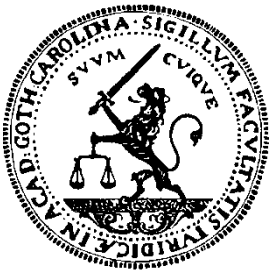

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The European Taxonomy Regulation and the Corporate Sustainability Due Diligence Directive: A Human Rights Perspective

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Contents

Summary

The EU has over the last few years set up the objective to become climate neutral by the year 2050. To achieve this objective, the European Commission has recognised the need for a massive transition investment into sustainable economic activities. The European Commission has also recognised that this investment cannot be done without the help of private funding which is why the European Commission recently adopted the Taxonomy Regulation that will help entities such as governments and private actors to categorize what activities can be regarded as sustainable and conclusively help the EU in the green transition.

As this green transition will have a huge impact on resources allocated to sustainable activities both inside and outside of the EU, the European Commission has also identified the need to incorporate human rights considerations into this framework in what is named 'the minimum safeguards'. Although these minimum safeguards establish a need for human rights considerations, especially the Bill of Rights and business and human rights frameworks such as the UNGPs and OECD guidelines on multinational enterprises, there is no clear guidance as to how these considerations should be applied in practice. Therefore, the European Commission has proposed a new directive, the Corporate Sustainability Due Diligence Directive, that will ensure that entities that want their activities to be classified as sustainable must conduct a human rights audit that fulfil several human rights considerations.

This thesis examines the relationship between on the one hand the Taxonomy and on the other hand the Corporate Sustainability Due Diligence Directive out of a human rights perspective. It finds that there is undoubtedly a clear need for the proposed directive but that the correlation to human rights standards and the reference to the frameworks on business and human rights differ in the two instruments. There are several variations, both in the application and in the integration of the proposed directive. This thesis establishes that the combination of instruments has potential but that the dissonance will potentially undermine human rights concerns in relation to the aspiration of the EU of becoming climate neutral in 2050.

Sammanfattning

EU har under de senaste åren satt upp målet att bli klimatneutral till 2050. För att nå upp till målet har EU-kommissionen identifierat att det behövs en massiv ekonomisk investering i hållbara ekonomiska aktiviteter runt om i EU. Denna omställning kan inte lösas utan stöd från privata investeringar och som en lösning på detta har EU-kommissionen infört EU:s gröna taxonomi som ska hjälpa entiteter såsom stater och privata aktörer att klassificera vilka ekonomiska aktiviteter som kan räknas som hållbara och därmed hjälpa EU att nå målet om att bli klimatneutral till 2050.

Eftersom denna omställning innebär en stor resursallokering till hållbara aktiviteter i och utanför EU har EU-kommissionen sett till så att det inkorporerats minimiskyddsåtgärder som ska skydda mänskliga rättigheter i anslutning till dessa investeringar. Dessa minimiskyddsåtgärder etablerar ett krav att följa internationella konventioner såsom OECD:s riktlinjer för multinationella företag och FN:s vägledande principer för företag och mänskliga rättigheter, och det internationella regelverket för mänskliga rättigheter. Dock etablerar inte minimiskyddsåtgärderna någon klar ledning av hur dessa åtaganden ska genomföras i praktiken. Som svar på detta har EU-kommissionen gett förslag på direktivet om hållbarhet i företags värdekedjor som ska säkerställa att aktiviteter som ska klassas som hållbara måste genomgå en granskning med hänseende till mänskliga rättigheter.

Den här uppsatsen undersöker hur mänskliga rättigheter korrelerar med å ena sidan den gröna taxonomin och å andra sidan direktivet om hållbarhet i företags värdekedjor och hur dessa rättsliga dokument förhåller sig till varandra. Slutsatsen är att det nya direktivet är nödvändigt för att säkerställa minimiskyddsrättigheterna men att korrelationen mellan vilka överväganden som görs i förhållande till mänskliga rättigheter skiljer sig mellan de två instrumenten. Det finns flera skillnader som avser både tillämpligheten och i integrationen av direktivet. Uppsatsen slår fast att de båda instrumenten har potential men att dissonansen riskerar att underminera införandet av ett starkt skydd för mänskliga rättigheter i förhållande till EU:s mål att bli klimatneutrala 2050.

Preface

What would only be a short stop at the Swedish Law programme in Lund became considerably longer than planned. Experiences and encounters that, when I started, I could only dream of have marked the past years in Lund. Not to mention all the friends I have gained along the way.

It would be impossible to mention and bring thanks to all of you that have made these years so memorable in this short preface. Hopefully, there will be other chances where I can extend my gratitude.

Nevertheless, I would like to direct a special thank you to my supervisor Daria that have set me on the right path and always been there to help. You serve as a great inspiration, and I hope that I one day can be able to experience the same exciting experiences in the human rights field that you have.

There are of course many more that deserves a special mentioning. First, my dear beloved Sofia. Without your support it would have been impossible to manage writing this thesis. I cannot wait to experience the world with you. I would also direct my warmest appreciation to my family that have supported me throughout the entire law programme. Olle Jonsson, Jasmin Öykü Özdemir and Jacob Thörnmo needs a special thank you for having taken the time to read the thesis and provide valuable input.

Last but not the least, my friends from the student life where the Karneval 2022 and the Academic Society in Lund deserves a special mentioning of thankfulness. Also, as anyone that have worked at the Faculty of Law, no preface is complete without a special thank you to all my current and previous colleagues at ‘Nätis’ and especially Lärarlyftet.

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Abbreviations

BHR	Business and Human Rights
EU	The European Union
EGD	European Green Deal
ESG	Environmental, social, and corporate governance
CSDDD	Corporate Sustainability Due Diligence Directive
CSRD	Corporate Sustainability Reporting Directive
DD	Due Diligence
HRDD	Human Rights Due Diligence
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
OECD	The Organization for Economic Cooperation and Development
MNE	Multinational enterprises
MS	Minimum Safeguards
NCP	National contact point
NGO	Non-governmental organization
UNGP	UN Guiding Principles on Business and Human Rights
SFDR	Sustainable Finance Disclosure Regulation
SME	Small and medium sized enterprises
The Commission	The European Commission of the European Union
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights

1 Introduction

1.1 Background and research problem

Recent years have brought both citizens and states to the realisation of the need for a set of standards that comprises what can be classified as green and subsequently what is not harmful to our planet. Two main points, however, have proven difficult to agree upon: how this classification shall be done and what considerations are needed to achieve this goal. At the same time, it is of essence that human rights considerations are not neglected. As multinational enterprises play a big part in the green transition, it is important that the criteria for what is environmentally sustainable in Europe does not harm other parts of the world where such human rights considerations are not protected.

There is however a highlight, as the EU has set forth a new ambitious plan to become climate neutral by 2050. Crucially, it has recognised that carbon neutrality must be done with the support of more than a few different actors within the EU. Simultaneously with the plan to become climate neutral, the EU has set out guidance on how such neutrality should be pursued in conformity with international human rights standards and that this will apply to all 27 member states.

This thesis sets out to investigate how these EU frameworks are expected to align with human rights. The thesis focuses on two of the most human rights integrated sets of standards. That is, The Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (Green Taxonomy) which is the underlying framework for the EU's ambition of being climate neutral and that is in force since January 2022. It is primarily its art. 18, on minimum safeguards, that deals with human rights obligations. The second sets of standards onto which this thesis focuses are a newly proposed, but nevertheless highly aspiring sets of standards that interrelates with both the Green Taxonomy and human rights obligations. Consequently, an important part of the puzzle. To be precise, this is the proposed Corporate Sustainability Due Diligence Directive (CSDDD) which is projected to regulate the due diligence requirements for companies within the EU. This proposed piece of legislation does not only put EU companies under scrutiny with regards to their human rights obligations, but also for their oversight over the entire value chain,[1] both inside and outside of the EU.

[1] The 'value chain' comprises all processes or activities of a company, such as production, marketing, sales, and after-sales service. It also covers activities both upstream and downstream of partners to whom which the company have an established business relationship.

The overarching question is then whether these two instruments are compatible with the international human rights frameworks and what path they together set out for business entities supervised by these pieces of legislations. There are, as this thesis will show, conflicts between the obligations that the minimum safeguards in art. 18 puts in place, and the realisation that the CSDDD proposes. One of the most conspicuous problems is the personal scope of the CSDDD. Since the due diligence obligations are not directly applicable to small and medium sized enterprises, how will this affect implementation? At the same time the CSDDD introduces a new term, which cannot be found in the UNGPs and the OECD Guidelines: that of the applicability of the CSDDD to 'business relations' and 'established business relationship'. The thesis will seek to understand the implication of these deviations in practice and the extent to which it may depart from the UNGPs.

It is imperative to investigate these questions out of several contexts. The most important is of course to see if the Green Taxonomy and CSDDD will undermine or help to promote the business and human rights standards already enshrined in the UNGP.

While the minimum safeguards of the Green Taxonomy make it clear that companies under the Green Taxonomy are under the obligation to follow the UNGPs a starting point with these questions is how the CSDDD will engage companies into finding the right balance between, on the one hand, being able to comply with the standards it introduces, and on the other hand not being over-burdened when trying to implement them. Too burdensome regulations can affect companies so that they will aim to avoid being within the reach of the regulations and may even move companies outside of the EU.

1.1.1 Research question

The primary purpose of this thesis is to investigate and analyse the correlation of the Green Taxonomy and the proposed CSDDD from a human rights perspective. That is to investigate how these two instruments use and portray human rights and what effects that might have on their implementation. The reason for this is to understand how one of the world's largest green initiatives works to incorporate human rights. Much of the future effectiveness of the area of business and human rights can be said to depend on how well this initiative work and therefore it is essential to understand how the new initiative interrelates with current developments in business and human rights.

Firstly, the point of departure is to analyse the correlation between these two pieces of legislation to determine on which level they intersect and what human rights obligations they provide for. Secondly, upon determination on the level of intersection and level of human rights application the thesis will discuss the limitations and inherent differences that the two instruments provide for in relation to human rights.

To achieve this, the thesis is focused on answering the following research question:

How does the Corporate Sustainability Due Diligence Directive intersect with the minimum safeguards in the Green Taxonomy to promote human rights?

This will be done by answering the following sub-questions:

What is the interlinkage between the Green Taxonomy and the Corporate Sustainability Due Diligence Directive?

How do they promote a business conduct which is human rights compliant?

What are the potential limitations?

1.2 Methodology and material

To answer the research questions, this thesis adopts a descriptive research method coupled with a comparative research objective method.[2] These two methods are used in combination to provide for and to develop the substance of the thesis and to help establish the argument throughout the thesis.

The methodologies are expressed through the study and comparison of the two systems of EU climate law and human rights law. The descriptive research method is centred around analysis and investigation of books and articles that relate to the subject matter of this thesis. This information has been thoroughly studied and narrowed down to a concise reading. Each chapter provides for a description of the existing law and, to clarify the meaning and significance of the findings, argument is made in connection to the findings. The thesis reviews the findings and encapsulates the main arguments in the discussion chapter in the end of the thesis where it also has the general comparison of the two systems and where the comparative research objective method is used to bring an answer to the research question. As to the discussion comparison it is subject to a legal dogmatic approach in that it detects conceptually equivalent rules through systemizing and interpreting established legal sources found throughout the thesis.[3] Evaluation is then made with regards to established human rights interests.[4]

The legal sources used in this thesis are furthermost international treaties and regulations, European Union law and domestic law from European countries. The legal sources have been interpreted with the help of academic legal

[2] Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Intersentia 2018) 9, 17.

