverty, or other

factors." (ActionAid International et al., 2020, p. 3). The Coalition stresses the importance of adopting specific methodologies to identify gendered adverse impacts and is particularly concerned by the lack of a gender and intersectionality perspective in the European Commission's proposal (ECCJ, 2022).

In the process of ceasing, preventing, and mitigating negative human rights and environmental adverse impacts, the Coalition proposes that companies take all necessary steps, such as modifying their "own purchasing practices and ensuring that suppliers have the financial capacity to comply with human rights and environmental standards." (ActionAid International et al., 2020, p. 3). In some cases, such as when free, prior and informed consent is not obtained in the context of a given activity, the project should cease altogether. Such a provision would have been helpful in the case of the Mexican wind farm mentioned above, as the representatives of affected communities could have invoked this fault to bring the project to a halt even before Mexican authorities cancelled it. However, in cases where activities or business relationships are terminated, the Coalition notes that "the directive must mandate responsible disengagement by clarifying that companies remain responsible for un-remediated impacts as well as addressing new and additional impacts arising from the disengagement." (ECCJ, 2022, p. 3). Under this approach, when tracking and monitoring the implementation of their due diligence measures, companies should use their results to inform changes to the global business operations, as opposed to only their due diligence policy, as foreseen in the European Commission's proposal.

To complete the due diligence process, the Coalition proposes that businesses should regularly and publicly disclose "detailed, relevant, timely and meaningful information about their operations and value chain as well as their due diligence processes and the findings, activities and outcomes thereof." (ActionAid International et al., 2020, p. 3). These communications must also be made easily accessible to rights-holders "for example by taking account of language and literacy levels." (ActionAid International et al., 2020, p. 3). In reaction to the communication requirements set out in the European Commission's proposal, the Coalition deplores the lack of "[e]ssential value chain transparency and disclosure requirements" and suggests that companies should be required to "map their value chain and business relationships and publish the relevant information." (ECCJ, 2022, p. 3).

As mentioned above, the Coalition regrets the absence of real due diligence obligations related to climate change. As such, the framework should contain "an immediate duty for companies to address climate change risks and impacts in their value chains," which "must be enforceable through action from public authorities, as well as civil liability." (ECCJ, 2022, p. 2).

Regarding the verification of compliance of companies with their due diligence obligations, the Coalition notes that the European Commission's proposal "gives considerable weight to codes of conduct, contractual clauses, third party audits and industry initiatives, which have proven to be insufficient means to identify and address human rights violations and environmental damage." (ECCJ, 2022, p. 3).

F. Enforcement

As is the case in the European Commission's proposal, the Coalition proposes that the due diligence obligations be enforced by EU Member States. It states that "Member States must put in place effective measures to ensure compliance with the above-mentioned obligations as well as access to remedy, including judicial remedy, for victims." (ActionAid International et al., 2020, p. 4). To this end, the Coalition suggests enforcement through administrative and judicial authorities, whereby "[a]dministrative authorities should be able to act on their own initiative, and both administrative and judicial authorities should be able to act on a complaint by third parties, including members of the public and, as such, civil society organisations and trade unions" (ActionAid International et al., 2020, p. 4). By judicial authorities, the Coalition refers to competent courts regarding the companies' civil liability and adds that "grounds for liability must be established on the basis of failure to carry out due diligence." (ActionAid International et al., 2020, p. 4).

These forms of enforcement are actually present in the European Commission's proposal, but include significant flaws, namely the burden of proof on claimants and the presence of loopholes to avoid civil liability. On the one hand, the Coalition proposes that the burden of proof be on the company "to prove whether it acted appropriately or not" and not "on the claimant who has limited resources and little access to evidence." (ECCJ, 2022, p. 2). On the other hand, the Coalition insists that there should be no possibility for companies that have contributed to human rights or environmental adverse impacts to escape liability, "even when they have sought to verify compliance through industry schemes and third-party audits." (ECCJ, 2022, p. 2).

G. Reparations

Under the Coalition approach, businesses have the obligation to take an active role in providing for or cooperating in the remediation of adverse impacts. In general, the Coalition explains that "[r]emedy may include, but is not limited to, financial or non-financial compensation, reinstatement, apologies, restitution, rehabilitation, contribution to investigation as well as the prevention of additional harm through, for example, guarantees of non-repetition." (ActionAid International et al., 2020, p. 4). Additionally, businesses are responsible for ensuring that remedy is effective and that rights-holders agree with the form of remedy. The remedy provided by the company must also take into account the diversity of backgrounds of rights-holders and their vulnerability.

