Institutional Investors and Sustainability

An Analysis of Institutional Investors' Legal Due Diligence Obligations

Master's Thesis in European and International Trade Law

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Abstract

The European Union's Sustainable Finance Agenda has launched several new actions in order to reorient capital flow of the financial market to sustainability objectives. One of these initiatives was to unify and harmonize the rules on marketing of sustainable aims of financial products. Financial Market Participant, including institutional investors, are obligated to disclose their due diligence polices under article 4 of the Sustainable Finance Disclosure Regulation. However, the regulation itself is unclear on the contour of this duty but some details are laid down in other EU legislative acts.

Human Rights due diligence is a paramount tool for institutional investors to fully comprehend and manage risks associated with social sustainability. The primary soft law instruments available on the global arena specifically addressing due diligence are the Organization for Economic Co-operation and Development's Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights. The former of which has produced additional practical recommendations expressly dedicated to the due diligence process for institutional investors.

Treaties from the International Labor Organization, national legal developments and privately initiated schemes can provide clarity in the jungle of legal framework. Due to limited scope or jurisdictional boundaries these have a restricted impact.

Keywords: Sustainable Finance Disclosure Regulation, Human Rights Due Diligence, Institutional Investors, Greenwashing, Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises, National Contact Point.

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List of Abbreviations

ESA	European Supervisory Authority
ESG	Environmental, Social, and Governance
ESMA	European Securities and Markets Authority
EU	European Union
ILO	International Labor Organization
NBIM	Norwegian Bank Investment Management
NCP	National Contact Point
NFRD	Non-Financial Reporting Directive
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-Operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
PAI	Principal Adverse Impact
RTS	Regulatory Technical Standards
SFDR	Sustainable Finance Disclosure Regulation
SDG	Sustainable Development Goals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights

1 Introduction

1.1 Background

In recent decades there has been a steep increase in the interest of sustainability-oriented investment strategies. 2021 testified to record high of capital inflow in sustainable fund assets which can presumably be deduced to both extreme weather changes and social injustice around the world.[1] The sustainability market trend has taken over the financial marketing sector in which sustainability is predominantly marketed as ESG which is an acronym for environmental, social and governance. [2] Each letter indicates a non-financial investment aim where investors pursue a combination of maximizing shareholder value but still choosing sustainable investments. [3]

One of the earliest international developments on the topic of ESG was launched by a UN report linked to the Global Compact initiated by the former Secretary-General Kofi Annan with the goal of forming universal business principles. In the so called 'Who Cares Wins' report it highlighted the connection between sustainable investment decisions and more resilient economy.[4] The EU has continued to foster this perception through initiation of the Sustainable Finance Agenda particularly targeting the investment community of the internal market.[5]

Studies testify to 70% of European institutional investors claiming that sustainability objectives are imperative to diversify and manage their portfolio risks.[6] Institutional investor's investment chains range in complexity and length, where the involvement of various intermediaries impedes the ability for end investors to predict or engage in the investment itself.[7]

[1] Ross Kerber and Simon Jessop, Reuters, Analysis: How 2021 Became the Year of ESG Investing, (23 December 2021) https://www.reuters.com/markets/us/how-2021-became-year-esg-investing-2021-12-23/.
[2] Tracy Dathe, Réne Dathe, Isabel Dathe and Marc Helmold, *Corporate Social Responsibility (CSR) Versus Environmental Social Governance (ESG): Approaches to Ethical Management*, (Springer International Publishing 2022), 134.
[3] ibid., 117.
[4] UN Global Compact, 'Who Cares Wins – Connecting Financial Markets to a Changing World', (2004) available from: https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf, 3.
[5] European Commission, Action Plan: Financing Sustainable Growth, COM (2018) 97 final (8 March 2018).
[6] Natixis Global Asset Management, When. Not if.: Institutions Prepare for the Fallout of a Market Shift, (2017) available from https://www.im.natixis.com/us/resources/2017-institutional-investor-survey.
[7] OECD, G20 Principles of Corporate Governance, (Paris: OECD Publishing, 2015), 29, available from https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1653378758&id=id&accname=ocid177253&checksum=7D4EEFDE1DCBC1B7690710A6E6B850D.

1.2 Purpose and Research Questions

Following the introduction, the purpose of this thesis is threefold. Firstly, it aims is to describe and analyze the due diligence duties of institutional investors found in article 4 of the SFDR. The Regulation does specify that the due diligence procedure must be aligned with international standards for instance the OECD Guidelines on responsible business conduct. Yet, the problem remains that it does not clarify the minimum assurance that the investors must maintain in relation to the due diligence process.

Secondly, as article 4 of the SFDR calls for extensive disclosure obligations regarding sustainability it would be necessary to examine the doctrine of human rights due diligence, primarily developed by the UNGPs and its working group, to fully comprehend the extent of due diligence in connection to sustainability objectives. In search of these broader requirements contemporary market practice will also be scrutinized as these legal developments have been adopted relatively recently.

Thirdly, in the absence of international mandatory due diligence obligations prompts the assessment of current legal trends and examine if the contemporary approaches could sufficiently govern the realms of binding due diligence legislation.

With this background and aim this paper will seek to answer and evaluate the following questions:

I. What should be disclosed in the financial market participant's due diligence process, at a minimum, in accordance with article 4 of the SFDR?
II. To what extent can the doctrine of human rights due diligence assist the institutional investors in managing the adverse impact of a social nature?
III. What are the current legislative acts methods of imposing due diligence and which of these is the most suitable alternative to regulate due diligence?

1.3 Method and Materials

1.3.1 EU Legal Sources

To fulfil the purpose of the thesis of primarily examining the SFDR, requires the study of EU legislation and therefore the EU legal method must be observed. The different legal sources

within EU law are divided into a hierarchical system that forms a part of every Member States' jurisdiction where the SFDR, the Taxonomy and the NFRD are incorporated. Considering that the SFDR has only been in force since last spring, there is an absence of case-law and the variety of legal and non-legal sources on the Regulation, notably literature, has been limited.

Regulations are directly binding upon all member states in its entirety, this type of law-making is generally considered to be technical and detailed which give no right of interpretation to the member states.[8] A directive is also binding; however, the member states enjoy a wide margin in the choice of implementation method if the same outcome is attained. [9] McLeod commends that the directives can be perceived as giving incentives in order to make amendments in the national jurisdictions without such change directly instituted by the EU.[10]

Article 288 of the TFEU states that regulations, directives, recommendations, decisions, and opinions must be enacted by the institutions in completion of the Union's duties.[11] All legal acts are translated into the official languages of the EU, therefore, enjoy the same formal status and are equally authentic. Preparatory works within the EU legal system are labeled as consultation documents, divided between green or white papers and communications. Green papers are issued by the Commission with the intention to encourage and create a foundation for political discussion. Subsequently, a proposal from the consultations for an EU action is engendered and outlined in the white paper. [12]

1.3.2 Doctrine of Direct Effect

Direct effect is a unique doctrine within EU law established by the Court of Justice of the EU in the case of Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*[13] where it was held that 'a new legal order of international law for the benefit of which the states have limited their sovereign rights … and the subjects of which comprise not only the Member States but also their nationals.'[14] Hence, the Court contended that the treaties does not only enforce obligations upon Member States but simultaneously could not hinder creating rights for

[8] Ulf Bernitz and Anders Kjellgren, *Introduktion till EU,* (Norstedts Juridik 2021), 51.
[9] Consolidated Version of the Treaty on European Union [2008], OJ C115/13, article 249.
[10] Ian McLeod, *Legal Method,* (Macmillan Press Ltd 1996), 90.
[11] TEU (n 9), article 288.
[12] McLeod, (n 10), 333.
[13] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1–2.
[14] ibid., 12.

individuals.[15] It could be construed that if individuals would be able claim Union rights at the national level the article in question confers direct effect in national jurisdictions.[16]

A year later, the Court affirmed in Case 6/64 *Costa v ENEL* that EU law enjoys primacy over national legal acts because of the treaties' original character it cannot be quashed by domestic legislation.[17] Since this landmark judgment, the principle of EU legal primacy has been a cornerstone in developing cohesion within the Union and its legal effects in the Member States' jurisdictions.[18]

1.3.3 Teleological Interpretation

A central component in understanding EU law is applying the main interpretation method exercised by the EU courts which is the teleological interpretation method used when the wording or the context of the law is unclear. Due to the relatively vague phrasing of the provisions where the secondary sources are intended to have a gap-filling function, might still create a lacuna. Accordingly, the courts have to review the entirety of a principle's context for it to be harmonized with the aims of the treaties.[19]

The teleological method appears to generate the least unreasonable interpretation and closest reading to the original objective of the law, even in unregulated circumstances it directs judges to seek the true aim of the legal document.[20] Additionally, priority is given to the interpretation that best fosters the efficiency of the provision and practical advantages.[21]

Considering the range of legal traditions in the Member States, where judges do not enjoy the same liberty when interpretating the law the EU adopted the procedure of preliminary rulings. The judges at the national courts have the opportunity to ask questions to the Court of Justice relating to interpretation of EU law.[22] These preliminary rulings are binding upon the national

[15] Case 26/62 *Van Gend en Loos* (n 13),12.
[16] Carl Fredrik Bergström and Jörgen Hettne, *Introduktion till EU-rätten*, (Studentlitteratur 2014), 110.
[17] Case 6/64 *Costa v ENEL* [1964] ECR 585, 594.
[18] Bergström and Hettne, (n 16), 117.
[19] Bergström and Hettne, (n 16), 335.
[20] Bergström and Hettne, (n 16), 394.
[21] Bert Lehrberg, *Praktisk Juridisk Metod*, (Iusté 2020), 148.
[22] Consolidated Version of the Treaty on the Functioning of the European Union, [2008], OJ C115, art 267.

court and induces consistent interpretation.[23] In the same manner, article 19.1 of the TEU clarifies that the courts' function is also to act as the guardian of a unified legal perception.[24]

In pursuance of an EU act's legitimate aim is often found in the preamble where considerations and objectives are laid down, comparable to Swedish preparatory works. Hence, the preamble is not legally binding but is valuable for interpreting the act. [25] This is reinforced by article 296 TFEU which dictates that all legal acts must explain its underlying rationale and refer to the documents on which it is established.[26] Alongside the binding sources, EU maintains documents of a non-binding nature such as opinions and recommendations.[27] Although, they are not binding upon the Member States yet fulfil a significant role in the capacity as a navigation system for judges in search of guidance.[28]

Primary EU law is composed of the founding treaties, particularly the Treaty on the Functioning of the European Union[29] and the Treaty on the European Union[30], both have the same judicial standing which together form the supreme source, thus, takes precedence over other legal sources. Stipulated in these sources are the political and judicial powers of the Union[31] and govern the conditions of secondary legislation.[32] Thus, it is perpetually relevant to resort to the primary sources when interpreting EU law.