[3] ibid 43.

[4] ibid 54.

literature and sources from practice (corporate reports, news articles, etc.). They are in turn interpreted through teleological, systematic, and textual interpretation.

It is important to notice that since the area of study is of a contemporary character there is currently no case law that can give directions on the interpretation of the law. This is a methodological difficulty as case law is a distinct part of the legal dogmatic approach to comparison. It is also an inevitable limitation of the thesis that the CSDDD is only proposed and has not yet been adopted. As will be seen this creates a hypothetical argument in many cases. It must also be noticed that soft law principles govern a wide area of business and human rights which in turn makes it difficult to set out clear obligations, many of which remain contested in existing literature.

1.3 Limitation

The thesis is limited to the draft proposal of the CSDDD from the Commission. Noteworthy is that the Council of the EU have recently adopted their position on the CSDDD which will serve as their negotiating position when negotiations on the CSDDD with the European Parliament starts.[5] Due to the recent publication of the position by the Council of the EU there has not been enough time to examine and incorporate these considerations into the thesis.

The thesis is limited to the Taxonomy Regulation's provision on minimum safeguards. It will only refer, when relevant, to the Corporate Sustainability Reporting Directive and Sustainable Finance Disclosure Regulation which, however, do not constitute the focus of this work. This limitation is done with the aim to create a more concise approach to the research question and to narrow the subject of the thesis. Though these two regulations play an important part in the overall implementation with regards to the auditing and disclosure mechanism of the Taxonomy, it is not essential to investigate them in detail to answer the research questions posed here, and thus understand the correlation with human rights.

The thesis will also briefly mention but not investigate the effect of the ILO conventions for the sake of minimum safeguards and CSDDD. This limitation is done with the aim to be more consistent with the human rights approach. Thus, the focus will be entirely on the human rights aspect of the instruments. It can be argued, however, that the ILO conventions also enshrine human rights standards, yet this thesis excludes them from its analysis in order to ensure the feasibility of the thesis.

[5] European Council of the European Union, 'Council Adopts Position on Due Diligence Rules for Large Companies' <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/> accessed 29 December 2022.

Another limitation to the thesis is the decision not to discuss the right to life. While this is an important international human right that can be clearly connected to the sustainability objectives of the Taxonomy, this thesis will not investigate such impacts in greater detail. Such an investigation would require a significant deviation from the research question and would not serve a purpose in answering them.

Lastly, with regards to national due diligence laws, the delimitation has been set so that the thesis only describes two of the current European national due diligence laws. Since it is only meant to exemplify how due diligence laws can be structured it is not necessary to describe all European national due diligence laws in detail. Thus, the most exemplifying has been selected.

1.4 Outline

To be able to answer the research question the thesis is divided into six chapters that will each help to clarify the subject. Each chapter contains sub-chapters that gives a more detailed account of every area.

The first chapter of the thesis is dedicated to the introduction and establish the foundational aspects of the thesis such as research question, limitations, and methodology.

The second chapter of the thesis will introduce the European Green Deal to the reader. This chapter aims to establish the foundational aspects for the research question and help to place the question in its broader contemporary context. Apart from giving a concise introduction of the European Green Deal this chapter will cover the Green Taxonomy, the minimum safeguards, and the Delegated Acts of the Green Taxonomy. Both the Green Taxonomy and the minimum safeguards have an essential role in answering the research question and are therefore extensive in their coverage. The chapter on the delegated act is important to understand the broader context of how the Green Taxonomy is meant to work and how it can be modified and altered throughout its application.

The third chapter of the thesis covers the human rights that are essential to answer the research question. Here the reader will be introduced to foundational human rights such as the International Bill of Human Rights but also more specific business and human rights frameworks such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines. The chapter will answer what context this have in relation to human rights and what role it plays. This chapter also briefly covers international labour laws and national due diligence laws to give the reader a summarizing context of how the areas are interlinked and to understand the broader perspective of the research question.

The fourth chapter covers the CSDDD. To give the reader an introduction to the area of human rights due diligence there is firstly an introduction to due diligence followed by a more detailed account for the whole CSDDD. This explanation is essential for the comparison between the Green Taxonomy and the CSDDD and in the end being able to answer the research question in detail.

Chapter five of this thesis is encompassing the discussion which will lead to the conclusion in chapter six where the main findings of this thesis and the answer to the research question are included.

2 The European Green Deal and the Green Taxonomy

2.1 The European Green Deal – a background

In December 2019 the European Commission (the Commission) introduced The European Green Deal (EGD) which is a reform package aimed at making the EU economy climate sustainable and transform the EU to a resource-efficient, competitive, and modern economy. The EGD is a climate transition package consisting of a coordinated set of policies and legislation that spans over several areas such as energy, agriculture, industry, transport, research, finance, and environment. The political ambition of the EDG is to make the EU climate neutral by 2050 and reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990.

To understand the idea of the EGD it is important to understand what prompted its development. The origin of the EGD dates back to 2008 when the Commission identified climate change as posing a 'threat multiplier' which could have severe effects on, amongst other things, the economy of the EU.[6] Over the following years this prompted a set of initiatives from the EU and its member states, some of which were applicable throughout the EU, some that were only adopted at a national level, as further discussed in this thesis. These initiatives led to the point in February 2018 when the European Council publicly announced that it would 'lead the way in the global pursuit of climate action', a statement followed by the elaboration of the EGD during the following year.[7]

To write into law the goal set out in the EGD, the EU has enacted the 'European Climate Law' (the Climate Law). This serves as the common foundation for the EGD.[8] The European Climate Law seeks to ensure that all the EU policies connected with the EGD are set towards the same end objective and that there are no differences among the various EGD policies. Except for the key element goal of climate neutrality by 2050 and the emission target for

[6] European Commission and the High Representative, 'Climate Change and International Security' (2008) Paper from the High Representative and the European Commission to the European Council S113/08 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf> accessed 4 October 2022.

[7] European Council of the European Union, 'Climate Diplomacy: Council Adopts Conclusions' <https://www.consilium.europa.eu/en/press/press-releases/2018/02/26/climate-diplomacy-council-adopts-conclusions/> accessed 4 October 2022.

[8] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') 2021 (OJ L).

2030 the Climate Law includes assessment obligations to keep track of the progress and adapt in accordance, coherence obligations across Union policies and the commitment to create roadmaps for different sectors to charting the path to climate neutrality.[9] Notably, the Climate Law sets out the creation of a European Scientific advisory board that will serve as a point of reference for scientific knowledge relating to climate change. The board is tasked with monitoring scientific findings from amongst other the Intergovernmental Panel on Climate Change (IPCC) as well as committing to the goals set out in the Paris Agreement. The board is required to use this data when giving advice to measures taken in relation to the Climate Law, to help policymakers make informed science-based decisions.[10]

It is evident that, at least on paper, the EU has set the ambition to be at the frontier of global climate action. It has made it clear, that by introducing the EGD it wants to set a worldwide positive example and encourage states around the world to set their own aims for climate neutrality.[11] However, it is important to notice that the EU at the same time wants to be at the frontline of economic competitiveness. Concerns, however, have already been raised about the fact that the EU, through the EGD, now has a new tool to foster green protectionism and subsequently also motivate protective mercantilism.[12] By using the EGD, the EU can now shift its dependence on external markets and suppliers by boosting renewable companies within the EU, factors that ultimately can pose exogenous risks to states outside of the EU. Defending its commercial interest and seeking to neutralize other states' competitiveness in relation to such issues as e.g., intellectual property law and holding renewable technology for itself may undermine the EGD.[13]

Another challenge for the EGD is the economic aspect that has always divided the EU. The richer northern part of Europe has less carbon-intensive economies while poorer Central European countries are more dependent on fossil energy.[14] Consequently, the EU has set up a 'Just Transition mechanism' that

[9] European Commission, 'European Climate Law' <https://climate.ec.europa.eu/eu-action/european-green-deal/european-climate-law_en> accessed 11 October 2022.

[10] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') art 3.

[11] European Commission, 'Delivering the European Green Deal' (*European Commission*) <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en> accessed 4 October 2022.

[12] Danila Bochkarev, 'The European Green Deal: Saving the Planet or Protecting the Markets?' (*IAI Istituto Affari Internazionali*, 6 September 2020) <https://www.iai.it/en/pubblicazioni/european-green-deal-saving-planet-or-protecting-markets> accessed 6 December 2022.

[13] Richard Youngs, 'The EU's Indirect and Defensive Approach to Climate Security - The EU and Climate Security: Toward Ecological Diplomacy' (*Carnegie Europe*) <https://carnegieeurope.eu/2021/07/12/eu-s-indirect-and-defensive-approach-to-climate-security-pub-84874> accessed 4 October 2022.

[14] POLITICO, 'What Is the Green Deal?' (*POLITICO*, 20 October 2020) <https://www.politico.eu/article/what-is-the-green-deal/> accessed 4 October 2022.

aims at ensuring that no one is left behind. It will be done by targeted support to affected regions, industries, and workers within the EU. Over the course of six years, from 2021 to 2027, the 'just transition mechanism' will enable €19.2 billion to be invested in these areas.[15]

Some concerns have been expressed about the fact that the EGD may constitute an 'indirect approach to climate security'. The underlying concern is that it focuses on the *process* of climate neutrality rather than on the actual outcome. Subsequently, shaping preparatory principles instead of focusing on precise results and quantifiable actions. To contextualize this, the EGD is dedicated to finding solutions that fits all member states rather than adapting measures that seek out country-specific strategic interventions.[16] Nevertheless, the EDG is still in its initial phase and while the overall actions target the whole union, there are certainly actions that affect some countries more than others. This will be elaborated upon in chapter 2.2.1 when examining the specificities of the delegated acts.

In sum, the EDG sets out a very ambitious climate initiative that stretches over several competence areas of the EU. As the EDG is still new and still in development, it is my opinion that it is impossible to know fully which impacts and results it will have. I believe there is still a long way to go to achieve its many ambitions and not so much time for achieving them. Chapter 2.2 examines in more details the economic investment framework of the EDG and how it is structured.

2.2 The European Taxonomy Regulation

The European Commission has estimated that the EU needs about €260 billion in extra investment every year over the next decade to achieve its goal of net zero emissions by 2050. To achieve this goal, public funding is not considered to be sufficient and subsequently there is a clear intention to mobilize private investors to help finance climate-friendly projects. Therefore, the EU has introduced criteria that specify which economic activities qualify as green and sustainable. These rules serve as a common classification system across the EU and have the aim to provide clarity around what can be regarded as

[15] European Commission, 'The Just Transition Mechanism: Making Sure No One Is Left Behind' (*European Commission*) <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed 4 October 2022.