Table 5 : The seven dimensions of corporate accountability in the Coalition approach

Dimensions	Coalition approach
A. Personal scope	All companies based in or operating in the EU
B. Beneficiaries	Society at large, more specifically rights-holders
C. Material scope	Exhaustive list, including climate change references To be specified
D. Legal force	Legally binding for companies
E. Due diligence process	Entire value chain (upstream and downstream) No limitation of the due diligence obligations Systematic rights-holder consultation Climate change due diligence Companies modify their practices to implement due diligence Responsible disengagement Companies monitor their due diligence and update their global operations Companies regularly and publicly disclose relevant information and map their value chain
F. Enforcement	Administrative supervision and civil liability Burden of proof on companies Civil liability applies in all situations
G. Reparations	Financial and non-financial compensation

Evaluation of the approach

Overall, the approach to corporate accountability proposed by the Coalition is an ambitious one, but requires some specifications. In terms of personal scope, it proposes to cover companies of all sizes and active in all sectors, which are based or operate in the EU. This systematic approach would ensure that no company is exempted from the due diligence obligation. The Coalition uses the notion of rights-holders, as opposed to that of stakeholders, extending the responsibility of companies to an even greater number of individuals who could potentially be affected by human rights or environmental adverse impacts caused by corporations. The material scope proposed by the Coalition would cover a wider, more systematic body of references and would allow for the possibility to update it when necessary. It would also contain international agreements on climate change and subject companies to climate due diligence. However, these instruments are not specified, which means this approach would require further discussion on the definition of the material scope. The due diligence process described by the Coalition is particularly ambitious, as it would cover the entirety of value chains, with no limitations, such as the notion of 'established business relationships' used in the European Commission's proposal. Additionally, the Coalition proposes a systematic and meaningful consultation of rights-holders at every step of the due diligence process, which ensures that they are given a voice in situations where they might be affected. The process of identification of potential or actual adverse impacts should be carried out using a gender-responsive methodology, with an intersectional perspective. The responsibility of companies would extend not only to

cases where there are potential or actual human rights or environmental adverse impacts, but also when business relationships are terminated as a result of those impacts. They would bear the duty of disengaging in a responsible manner. Stricter requirements for communication on due diligence activities and value chain transparency would complement the process. The verification of compliance with due diligence obligations through third-party audit is not sufficient under this approach. Finally, the enforcement of the due diligence obligations would be done through administrative supervision and civil liability, as is the case in the European Commission's proposal. The slight but important differences are that the burden of proof would be placed on companies in court, and that no measure could allow them to avoid civil liability. As such, the Coalition approach to corporate accountability is far-reaching and ambitious, and offers an effective alternative to the flaws contained in the European Commission's proposal. With specifications from the co-legislators on a few elements, it could prove a strong approach to corporate accountability in the EU and beyond.

COMPARATIVE ANALYSIS OF THE TWO APPROACHES

In this section, I will briefly compare the findings from the two analyses presented above through the prism of the seven dimensions of corporate accountability. Overall, the two approaches to corporate accountability presented in this thesis have a lot in common. Indeed, they both draw from similar principles, but the few differences they contain are determinant factors to assess their potential for corporate accountability. Regarding the personal scope, the European Commission adopts a pragmatic approach, limiting due diligence obligations to companies with a minimum number of employees and minimum net turnover - with thresholds lower than the French and German due diligence laws. On the other hand, the Coalition approach proposes a systematic approach, whereby all businesses based and operating in the EU would be subject to due diligence obligations. The body of references contained in the European Commission's proposal is non-exhaustive, and therefore does not provide the legal certainty expected from this Directive. The Coalition suggests that an exhaustive list of conventions and the inclusion of climate agreements to the body of references would make for a more certain and more ambitious material scope. However, the Coalition does not provide said exhaustive list, which could be seen as a way of leaving a greater margin of appreciation to the co-legislators, but also as a shortcoming of the approach.