1.3.4 Soft Law Sources

There are multiple legislative acts that address corporate human rights due diligence, however, on an international level there is no such binding convention. It is principally international soft law instruments that have advanced the notion of corporate due diligence obligations; therefore, the thesis will partly rely on the UN Guiding Principles on Business and Human Rights as well as the OECD Guidelines for Multinational Enterprises. These two accords are frequently

[23] Lehrberg, (n 21), 199.
[24] TEU (n 9), article 19.1.
[25] Lehrberg, (n 21), 147.
[26] TFEU (n 22), article 296.
[27] TFEU (n 22), article 288.
[28] Lehrberg, (n 21), 110.
[29] TFEU (n 22).
[30] TEU (n 9).
[31] TFEU (n 22), article 1.
[32] Bergström and Hettne, (n 16), 20.

mentioned by legal scholars in the field of sustainability and the frameworks have been developed by experts to operate in a global context.

On the one hand, hard law is in general viewed as coherent and provides for more legal certainty. On the other hand, soft law tends to thrive where political consensus is difficult to achieve but also facilitates the inclusion of other stakeholder in the draft process. [33] There is no prevailing consensus on the definition of soft law, however, Trebilcock describes the concept as the following:

> 'Soft law, while united by its lack of reliance on governmental authority and resources, encompasses a much wider domain. It ranges from customary rights to the exhortatory or aspirational nature of some provisions in formal international agreements.'[34]

International voluntary standards have profited of this approach in which less detailed principles have been agreed upon and circumventing controversies regarding technicalities. Despite their distinct characteristics, they complement each other and must coexist in favor of a more holistic view on legal sources.[35] Since soft law sources do not have any legal status and exercise a voluntary character, still they are of considerable importance and contribute value to the overall discussion.[36]

1.3.5 National Legal Sources

It is important to examine how human rights due diligence obligations has been implemented into domestic jurisdictions, the thesis will demonstrate this with two European examples namely the Modern Slavery Act of the United Kingdom and the French Law on Duty of Vigilance. No comparison will be made between the two statutes, solely symbolizing the development of the human rights due diligence concept in national law. Therefore, regarding the illustration of the national laws the legal dogmatic method will be employed.

[33] John J Kirton and Michael J Trebilcock, 'Introduction: Hard Choices and Soft Law in Sustainable Governance' in John J Kirton and Michael J Trebilcock (eds.), Hard Choices, Soft Law: Voluntary standards in Global Trade, Environment and Social Governance (London: Routledge 2004), 22.
[34] ibid., 22.
[35] Ibid., 24.
[36] Jan Kleineman, 'Rättsdogmatisk Metod', in Maria Nääv and Mauro Zamboni (eds.), Juridisk Metodlära (Studentlitteratur 2018), 32.

Legal dogmatic research is most suitable when interpretating present law as it combines systematically outlining relevant legal provisions within a certain field as well as analyzing the sources to possibly bridge existing gaps.[37] Thus, existing law, *de lege lata*, is ascertained in the interest of further evolving how future legislative acts should be framed, *de lege ferenda.*[38]

Yet, the legal dogmatic method can never be purely descriptive and simply summarize the law, a vital element is the normative features incorporating opinions that criticize or justify the present law.[39] The method embodies a flexible approach in which it has to echo both current legal changes as well as foreign legal aspects in order to thoroughly examine modern law.[40]

1.3.6 Secondary Sources

Complementary opinions from scholars provides the research with indispensable perspectives further problematizes the issue of institutional investor's due diligence responsibility. To comprehensively fathom legislation and its context in which it operates, it is important to explore additional sources.[41]

It is worth mentioning that some of the articles derive from business or economic journals and literature to portray the non-legal aspects that comes with regulating the financial sector and to give a more specific description of ESG investments. Reports and studies have also been included to present cutting-edge science in the sustainability department and the significance of sustainable finance.

1.4 Delimitations

In order to limit the paper, it will primarily focus on the Sustainable Finance Disclosure Regulation and other enclosed documents as it is binding upon virtually every financial market participant that offers financial products in the EU. Additionally, some examples of national legislation in the field will be included to exemplify how disclosure laws have been adopted prior and alongside of the SFDR.

[37] Jan M. Smits, 'What is Legal Doctrine? On the Aims of and Methods of Legal-Dogmatic Research' in Rob van Geste, Hans-W. Micklitz and Edward L. Rubin (eds.), Rethinking Legal Doctrine: A Transatlantic Dialogue, (CUP 2017), 210.
[38] Lehrberg, (n 21), 203.
[39] Aleksander Peczenik, 'Juridikens Allmänna Läror', (2005) Svensk Juristtidning 249, 250.
[40] Smits (n 37), 212.
[41] Lehrberg, (n 21), 204.

The notion of ESG integrates environment, social and governance features. The thesis will mainly address the environmental and social aspects of sustainability issues as chosen frameworks are tailored to those. The legislative acts of the EU have principally conformed to climate change objectives whilst the development of the human rights due diligence has had social concerns as its focal point. Governance-related topics are completely excluded from the study.

The SFDR applies to 'financial market participants'[42] which encompasses multiple different types of actors within the financial market sector. Since the terminology employed by the SFDR is unique, the thesis will adopt a focus on institutional investor's obligation from the outset and throughout. Defined by the OECD an institutional investor is a 'financial institution that accepts funds from third parties for investment in their own name but on such parties' behalf.[43]

It is primarily national legislation and international guiding soft law instruments that govern the issue of business and human rights. Beside the EU regulation, the principal international legal sources and materials used in this thesis are the UNGPs and OECD guidelines. They are of a voluntary nature and have no binding or implementing force, nonetheless, they are still of substantial value. The OECD has established other various sector-based due diligence guides that might be relevant for intuitional investors[44], however, to keep this thesis sufficiently narrow they have been excluded from the scope of the examination.

Regarding the UNGPs rests on three components of state duty to protect human rights, corporate responsibility to respect human rights and the access to remedy for victims of human rights violations. The framework is to be understood holistically and in unity. Nevertheless, it is solely the second Pillar that addresses the due diligence responsibilities of corporations and therefore is pertinent to the study of institutional investors' duties.

[42] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1, article 1a-j enumerates the different types of financial market participants.

[43] OECD, Corporate Governance: The Role of Institutional Investors in Promoting Good Corporate Governance, (2011) https://www.oecd.org/daf/ca/49081553.pdf, 9.

[44] For instance, including the following sectors of agriculture, garment and footwear, minerals, extractives etc. See OECD framework table: https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

Despite the fact that the thesis is centered around the European Union and its legislative acts, the exception of the United Kingdom's Modern Slavery Act was made to illustrate an early legal development of human rights disclosure legislation on the national level. Its focus on modern slavery and human trafficking has influenced the drafting of similar acts, particularly within the common law sphere for instance the Australian Modern Slavery Act.

In February 2022, the EU Commission published a proposal for a directive on Corporate Sustainability Due Diligence which will most likely have an effect on the NFRD. By reason of it, at the current stage, being a proposal it has not been taken into account in the thesis.

2 Overview of the Sustainable Finance Disclosure Regulation

2.1 EU's Sustainable Finance Agenda

In pursuit of aligning more of the EU's policy framework with both the UN 2030 Agenda for Sustainable Development characterized by its Sustainable Development Goals[45] and the Paris Agreement[46], the Commission announced in 2018 the Action Plan on Sustainable Finance which aims to

1. Reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth;
2. Manage financial risks stemming from climate change, resource depletion, environmental degradation, and social issues; and
3. Foster transparency and long-termism in financial and economic activity.[47]

These aims were arranged into ten actions, two of which targeted both 'clarifying institutional investors' and asset managers'[48] duties' as well as 'strengthening sustainability disclosure and accounting rule-making'.[49] Since the recession in 2008 the financial sector has been under constant scrutiny, though, it is only in recent times when the regulatory focal point has shifted from economics to sustainability.[50]

2.2 The Issue of Greenwashing

As optimistic as all the regulatory changes sound, the notion of ESG investing is still in its infancy and is followed by the problem of 'greenwashing', whereby the promotion of a sustainable financial product, intentionally or unintentionally, depends on falsified or altered information either through omission or action.[51]

[45] UNGA, 'Transforming Our World: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.
[46] Conference of the Parties, Adoption of the Paris Agreement, 12 December 2015, UN Doc. FCCC/CP/2015/L.9/Rev/1.
[47] Action Plan: Financing Sustainable Growth (n 6), 2.
[48] Action Plan: Financing Sustainable Growth (n 6), 8.
[49] Action Plan: Financing Sustainable Growth (n 6), 10.
[50] Danny Busch, 'Sustainability Disclosure in the EU Financial Sector' in Danny Busch, Guido Ferrarini and Seraina Grünewald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets,* (Springer International Publishing), 397.
[51] European Securities and Markets Authority, Sustainable Finance Roadmap 2022-2024, (10 February 2022) https://www.esma.europa.eu/sites/default/files/library/esma30-379-1051_sustainable_finance_roadmap.pdf, 8.