[16] Youngs (n 13).

sustainable investment and, furthermore, encourage private investors to join the transition by contributing with investment in such sustainable activities.[17]

At the heart of this sustainable investment plan is the Green Taxonomy from 2020, which facilitates the key environmental objectives, the policymaking around those objectives, and which considerations must be made in relation to those objectives. Subsequently the Green Taxonomy sets out to establish the basic principles, for which companies and policymakers in the end can decide which economic activities can be considered environmentally sustainable and ultimately help redirect capital in that way.[18] However, concerns have been raised that this is a problematic approach in the sense that this creates a 'binary' methodology to the Green Taxonomy. That is an approach that classifies activities as either 'sustainable or 'non-sustainable'.[19] I agree with this critique, and furthermore I also believe that this generates further difficulties such as that activities that could be beneficial to the environment are discarded by investors because they are not included in the Taxonomy. There is of course the possibility to include them through delegated acts, but this is not an effortless process which in turn makes the Taxonomy quite static in its application.

Under the Green Taxonomy, an activity is considered environmentally sustainable if it substantially contributes to at least one of the environmental objectives enshrined in the Green Taxonomy.[20] It is also imperative that it does so without causing any significant harm to any of the other objectives.[21] The six environmental objectives set forth in the Green Taxonomy are:

1. Climate change mitigation (defined as something that is considerably contributing to the minimization of greenhouse gas emissions. Either by reducing them or by removing them. It could additionally be by avoiding the enhancement of the gases in certain ways. Important is

[17] European Parliament, 'EU Defines Green Investments to Boost Sustainable Finance | News | European Parliament' (*European Parliament*, 11 June 2020) <https://www.europarl.europa.eu/news/en/headlines/economy/20200604STO80509/eu-defines-green-investments-to-boost-sustainable-finance> accessed 5 October 2022.

[18] Gabrielle Holly and Signe Andreasen Lysgaard, *How Do the Pieces Fit in the Puzzle?: Making Sense of EU Regulatory Initiatives Related to Business and Human Rights* (Version 2, Danish Institute for Human Rights 2022) 18.

[19] Platform on Sustainable Finance, 'Public Consultation Report on Taxonomy Extension Options Linked to Environmental Objectives' (*Platform on Sustainable Finance*, 2021) 6 <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-platform-report-taxonomy-extension-july2021_en.pdf> accessed 23 November 2022.

[20] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) 2020 (OJ L) art 3.

[21] ibid.

that the economic activity is in line with the goal in the Paris Agreement on the overall temperature target).[22]

2. Climate change adaptation (defined as an action that should substantially assist to decrease or prevent the possible impact, or risk of impact, of the imminent projected climate change. The activity can be both in relation to people, nature, or an asset. No matter what, it is important that the action is taken in accordance with relevant Union law and the Sendai Framework for Disaster Risk Reduction 2015–2030).[23]

3. Use and protection of water and marine resources (defined as something that 'either contributes substantially to achieving the good status of bodies of water, including bodies of surface water and groundwater or to preventing the deterioration of bodies of water that already have good status, or contributes substantially to achieving the good environmental status of marine waters or to preventing the deterioration of marine waters that are already in good environmental status').[24]

4. Circular economy (something that can help increase the durability, reparability, upgradability, and reusability of products or reduce use of resources in various ways, e.g., food waste. The circular economy can also be a business model with a circular value chain. As a minimum, it could be something that reduces the content of hazardous substances in materials).[25]

5. Pollution prevention and control (defined as something that prevents or reduces pollutant emissions other than greenhouse gases or improves air, water or soil quality or is cleaning up litter other than pollution).[26]

6. Protection and restoration of biodiversity and ecosystems (defined as something that is 'contributing substantially to the protection and restoration of biodiversity and ecosystems where that activity contributes substantially to protecting, conserving or restoring biodiversity or to achieving the good condition of ecosystems, or to protecting ecosystems that are already in good condition').[27]

In addition to the two prerequisites of contributing to one or more of the environmental objectives and not doing any significant harm to any of the other

[22] ibid explanatory memorandum (24).
[23] ibid explanatory memorandum (25).
[24] ibid 12.
[25] ibid explanatory memorandum (28).
[26] ibid 14.
[27] ibid 15.

objectives, there are two other important criteria that must be fulfilled for an activity to be considered as sustainable. That is:

1. The activity must be carried out in compliance with the minimum safeguards (which will be further examined in chapter 2.3), and

2. The activity must comply with the technical screening criteria that are established by the Commission through delegated acts.[28]

Consequently, it is important to keep track of all four criteria for compliance with the Green Taxonomy. The regulation also makes it evident that the assessment of what constitutes a sustainable activity can shift over time. Depending on the fluctuating nature of science and technology, an economic activity may well have a different environmental impact. Thus, the Commission established that these conditions shall be 'updated regularly' and makes way for input from stakeholders as well as experts on their review. The same goes for what constitutes the criteria of 'do no significant harm'.[29] It is my opinion that this is a crucial element of the Taxonomy and that much of the effectiveness and implementation relies on this wording. Because without regular updates to the Taxonomy there is both the risk of lack of practice as the regulations are outdated but also that activities might well harm the environment instead of being positive.

Another consideration of importance is that all six environmental objectives are homogeneously strong. This is crucial to avoid a risk of uneven focus among the Green Taxonomy objectives and consequently, that both actions and investments are drawn to some objectives at the expenses of others. There are concerns, for instance, that the environmental objectives are unequally powerful in the sense that they differ in effectiveness and, in some cases, have loopholes that makes them counterproductive. [30] One such example is the Green Taxonomy criteria for 'pollution prevention and control'. This criterion is criticised as in some cases relies on existing regulations that is considered not to be up to date with the ambition of the EGD.[31] An example of an area where such loopholes can be found is in the chemical pollution obligations and duties. The rules on what chemicals are hazardous and considered harmful to the environment are always in the process of revising as new chemicals are invented and discovered regularly. Thus, making it possible for companies to update older harmful chemicals that eventually becomes banned to newer chemicals that is not yet established harmful for the environment.

[28] ibid 3.

[29] ibid explanatory memorandum (38).

[30] Charlotte Wagner and Timothy Suljada, 'The EU Taxonomy Is Also about Tackling Chemical Pollution' (*www.euractiv.com*, 10 January 2022) <https://www.euractiv.com/section/energy-environment/opinion/the-eu-taxonomy-is-also-about-tackling-chemical-pollution/> accessed 13 October 2022.

[31] ibid.

Conclusively creating a loophole as the companies are always a step ahead of the regulations.[32]

When it comes to the scope of the Taxonomy it is extensive in its application and can generally be divided into three groups. First, the EU and its member states with regards to all measures, standards and labels established with requirements on green financial products or green bonds. Secondly financial market participants that make available financial products and services. Thirdly, financial, and non-financial larger companies that fall within the scope of the Non-Financial Reporting Directive.[33]

Lastly about the Green Taxonomy it is important to consider some aspects of the 'do no significant harm' (DNSH) requirement of the Green Taxonomy. This is one of the fundamental criteria as mentioned above. The overall reason why it is included in the Green Taxonomy is to ensure a baseline standard among the environmental objectives. Its applicability will mostly be with regards to the delegated acts (which will be covered more deeply in the next chapter). How the DNSH will work is that the delegated acts set out technical screening criteria on how to demonstrate alignment of economic activities with the environmental and social objectives mentioned above. To be aligned with the Green Taxonomy, entities will have to provide information on how they are aligned and subsequently living up to DNSH principle for such objectives. The easiest way to do it is by providing information on how the entity is working with the other objectives.[34]

However, the DNSH does not come without criticism. Criticism can furthermost be directed towards its complex structure and the unclarity on how to report in line with these structures.[35] Other criticism can be directed to the international human rights aspect of the DNSH requirement. As the DNSH is similar, but not an exact replica, of the 'No Harm' principle, found in customary international law where it provides states a duty to prevent, reduce and control the risk of environmental harm to other states.[36] The customary international law principle is an important tool to address transboundary

[32] Suljada T, Wagner C and Wickman J, 'SEI Experts Dissect the New EU Taxonomy' (*Stockholm Environment Institute*, 24 January 2022) <https://www.sei.org/featured/sei-experts-dissect-the-eu-taxonomy/> accessed 6 October 2022.

[33] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) 2020 (OJ L) art 1 (2) c; 'What Is the EU Taxonomy?' <https://blog.worldfavor.com/what-is-the-eu-taxonomy> accessed 13 October 2022.

[34] FTSE Russell, 'Russell US Indexes' (*FTSE Russell*, 15 December 2021) <https://www.ftserussell.com/research/do-no-significant-harm-and-minimum-safeguards-practice-navigating-eu-taxonomy-regulation> accessed 14 October 2022.

[35] ibid.

[36] Patricia W Birnie, Alan E Boyle and Catherine Redgwell, *International Law and the Environment* (3. ed., Oxford University Press 2009) 137.

environmental harm in the international context.[37] In my opinion the problem then lies in the unclarity weather the DNSH lower the standard for protection of the environment through adding a 'significant' to the 'No Harm' principle and the fact that the Green Taxonomy does not clarify how this should be interpreted.[38] The 'do no significant harm' is also scrutinized as it has different nuances from the Sustainable Finance Disclosure Regulation and the Green Taxonomy.[39] This I believe is a strange deviation from the established criterion that will undermine the application of the Green Taxonomy in the sense that it will make it less accessible.

2.2.1 Delegated acts

According to article 290 of the Treaty on the Functioning of the European Union the Commission has the power to adopt non-legislative acts which serve to modify or supplement non-essential elements of a legislation.[40] Delegated acts can be revoked at any time by the European Parliament or by the Council. The European Parliament has highlighted the importance of having clear criteria on what is sustainable and eco-friendly as there otherwise will be a risk of greenwashing.[41]

In connection to the Green Taxonomy, delegated acts serve to specify the requirements for what technical screening criteria and what different activities constitute 'substantial contribution' and 'significant harm' to the environmental objectives.[42] Consequently the delegated act provide necessary guidance on how both investors and authorities shall comply with the environmental objectives of the Green Taxonomy. It is important to remember that the Green Taxonomy conditions that such policies shall be adapted to meet with latest science and technology. In other words, be science based. When mentioning the delegated acts, it is also important to observe that the Green Taxonomy makes clear references to both the UN General Assembly 2030 Agenda for Sustainable Development and its implementation into the Union member states in its conformity.[43] Likewise, the Green Taxonomy makes it

[37] ibid 143.

[38] cf 'What Does It Mean to "Do No Significant Harm"? Insights' *Bloomberg Professional Services* (4 March 2022) <https://www.bloomberg.com/professional/blog/what-does-it-mean-to-do-no-significant-harm/> accessed 10 October 2022.

[39] ibid.

[40] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) 2007 (OJ C326/1).

[41] 'EU Defines Green Investments to Boost Sustainable Finance | News | European Parliament' (n 17).

[42] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) explanatory memorandum (58).

[43] ibid preamble (2).

clear that the goals of climate neutrality are set with the 2016 Paris Agreement which the Union has signed.[44]

There are up until now three delegated acts. The first was published in the Official Journal of the European Union on the 9 December 2021 and is the Delegated Act on Sustainable Activities for Climate Change Adaptation and Mitigation Objectives (Climate Delegated Act).[45] It sets up technical screening criteria for several areas such as forestry, wetland restoration, the manufacturing sector, use of energy, water supply, sewerage, waste management and the transportations sector.[46] What it does in practice is to help companies and investors make sense on the two environmental objectives of climate change mitigation and climate change adaptation by clarifying which economic activities makes either a substantial contribution or significant harm to them.