Although both approaches draw from the UNGPs for their conception of due diligence, they differ greatly in their application. The European Commission proposes due diligence obligations, which stops at the level of 'established business relationships' and where consultations with stakeholders are only conducted 'where relevant'. The heavy reliance on third-party verification turns the entire process into a box-ticking exercise and therefore falls short of the process described in the UNGPs. The Coalition, on the other hand, proposes a dynamic form of due diligence that stretches through the entire value chain, with systematic consultation of rights-holders and regular updates of company policies and practices based on the findings of the due diligence process. While both approaches rely on Member States for the enforcement of the due diligence obligations through administrative supervision and civil liability, the European Commission's proposal is substantially weakened by the presence of major flaws relating to access to justice. The Coalition proposes to place the burden of proof on companies and to get rid of exemptions from civil liability, even when companies have taken appropriate measures to prevent adverse impacts.

Seeing as the two approaches are relatively close, it can be said that the weaknesses present in the European Commission proposal lie in details and application, rather than in the overall architecture of the proposal. In this sense, the Coalition approach proposes to bridge the gaps contained in the European Commission's proposal. More specifically, the main flaws it addresses are the personal scope, the concept of 'established business relationships', the box-ticking approach to due diligence, as well as issues with access to and applicability of justice. In general, the Coalition is very realistic in its demands and proposes an approach to corporate accountability that is strong, yet achievable when compared to existing international standards. In line with the recommendations of the UN Working Group on Business and Human Rights to turn the UNGPs into mHRDD, the Coalition approach ensures that the CSDDD remains close to the text of the UNGPs, using

existing language, offering more legal certainty and a level playing field, at least at the EU level. As such, the Coalition approach to corporate accountability is significantly stronger than the European Commission's proposal.

Table 6 : The seven dimensions of corporate accountability in the European Commission proposal and the Coalition approach

Dimensions	European Commission proposal	Coalition approach
A. Personal scope	Companies based in the EU with 500+ employees and a net turnover of EUR 150+ Companies Financial companies have limited due diligence obligations	**All companies based in or operating in the EU**
B. Beneficiaries	Society at large, more specifically stakeholders	Society at large, more specifically rights-holders
C. Material scope	Non-exhaustive list 20 human rights violations + catch-all clause 12 environmental violations	**Exhaustive list, including climate change references** **To be specified**
D. Legal force	Legally binding for companies	Legally binding for companies
E. Due diligence process	Entire value chain (upstream and downstream) Limited to 'established business relationships' Stakeholder consultation where relevant Based on contractual assurances and third-party verification Companies monitor their due diligence process and update their due diligence policy accordingly Companies publish an annual statement on due diligence	Entire value chain (upstream and downstream) **No limitation of the due diligence obligations** **Systematic rights-holder consultation** **Climate change due diligence** **Companies modify their practices to implement due diligence** **Responsible disengagement** **Companies monitor their due diligence and update their global operations** **Companies regularly and publicly disclose relevant information and map their value chain**
F. Enforcement	Administrative supervision and civil liability Burden of proof is on claimants Civil liability does not apply if company took appropriate measures	Administrative supervision and civil liability **Burden of proof on companies** **Civil liability applies in all situations**
G. Reparations	Financial and non-financial compensation	Financial and non-financial compensation

This comparative analysis has highlighted a number of key differences concentrated in four out of the seven dimensions of corporate accountability, as shown in Table 6. These dimensions are the personal scope, material scope, due diligence process, and enforcement of the respective approaches.