ESG marketed financial products do not always live up to their clients' expectations and cannot fully realize their sustainability-oriented promises. This greenwashing phenomenon has been detected by the Financial Times where it was demonstrated that choosing an ESG investment plan, where the capital is claimed to primarily be devoted to companies with high sustainability standards, may have its largest holdings in non-ESG stocks.[52]

In 2021, the DWS Group, an asset managing subsidiary to Deutsche Bank, a former employee alleged that their investment policies misled clients by portraying it as more environmentally friendly and ESG-compatible than what was accurate. The whistleblower underlined the greenwashing problem partly stems from the absence of standardized definitions and reporting benchmarks.[53] As a consequence of these allegations, it provoked an investigation from the U.S Securities and Exchange Commission into the allegations of overexaggerating its ESG credentials.[54]

2.3 Sustainable Finance Disclosure Regulation

A part of the materialization of promoting sustainable investments and preventing greenwashing within the EU became the Sustainable Finance Disclosure Regulation. The objective is to harmonize rules on sustainability-related disclosure where financial market participants[55] and financial advisers[56] are obligated to make pre-contractual and continuing acknowledgments on both qualitative and qualitative information concerning adverse sustainability impacts on financial products.[57] Entities that are subject to the regulation must adhere to the provisions where they manufacture financial products[58] or give advice on investments, depending on whether the entity in question is deemed a financial market participant or a financial adviser.[59]

[52] Laurence Fletcher and Joshua Oliver, Financial Times, Green Investing: The Risk of a New Mis-Selling Scandal, (20 February 2022) https://www.ft.com/content/ae78c05a-0481-4774-8f9b-d3f02e4f2c6f.
[53] Tim Bartz, Der Spiegel, Former Deutsche Bank Executive on Green Investments: The Sustainability Propaganda Got Completely Out of Control, (1 September 2021), https://www.spiegel.de/international/business/former-deutsche-bank-executive-on-green-investments-the-sustainability-propaganda-got-completely-out-of-control-a-a07d3744-e79f-44bc-ab12-97b70c000b86.
[54] Gary Robinson, International Investment, DWS Rocked by $1 Trillion SEC Greenwashing Probe – Reports, (26 August 2021) https://www.internationalinvestment.net/news/4036306/dws-rocked-usd1trillion-sec-greenwashing-probe-reports.
[55] SFDR (n 42), article 2.1 a-j defines what 'financial market participant' means according to the regulation.
[56] SFDR (n 42), article 2.11 a-f defines what 'financial adviser' means according to the regulation.
[57] SFDR (n 42), article 1.
[58] SFDR (n 42), article 2.12 (a-g) defines what 'financial product' means according to the regulation.
[59] SFDR (n 42), recital 7.

2.3.1 Aim of the Sustainable Finance Disclosure Regulation

The overhanging threat of climate change presses the urgency for the private sector to mobilize capital toward ESG objectives including the obligation of financial market participants and financial advisers to declare their integration of sustainability risks. Through enforcing mandatory disclosure requirements, the intention is to make the choices of end investors more insightful and contribute to better protection of investments.[60]

Recital 9, states that as there is no prevailing market practice for sustainability-related disclosure undermines both the comparison and analysis claims for end investors of sustainability claims. If these diverging disclosure measures produce different results, it could further disrupt the efficiency and competence of the internal market. [61]

Additionally, merging sustainability risks into an investment's decision-making process can increase flexibility and stability to the financial system, that as a consequence might have an effect on the risk-return of financial products.[62] Research from Japan indicates that Socially Responsible Funds, which involves an investment process with regard to both financial performance and sustainability[63], demonstrated better resilience and could to a larger extent resist the effects from the global financial crisis of 2008 compared to conventional funds.[64]

The EU Commission established that because of multiple financial market participants already adhere to the non-financial reporting conditions found in the NFRD where the same information could be used in order to comply with the SFDR. Thus, introducing the SFDR would not further inhibit or constrain actors affected by it.[65]

[60] SFDR (n 42), recital 8.
[61] SFDR (n 42), recital 9.
[62] SFDR (n 42), recital 19.
[63] Miwa Nakai, Keiko Yamaguchi and Kenji Takeuchi, 'Can SRI Funs Better Resists Global Financial Crisis? Evidence from Japan', (2016) 48 International Review of Financial Analysis 12, 12.
[64] ibid., 17.
[65] Letter of the European Commission to the three European Supervisory Authorities, from October 2020, Application of Regulation (EU) 2019/2088 on the Sustainability-Related Disclosures in the Financial Services Sector, available at https://www.esma.europa.eu/sites/default/files/library/eba_bs_2020_633_letter_to_the_esas_on_sfdr.pdf.

2.3.2 Disclosure Obligations under the Sustainable Finance Disclosure Regulation

Financial market participants ought to publish their sustainability integration strategies in their investment decision-making process[66] whilst financial advisers are obligated to the same in their investment advice.[67] Driessen clarifies that even though the Regulation only focuses on financial market participants and financial advisers they might have to acquire information from a wide range of other parties. 'Green' or 'sustainable' strategies applied by fund managers confide in the information maintained by their investment issuers to present reports in accordance with the SFDR. Therefore, the provisions indirectly affect corporate issuers through investors and other actors that are subject to the Regulation.[68]

2.3.3 Article 4 of the Sustainable Finance Disclosure Regulation

In pursuance of these disclosure requirements, an adequate due diligence must be fulfilled prior to making investments. Article 4.1 stipulates that where financial market participants consider principal adverse impacts of investment decision on sustainability factors, they must declare on their website a due diligence policy concerning those impacts with respect to 'their size, the nature and scale of their activities and the type of financial products they make available'. If they do not consider any adverse impacts, an explanation as to why they do not do so must be provided.[69]

Principal adverse impacts (PAI) are recognized as 'impacts of investment decisions and advice that result in negative effects on sustainability factors'.[70] Actors exempted from reporting requirements are companies employing less than 500 people and financial market participants covered by a large parent company group.[71]

It is essential that the disclosed information contains the following:

a. information about their policies on the identification and prioritization of principal adverse sustainability impacts and indicators;

[66] SFDR (n 42), article 3.1.
[67] SFDR (n 42), article 3.2.
[68] Marieke Driessen, 'Sustainable Finance: An Overview of ESG in the Financial Markets' in Danny Busch, Guido Ferrarini and Seraina Grünewald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets*, (Springer International Publishing), 343.
[69] SFDR (n 42), article 4.1 a-b.
[70] SFDR (n 42), recital 20.
[71] SFDR (n 42), article 4.4.

b. a description of the principal adverse impacts and of any actions in relation thereto taken or, where relevant, planned;
c. brief summaries of engagement policies in accordance with Article 3g of Directive 2007/36/EC, where applicable;
d. a reference to their adherence to responsible business conduct codes and internationally recognized standards for due diligence and reporting and, where relevant, the degree of their alignment with the objectives of the Paris Agreement.[72]

2.3.4 Regulatory Technical Standards

In view of the above, the European Supervisory Authorities distributed a draft on potential supplementary Regulatory Technical Standards (RTS) incorporating more content on the disclosure requirement in accordance with article 4.6 SFDR.[73]

As the content of an investment portfolio can change daily, conducting due diligence, at a minimum, must be carried out four times on an annual basis. Enclosing the reports from previous years guarantees transparency and reaches an accepted standard.[74] In the interest of end investors, further declaring actions or already set targets planned for the future in an attempt to diminish the negative effects on sustainability. These actions could be 'active engagement' were the financial market participant, in the capacity as a shareholder, exercises voting rights during annual board meetings, creating dialogue concerning specific problems and finally contemplating divestment if the demands are not met within a reasonable period of time.[75]

The statement on an entity's website of describing its due diligence policy in respect of the adverse impact of investment decisions shall refer and comply with global due diligence standards and recognized business conduct codes.[76] A description of the due diligence mechanism on the underlying assets of the financial product, including both external and

[72] SFDR (n 42), article 4.2 a-d.
[73] SFDR (n 42), article 4.6.
[74] European Supervisory Authority, 'Final Report on draft Regulatory Technical Standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a (3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of Regulation (EU) 2019/2088' JC (2021) 03, 13.
[75] ibid., 14.
[76] ibid., 26.

internal control.[77] In order for the adverse impact disclosures to be meaningful, some minimum common elements of disclosure are necessary to include for all financial market participants and financial advisers without a fully harmonized template with the same fields to be filled in.[78]