The second delegated act was published on the 6 December 2021 and is the Delegated Act Supplementing Article 8 of the Taxonomy Regulation (Delegated Act on disclosure). This delegated act regulates which information should be disclosed by financial and non-financial undertakings in relation to methodology, content, and type of information. Both relating to the economic activities in their business, but also other types of investments and lending activities.[47] What it does in practice is to state that companies and investors now have a duty to release information on the extent to which their economic activities are Taxonomy-aligned.[48]

The third delegated act was published on 9 March 2022 and is the Complementary Climate Delegated Act. This act extends the Green Taxonomy to include certain economic activities that incorporates nuclear and gas energy to activities covered by the Green Taxonomy and subsequently should be seen as environmentally sustainable.[49] This delegated act is without doubt

[44] ibid preamble (3).

[45] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (Text with EEA relevance) 2021 (OJ L).

[46] ibid.

[47] Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation (Text with EEA relevance) 2021 (OJ L); 'EU Taxonomy for Sustainable Activities' <https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en> accessed 5 October 2022.

[48] 'Russell US Indexes' (n 34) 3.

[49] Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors

motivated by the current European energy demand and accordingly draws on the (relatively) low-carbon emissions of these energy sources. The Commission has stated that the inclusion of these activities into the Green Taxonomy 'allow us to accelerate the shift from more polluting activities, such as coal generation, towards a climate-neutral future, mostly based on renewable energy sources'.[50] The road to use gas and nuclear energy is not straightforward as the Complementary Climate Delegated Act sets up plenty of prerequisites. For example, one condition for the use of gas that it replaces an existing coal generation plant. And for nuclear energy, that the country where it shall be used has a documented plan for having a disposal facility for radioactive waste ready by 2050. In reality that leaves only France, Finland, Estonia, and Sweden as possible countries of application.[51]

It goes without saying that the Complementary Climate Delegated Act has been heavily criticised. Amongst other it is said to have lost its link to science and is also accused to generate irreversible effects on positive climate activities for the coming decade.[52] An example of one of these irreversible effects is that energy companies will have the possibility to get financing for activities adhering to natural gas which then will be classified as 'sustainable'. This classification can last for as long as the next decade without the possibility for legislators to reverse the classification of investments that have already been given.[53] In the end, the European parliament voted to not object the delegated act but there was however a significant political opposition against it.[54] In my opinion this is a clear deviation from the science-based consideration that the Green Taxonomy are supposed to promote. I believe it is harmful to include gas and nuclear energy as a sustainable resource and that this heavily undermines the Green Taxonomy, both out of a scientific perspective but also out of a public opinion perspective. I.e., the public opinion perceives the Green Taxonomy as less effective in tackling climate change and subsequently less valuable.

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and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities (Text with EEA relevance) 2022 (OJ L).

[50] European Commission, 'EU Taxonomy: Complementary Climate Delegated Act' (*European Commission*, 2 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_711> accessed 16 October 2022.

[51] Gabriel Carhart, 'EU Taxonomy Fossil Gas Criteria: Not Exactly a Free Pass for Gas' (*Climate Bonds Initiative*, 10 October 2022) <https://www.climatebonds.net/2022/10/eu-taxonomy-fossil-gas-criteria-not-exactly-free-pass-gas> accessed 16 October 2022.

[52] Kate Mackenzie, 'EU's Proposed Green Labels Have Lost Their Link to Science' [2022] Bloomberg.com N.PAG.

[53] Such investments most noticeably comprises 10-year bonds; ibid.

[54] European Parliament, 'Taxonomy: MEPs Do Not Object to Inclusion of Gas and Nuclear Activities | News | European Parliament' (*European Parliament*, 6 July 2022) <https://www.europarl.europa.eu/news/en/press-room/20220701IPR34365/taxonomy-meps-do-not-object-to-inclusion-of-gas-and-nuclear-activities> accessed 16 October 2022.

The Commission is currently reviewing or expecting to review the drafting of further delegated acts to help determine which activities are accommodating and/or harmful for the other four environmental objectives.[55]

2.3 Minimum Safeguards – art. 18 of the Green Taxonomy

2.3.1 Introduction

As examined in the previous chapter, the Minimum Safeguards (MS) is a prerequisite for alignment with the Green Taxonomy. The need for MS was established by the European Parliament and European Council mutually and subsequently developed by the Technical Expert Group on the Green Taxonomy.[56] Since the commencing of work on the Green Taxonomy, an advisory board has been mandated by the European Commission to provide guidance on implementation. This advisory board is named 'The Platform on Sustainable Finance' and has up until now produced two reports on the implementation of the MS in the Green Taxonomy. This chapter will draw on its conclusions.

At the outset, the overall objective of the MS is to establish social and governance standards to be used with the technical screening criteria when an entity wants to carry out an activity that it wants to be labelled as environmentally sustainable. In other words, the objective of the MS is to shield economic activities from becoming branded as 'sustainable' when they could in fact involve activities that involve human rights violations.[57] The MS are enshrined in art. 3 (c) in combination with art. 18 of the Green Taxonomy. These articles state as follows:

Article 3 - Criteria for environmentally sustainable economic activities

For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity:

[55] 'Russell US Indexes' (n 34) 3.

[56] Technical Expert Group on Sustainable Finance, 'Taxonomy: Final Report of the Technical Expert Group on Sustainable Finance' (2020) 17 <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf> accessed 17 October 2022.

[57] Platform on Sustainable Finance, 'Final Report on Minimum Safeguards' (2022) Text 6 <https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance_en#activities>.

(a) contributes substantially to one or more of the environmental objectives set out in Article 9 in accordance with Articles 10 to 16;

(b) does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17;

(c) is carried out in compliance with the minimum safeguards laid down in Article 18; and

(d) complies with technical screening criteria that have been established by the Commission in accordance with Article 10 (3), 11(3), 12(2), 13(2), 14(2) or 15(2).

Article 18 - Minimum safeguards

1. The minimum safeguards referred to in point (c) of Article 3 shall be procedures implemented by an undertaking that is carrying out an economic activity to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.[58]

In sum, art. 18 provides for four different sets of obligations stemming from the following international instruments and standards:

- The Organization for Economic Cooperation and Development Guidelines on Multinational Enterprises (OECD Guidelines).
- The United Nations Guiding Principles on Business and Human Rights (UNGP).
- The eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work.
- The International Bill of Human Rights.

The international instruments covered by the MS will be given a more detailed explanation in chapter three of this thesis. For the purposes of this chapter, it will deal primarily with the overarching significance of the instruments and asserting what obligations can be derived from them in relation to the MS.

A starting point when discussing these instruments is to establish that they compel no new international obligations. Many of these requirements and

[58] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) arts 3, 18.

obligations have been around for some time but here is essential to remember that their applicability is depending on the realisation by each member state. Therefore, the level of implementation of all instruments also differs within the EU member states. Nonetheless, there are some obligations in the form of prohibitions that are already widespread and enacted all over the EU, either through the EU framework or by domestic regulations. This comprises regulations such as the injunction on tax fraud, corruption and bribery, child and forced labour, and unfair competition.[59] As regards the applicability of these in parallel to the MS, the EU has made it clear that obligations stemming from the MS shall not interfere or demote application of other requirements set out in Union law.[60]

2.3.2 Applicability of the Minimum Safeguards

As regards the relation between the four different instruments and directives the OECD Guidelines; UNGPs; ILO declarations on fundamental principles and rights at work are undoubtedly correlating the most. That has to do with the fact that they are all directed towards business entities and relate to obligations that are directly applicable to corporations. The international Bill of Human Rights on the other hand is not directed at business entities but rather directed at states.[61]

It is clear that private entities such as households are not in the direct scope of art. 18.[62] Households are excluded from the application of art. 18 but not construction and renovation companies that deal with private households.[63] The report on the MS state that responsibilities for public entities such as local and regional governments cannot be overseen when dealing with art. 18. They are however not always in the direct scope of the MS regulations, even if they carry out activities that fall within the scope of the Green Taxonomy. An example involves the possibility for local- and regional governments to receive loans from banks or lending institution. This possibility is not explicitly covered by either the UNGPs or the OECD Guidelines and consequently not by the MS. The question then arises how banks and lending institutes shall adhere to the MS when investigating these local- and regional governments. The suggested solution given by the Platform on Sustainable Finance is that in those cases banks and lending institutes should rely on information from UN monitoring mechanisms and non-governmental organizations country ratings

[59] Platform on Sustainable Finance (n 57) 8.

[60] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) explanatory memorandum (35).

[61] Platform on Sustainable Finance (n 57) 11.

[62] ibid.

[63] Platform on Sustainable Finance, 'Draft Report on Minimum Safeguards' 10 <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/draft-report-minimum-safeguards-july2022_en.pdf> accessed 6 September 2022.

on human rights.[64] This adds to a developing conception within the academia that banks and lending institutions also have obligations and responsibilities when it comes to human rights and subsequently cannot be left out.[65]

2.3.3 The substantive dimension of the minimum safeguards

As written above, one of the objectives with the chapter on MS is to single out what substantive obligations are stemming from the provision. All in all, the MS refers to five different instruments and regulations. They in turn contain a variety of obligations and guidelines.

There is probably no revelation that the ILO declarations on fundamental principles and rights at work bring the labour dimension into the MS. I.e., rules on freedom of association and protection of the right to organise; right to organise and collective bargaining; regulations on forced labour; minimum age regulations; regulations on equal remuneration; discrimination obligations. In conclusion, foundational aspects that now need to be fulfilled to meet with the MS obligations.

The international human rights dimension is supplemented by the International Bill of Human Rights. As discussed above, this is aimed primarily towards states although there is a growing discussion in the literature about the heightened responsibility that business enterprises and other non-state actors may have in specific contexts, such as those related to climate change. The International Bill of Human Rights covers the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights. This will be covered in a subsequent chapter.

Last of the international instruments is the OECD Guidelines and UNGPs. Both the OECD Guidelines and the UNGPs are overlapping in that they define responsibilities for business entities. Both instruments equally include human rights, labour rights and what is referred to as ‘consumer interests’ by the Platform on Sustainable Finance. ‘Consumer interests’ is a term that refers to consumer rights which in essence covers the obligation to not inflicting harm on stakeholders.[66] Thus, these two instruments interrelate with obligations stemming from both the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the international

[64] Platform on Sustainable Finance (n 57) 57ff.

[65] Business & Human Rights Resource Centre, ‘The Responsibility of Financial Institutions under the UN Guiding Principles’ (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/financial-institutions-responsibility-under-the-un-guiding-principles/> accessed 22 December 2022.

[66] Platform on Sustainable Finance (n 57) 10.

human rights provisions as can be found in the International Bill of Human Rights.

One of the biggest differences between the two instruments lies in that the OECD Guidelines explicitly deal with areas such as the environment; bribery (including bribe solicitation and extortion); science and technology; fair competition; taxation. These are areas that are not explicitly covered by the UNGPs but in my opinion must not be neglected when it comes to their appliance as they are in many senses overlapping.[67] The question then arises if all these areas are of essence for the MS or if only a few of them are of interest for the purposes of its applicability. The Platform on Sustainable Finance has established that for MS compliance, the OECD Guidelines areas of environment and science and technology are not compulsory. Hence, considerations on these areas are of course allowed, however, they are not a mandatory step to be compliant to the MS.