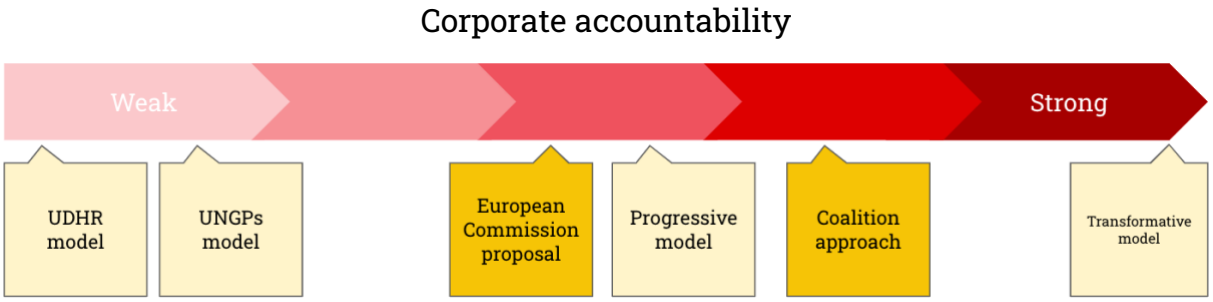
To situate the two approaches relatively to the ones presented by Bernaz (2020), neither of the two approaches are quite as strong as the transformative model, as they do not foresee criminal liability of companies or international judicial enforcement. This comes as no surprise in the case of the EU Directive, as not all Member States provide for the criminal liability of companies in their national jurisdictions. Essentially, basing the enforcement of the framework on administrative sanctions and civil liability ensures that all Member States already have the legal tools to take action as soon as the Directive comes into force. As such, it can be argued that both of them are close to the progressive model, as they impose direct legally binding human rights and environmental obligations on companies to be enforced by Member States. Whereas the feature of national enforcement is seen as a weakness of the progressive model according to Bernaz, EU Directives are designed to be incorporated by Member States into their national legislation. In fact, this form of enforcement could even prove beneficial to the advancement of corporate accountability, as national administrative authorities could initiate investigations into due diligence compliance among companies headquartered within their national jurisdiction.

Regarding the personal scope, Bernaz notes that while the UNGPs apply to all businesses, under the progressive model corporations would be subject to legally binding obligations, which would make this "broad-brush approach" more difficult (Bernaz, 2020, p. 55). This argument also seems to be present in the European Commission's proposal, as the thresholds it contains drastically restrict the number of companies to which the Directive would apply. While it can be argued that this would allow for easier implementation of the due diligence obligations, this less ambitious approach would leave out a number of companies whose value chains also have a high risk factor. Ultimately, the path chosen by the European Commission when faced with this trade-off can only yield a relatively weak form of corporate accountability.

From accountability to rights-holder to the application of the due diligence process, it shows similarities with the progressive model, which Bernaz sees as the most adequate one for immediate application - whereas the transformative model would require solving a host of legal challenges before being implemented. Regarding the enforcement of the framework, Bernaz notes that under the progressive model, "[a]ccess to justice for victims of corporate abuse is therefore as good as access to justice for victims of human rights abuse generally in the state in question" (Bernaz, 2020, p. 56). In this case, it can be argued that the good quality of judicial systems in EU Member States would guarantee effective enforcement of the due diligence obligations - that is, if the Directive does not contain barriers to justice, which is the case in the European Commission's proposal.

All in all, it can be said that the Coalition approach would constitute a more significant step forward for corporate accountability than the European Commission's proposal. Its more systematic personal scope and guaranteed access to justice make it stronger than the progressive model, while the European Commission's proposal lags behind because of its significant flaws in those areas. Figure 3 shows where the two approaches rank on the corporate accountability strength spectrum presented earlier.

Figure 3 : Corporate accountability strength spectrum, including the European Commission proposal and the Coalition approach



Ultimately, when EU decision-makers debate the substance of the CSDDD, these four dimensions - the personal scope, material scope, due diligence process, and enforcement - will be the key determinants of the Directive's strength and potential for achieving corporate accountability.

CURRENT DEVELOPMENTS

In this section, I will briefly present current developments taking place for the two approaches, with the legislative process at the EU level on the one hand, and the work done by the Coalition on the other.

LEGISLATIVE PROCESS AT THE EU LEVEL

It remains to be seen whether the next steps of the legislative process will take the CSDDD closer to the approach proposed by the Coalition. For now, it seems that the possibility of a Directive yielding strong corporate accountability is somewhat threatened. Indeed, the latest development in the legislative process is the adoption of a so-called 'General Approach' by the Council of the EU ("Council") on 1st December, 2022 (Council of the European Union, 2022b). This document is a compromise version, which ministers from the 27 Member States agreed upon and will be using in their negotiations with the European Parliament.

As it stands, this version of the CSDDD could prove an even weaker approach to corporate accountability for two main reasons. The first one is that in addition to the quasi exclusion of the financial sector proposed by the European Commission, the Council has agreed on a total exclusion of investment companies from the scope of the Directive. The second one is the replacement of the notion of 'value chain' - describing all activities related to the product or service, whether upstream or downstream - to the new concept of 'chain of activities'. This untested concept is based on that of 'supply chain' - covering only upstream activities - with the addition of the distribution, transport, storage, and disposal phases. This excludes the use phase from the scope of the framework, which poses particular threats in sectors where the use of products can lead to human rights and environmental adverse impacts, such as the weapons or chemicals industries. Keeping these major modifications in the final version of the text would substantially weaken the Directive and its contribution to corporate accountability.