The draft indicated the relevant mandatory social indicators concern the violations, the processes and compliance mechanisms of companies with regard to the OECD Guidelines for Multinational Enterprises as well as indicators on gender pay gap, gender diversity and controversial weapons. As regards to climate one indicator was deemed to be on the greenhouse gas emission intensity but also exposures to fossil fuels, energy performance, biodiversity, water, and waste.[79]

From a financial perspective, the latest research of the SFDR's effectiveness indicates that it may already have accomplished one of the regulation's stipulated objectives where more capital has been mobilized toward sustainable investments. [80]

2.3.5 Sanctions of the Sustainable Finance Disclosure Regulation

Nonetheless, the principal drawback that scholars point to is the absence of a central supervisory body or sanctioning regime, as article 14 delegates this responsibility to the national competent authorities with the duty to oversee compliance.[81] By delegating the supervisory administration to a qualified EU body would naturally create more harmony.[82]

Yet, it is interesting to note that a recent inspection from the Swedish Financial Supervisory Authority of fund managers' implementation strategies of the SFDR noted that about 5 percent of the questioned fund managers did not consider the Principal Adverse Impacts or sustainability risks.[83] Moreover, the government agency has classified greenwashing as one of

[77] ibid., 39.
[78] ibid., 104.
[79] Regulatory Technical Standards (n 74), 105.
[80] Martin G. Becker, Fabio Martin and Andreas Walter, 'The Power of ESG Transparency: The Effect of the New SFDR Sustainability Labels on Mutual Funds and Individual Investors', (2022) 102708 Finance Research Letters, 5.
[81] SFDR (n 42), article 14 1–2.
[82] Busch (n 50) 438.
[83] Finansinspektionen, Promemoria: Hållbarhetsinformation i Informationsbroschyr och på Webbplats, (29 September 2021) https://www.fi.se/contentassets/185b3827711f493897c148671179ebf6/hallbarhetsinformation-informationsbroschyr-webbplats.pdf.

the biggest risks in the financial market and has decided to delve deeper into the issue related to the SFDR.[84]

While the Regulation harmonizes the rules on ESG investments which is a cornerstone in achieving a sustainable financial market, critics point out some deficiencies that are yet to be addressed by the EU. The Regulation does not contemplate the practical problems as financial market participants are most likely dependent on data from a third-party to assess the principal adverse impacts of the investment.[85]

[84] Finansinspektionen, FI Granskar Hållbara Fonder, (12 April 2022) https://fi.se/sv/publicerat/nyheter/2022/fi-granskar-hallbara-fonder/.
[85] Busch (n 50), 413.

3 Complementary EU Legislation

3.1 Non-Financial Reporting Directive

Since 2018 the EU the directive targeted at non-financial and diversity reporting of certain large undertakings and groups (NFRD) has been in forced. With resembling goals to the SFDR, the Directive seeks uniformity in environmental and social disclosed information which would make matters of comparison easier. It enforces communication obligations on issues concerning 'environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters' and a description of its due diligence polices must be attached to the statement.[86]

Fundamental to the reporting requirement is the undertakings' determination of the most severe risks and how they are handled.[87] Paragraph 9 of the Directive succinctly mentions both the UNGPs and the OECD Guidelines as alternate instruments serving the purpose of delineating the necessities of non-financial reporting under which subjects to the Directive can comply with.[88] Nevertheless, it also diminishes comparability when different instruments are chosen by corporations, likewise it restricts the level of enforcement and accountability upon wrongdoing.[89]

Concerns and weaknesses of the Directive detected in empirical research were providing insufficient information on a variety of sustainability matters and its due diligence processes.[90] Unreliable or unsatisfactory information supplied by large corporations could have detrimental consequences as the financial market participants confide in these disclosure statements in order to observe their requirements in the SFDR.[91]

[86] Directive 2014/95/EU of the EU Parliament and of the Council Amending Directive 2013/34/EU as Regards Disclosures of Non-Financial and Diversity Information by Certain Large Undertakings and Groups (NFRD). Off. J. L330, recital 6.
[87] ibid., recital 8.
[88] ibid., recital 9.
[89] Andreas Rühmkorf, 'Stakeholder versus Corporate Sustainability: Company Law and Corporate Governance in Germany' in Danny Busch, Guido Ferrarini and Seraina Grünewald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets,* (Springer International Publishing), 241.
[90] ESMA, Report Enforcement and Regulatory Activities of European Enforcers in 2019 (April 2020), 30.
[91] Michele Siri and Shanshan Zhu, 'Integrating Sustainability in EU Corporate Governance Codes', in Danny Busch, Guido Ferrarini and Seraina Grünewald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets,* (Springer International Publishing), 183.

Inherent to the due diligence process is to identify and avoid risks, however, art. 1.1(b) appears to be based on a reactive model rather than a proactive one. The reporting only accounts for activities of the past as opposed promote corporations to actively address the issues in a proactive manner. Buhmann questions the capacity of transparency legislation to further encourage different communication practices aligning to with a preventative strategy.[92] Notwithstanding, disclosure declarations can ignite structural change within an entire business in a longer time frame.[93]

In Germany, problems arose as multiple large corporations do not operate on the financial market, thus, exempt from the Directive. The discussion merger whether to expand the scope of the national implementation in order to cover retailers like Aldi and food processor Dr. Oetker.[94] An EU directive, as intended, will always have diverging implementation methods in each Member State. Thus, the consistent and systematic rules found in the SFDR alleviates harmonization and implementation aspects resulting in increased uniformity across the EU.[95]

Research carried out by the Alliance for Corporate inspected disclosure statements of the 1000 largest companies operating in the EU where results indicated the shortcomings of the NFRD. The NGO confirmed the views that a vast majority of the reviewed corporations made 'too generic statements to offer any meaningful insights into corporate practice'[96] It was also found that the number of companies that had introduced due diligence had increased yet the absence of reporting details would incentivize the drafting of standardized mandatory due diligence requirements.[97] The study also concluded that one of the most commonly referred reporting standards was the OECD Guidelines. On the other side of the spectrum, less than 10% of the surveyed corporations relied upon the UNGPs.[98]

The implementation of the Directive in Italy imposed reporting commitments on both social and environmental issues by only large business entities. Concerning environmental problems,

[92] Karin Buhmann, 'Neglecting the Proactive Aspects of Human Rights Due Diligence: A Critical Appraisal of the EU's Non-financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action', (2018) 3 BHRJ 23, 42.
[93] ibid., 39.
[94] Rühmkorf (n 89), 242.
[95] Busch (n 50), 432.
[96] Alliance for Corporate Transparency, '2019 Research Report: An Analysis of the Sustainability Report of 1000 Companies Pursuant to the EU Non-Financial Reporting Directive', available from: https://www.allianceforcorporatetransparency.org/assets/2019_Research_Report%20_Alliance_for_Corporate_Transparency.pdf, 36.
[97] ibid., 6.
[98] ibid., 11.

the rules were detailed, laying down greater requirements than the Directive, in the areas of greenhouse gas emissions, pollution in the atmosphere, and the use of energy-related and renewable resources. It also recited several socially sustainable objectives for example the steps taken in order to prevent breaching human rights and the information that must be presented concerning human rights. [99] The 'explain and comply' approach did raise the standards for non-financial in Italy, however, the Directive has a limited impact as it only applies large entities.[100]

3.2 EU Taxonomy

Another part of the EU's Sustainable Finance action plan was the need to create clear categorization in order to resolve ambiguity and uncertainty concerning the notion of sustainability. As this complex and large-scale systematization needs both legal and technical components, the Commission affirmed the choice of a step-by step approach beginning with environmental activities.[101] The Taxonomy Regulation established a classification system for environmentally sustainable activities and set up a shared understanding of green investments.[102] It was decided that six environmental objectives were accentuated and enumerated in an exhaustive list.[103]

Moreover, the Taxonomy does not automatically enforce duties upon financial market participants, it is merely a supplementary tool to other legal instruments regarding definitions of ESG investments.[104] For this reason, certain definitions and demarcations found in the Taxonomy can be applied in order to clarify the expectations of the SFDR.[105]

Albeit, the Taxonomy does not explicitly acknowledge the due diligence theory, article 18 states that a sustainable economic activity must have mechanisms in place compliant with the UNGPs the OECD Guidelines which are referred to as 'minimum safeguards'.[106]

[99] Alessio Bartolacelli, 'The Unsuccessful Pursuit of Sustainability in Italian Business Law' in Beate Sjåfjell and Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, (Cambridge University Press), 297.
[100] ibid., 298.
[101] Action Plan: Financing Sustainable Growth (n 6), 4.
[102] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, recital 6.
[103] ibid., article 9.
[104] ibid., article 1.2 a-c.
[105] Busch (n 50), 405.
[106] EU Taxonomy (n 102), article 18.1.