In what follows, a brief explanation for this exclusion will be provided, starting with the environmental safeguards established by the OECD Guidelines. According to the Platform on Sustainable Finance the problem with having MS regulations on the environment is that they would be deficient compared to the environmental safeguards that are already set out in the technical screening criteria. Thus, the Platform on Sustainable Finance thinks that there is no need to have double regulations on what is environmentally compatible and that the regulations set out in the technical screening criteria are sufficient.[68] It remains however to be seen whether it is appropriate, from a legal perspective, to leave out these additional environmental criteria set out in the OECD Guidelines.

Neither is the science and technology criteria of the OECD Guidelines relevant for the application of the MS since the OECD Guidelines criteria only serves as to encourage a technology diffusion between states with a high technological advancement and states in need technology to develop. Subsequently it has nothing to do with protecting entities.[69] Subsequently, it is not conformed with the MS overall objective of establishing a social and governance criteria in relation to the technical screening criterions.

The Platform on Sustainable Finance recognises that that hat leaves six different areas of applicability stemming from the MS instruments. That is:

Human rights

[67] Platform on Sustainable Finance (n 63) 9.

[68] Platform on Sustainable Finance (n 57) 10–11.

[69] OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (2011) 55–56. <https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en> accessed 19 September 2022.

Labour rights

Consumer rights

Bribery, bribe solicitation and extortion

Taxation

Fair competition[70]

With regards to these, the Platform on Sustainable Finance stresses how important it is that these areas are applied together, and that no area is left out when the MS is implemented or used in the process of legalizing or similar.[71]

2.3.4 The implementation of the minimum safeguards in practice

It is no secret that several companies are uncertain how the MS should be realized with regards to their business. This applies to companies within and outside of the EU. The Platform on Sustainable Finance has found that many companies have various misconceptions about what MS compliance really means.[72] As of now, many companies use environmental, social, and corporate governance (ESG) rating agencies to help verify their MS compliance. These agencies make an external audit on the compliance of the environmental, social, and corporate governance aspects. They, in turn, have two systems for establishing compliance with the minimum safeguards. The first technique is a legal controversy screening technique that finds out if there are allegations on human rights abuses by a company, and if so, determine how serious the allegations are. The second technique evaluates if the company has implemented a due diligence process.[73] It is clear, that up until now the first technique is the most profitable and widely used by ESG rating agencies. The fact that the first technique is the most widely used has to do with several factors, one of which is the fact that the second technique limits the complaints with regards to the first technique and thus makes the ESG industry less profitable. Another factor is that the second technique is more rewarding for companies in the sense that they can show investors and owners data that promotes the company's good standing. The Platform on Sustainable Finance has however established that since the implementation of the MS there has been a change and that enterprises, both ESG rating companies and the companies evaluated, are more eager to also implement a due diligence process.[74] For this sake it is important to understand that the UNGPs calls for the second technique to be

[70] Platform on Sustainable Finance (n 57) 11.
[71] ibid 31.
[72] ibid 24.
[73] Platform on Sustainable Finance (n 63) 24.
[74] Platform on Sustainable Finance (n 57) 25–26.

used in combination with the first technique. I.e., the need for companies to have a due diligence implementation procedure for a company to be aligned with the requirements in the UNGPs.[75] This is also something that the Platform on Sustainable Finance highlights and describes as the need to both make an 'assessment of whether an undertaking respects human rights, i.e., it avoids and addresses negative impacts, and an assessment of whether the undertaking has the due diligence procedure'.[76] Conclusively, the practical implication for the MS is that the MS provision on the UNGPs calls for companies to implement a human rights due diligence process.[77] The chapter on the UNGPS will examine the specific obligations stemming from these provisions.

2.3.5 The minimum safeguards obligation to adopt a due diligence mechanism

As described above an essential factor for a company to be able to comply with the MS is to have an adequate due diligence mechanism in place. The Platform on Sustainable Finance has identified six steps that a due diligence mechanism must have to conform with the MS. That incorporates:

1. The inclusion of human rights due diligence considerations into a company's policies, procedures, and management systems.

2. Stakeholder engagement, including a mechanism for identification and assessment of adverse impacts. Both in relation to a company's own operations, its supply chains, and its business relationship.

3. A plan for how the company should cease, prevent, mitigate, and remediate adverse impacts. This step also includes the fact that a company must take these actions.

4. A mechanism for tracking the implementation and a system to monitor the results.

5. An open engagement and inclusiveness of parts outside the company on how the company is engaged in these questions and what their current actions and results are.

[75] Human Rights Council, 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) A/HRC/17/31 arts 11, 15 <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 6 September 2022.

[76] Platform on Sustainable Finance (n 57) 34.

[77] Platform on Sustainable Finance (n 63) 25.

6. Mechanisms for individuals and groups to complain and raising concerns.[78]

As will be discussed in the chapter on the OECD guidelines and the UNGPs all these obligations are stemming from those instruments.

2.3.6 Breach of the minimum safeguards

The final report on the MS made by the Platform on Sustainable Finance suggests that there should be a twofold criterion for non-compliance with the minimum safeguards. Where one of these applies, the MS is breached. These criteria are based both on the due diligence obligations and the sought-after result. That is:

1. 'The company has not established adequate human rights due diligence processes, as outlined in the UNGPs and OECD Guidelines for MNE'. [79]

2. 'There are clear indications that the company does not adequately implement HRDD resulting in human rights abuses. Data on breaches should be generated from sources with a high level of independence and impartiality'.[80]

All in all, it can be concluded that alignment with the MS is a twofold effort.

The wording 'effort' is also important here since the MS is not ruling out that there will be negative impact on areas covered by the provision. I.e., efforts are legally sufficient when companies can state that they have met with the MS criterions, even when human rights harm has taken place. The important point is that the company can demonstrate how it is addressing negative impacts, how it respects them and how a company has enacted due diligence procedures in place. In other words, the MS is a regulation that gives means towards an end rather than focusing on upholding the end itself. Something that 'compliance' in art. 3 façade can be an expression for.

2.3.7 The MS as a part of the regulatory landscape

The MS is not working in a vacuum. Instead, it is part of a broader regulatory landscape that is presently expanding through the implementation of the

[78] Platform on Sustainable Finance (n 57) 33.
[79] ibid 34–35.
[80] ibid.

EGD. In the reminder of this chapter shall be discussed how the MS integrate with other important parts of the EDG and what it entails. The CSDDD will be discussed in a chapter four but here will be mentioned two other EU regulations that work together with the MS and the Green Taxonomy. That is the SFDR, that was briefly mentioned regarding the MS obligations, and the Corporate Sustainability Reporting Directive (CSRD).

2.3.7.1 The Sustainable Finance Disclosure Regulation

Starting with the SFDR, this regulation is directly referred to in art. 18 (2) of the Green Taxonomy and establish the MS obligation to 'do no significant harm'. The Platform on Sustainable Finance concludes that this provision in general is quite aligned with art. 18 (1) but that art. 18 (2) in general covers more than art. 18 (1). This is because, in addition to the six provisions covered in art. 18 (1), it also covers 'social objectives'. What those 'social objectives' consists of is not yet clear, as they are not yet a part of the Green Taxonomy, but the Platform on Sustainable Finance reckons that the 'do no significant harm' principle should apply to some principal adverse impact factors that are set up in the SFDR. For example, unadjusted gender payment gaps and lack of compliance processes to monitor compliance with the OECD Guidelines.[81] One of the practical implications of art. 18 (2) is that manufacturing and/or selling of controversial weapons is not conform with the MS.

2.3.7.2 The Corporate Sustainability Reporting Directive

The CSRD is a directive that will establish what and how companies must disclose on sustainability matters. It is applicable to companies that have at least two denominators of either 250 or more employees, a turnover of EUR 40 million or more and a balance sheet of more than EU 20 million. At the time of writing the reporting standards on this directive have not been finalized. The Platform on Sustainable Finance has however concluded that the disclosure obligations stemming from the CSRD are enough to comply with the MS as for example taxation is not covered. The Platform on Sustainable Finance further reiterates that companies will 'assess their compliance with MS as part of their disclosures under Article 8 of the Taxonomy Regulation' rather than under the CSRD.[82]

[81] ibid 13–14.
[82] ibid 16–17.

3 The Human rights Perspective

3.1 Introduction

This part of the thesis will introduce the reader to the human rights continuum related to the EGD. On the façade of this field is the International Bill of Human Rights. Nevertheless, as seen in the Green Taxonomy, other instruments also play an important role. This include the UNGPs, the OECD Guidelines on Multinational Enterprises and the eight fundamental conventions of the ILO. Additionally, this chapter will give the reader an idea of what efforts have been done through domestic regulations in the field of business and human rights. Conclusively, the aim of the chapter is to give the reader means to understand what human rights considerations are taken in relation to the EGD does and how they interlink with the MS.

3.2 International Bill of Human Rights

At the heart of human rights is without doubt the International Bill of Human Rights. It is from this set of instruments that modern international human right has evolved and ultimately become what is said to be the 'minimum rights guaranteed to all human beings'.[83] This part of the chapter introduces the history, the content and the rights enshrined in the International Bill of Human Rights (the Bill).

At the outset of understanding the Bill is the fact that it is not one single document but rather consists of several international human rights covenants developed by the UN in the aftermath of the second world war. The drafting of the first covenant, the Universal Declaration of Human Rights began in 1946 and was finished in 1948. The drafting of the two adjoining covenants began soon after. The initial idea was to be one concise human rights instrument, but this idea was soon abandoned as the political ideologies of the eastern and western states of the time was impossible to bridge. Instead, the UN Commission on Human Rights had to produce two separate instruments. Each covering the interest for each set of ideas. This resulted in The International Covenant on Economic, Social and Cultural Rights (ICESCR) on the one hand and The International Covenant on Civil and Political Rights (ICCPR) on the other hand. Later, came two optional protocols to be included. [84]

[83] Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (Routledge 2017) 83–84.

[84] Daniel Moeckli and others (eds), *International Human Rights Law* (2. ed, Oxford University Press 2014) 30.

The provisions covered by the Bill has been cited in numerous treaties, laws, regulations, instruments and other forms and forums all over the world. It is used by states as well as courts on both international and national level. However, there is no secret that at the time of adoption large parts of the world was under colonial rule and thus unable to vote on its adoption.[85] It is also no secret that the human rights within the Bill are regularly violated and that there is a gap between their realization and the rhetoric around the implementation of the rights.[86] Today, the Universal Declaration is considered to be customary international law and therefore universally applicable to all states and human beings.[87]

When examining the Bill, it is essential to notice that there are a multitude of human rights that are not enshrined and encompassed in its provisions. Examples include many rights of the child[88], rights of indigenous peoples[89], rights of persons with disabilities[90], and the right to a healthy environment[91] amongst many more. The reason for their omission has largely to do with the fact that they were formed and developed after the completion of the Bill. There are of course other reasons for the absence of rights, such as disagreement between states that has now come to an end and the public international debate that have helped to generate the agreement on new rights.[92] Even though the Bill does not include more 'modern' human rights they must be considered and cannot be left without regard when discussing human rights. Here I would argue that even though only some rights are enshrined in the Bill, these 'new rights' must also be considered when discussing human rights in relation to the implementation of the EGD. What supports this argument is that human rights are designed as indivisible, interdependent, and interrelated.[93] In other words, human rights intersect, and human rights are dependent on each other to work as a whole. Therefore, it is my belief that the Bill nowadays treasures many more rights and obligations than just those included at the time of the drafting.