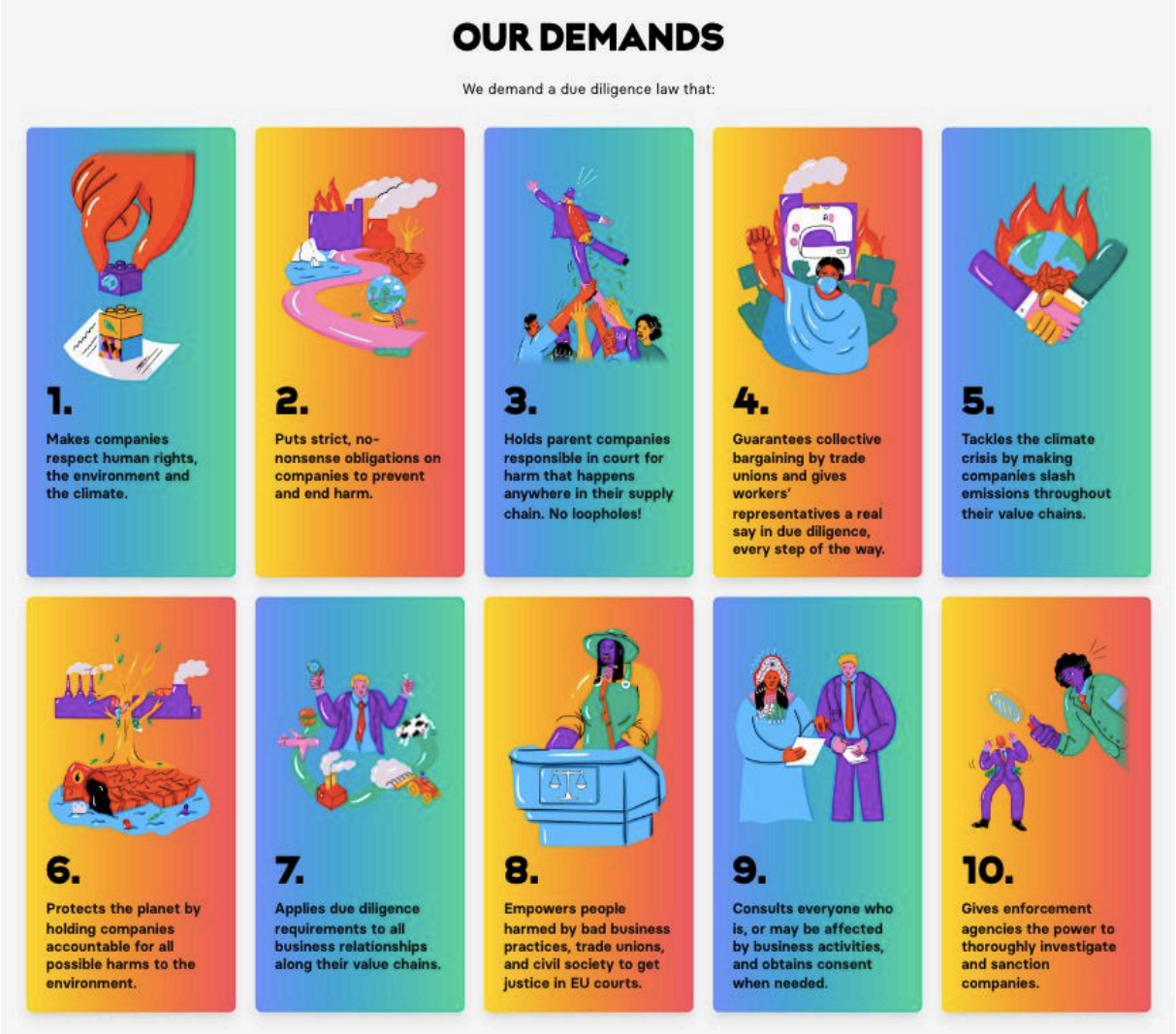
However, the European Parliament still has a significant role to play in the co-legislative process before a final version of the text is adopted. Bearing in mind that the recommendations to the European Commission formulated in its resolution from 10th March, 2021 were more ambitious than the contents of the proposal, which came out of it, the perspective of a CSDDD offering a stronger approach to corporate accountability remains possible.