There is an imbalance among ESG data where issues concerning the environment is rich, however, other sustainability related aspects are less advanced. Consequently, the asymmetric distribution of data weakens the comparability and accuracy among the corporate disclosure statements. Additionally, fallacies or imprecisions alters institutional investors' risk assessment and selection process which can contradict the expected reallocation of capital to sustainable objectives. [107]

Zetzsche and Anker-Sørensen argue that fostering expertise in the field alongside the legal developments would improve its predictability by consistently adjusting to contemporary science while still retaining the aim of the regulation. At its current state, regulating financial sustainability might be built upon false premises where the legislation's momentum is centered around policies rather than data. This paradox described as by the authors as 'regulating sustainable finance in the dark'.[108]

Moreover, ESG and sustainability embodies more than simply climate change related issues, however, the EU's starting point in a taxonomy on climate change problems is not insignificant. The current lack of a consolidate social taxonomy hinders the pursuit and fulfilling the purpose of sustainable finance.[109]

3.3 EU Due Diligence Report

The EU Commission's Directorate-General for Justice and Consumers mandated a study on the issue of due diligence in the supply chain in line with Action Plan on Sustainable Finance for possible future regulatory development in the field.[110] The Non-Financial Reporting Directive initiated the due diligence doctrine within the EU, nonetheless, it does not prescribe any mandatory commitments to realize such a mechanism. Transparency requirements can encourage businesses to minimize their adverse human rights impact throughout the supply

[107] European Supervisory Authorities, Letter to the European Commission, Public Consultation on a Renewed Sustainable Finance Strategy, (15 July 2020) available from https://www.esma.europa.eu/sites/default/files/library/2020_07_15_esas_letter_to_evp_dombrovskis_re_sustainable_finance_consultation.pdf.

[108] Dirk A. Zetzsche and Linn Anker-Sørensen, 'Regulating Sustainable Finance in the Dark', (2022) 23 European Business Organization Law Review 47, 81.

[109] ibid., 52.

[110] Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza- Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, Study on due diligence requirements through the supply chain, Final report (January 2020), available at https://op.europa.eu/en/pub lication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en., 15.

chain. A more effective regulatory avenue is believed to be through instituting compulsory due diligence procedures that saturates the entirety of the business operations.[111]

Surveys concluded that despite the absence of regulatory clarity regarding the details of investor's due diligence obligations, the survey indicated that one of the main incentives for businesses to conducting due diligence was high standards demanded by investors.[112] In the same vein as Buhmann, the study maintained that corporate mandatory due diligence upholds a more powerful tool beneficial for preventative measures. Companies cannot simply rely on the reputational of pertinent stakeholders scrutinizing their disclosure statements.[113]

Minimizing the due diligence gap of corporations through mandatory legislation could provide more data for institutional investors to depend on. Business enterprises consistently being transparent and demonstrating their sustainability risk might be considered a safer option in ESG investing.[114]

[111] EU Due Diligence Study (n 110), 36.
[112] EU Due Diligence Study, (n 110), 89.
[113] EU Due Diligence Study, (n 110), 557.
[114] EU Due Diligence Study, (n 110), 451.

4 Human Rights Due Diligence both in Soft Law and National Law

4.1 United Nation Guiding Principles on Business and Human Rights

As the SFDR asserts the importance of financial institutions to realize and perform their investigative commitments considering potential negative environmental and human rights effects.[115] Manifested by the novel regulation, the due diligence process is slowly changing character, from being principally a soft law expectation to becoming codified in legally binding documents.[116]

Originally, the conceptualization of human rights due diligence emerged in the United Nations Guiding Principles on Business and Human Rights which rests on three core pillars;

1. 'The State Duty to Protect Human Rights,
2. The Corporate Responsibility to Respect Human Rights, and
3. Access to Remedy for Victims'.[117]

Published in 2011 the UNGPs define the responsibilities of both Governments and business enterprises when preventing and addressing the risk of adverse human rights impacts linked to business activities in which all three pillars must be understood both individually and collectively.[118]

4.1.1 Pillar 2 – The Corporate Responsibility to Respect Human Rights

The underlying rationale of the guidelines is for companies to manage their risks connected to human rights and remediate where adverse impacts have occurred. Comparable to the SFDR, principle 16 of the UNGPs recommends business enterprises to promulgate a policy statement on their respect for human rights and their commitment to meet this responsibility.

Business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other

[115] Claire Bright and Karin Buhmann, 'Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition', (2021) 13 Sustainability 10454, 6.
[116] ibid., 7.
[117] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' (A/HRC/17/31, 21 March 2011) (Guiding Principles), 6.
[118] ibid., 8.

performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake. Through these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.[119]

Additionally, accommodated in the second pillar is the human rights due diligence doctrine which constitutes an intrinsic element to refrain from human rights violations. Performing a due diligence process is an adequate method to self-regulate the business operations where issues related to human rights can be detected and evaluated. [120]

Nolan and Frishling further elaborate on this concept for stakeholders within the business world.

> 'A key feature that distinguishes human rights due diligence from traditional corporate due diligence is that human rights due diligence focuses primarily on detecting the risks that the company may impose on others, as opposed to the risks to the company. As such, human rights due diligence is designed to be an ongoing interactive mechanism that keeps the company apprised of its impacts on workers, the community, and a broader set of stakeholders.'[121]

Since business enterprises can have a negative effect on a wide scope of human rights, the commentary specifies that, at a minimum, companies ought to respect the International Bill of Human Rights[122] and the eight core ILO conventions.[123] By establishing a minimum human rights standard the UNGPs proposes that this benchmark can be used as an indicator for other actors to estimate and determine the corporation's human rights repercussions.[124]

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[119] Guiding Principles (n 117), 7.
[120] Guiding Principles (n 117), 17.
[121] Justine Nolan and Nana Frishling, 'Human Rights Due Diligence and the (Over) Reliance on Social Auditing in Supply Chains' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business,* (Edward Elgar Publishing), 109.
[122] The International Bill of Human Rights is comprised of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.
[123] This covers the Forced Labor Convention, 1930 (No. 29), Abolition of Forced Labor Convention, 1957 (No. 105), Equal Renumeration Convention, 1951 (No. 100), Discrimination (Employment Occupation) Convention, 1958 (No. 111), Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labor Convection, 1999 (No. 182), Freedom of Association and Protection of Rights to Organize Convention, 1948 (No. 87), Right to Organize and Collective Bargaining Convention, 1949 (No.98).
[124] Guiding Principles (n 117), 13.

Through following the fundamental steps of 'identify, prevent, and mitigate and account for how they address their impacts on human rights' in order to conduct a thorough due diligence mechanism. This structured mechanism should be applied throughout the entirety of the company and be revised regularly.[125] By displaying that all the reasonable steps were taken to avoid breaching human rights may also aid business enterprises address possible legal claims. However, there is no guarantee that only by administering a due diligence system will engender certain legal immunity.[126]

This responsibility extends beyond complying with national law, it also encompasses adverse human rights impacts that can be directly linked to its business relationships, therefore, covers its global supply chain.[127] Certain business sectors, industries or contexts may be subject to a heightened risk of negative human rights impact, thus, requires additional scrutiny with regular reviewing and not an annual inspection. Nonetheless, the list of recommended human rights conventions does not preclude the use of supplementary standards as a benchmark.[128]

Principle 19 advocates for corporations to utilize its 'leverage' in furtherance of affecting third parties with which they have an engaging business relationship. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.[129] The human rights due diligence process could also be seen as a tool that reaches beyond reducing adverse social impacts. A comprehensive human rights due diligence process may also indirectly provide for the potential economic loss and reputational damage.[130]

4.1.2 Institutional Investors' duties under the UNGPs

The Working Group connected to the UNGPs have published a document specifically addressing investor obligations under the framework. Echoing that the UNGPs responsibilities to respect human rights also extends to investors and applauding the EU's leading work within

[125] Guiding Principles (n 117), 15.
[126] Guiding Principles (n 117), 17.
[127] Guiding Principles (n 117), 17.
[128] Guiding Principles (n 117), 12.
[129] Guiding Principles (n 117), 19.
[130] Karin Buhmann, 'Neglecting the Proactive Aspects of Human Rights Due Diligence: A Critical Appraisal of the EU's Non-financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action', (2018) 3 BHRJ 23, 31.

developing legal frameworks on responsible investing such as the SFDR and shaping its sustainable agenda to cover institutional investors was praised by the Working Group.[131]

It was noted that in spite of the improvements made in the contemporary financial sector, it is not a standardized practice within the institutional investor community to consistently address human rights. A large problem lies in the lack of investors understanding their human rights duties and the construction of a useful due diligence procedure.[132]

The policy should permeate the entire organization and provide an amplified explanation of the practical human rights aspects in their governance structure and business operations. Most importantly, there needs to be a human rights declaration on how a human rights approach is ingrained in its investment activities, decision-making and engagement with business partners.[133]

Prior to making investments, it is the responsibility of the investor to complete a due diligence process as well as regularly during the investment to find and wholly fathom potential human rights risks. Depending on factors like investment type, strategy, and the investor's leverage capacity the practical forms of the due diligence will differ.[134]

Macchi and Bernaz contend that the UNGP due diligence can be entirely understood with the assistance of acknowledged standards for example international environmental law. The undeniably legal character of the framework urges the interpretation of the principles to delve deeper into international human rights law.[135] Understanding the corporate due diligence obligations found in Pillar 2 by taking into account additional legal text 'provides the strongest normative basis'[136] and can be deduced from the Vienna Convention on the Law of Treaties.[137]

[131] UNGA, 'Report of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (17 June 2021) UN Doc. A/HRC/47/39/Add.1, 10.
[132] ibid., 13.
[133] ibid., 4
[134] ibid., 5.
[135] Chiara Macchi and Nadia Bernaz, 'Business, Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks', (2021) 13 Sustainability 21, 6.
[136] ibid., 21.
[137] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969.