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[85] Bernaz (n 83) 82.

[86] Christopher NJ Roberts, *The Contentious History of the International Bill of Human Rights* (Cambridge University Press 2015) 3.

[87] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Co 2013) 40.

[88] UN General Assembly, 'Convention on the Rights of the Child' (United Nations 1989) Treaty Series, vol. 1577, p. 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 22 December 2022.

[89] UN General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples' (United Nations 2007) A/RES/61/295 <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples> accessed 22 December 2022.

[90] UN General Assembly, 'Convention on the Rights of Persons with Disabilities' (United Nations 2007) A/RES/61/106 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> accessed 22 December 2022.

[91] UN General Assembly, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) Resolution A/RES/76/300.

[92] Theo van Boven, 'Categories of rights' (n 84) 144.

[93] ibid 140.

As to the realization of the Bill, there are three main obligations that fall onto those who are subject to its implementation. Those three are the respect, protect and fulfil requirements. Respect is the first obligation and is mostly negative in its nature as it encompasses the obligation to refrain from interference (direct or indirect) with human rights. Protect is the obligation to defend rights-holders from human rights abuses. Thus, to ensure that the rights are protected by e.g., businesses, other human beings, and political groups. Fulfil is the last obligation and is the obligation to realize the rights.[94] The classical way of approaching the respect, protect and fulfil typology is that this only applies to states. As it will be discussed in chapter 3.2.2, however, it is possible to argue that this typology is no longer exclusively reserved for states but can also be referred to businesses as well.

3.2.1 The elements of the International Bill of human rights

3.2.1.1 The Universal Declaration on Human Rights

The UN Declaration on Human Rights consists of a total 30 articles and a preamble divided into a set of economic, social, and cultural rights but also a set of civil and political rights. It is often stated that the UN Declaration on Human Rights distinguishes the fundamental human rights entitlements but that the legal obligations are found in other human rights treaties such as the ICCPR and ICESCR.[95]

The third article of the Universal Declaration, the right to life, liberty and security is the first cornerstone of the Declaration and bears way for art. 4–21 which is the foundation for the civil and political rights. The civil and political rights, in turn, include rights such as the right to not be subject to slavery, the right to use law and the right to privacy.

The second cornerstone of the Declaration can be found in art. 22 which introduces the economic, social, and cultural rights through the right to social security as a member of a state. Art. 23–27 then include rights such as the right to work, the right to social service and the right to education. The last articles of the Declaration give fundamental aspects in concern with the Declaration.[96]

[94] Frédéric Megret, 'Nature of obligations' ibid 97ff.

[95] Justine Nolan, 'Mapping the movement: the business and human rights regulatory framework' in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 34.

[96] Office of the United Nations High Commissioner for Human Rights, 'Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights' (1997) <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-02-rev-1-international-bill-human-rights-archive> accessed 1 November 2022.

The two optional protocols shall also be mentioned in this section. The first optional protocol is to the ICCPR and sets up a victim mechanism for individuals to complain on violations. The second optional protocol is also to the ICCPR and aims to abolish the death penalty.

3.2.1.2 International Covenant on Civil and Political Rights

As described in the title, the ICCPR provides protection for civil and political rights. That is amongst other, the protection of life; the right to liberty and security of the person; the right to recognition as a person before the law.

3.2.1.3 International Covenant on Economic, Social and Cultural Rights

The ICESCR contains rights that adhere to Economic, Social and Cultural considerations. Those include amongst other the right to strike; the right to be free from hunger; the right to health and the right to education. It is often stated that this set of rights entails a greater need for government action. However, this distinction is apparently not always correct as the civil and political rights can demand equal effort by states. According to Jan Klabbers the only possible advantage of political rights is often that they are easier to incorporate into a state's legal order.[97]

3.2.2 Applicability of the International Bill of Human Rights to multinational entities

The traditional view is that international law only governs relationships between states which means that the Bill would only be applicable to states. This view is controversial within international law and although it is only states that can be bound by treaties in the formal sense, the Universal Declaration makes it clear in its art. 30 that 'Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.[98] In my view it is evident that this phrasing open up a broader interpretation that includes other entities than just states. A fact that supports this opinion is that at the time of the drafting, the word 'group' was considered by the communist countries to include the business sector.[99]

The question then arises is if multinational enterprises can be seen as full subjects of international law? What adds to the argument that multinational enterprises are full subjects of international law is the International Court of

[97] Jan Klabbers, *International Law* (Second edition, Cambridge University Press 2017) 120.

[98] UN General Assembly, 'Universal Declaration of Human Rights' (1948) Resolution 217 A (III) art 30.

[99] Bernaz (n 83) 83.

Justices advisory opinion in the *Reparation for Injuries Suffered in the Service of the United Nations* case, that gives organisations the prospect of being subjects of international law and having right to bring claims and maintain its rights as well as capable of possessing international rights and duties.[100] Rights and capacity to bring international claims are without doubt something that multinational enterprises are exercising but when it comes to duties it is not quite as clear.[101] There are several provisions that add to the controversy if multinational enterprises have the capacity to exercising the same duties as states. Such as the fulfilment of many provisions of the ICCPR and ICESCR that can be seen as directed towards states alone. Examples of such duties can be found in art. 10 of ICCPR that gives right to detainees and the right to education in art. 13 of the ICESCR. While states can be the primary duty bearers, it is my opinion that nothing in this provision prevents other entities from being secondary duty bearers. That is a duty bearer that cannot be subject to all requirements that pertain to a state but should be able to meet the obligations to an almost identical amount.

If then, multinational enterprises are secondary duty bearers in international law, they would not be subject to all duties in international law. Neither would they be able to create international law, though they can of course be influencing the creation and have during the last centuries had a more and more important role in the making of soft law. In the same way as individual has certain duties under international law, e.g., to refrain from committing genocide, multinational enterprises must be duty bearers in the same way if not more.[102]

The summary is that multinational enterprises both have rights and capacity to bring claims. When it comes to their duties, it can be concluded that they have duties but not in the full range as states and international organisations. For the sake of this thesis, it is not of the essence to try to fit multinational enterprises in the same box as states. Nor is it important to debate whether multinational enterprises are a part of the law-making process. For this thesis, the importance lies in the conclusion that multinational enterprises are subjects of international law and subsequently are duty bearers.

One can ask oneself, why is it important to establish that multinational enterprises have human rights responsibilities under international law? The answer is simple. Most multinational businesses work and operate in countries where human rights are not upheld by the government and where violations of human rights are repeatedly made. As will be discussed in the next chapters,

[100] *Reparation for Injuries Suffered in the Service of the United Nations* [1949] International Court of Justice A/RES/365 178.

[101] Bernaz (n 83) 88.

[102] ibid 89.

multinational enterprises have even more specific set of international rules with regards to human rights that they operate under.

3.3 An introduction to the OECD Guidelines and the UNGPs

To understand the OECD Guidelines and the UNGPs a concise background on the development of these instruments will be given. Both instruments fall within the category of Business and Human Rights (BHR). This is an area of human rights that is evolving and increasingly important but that is also 'under construction'. Since the MS refer to these two instruments and the CSDDD falls within the area of BHR, it is necessary to provide a background and explanation of this field of human rights.

The evolution of BHR has not been free from complications. A multitude of international catastrophes and misfortunes precedes today's framework. Most infamous are possibly the Shell and Oogonia case in Nigeria[103], Nike Case in Philippines[104], and Bhopal catastrophe in India[105]. Though, these tragedies happened in the 1980s and 1990s it was not until the 21st century that the area of BHR really came into light from the perspective of the legislators.

The area of BHR has so far had three historical advancements. Noticeable is that the development started in pure soft law and has now advanced to a combination of soft- and hard law. The first movement can be traced back to the Corporate and Social Responsibility movement of MNEs from the 1950s-60s. This movement was influenced by the growing social awareness and by the pressure by social movements which characterised those decades. Those movements include anti-war protests and the civil rights movement. The practical aspects of this effort to regulate MNEs are mostly based on pure voluntarism and philanthropist actions.[106]

The second movement started in the 1970s and encompassed a period of several legislations covering product safety, labour rights and environmental aspects. This movement introduced the discussion, though not in a coherent

[103] For a complete overview of the case see 'Wiwa et al v. Royal Dutch Petroleum et Al.' (*Center for Constitutional Rights*) <https://ccrjustice.org/node/1505> accessed 22 December 2022.

[104] For an overview see Amy Sankey, 'A History of Nike's Changing Attitude to Sweatshops' (*Glass Clothing*, 2 July 2018) <https://glassclothing.com/a-history-of-nikes-changing-attitude-to-sweatshops/> accessed 22 December 2022.

[105] Apoorva Mandavilli, 'The World's Worst Industrial Disaster Is Still Unfolding' (*The Atlantic*, 10 July 2018) <https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/> accessed 22 December 2022.

[106] Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir and Brynhildur Davídsdóttir, 'A Literature Review of the History and Evolution of Corporate Social Responsibility' (2019) 4 International Journal of Corporate Social Responsibility 1, 4–5.

manner, around CSR and its use.[107] At a regional level, the OECD Guidelines were drafted in the 1970s as a part of the second movement. OECD is the Organization for Economic Cooperation and Development (OECD) which is a policy building international organisation that works on establishing international standards and finding solutions to economic challenges.[108]

The last movement started around the year 2000 with the UN Global Compact project. Regrettably it has not been very successful in making companies deliver on human rights since it is based on company-voluntarism.[109] The UN also tried to codify regulations in relation to Business and Human Rights in the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, a set of standards which amongst other things were seeking to establish direct obligations for non-state actors.[110] This initiative was also unsuccessful and the Council of Human Rights rejected them due to lack of consensus. There are various accounts of why they were rejected, some argue that they put too many obligations on states,[111] but according to other accounts, the business sector lobbied states fiercely to ensure that they were not accepted.[112]

The UNGPs were unanimously endorsed by the Human Rights Council in 2011.[113] Led by Professor John Ruggie, this was one of the first successful attempts to codify regulations on Business and Human Rights and was not like the OECD Guidelines, subject to the scrutiny of a few Western counties. Instead, they were endorsed by a broad majority of countries. They are built both on the concept of voluntarism and mandatory rules. This is something that attracts a broad variety of stakeholders and that does not put the burden on just one subject, e.g. the state or NGOs.

Before going into more detail with regards to the UNGPs, something shall be said of their magnitude. The UNGPs are often portrayed as something of a milestone in business and human rights which most probably has to do with the unanimity with which they were endorsed by the Human Rights Council

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[107] ibid 6.

[108] OECD, 'About the OECD - OECD' <https://www.oecd.org/about/> accessed 22 December 2022.