THE COALITION

At the time of writing, the Coalition is still advocating with the EU institutions to try and get a version of the Directive that includes its demands and bridges the gaps to corporate accountability left in the European Commission's proposal. Since the publication of the European Commission's proposal, there have been over 15 disclosed meetings between Members of the European Parliament (MEPs) and representatives of the Coalition

(European Parliament, 2022). On 16th December, 2022, in reaction to the General Approach adopted by the Council of the EU threatening to further weaken the Directive, members of the Coalition - including ECCHR and ECCJ - published a 4-page statement clarifying that the due diligence expectations in the OECD Guidelines for Multinational Enterprises and the UNGPs apply to the fill value chain, including downstream business relationships (Wilde-Ramsing et al., 2022). In this statement, they echo a statement by the OHCHR published in September 2022, noting that if the EU were to restrict the extent of the due diligence obligations in the CSDDD by excluding downstream activities, it would "undermine the international consensus", "not align" with international standards, "neglect significant human rights impacts", and "undercut the stated objectives" of due diligence (OHCHR, 2022a). This shows that the Coalition is already anticipating the next phases of the legislative process and acting upon the need for due diligence obligations applicable throughout entire value chains as a key component of corporate accountability.

Figure 4 : The 10 demands of the 'Justice is Everybody's Business' campaign



Source : Justice is Everybody's Business (2022)

To complement its political advocacy work, the Coalition recently launched a campaign to raise awareness, garner public support, and put the spotlight on the discussions on corporate accountability taking place within EU institutions. This campaign, launched on 6th September, 2022 is titled 'Justice is Everybody's Business' and is built around 10 demands of the Coalition for a strong European due diligence framework.[13] This campaign gives the Coalition's advocacy work a public face and is deployed on social media, as well as during public events. Along with these actions, the Coalition also launched a petition as part of the campaign, which has gathered over 80,000 signatures as of December 2022.

Figure 5 : Launch of the 'Justice is Everybody's Business' campaign on Place du Luxembourg in Brussels, on 6th September, 2022

Source : Justice is Everybody's Business (2022)

[13] For the 'Justice is Everybody's Business' campaign, the Coalition is composed of a steering group of 6 organisations, as well as other CSOs supporting the campaign. CSOs are welcome to join the list of supporting organisations by reaching out to the steering group. A sign-up form is available on the campaign's website. At the time of writing, the group of supporting organisations is composed of 107 CSOs. The full list can be found on the campaign's website: https://justice-business.org/about/.

CONCLUSION AND OUTLOOK

In this thesis, I have presented an analysis of two competing approaches to corporate accountability for the development of an EU Directive on human rights and environmental due diligence. The aim of this thesis was to determine which of the European Commission's proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) or the Coalition approach constitutes a stronger framework for corporate accountability. To do so, I presented ECCHR - the organisation in which the traineeship was completed - and the Coalition advocating for corporate accountability at the EU level. Then, a literature review on corporate accountability was presented, along with a state of the evolving policy field of due diligence, followed by the analytical framework conceptualising corporate accountability by Bernaz (2020) used in the analysis. Finally I presented an analysis of each approach, as well as a comparative analysis to determine which one constituted a stronger framework for corporate accountability.

The analysis has shown that while relatively close to Bernaz's progressive model, the approach proposed by the European Commission contains major shortcomings. These shortcomings are concentrated in four out of the seven dimensions of corporate accountability, namely the personal scope, the material scope, the due diligence process, and the enforcement of the framework. One of the features that specifically impede the proposal's potential are its unambitious scope, limiting the number of companies to only a fraction of all businesses based and active in the EU. Additionally, its non-exhaustive body of references for human rights and environmental standards prevent it from offering the legal certainty that many were expecting from this framework. The limited extent and box-ticking approach to the due diligence process in the proposal falls short of the aims of due diligence described in international standards, such as the UNGPs, which fails to achieve a level playing field. Finally, the burden of proof placed on plaintiffs and the presence of loopholes allowing companies to escape civil liability imply that the European Commission's proposal fails to provide easy access to justice and effective remedy for affected persons. For these reasons, this proposal does not constitute a strong framework for corporate accountability.