4.2 OECD Guidelines for Multinational Enterprises

The Organization for Economic Co-operation and Development[138] outlined the Guidelines for Multinational Enterprises which frames recommendations for responsible business conduct and 'aims to enhance the contribution to sustainable development made by multinational enterprises'.[139]

The National Contact Point (hereafter NCP) is a unique enforcement instrument found in every member state where an alleged breach of the guidelines can be addressed for pertinent businesses, NGOs, worker organizations, and other interested parties. Thus, it operates as a forum in order to provide assistance for the parties through conciliation or mediation.[140] After the NCP has assessed the issue and consulted the parties in question, a statement is published contain the results of the proceedings and the final decision.[141] These opinions are not binding upon the participants; however, they do administer redress for business misconduct and its victims.[142]

4.2.1 Responsible Business Conduct for Institutional Investors

In addition to the Guidelines for Multinational Enterprises, the organization proceeded further with the sustainability objective on a more detailed and sector-specific level where the financial market and institutional investors have been given more specific advice on organizing a due diligence mechanism. The Responsible Business Conduct for Institutional Investors is based on the OECD Guidelines but offers recommendations regarding preventing and addressing adverse impacts within in their investment portfolios.[143]

In recent years expectations have increased for investors to also contemplate investment value drivers other than strictly financial ones. Emphasis is put on investors' duty to fulfil due diligence measures as a way of safeguarding that those investments are devoted toward

[138] See list of OECD member countries by 2022-04-26, available at: https://www.oecd.org/about/document/ratification-oecd-convention.htm.
[139] Organization of Economic Cooperation and Development, OECD Guidelines for Multinational Enterprises, rev May 2011 (Paris: Organization of Economic Cooperation and Development, 25 May 2011), 13.
[140] ibid., 72.
[141] ibid., 73.
[142] Karin Buhmann, 'Analyzing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook', (2018) 36 Nord. J. Hum. Rights. 390, 392.
[143] Organization of Economic Cooperation and Development (2017), Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises, 3.

responsible companies that can further facilitate realizing international ambitions established in the Paris Agreement and Agenda 2030.[144]

Identical to the UNGPs, the OECD Guidelines entrust the 'identify, prevent and mitigate' process to manage and communicate investors' actual and potential adverse impacts on human rights. The importance of conducting due diligence regularly throughout the life-cycle of the investment in order to continually encompass changing circumstances.[145]

Since institutional investors operate in a different way than the conventional purchaser and supplier relationship, there is does not necessarily have to be direct contractual or operational links between an investor and an investee company. It is mainly through shareholder ownership that leverage can be exercised.[146] Furthermore, investors have a direct link to negative impacts if they own shares in the company even though it is a minority holding.[147]

The possibility for minority shareholders to utilize its influence might be small but not entirely insignificant. Institutional investors that activity participate in a company's business conduct through various means is advocated by the OECD and cannot be seen as acting in the best interest of the client. Failing to seek prevention or mitigate adverse impacts through active engagement could result in financial losses for the end investor.[148]

A prevalent dilemma for institutional investor is how to revise an entire supply chain built into an investment. It is too much of a burden to expect full control over every aspect of the business relationships from top to bottom, instead it is recommended that investors overlook their respective due diligence policies. This generates intuitional investors to manage their risks of adverse impacts more rigorously but also stimulates other business enterprises to adopt their own due diligence mechanisms.[149]

[144] Responsible Business Conduct for Institutional Investors (n 143), 3.
[145] Responsible Business Conduct for Institutional Investors (n 143), 16.
[146] Responsible Business Conduct for Institutional Investors (n 143), 7.
[147] Responsible Business Conduct for Institutional Investors (n 143), 13.
[148] Responsible Business Conduct for Institutional Investors (n 143), 15.
[149] Responsible Business Conduct for Institutional Investors (n 143), 17.

4.2.2 NCP Statements on Investor Due Diligence

The economic leverage that investors can exercise through due diligence is a key vehicle for influencing to possibly change irresponsible business behavior. Several NCPs have made statements of significant value on the connection between institutional investors and violation of the OECD guidelines.[150]

In 2012, a number of NGOs filed a specific instance against a global steel manufacturer POSCO for failing to seek and prevent human rights abuse and to conduct a due diligence procedure in line with the OECD Guidelines in India. The complaint was brought before the Norwegian NCP as the Norwegian Bank Investment Management had a responsibility 'to prevent or mitigate the real and potential adverse impacts directly linked to their operations through their financial relationship with POSCO'.[151]

A dialogue between the parties was initiated where NBIM claimed that the Guidelines did not apply to minority shareholders, shareholders who own less than 50% of stock in a company. However, this view was not supported by the Norwegian NCP issued a declaration based on the Guidelines, the UNGPs and an additional confirmation letter from the UN Office of the High Commission for Human Rights.[152] The collection of sources pointed out that the financial sector was not exempted from complying with the Guidelines nor could any exceptions for minority stakeholders be made.[153]

Moreover, the NCP found that both NBIM's lack of disclosure and failing to 'systematically influence its portfolio companies to avoid or mitigate significant human rights impacts beyond children's rights' was problematic. Therefore, it was recommended that NBIM should establish a broader due diligence system that can pinpoint heightened human rights risk prior to investing and continuously throughout the role as shareholders, even if the ownership might be small.[154]

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[150] Buhmann (n 142), 397.
[151] Specific Instance, OECD Guidelines for Multinational Enterprises, https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/OECDGuidelines%20Specific%20Instance_POSCO_ABP_GPFG_2012-09-10%20FINAL.pdf, 7.
[152] Office for the High Commissioner on Human Rights, 'The Issue of Applicability of the Guidelines on Human Rights on Minority Shareholder, April 2013, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterSOMO.pdf.
[153] Norwegian National Contact Point, Final Statement of May 2013 on the POSCO case, available at: https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/nbim_final.pdf, 22.
[154] ibid., 37.

It is the responsibility of the investor to examine whether the accusations of poor business conduct are well-founded. Based on those findings the investor must balance the severity of the abuse against the possible power of influence as a shareholder, alternatively contemplating noninvestment or withdrawing completely from a previously made investment.[155] It is the responsibility of NBIM to urge POSCO to adopt the OECD Guidelines in its business operations to adequately address negative human rights effects.[156]

Other cases have also produced statements regarding the comprehensive approach of investor responsibilities for instance the Dutch NCP contended that other legal instruments such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[157], ILO Violence and Harassment Convention[158] and the ILO Declaration on Fundamental Principles and Rights at Work[159] must be understood as supplement to the Responsible Business Conduct for Institutional Investors.[160]

Additionally, the NCPs have made other statements not specifically involving institutional investors but equally important. The UK NCP recognized that completely withdrawing from a business relationship in which human rights are at risk of being infringed they have not automatically resulted in a recommendation to completely withdraw from the business contracts.[161] Even in situations where the company has carried out their human rights due diligence it is encouraged that this process is continuously developed.[162]

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[155] Norwegian NCP Final Statement (n 153), 46.
[156] Norwegian NCP Final Statement (n 153), 43.
[157] ILO (International Labor Office). (2017) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 5th edition (Geneva). Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.
[158] Convention (No 190) on Eliminating Violence and Harassment in the World of Work (adopted June 21 2019, entered into force 25 June 2021).
[159] ILO (International Labor Organization), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf.
[160] Dutch National Contact Point, Final Statement of February 2022, *APG Asset Management vs four Trade Unions*, available at: https://www.oecdguidelines.nl/documents/publication/2022/02/03/fs-4-trade-unions-vs-apg, 3.
[161] UK National Contact Point, Final Statement of March 2015 on Lawyers for Palestinian Human Rights & G4S PLC, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/846880/bis-15-306-lawyers-for-palestinian-human-rights-final-statement-after-examination-of-complaint-uk-national-contact-point.pdf, 14.
[162] Swedish and Norwegian National Contact Points, Joint Final Statement of February 2016, *Jijnjevaerie Saami Village v. Statkraft AS*, available at: https://www.government.se/4ad14f/contentassets/b08309e008a84c39aa491b0451cea50d/final-statement-jijnjevaerie-saami-village--statkraft-sca-vind-ab-ssvab-norway-and-sweden-oecd-ncp.pdf, 16.

The NCPs help stakeholders, in particular institutional investors, fully grasp the depth and importance of performing thorough due diligence.[163] By clarifying the necessities for complying with the OECD Guidelines the NCPs can strengthen the concept of investor due diligence and offer advice to specifically institutional investors where most other frameworks address traditional business relationships or supply chains.[164] This relatively meticulous guidance given by the NCPs also creates, to some extent, legal certainty for parties involved in the controversy.[165]

Although, the NCPs have enlightened business enterprises on how and when to perform a human rights due diligence, yet, they have recognized complex aspects such as difficult circumstances and business interests which may be challenging to consistently unify with a human rights due diligence mechanism. It appears to be a more business friendly approach where a balance is struck between respecting human rights and understanding intricate business relationships.[166]

4.3 ILO Conventions concerning Corporate Misconduct

International labor law is not completely fruitless when prescribing human rights obligations directly upon companies. As early as 1977, the ILO affirmed in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy that states, labor unions as well as companies have an essential role in strengthening the enjoyment of basic human rights.[167] Later amendments have reiterated the same idea by also including the notion of sustainable development into the declaration's aim.[168]

Similarly, to the other instruments discussed above this declaration is formulated in a voluntary manner, nonetheless, in the words of Jernej Letnar Cernic 'it may be described as an authoritative interpretation of some of the International Labor Conventions and

[163] Buhmann, (n 142), 403.
[164] Buhmann, (n 142), 406.
[165] Buhmann, (n 142), 409.
[166] Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law*, (CUP 2021), 312.
[167] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO Doc. 28197701, OB VTol. LXI, 1978, ser. A, no. 1 (1977), preamble.
[168] ILO (International Labor Office). (2017) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 5th edition (Geneva). Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

Recommendations on which it is based.'[169] Yet, the sphere of influence compared to the UNGPs and the OECD Guidelines remains limited due to its focus solely on labor issues.