[109] Schilcht GA, 'Reflecting on the UN Global Compact: What Went Wrong?' (*LSE Business Review*, 26 July 2022) <https://blogs.lse.ac.uk/businessreview/2022/07/26/reflecting-on-the-un-global-compact-what-went-wrong/> accessed 22 December 2022.

[110] UN Subcommission on the Promotion and Protection of Human Rights Working Group on the Working Methods and Activities of Transnational Corporations, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ': (UN, 2003) E/CN.4/Sub.2/2003/12 <https://digitallibrary.un.org/record/498842> accessed 22 December 2022.

[111] Ruggie (n 87) 47.

[112] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 287–288.

[113] UN Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises' (2011) A/HRC/RES/17/4 <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

in 2011.[114] However, if we take a closer look into why they are so praised, it is easy to see that what the UNGPs achieved, was indeed to give each actor what they wanted. That is, states are not lone bearers of duties, NGOs and other organisations are welcomed to participate in the auditing and businesses are now a part of the multistakeholder initiative and are able to affect the implementation of rights. As some scholars have argued, one of the risks posed by the UNGPs is that companies themselves are 'redefining the acceptable scope and direction of human rights standards regulating corporate conduct'.[115] It is my opinion that when implementing the UNGPs, it must be done while at the same time scrutinising the efforts made by companies. The UNGPs represent a 'bare minimum' and to not play too much in the hands of companies, their implementation must be subject to a steady analysis to not lose track of the overall objective of preventing abuse of human rights.

3.3.1 The UNGPs

As described in the previous chapter the UNGPs are the latest international framework that regulates multinational enterprises. This section of the thesis will examine the UNGPs further.

The UNGP framework is divided into three sections that build on the protect, respect and remedy typology. The first guiding principles 1–10 cover the state duty to protect, the second part, guiding principles 11–21 coves the corporate responsibility to respect and the last guiding principles 22–31 cover the right of victims of corporate harm to access remedies.[116] The UNGPs start with making it clear that the full range of human rights obligations lies primarily on the state. This means obligations to 'prevent, investigate, punish' and redress human rights abuses through policies, legislation, regulation, and adjudication.[117]

As mentioned, the overarching typology of the UNGPs is to protect, respect and remedy. States shall ensure that human rights are properly protected. Multinational companies shall respect human rights. There shall also be a reassurance that there are proper pathways to remedies, both judicial and non-judicial.[118] This typology builds upon the traditional 'respect, protect, and fulfil' typology discussed in chapter 3.2.[119]

[114] Chip Pits, 'The United Nations 'Protect, Respect, Remedy' Framework and Guiding Principles' in Baumann-Pauly and Nolan (n 95) 51.

[115] Daria Davitti, 'Regulating Multinational Corporations' in Koen De Feyter, Gamze Erdem Türkelli and Stéphanie de Moerloose (eds), *Encyclopedia of Law and Development* (Edward Elgar Publishing 2021) 245.

[116] Human Rights Council (n 75).

[117] ibid Guiding Principle 1.

[118] Bernaz (n 83) 191ff.

[119] Ruggie (n 87) 83.

When it comes to compliance with the framework, the UNGPs are based on the idea of 'polycentric governance' which can be explained as a control mechanism divided into three separate but interlinked governance systems that are thought to rule the company behaviour. They consist of:

> Public governance. The public governance mechanism is built around the more traditional governance structure enacted through regulations in law and policies that are created by governments, states, and intragovernmental structures.
>
> Business governance. This control mechanism is constituted of the business's own regulations and supervision of conduct. That is, how the business regulates its behaviour through corporate control.
>
> Civil governance. This last governance mechanism is guided by stakeholder impact and various public compliance mechanisms. The idea is that outside pressure from the public, such as investors, customers, NGOs, and other external actors will at all times audit the company behaviour and help subsequently help govern the acts of the company.[120]

There has long been a debate on which human rights the corporate responsibility covers. Guiding principle 12 establish that 'at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International labour Organization's Declaration on Fundamental Principles and Rights at Work'.[121] It is my opinion that this reference is problematic as it excludes human rights that were developed after the adoption of the Bill. The comment to guiding principle 12, however, recognizes that there can be a need 'to consider additional standards' and, that 'United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families'.[122] I find this to be a precarious approach since many important human rights are not included in the basic considerations that needs to be done. Providing for a potential human rights degradation.

Another problematic area of the UNGPs is that they do not set up any enforcement or monitoring mechanism for the UNGPs other than Guiding Principle number 5 obligation on states themselves to 'exercise adequate oversight'.[123] This essentially means that the companies themselves must follow the responsibility to 'respect'. Nevertheless, there are other regulations that can help to monitor enforcement, as discussed in the next chapter.

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[120] ibid xliii.
[121] Human Rights Council (n 75) Guiding Principle 12.
[122] ibid Commentary to Guiding Principle 12.
[123] ibid Guiding Principle 5.

Lastly shall be mentioned that the UNGP does not use the concept of 'violation of rights', but rather frames breaches of the UNGPs in the terms of 'adverse impacts' that are 'actions or omission that removes or reduces the ability of an individual to enjoy his or her human rights'.[124]

3.3.2 The OECD Guidelines

The Organisation for Economic Cooperation and Development (OECD) published its first version of its guidelines for multinational companies already in 1976. Then, the organisation consisted only of a selected few western, developed states and non-surprisingly had no trouble unify around these guidelines. Since then, both the organisation and the guidelines has evolved, and OECD today comprises of states that aren't wester. Although Brazil, Russia, India, China, and South Africa most notably is not a part of the organisation. The reason for the unanimity of the OECD most probably lies in the fact that the organization consists of likeminded countries.[125] The latest version of the guidelines was published in 2011.[126] The Guidelines covers topics such as: Disclosure, Human Rights, Employment, Environment, Bribery and Extortion, Consumer Interests, Competition and Taxation.[127]

The passage on human rights was introduced in the 2000 revision.[128] In the first commentary on the OECD Guidelines, Human rights is explained to be primarily a concern for states but recognized to play a part when it intersects with corporate conduct. It explains that multinational enterprises should respect human rights both in relation to its employees but also with respect to other affected by its activities. This, however, is only in relation to the governments' international obligation and commitments.[129] Since the 2011 revision the OECD Guidelines includes a whole chapter on human rights. This chapter aims to be consistent with the UNGPs and now makes it clear that human rights are to be respected irrespectively of the host states commitment to international human rights. [130] What the chapter does is to explicitly address the company's responsibility to respect human rights (even if the member states do not). Individuals who are affected by MNEs activities shall enjoy protection with reference to the international human rights obligations 'at a minimum to the internationally recognised human rights expressed in the

[124] Gabrielle Holly and Signe Andreasen Lysgaard, *Legislating for Impact - Analysis of the Proposed EU Corporate Sustainability Due Diligence Directive* (Danish Institute for Human Rights 2022) 13.
[125] Bernaz (n 83) 197.
[126] OECD (n 69) 1.
[127] OECD (n 69).
[128] Bernaz (n 83) 201.
[129] OECD (n 69) ch IV the commentary.
[130] ibid IV.

International Bill of Human Rights'.[131] A due diligence obligation was also included.[132]

As to their implementation, the OECD Guidelines are voluntary and not legally enforceable, and the guidelines make it clear that the first obligation of enterprises is to 'obey domestic law'.[133] Subsequently, the whole framework is soft law.

Adherence to the OECD Guidelines is monitored through national contact points (NCPs). They serve as an implementation mechanism and are set up in adhering member states to assist enterprises and stakeholders in their implementation of the guidelines. They can also serve as a negotiation point.[134] There has been several national cases brought to the NCPs. Since 2000 it is possible to bring complaints against multinational enterprises. The last revised version of the OECD Guidelines in 2011 also helped to improve the importance of the NCPs as there is now an obligation on states to finance their NCPs. NCPs can no longer finish a case without any reasons if an agreement between the parties does not exist. In practice, this makes it possible for the NCPs to 'shame' companies through their obligation to make their report publicly available. Though non-judicial in nature, they serve as a form of state-financed dispute settlement.[135]

In conclusion, the reason for the relative success of the OECD Guidelines can be subject to both the unanimity of the substantive provisions of the guidelines but also the recent procedural obligations that have come to make the NCPs a tool to hold MNEs accountable for human rights violations.[136] Had the so-called developing states been a part of the development of the guidelines, they would have probably been less thorough and would most likely not exist in their current form.[137]

3.4 International Labour Laws

Labour rights precedes human rights in codification date. This field is distinguished from human rights as its primary concern is to limit the power of private actors in the market while human rights traditionally aim to limit the power of the state. However, the core regulations of ILO are binding for states. Labour rights can also be said to be more collective in their application

[131] ibid 32.

[132] John Gerard Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges' (2015) 22 Brown Journal of World Affairs 99, 105.

[133] OECD (n 69) para 1.

[134] ibid foreword, section three.

[135] Bernaz (n 83) 201.

[136] ibid 203.

[137] ibid 197.

even though some researchers claim that labour rights are also a field within human rights. No matter what, they are both a part of international law that are relevant to the field of business and human rights.[138]

There is little doubt that membership of international and domestic trade unions has significantly declined. This can be explained by the deindustrialisation in the West and by the fact that corporate manufacturing is mostly located in countries where unionisation rates are lower.[139]

In 1998 the ILO adopted its Declaration on Fundamental Principles and Rights at work. This declaration has identified four human rights as core labour rights. That is:

- Freedom of association and the effective recognition of the right to collective bargaining.
- The elimination of all forms of force or compulsory labour.
- The effective abolition of child labour.
- The elimination of discrimination in respect of employment and occupation.[140]

The eight conventions consist of:

1. Freedom of Association and Protection of the Right to Organise Convention, 1948.
2. Right to Organise and Collective Bargaining Convention, 1949.
3. Forced Labour Convention, 1930.
4. Abolition of Forced Labour Convention, 1957.
5. Minimum Age Convention, 1973.
6. Worst Forms of Child Labour Convention, 1999.
7. Equal Remuneration Convention, 1951.
8. Discrimination (Employment and Occupation) Convention, 1958.

[138] ibid 52.
[139] ibid 58.
[140] Barbara Shailor, 'Workers' rights in the business and human rights movement' in Baumann-Pauly and Nolan (n 95) 196.

This section will not go any deeper into the various subjects that each convention cover. However, for the sake of this thesis it is important to know what the core regulations of ILO are and what the core labour rights are.

3.5 National Due Diligence Laws

This last section of the human rights part of the thesis covers national due diligence laws. This is to give the reader an idea of where the current development is. Within the EU and the European countries there has up until now been a few mandatory human rights and environmental due diligence regulations. France, Germany, The Netherlands, and Norway are so far the only countries with this type of regulation.[141] The following description will exemplify how the French and the Dutch are dealing with due diligence since they are two regulations that are far from each other in subject matter.

France adopted a law of duty of vigilance in 2017 applicable to French companies. Companies are under the French law required to establish, disclose, and implement a plan that specifies the measure to identify risks, and prevents human rights and fundamental freedom, risks and serious harms to health, safety, and environment. The law's personal scope is companies with more than 5,000 employees and/or companies with 10,000 employees in France and abroad.[142]

The Dutch regulation has a somewhat different scope as it focusses on child labour.[143] It does not need continuance in the disclosure but only one statement that it has not breached any obligations in relation to child labour.[144] Therefore, it cannot be said to be as broad as the UNGPs or the OECD Guidelines.