The Coalition approach proposes to bridge the gaps contained in the European Commission's proposal by offering a much more systematic approach and removing exemptions and legal loopholes from the Directive. By proposing to include all business based and active in the EU and to extend the due diligence obligations to the entire value chain without limitation, the Coalition approach ensures that all adverse impacts arising from business activities are adequately addressed. The due diligence process proposed in this approach is generally more dynamic and leads to more impactful change, be it through the adaptation of global activities based on the findings of the process or the public disclosure of value chain maps. The question of access to justice and effective remedy is solved by reversing the burden of proof onto the companies, which would be responsible for proving that they did not cause or contribute to negative adverse impacts, as well as by removing the possibility for companies to escape civil liability. The only challenges in the Coalition proposal that the analysis has highlighted are the potential difficulty in ensuring the compliance of all businesses with their due diligence obligations given their number, as well as the need for a clearly defined exhaustive list of international human rights,

environmental, and climate standards for the material scope. Despite these challenges, the Coalition approach would maximise the impact of the directive by aligning with international standards, thereby creating a level playing field within the EU and beyond. Overall, this approach constitutes a much stronger framework for corporate accountability than the European Commission's proposal.

Currently, the Corporate Sustainability Due Diligence Directive is far from its final form and it could take several years before it enters into force. The next steps of the legislative process will certainly require important discussions - especially on the four dimensions of corporate accountability highlighted in this thesis - between a more conservative Council and a more progressive Parliament. The several amended versions of the Directive that will arise from this co-legislative process could each be the subject of analysis such as the one presented in this thesis and compared to the two existing approaches. In any case, given the importance of this topic, it can be expected that civil society will continue to organise and advocate for strong frameworks for corporate accountability in the EU and beyond. These developments should be the focus of further academic attention and inform similar processes and initiatives globally.

RECOMMENDATIONS

My traineeship at ECCHR was not based on a specific set of tasks and did not require me to make recommendations to the organisation in my report, as is often the case for academic internships. However, the outcomes of the analyses presented above have led to the formulation of recommendations to the Coalition, to ECCHR, to EU co-legislators, and to other CSOs advocating for corporate accountability. As more and more legislative proposals for due diligence frameworks are formulated around the globe, CSOs concerned with the impact of corporations on human rights, the environment and the climate have a crucial role to play in ensuring strong approaches to corporate accountability. Strategies adopted by the Coalition in its advocacy work with EU institutions can be replicated for maximal impact.

Recommendations to the Coalition

1. Articulate further advocacy efforts around the four critical dimensions of corporate accountability - personal scope, material scope, due diligence process, and enforcement.

2. Propose a material scope for the CSDDD with an exhaustive list of references covering human rights, environmental and climate obligations.

3. Insist on inscribing the reversal of the burden of proof in the Directive.

4. Push for the removal of possibilities to avoid civil liability for companies in the implementation of the Directive.

5. Monitor the co-legislative process and ensure the due diligence obligations do not fall lower than those contained in the European Commission's proposal.

6. Insist on keeping investment companies within the scope of the Directive and extending the full due diligence obligations to the financial sector.

7. Insist on removing the concepts of 'chain of activities' and 'established business relationships' from any future versions of the Directive.

Recommendations to ECCHR

8. Communicate on past and ongoing cases, especially those using the French 'Loi de vigilance', to show the need for due diligence legislation at the EU level.

9. Use its network of partner organisations to identify opportunities to advocate for due diligence legislation in other jurisdictions and support those efforts.

Recommendations to EU co-legislators

10. Create a formal forum for civil society consultations on the CSDDD.

11. Use this forum to review amended versions of the Directive with CSOs throughout the co-legislative process.

Recommendations for civil society advocacy for corporate accountability

12. Identify opportunities for due diligence legislation in other jurisdictions.

13. Build coalitions with like-minded NGOs, trade unions, and other organisations to gain legitimacy when advocating for strong corporate accountability frameworks with decision-makers.

14. Support due diligence legislation that is as close as possible to the UNGPs in order to ensure a level playing field with other jurisdictions, as suggested by the UN Working Group on Business and Human Rights.

15. Include mandatory environmental and climate due diligence in proposals, in addition to the mandatory human rights due diligence set out in the UNGPs.

16. Organise public campaigns to gather public support for the advocacy work.

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