4.4 The Emergence of National Business and Human Rights Legislation

The evolvement of international recommendations directly on business and human rights have seemingly had a meaningful influence on national legislators and their draft processes. Namely, there are two types of legal development that can be observed around the world in connection to human rights due diligence.

Uncovering business enterprises approach to sustainability issues might not directly affect investors' leverage against company misconduct, nevertheless, these legal developments have the 'potential to signal a shift in terms of demanding corporate accountability to stakeholders and society in general'.[170]

Multiple attempts to regulate negative business conduct have been made since then, however, it is only recently that the focus has shifted toward a due diligence centered approach. The problematization of business and human rights abuse has existed since the 1970s where human rights advocates pointed out that the world's largest transnational corporations had greater revenues than the gross national product of many states. These enormous companies and their shareholders were criticized for being 'new colonializes' with solely an economic interest.[171]

As national legislation requiring companies to conduct human rights due diligence processes within its operations is relatively new. Nevertheless, they offer business enterprises a clearer and more practical approach to the concept of due diligence. These initiatives tend to aim directly on the supply chain of the business activities inclosing subsidiaries and third parties. Transparency-based laws does not compel accountability upon corporations' misconduct,

[169] Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy', (2009) 6 Miskolc J Int'l L 24, 26.
[170] Iris H.-Y. Chiu, 'Disclosure Regulation and Sustainability: Legislation and Governance Implications' in Beate Sjåfjell and Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability,* (Cambridge University Press), 526.
[171] Anita Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: beyond the Corporate Responsibility to Respect?* (CUP 2013) 165.

although, it presents pertinent stakeholders on how the company in question governs their human rights risks.[172]

4.4.1 Modern Slavery Act of the United Kingdom

The Modern Slavery Act of the United Kingdom of Great Britain and Northern Ireland prescribes certain commercial organization to declare how they address human trafficking and modern slavery. This proclamation must encapsulate the undertaken commitments in order to guarantee that no human trafficking or modern slavery is part of their own business and supply chain.[173] Alternatively, announcing that the organization has done no such thing.[174]

Furthermore, the Act suggests that a due diligence processes regarding modern slavery and human trafficking is disclosed[175], nonetheless, a practical guide has stipulated that including due diligence mechanism in the public statement is not obligatory.[176] References to both the UNGPs and the OECD Guidelines for explanatory work on the concept and catering of sector-specific frameworks.[177]

Yet, the Home Office also provided comprehensive instructions on the fulfilment of a due diligence tool and underlined the possibility of not only enhancing sustainability risk management but financial performance as well. It confides in investors and other stakeholders to either invest or divest in a company that contributes human rights offences[178] where in cases of non-compliance the assumption is that it will cause irrevocable reputational damage.[179]

As the reporting is mandatory but its exact content is left vague, it becomes more strenuous upon investors to scrutinize and compare the presented information among businesses.[180] With consolidated and compulsory reporting details attached to the legislation facilitates the investors

[172] Nolan and Frishling (n 121), 114.
[173] UK Modern Slavery Act 2015, Part 6, s 54(4)(a) (1-11) available at https://www.legislation.gov.uk/ukpga/2015/30/part/6/enacted.
[174] ibid., Part 6, s 54(4)(b).
[175] ibid., Part 6, s 54(5) C.
[176] Home Office, *Transparency in Supply Chains etc.: A Practical Guide* (2015), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040283/Transparency_in_Supply_Chains_A_Practical_Guide_2017_final.pdf, 12.
[177] ibid., 32.
[178] ibid., 4.
[179] Ibid., 6.
[180] Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?', (2018) 15 Braz J Int'l L 65, 70.

process of pinpointing 'best practice'.[181] The Business and Human Rights Resource Centre reviewed the compliance of the legislative act which unveiled that the majority of British companies formulate generic statements and lack of further explaining.[182]

There is no burden for companies to eliminate modern slavery or human trafficking within their supply chain, solely to deliver an annual statement on action or inaction in response to such issues.[183] Indeed, these transparency reports can expose severe human rights breaches in connection to the business operations, still, the law does not dictate any sort of governmental reaction. This kind of shift from the state to investors, in respect of corporate accountability, will most likely generate non-legal repercussions stemming from a legal source.[184]

4.4.2 The French Law on Duty of Vigilance

The French 'la loi sur le devoir de vigilance' was enacted into the French Commercial Code in 2017 and imposes a mandatory duty to be vigilant for large French companies to avoid human rights and environmental damage stemming from their business operations and relationships. It obliges companies to publish a vigilance plan containing appropriate measures to identify and prevent serious risks of breaching 'human rights, fundamental freedoms and health and safety for the environment and people'.[185]

Additionally, victims of adverse environmental or human rights effects have the possibility to seek compensation through civil court proceedings. French courts can sanction companies where a vigilance plan is absent, command changes in insufficient plans and place penalties upon businesses that refrain from complying.[186] The drive for implementing obligatory human rights due diligence in national jurisdictions has been embraced by the working group on Business and Human Rights and indicated that it was 'the most notable development'.[187]

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[181] Nolan (n 180), 74.
[182] Business and Human Rights Resource Centre, 'FTSE 100 & The UK Modern Slavery Act: From Disclosure to Action', (2018) 3 available at: https://media.business-humanrights.org/media/documents/files/FTSE_100_Briefing_2018.pdf.
[183] Jena Martin, 'Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda', (2018) 56 Colum J Transnat'l L 530, 557.
[184] ibid., 570.
[185] Loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (law on the Duty of Vigilance), available online at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626, accessed on 18 April 2022.
[186] ibid,.
[187] UNGA, 'Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises', (16 July 2018) UN Doc. A/73/163, 67.

This unprecedented piece of legislation governs the extraterritorial conduct of businesses by imposing the onus on the French parent company in which the French legislators circumvented unnecessary hampering in foreign affairs of other states. Therefore, the obligation has shifted, in particular from states with a lack of capacity on multinational corporations.[188]

Despite the endorsement, the law on the duty of vigilance has received criticism. In situations where allegations are directed toward a company for failing to respect their plan, it is the court to judge if the company has been able to recognize the risks within their business relationships; if adequate measures were enforced and if they were effective.[189]

In 2019, civil society organizations from both France and Uganda claimed that Total's, a French multinational oil and gas company, vigilance plan did not identify risks neither provided measures for adverse impacts related to two oil projects. Ecological hazards and resettlement of local communities have direct negative effects have been carried out by Total and its subsidiaries. A separate case was filed based on Total's lack of substantial information in its plan concerning reducing its greenhouse gas emission, accordingly, contradicting the objectives on limiting global warming found in the Paris climate agreement.[190]

Even though, the lawsuits have only made procedural advancements and no final verdict has been ruled, still, the progress is much more than solely symbolic. The French judicial system has demonstrated promising evidence that remediation for victims of corporate human rights abuse and corporate impunity might come to an end.[191]

[188] Monnheimer (n 166), 311.
[189] Sandra Cossart and Lucie Chatelain, 'Human Rights Litigation against Multinational Companies in France', in Richard Meeran and Jahan Meeran (eds), *Human Rights Litigation against Multinationals in Practice,* (Oxford University Press), 245.
[190] Sandra Brabant and Elsa Savourney, 'All Eyes on France – French Vigilance Law First Enforcement Cases (1/2): Current Cases and Trends', (Cambridge Core Blog, 24 January 2020), https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/#_edn13, accessed 19 April 2022.
[191] Cossart and Chatelain (n 189), 253.

5 The Concept of Disclosure Legislation

Disclosure legislation is portrayed as the most subtle and least invasive method of coercing business enterprises to display information for relevant actors to utilize their influence and ultimately demand change in its corporate behavior. As of lately, these legislative transparency obligations have directed the attention to sustainability-related matters rather than the traditional problems concerning finances.[192] Proponents of disclosure-based laws contend that promulgating corporate wrongdoing enables consumers and investors to make decisions from their own perspective on the sustainability concept. Divestment and boycotting of the South African economy played a part in bringing an end to the apartheid regime.[193]

Human Rights and other sustainability-related reporting commitments have been criticized for being overly optimistic when attempting to shape consumer or investor responses. Merely enhancing the components of the sustainability reports is not adequate enough when pursuing the accountability objective often predicted by the legislators.[194]

The disclosure theory instilled in these laws rely on an assumption that consumers and investors will automatically pressure corporations to change their business practices. Narine argues that this premise is well-intentioned and aims at delegating responsibility over to the private sector, however, they fail to take into consideration how pertinent actors will assess and use the data provided by the company.[195] Potentially, the corporate disclosure requirements might generate reactions from investors and other relevant stakeholders which in turn can shift the consumer demand, and in the course of time has a significant effect on global business management.[196]

Further criticism has targeted the lack of specific definitions and common understanding of important norms[197] and disclosure legislation being drafted without any substantial penalties and primarily entrusting institutional investors to act upon the published information will presumably not have the anticipated effect or solve human rights crises.[198] Reporting as a means

[192] Chiu (n 170), 521.
[193] Marcia Narine, 'Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts', (2015) 47 COLUM. HUM. RTS. L. Rev. 84, 129.
[194] Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability', (2021) 21 Chi J Int'l L 323, 351.
[195] Narine, (n 193), 91.
[196] ibid., 92.
[197] Chiu, (n 170), 522.
[198] Narine, (n 193), 127.

for corporate sustainability disclosure is heavily weakened without a regulatory oversight body that can sanction inaccurate or ambiguous information.[199]

Moreover, legislation relying on the transparency of business entities must require conducting a due diligence process prior to sharing predicted sustainability risks. Otherwise, this may jeopardize the efficiency of minimizing adverse human rights impact and corporate accountability intended by the law.[200] Where there is a lack of standardization on sustainability-related risk for institutional investors and when it is of a voluntary nature it can induce skewed information declared by the companies.[201] Alternatively, adopting mandatory disclosure requirements entails equipping institutional investors with unambiguous and purposeful instruction on what and how to fulfil the standards.[202]

5.1 Private Due Diligence Initiatives of the Financial Sector

The EU study on due diligence welcomed the surge in investor-driven initiatives advocating for increased due diligence obligations as a means to manage the reputational risks.[203] A prominent example of the this is the Corporate Human Rights Benchmark, composed of various organizations from the private sector, that collectively support due diligence mechanism found in the UNGPs and the OECD Guidelines a full implementation throughout the business operations and value chains. The Corporate Human Rights Benchmark provides additional benchmarks and resources that can be used as sustainability indicators for institutional investors.[204]

Nevertheless, Monnheimer asserts that it is undemocratic in its nature for non-state actors to formulate social standards where the transparency of their entire research, conclusion, and decision-making cannot be assured. By delegating the duty of outlining international human rights standards, a role traditionally held by the state, to private actors will result in issues concerning legitimacy as they are not in the position to draft normative legal frameworks.[205]

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[199] Jill E. Fisch, 'Making Sustainability Disclosure Sustainable', (2019) 107 Geo LJ 923, 927.
[200] Chambers and Vastardis (n 194), 347.
[201] Fisch, (n 199), 926.
[202] ibid., 928.
[203] EU Due Diligence Study (n 110), 453.
[204] Corporate Human Rights Benchmark, 'Invest or Statement Calling on Companies to Improve Performance on on the Corporate Human Rights Benchmark', available from: https://www.pggm.nl/media/5c0dslbj/public-statement-calling-on-companies-to-improve-human-rights-performance-feb_28.pdf.
[205] Monnheimer (n 166), 41.

6 Discussion

6.1 Article 4 of the Sustainable Finance Disclosure Regulation

The financial sector cannot be the sole driver of the green economy and sustainable development, notwithstanding, the ambitious action plan will likely have an impact by redistributing capital and facilitating this target with clarifications on sustainable investments. Certainly, if the trend of ESG investing loses its attraction, consequently, the Sustainable Finance Disclosure Regulation fails to achieve any sustainability objectives.

Due to the novelty of the SFDR, it cannot be precisely specified what a financial market participant ought to disclose in its due diligence process according to article 4. Stipulating more of an exact minimum benchmark on transparency will have to be evolved either through EU legislation or other legal frameworks mentioned in the thesis. Evidently, there is a demand from financial market participants, for example institutional investors, for further guidance, however, the EU has omitted to specify the equivocal obligations under article 4.

With the aim of harmonizing rules within internal market an EU regulation will always be the most efficient way and entail less legal uncertainty compared to a directive. Diverging national implementation sets different standards across the internal market, it is possible that corporations or investors operating throughout the EU will mostly depend on due diligence schemes developed internally which could decrease the significance of an EU standard.

Entrusting the pertinent national authorities with supervising compliance with the SFDR could also have the opposite impact of achieving unity. Public budgets vary in size from country to country, even within the EU, and the fact that is a non-financial issue this might prompt diverging supervisory outcomes. It is evident that the Swedish authorities do prioritize overseeing the marketing of sustainable financial products, nonetheless, this is perhaps not the case in all Member States.

The EU Taxonomy clearly demonstrates the importance for the EU to prioritize environmental objectives over socially oriented goals. It is without a doubt inadequate to achieve the goals found in the SDGs and sustainability solely providing clarification on targets related to climate change.

6.2 International Due Diligence Standards

Corporate accountability for human rights violations has been a long-standing regulatory void on the global arena primarily governed through international soft law instruments. The voluntary essence of these schemes preserves resilience and flexibility that can easily adjust to a transforming modern business in constant change. The constant mentioning of international standards of due diligence in the EU's core frameworks relating to the sustainable finance agenda signals how highly regarded these frameworks are. Reference to additional non-EU due diligence schemes depending on the nature of the sustainable objective creates legal chasms regarding which standards to align its processes with.

The UNGPs declare that they are applicable to corporations as well as investors, however, compared to the more unequivocal OECD document specifically devoted to the most substantial features of due diligence policies, the UNGPs loses some of its practical qualities. As stipulated by scholars, the framework is best comprehended and interpreted in the light of other internationally recognized standards linked to human rights and sustainable development.

In contrast to the UNGPs, the OECD has constructed more progressive frameworks on responsible business conduct of multinational enterprises by the number of sector-based guidelines provide clarity in the regulatory jungle. Private actors like institutional investors are given meticulous recommendations dedicated to their due diligence process accompanied by the case-by-case revision from the NCPs.

The NCP statements do serve the investor community with indispensable opinions, however, these forum discussion does not produce any precedents. There is a risk of contradictory guidance being issued, thus, no observance of legal certainty or a guarantee of impartial judges. Yet, it has introduced a forum where issues between corporations, investors and victims of human rights abuse can be, to some extent, addressed and documented. Though it is far from traditional court proceedings, it is presumably the closest present alternative that can provide some form of redress for the parties involved and set important standards for institutional investors.

The current lack of case-law in the area of institutional investors' due diligence duties does create gaps where voluntary discussion forums do fulfil a necessary function. Nevertheless, from a traditional legal perspective, several persisting problems arise in connection to the non-binding nature of the NCP rulings. Due to the relatively low number of OECD member states, the impact of the NCP decisions is limited.

Both the UNGPs and the OECD Guidelines state the basic human rights that ought to be observed and respect by business enterprises throughout its operations are covered by the International Bill of Human Rights and the eight fundamental conventions formed by the ILO.

6.3 National legal developments

In the absence of a binding international treaty has compelled national parliaments to draft their own laws in business and human rights. Legal progress in Europe implies the willingness to utilize the domestic judicial powers to govern and investigate alleged breaches that occur within and beyond the boundaries of the jurisdiction. Regulating at a smaller scale facilitates the ability to tailor binding frameworks in conformity with different needs depending on geographical setting or business sector.

Large French companies will operate under close examination from not only active NGOs and interested investors but also state authorities with the power to initiate legal proceedings if the due diligence mechanism is insufficient as seen in the accusations against oil giant Total in Uganda. Several cases have been filed for failing to abide by the duties found in the vigilance law, yet no case has reached court proceedings addressing issues other than that of admissibility.

The French law on the duty of vigilance is pioneering in prescribing mandatory provisions on a due diligence mechanism. This represents an early step in crystallizing binding corporate due diligence in relation to human rights which could translate into a global phenomenon in the near future. The UK Modern Slavery Act limits its scope and applicability from the outset drastically by only relating to human trafficking and modern slavery compared to the French law. In business fields where there is a specific tendency for certain issues to arise, the attention to issues could be imperative for investors to contemplate whether additional scrutiny is needed.

6.4 Regulatory Approaches to Due Diligence Duties

Chapter 5 discussed the advantages and disadvantages of regulatory methods in regard to due diligence commitments. The disclosure based regulatory method as demonstrated by the UK Modern Slavery Act requires, stipulated in the aim of the Act, that active investors or NGOs to closely examine the declarations provided by the companies.

Scholars have asserted that relying on disclosure statement alone does not automatically produce any preventative action for future adverse impacts. This could result in structural changes in the long run by external pressure from engaged NGOs, private sector initiatives, investors, or other relevant stakeholders. By equipping the regulation with mandatory due diligence provisions generates the proactive features of 'identify, prevent and mitigate' in which severe issue can be recognized directly internally and at an earlier stage, therefore, the chances of minimizing adverse human rights impact is higher. To cater to different sectors and keeping the legislation updated in a constantly changing business world, the disclosure method offers a more dynamic and less rigorous procedure.

Private initiatives have surfaced due to the lack of regulatory clarity regarding the due diligence mechanism. This phenomenon has been criticized for leaving traditionally regulatory tasks to the private sector with no legal knowledge of how adequately develop regulation. Perhaps a combination of a generic regulation encompassing mandatory due diligence for large business entities accompanied by disclosure statements imposed on institutional investors.

7 Conclusion

Reiterating the purpose of the thesis to assess the due diligence obligations in the article 4 of the SFDR, it is necessary to seek a full comprehension of the duty in additional EU law. With references to international due diligence standards the exact length in which institutional investor need to carry out the due diligence procedure according to the Regulation is left vague. This could result in that every institutional investor decides to apply different international frameworks contributing further to difficulties for end investor comparison.

Due diligence concerning social objectives are intrinsically dependent on international human rights law in which both the UNGPs and OECD Guidelines are based on. Although, the doctrine only extends to social features of sustainability and ESG it might be a complement as there currently is no social EU taxonomy yet in force. Both frameworks agree on the basic human rights that business entities, including institutional investors, at a minimum must respect

In general, scholars appear to agree that imposing mandatory due diligence obligation upon corporations, institutional investors and other stakeholder is the most effective regulatory avenue to combat corporate human rights abuse. Disclosure legislation delegates too much for interpretation to the corporations which often results in diverging practices and makes transparency comparisons burdensome on interested parties such as end investors.

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