For the sake of the business and human rights field and of this thesis, these national laws could serve as an indicator and ultimately help to implement the Green Taxonomy and the CSDDD. They could be seen as a prior step with potential for further development. In my opinion these national due diligence laws present several difficulties. The biggest is of course the difference of

[141] Platform on Sustainable Finance (n 63) 19.

[142] Gabrielle Holly and Claire Methven O'Brien, *Human Rights Due Diligence Laws: Key Considerations - Briefing on Civil Liability for Due Diligence Failures* (The Danish Institute for Human Rights 2021) 26; LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) 2017 (2017-399) art L. 225-102-4.

[143] Ministerie van Buitenlandse Zaken, 'Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid)' (13 November 2019) <https://zoek.officielebekendmakingen.nl/stb-2019-401.html> accessed 26 September 2022 (translated into English).

[144] ibid 4.

content and the fact that national laws are not aligned with each other. This makes it hard for investors and companies to know which regulations they comply with already or not.[145]

Another problem is that most of the national laws will enter into force somewhere between 2022–2024 which limits the data that can be extracted from them.

[145] Platform on Sustainable Finance (n 63) 20.

4 Corporate Sustainability Due Diligence Directive

This part of the thesis deals with the matter of reporting on the respect for human rights. It is the last part of the triarchy that together with the Green Taxonomy and the human rights considerations explained earlier in this thesis serves as the foundation for the discussion. This chapter will account for what due diligence entails and then describe the new CSDDD and what it requires from the different actors. The chapters main findings draw from the findings of Gabrielle Holly and Signe Andreasen Lysgaard in their report 'Legislating for impact' from the Danish Institute for Human Rights.

4.1 What is company due diligence?

At this point of the thesis, it is probably no revelation that companies must report on their actions and that the conventional way of reporting essentially concerns financial issues such as liquidity, stockholder equity, company balance etc. As described in the beginning of the thesis, social concerns have become increasingly important in recent years and as reporting on social issues are becoming more significant this in turn have created a whole industry for corporate and social responsibility consultancies.[146]

While frameworks such as the UNGPs and OECD Guidelines focus on what obligations exists, and what obligations multinational enterprises and states should be obliged to follow, they do not specify which practical process a company should comply with when reporting on its respect for human rights. That is, on the process for gathering and disclosing information as well as the scope and the scale of the reporting.[147] This field has many names and is often referred to as social due diligence or corporate and sustainable due diligence. It is important to make a distinction between human rights due diligence and normal due diligence that is mostly related to the financial audit of the company. For ease of reference within this thesis, the term Human Rights Due Diligence (HRDD) will be used.

There are currently a variety of frameworks on HRDD, and they are in most cases specific to a certain area. These HRDD frameworks are ranging from voluntary initiatives, such as those from the Sustainability Accounting Standards Board to multi-stakeholder initiatives, such as those for private security companies by the International Code of Conduct Association.[148]

[146] Amol Mehra and Sara Blackwell, 'The rise of non-financial disclosure: reporting on respect for human rights' in Baumann-Pauly and Nolan (n 95) 276.

[147] ibid 277.

[148] International Code of Conduct Association, 'The Code' (*ICoCA - International Code of Conduct Association*) <https://icoca.ch/the-code/> accessed 14 November 2022;

However, a big problem with HRDD is that the many initiatives might grow too burdensome for companies and ultimately harm the way reporting is done. There are several reasons for this. For instance, the multitude of initiatives and their absence of alignment or measurement against a standard benchmark make it easy to see that they might become difficult to follow. Amol Mehra and Sara Blackwell explain this problem as the need for the 'three Cs of reporting' – content, capacity, and consideration of the audience. Firstly, the content specific problem is that the subject matter of the reports varies and that there is no alignment in which content HRDD must deal with. The second problem has to do with the internal factor of capacity as corporations do not always have the capability to report on human rights. This can either be because of its size or because their internal structures established for reporting are not aligned with HRDD.[149] Lastly, the problem of HRDD lies in the consideration for audience that shapes how the due diligence report are framed and the difference that makes if the report is directed towards shareholders, regulator or an external audience that tries to understand how the company addresses human rights. All in all, these three concerns make the company due diligence sprawling.[150]

4.2 The Corporate Sustainability Due Diligence Directive

The CSDDD is a proposed directive that, if supported, will regulate the due diligence requirements across the value chain.[151] The CSDDD was announced in April 2020 and published in January 2022. It is now awaiting approval by the European Parliament.[152] Simplified, the Directive can provide a hardening of the minimum safeguards in the Green Taxonomy regulation and establish mandatory regulations for the companies covered.[153]

With the CSDDD the EU seeks to harmonise the legal requirements linked to the human rights' due diligence area and increase the accountability of companies in EU member states. According to the Commission 'The aim of this Directive is to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance. The new rules will ensure that businesses address adverse impacts of their actions, including in their value chains inside

Sustainability Accounting Standards Board, 'Standards Overview' (*SASB*) <https://www.sasb.org/standards/> accessed 14 November 2022.

[149] Amol Mehra and Sara Blackwell, 'The rise of non-financial disclosure: reporting on respect for human rights' in Baumann-Pauly and Nolan (n 95) 281ff.

[150] ibid.

[151] A value chain is often described as the process of a product from the creation to the finished product.

[152] Holly and Lysgaard (n 18).

[153] Platform on Sustainable Finance (n 63) 17.

and outside Europe'.[154] As Radu Mares explains, the CSDDD is dual in nature since it is both an accountability legislation and a corporate governance instrument. That is, it protects interests in society by making companies liable for its actions and it puts governance on the directors in the sense that they will have to expand their perspective to what effort might be harmful to the stakeholders.[155]

The process set out in the CSDDD is aligned with the six steps in the OECD Due Diligence Guidance for Responsible Business Conduct and will obligate companies to implement measures and address human rights and environmental impacts to fulfil the CSDDD's requirements. They can be summarized as follows:

1. Due diligence interests actively need to be implemented into company policies;

2. effectiveness must be measured, both what regards policies but also the measures a company takes;

3. companies need to identify both concrete and possible harmful human rights impacts;

4. companies must mitigate possible adverse impacts as well as bringing actual adverse impact to an end and reducing its extent when discovered;

5. there must be a complaints procedure that is actively maintained within the companies;

6. companies must be transparent and communicate their due diligence findings publicly to external actors.[156]

For the practical use of the CSDDD, it is not supposed to be working in a vacuum. Instead, it relies on another directive to disclose what due diligence process a company has implemented, namely the Corporate Sustainability

[154] European Commission, 'Corporate Sustainability Due Diligence' (*European Commission - European Commission*, 23 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 6 September 2022.

[155] Radu Mares, 'The New EU Directive on Corporate Sustainability Due Diligence: Origins, Compliance Effects and Global Significance' (*The Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, 1 April 2022) <https://rwi.lu.se/blog/the-new-eu-directive-on-corporate-sustainability-due-diligence-origins-compliance-effects-and-global-significance/> accessed 6 September 2022.

[156] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 2022 32 note 16.

Reporting Directive.[157] In essential, this means how a company has complied with the implementation of an adequate process and how the company performs on the monitoring of this performance.[158] This must not be mistaken with the CSDDD itself that contains HRDD requirements and obligations for companies.[159] Other instruments do also play a part in the implementation of the CSDDD. For example, is the definition of a company applied by the EUs Accounting Directive[160] or by comparable law of the third country.[161]

It is important to bear in mind that the model of the CSDDD does not guarantee the absence of human rights breaches and neither ask for companies to guarantee that human rights breaches will never happen. The CSDDD essentially seeks to minimize and address them. The CSDDD explains this as a focus on 'obligations of means'.[162] In other words, the CSDDD's main focus is on the process of HRDD rather than on the outcome. What substantiates this is that the CSDDD, unlike the UNGPs, has no set-out obligations on a policy commitment to respect human rights.[163] This will be discussed further in chapter 4.2.3.

4.2.1 Personal Scope

Only ca 1 % of all EU companies fall within the personal scope of the CSDDD, which, giving to the explanatory memorandum of the CSDDD, is approximately 13,000 EU companies and 4,000 third-country companies.[164] According to the CSDDD it applies to three sets of companies that are formed in accordance with the legislation of an EU member state. Those are:

> Large EU companies: companies with both a net worldwide turnover of 150 million Euro and more than 500 employees.

[157] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting 2021.

[158] Holly and Lysgaard (n 18) 12.

[159] ibid 3.

[160] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance 2013.

[161] Holly and Andreasen Lysgaard (n 124) 9.

[162] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) explanatory memorandum (15).

[163] Human Rights Council (n 75) ch 2.

[164] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) 16.

Medium EU companies: Net worldwide turnover of 40 million Euro, more than 250 employees and that has business in (at least 50 %) in various high-impact targeted sectors.[165]

The CSDDD also applies to non-EU companies that are formed in accordance with the legislation of a third country. The CSDDD is then applicable if they:

- Have a generated turnover of more than 150 million Euro and/or;
- have a net turnover of 40 million Euro or more and that the company has business in a high-impact targeted sector.[166]

At first glance it is a provocative modest amount of the companies operating in the EU and almost all small, and medium sized enterprises (SMEs) are left out. Nevertheless, the CSDDD states that there are several reasons for why SMEs are not included. Firstly, the administrative and financial burden of enacting a due diligence process in SMEs are thought being too high and disproportionate in relation to their size. Secondly, it can be argued that SMEs lack the knowledge, personnel, and resources for setting up such mechanisms.[167]

The explanatory memorandum sets out that SMEs are to be included in due diligence mechanisms as subjects to the bigger companies. Subsequently bigger companies will make sure that SMEs are exposed to their due diligence obligations which in turn includes SMEs as their foundation relies on contractual approaches.[168] For the obligations on SMEs to not be too burdensome, the CSDDD sets out that the larger companies shall help them in both preventing impacts but also bringing adverse impacts to an end.[169] This I believe is a dangerous path as there is a risk that larger companies themselves are not compliant with the HRDD obligations in all regards. Then, the incompliance will be reflected onto the SMEs and harm their possible compliance with HRDD obligations. There is of course always the risk of being scrutinized based on the public communication on their HRDD but, where it is a multinational enterprise with possible hundreds of subcontractors it is close to say that not all of these can be under public scrutiny. In my opinion too much trust is put onto the larger companies' effort in the CSDDD. This argument is supported by the Principles for Responsible Investment that calls on the Commission to broaden the personal scope of the CSDDD. They assert that the obligation to respect human rights applies to all companies and not just a few as per the current draft of the CSDDD.[170] However, one incentive

[165] ibid 2 (1) a–b.
[166] ibid 2 (2) a–b.
[167] ibid 14.
[168] ibid 14.
[169] ibid 7 (4), 8 (5).
[170] Elise Attal and Hazell Ransome, 'PRI Position Paper - EU Corporate Sustainability Due Diligence (CSDD) Directive' (Principles for Responsible Investment 2022) 5

created for supporting SMEs to conduct HRDD is the enabling of SMEs to get financial support from member states in fulfilling the obligations resulting from the CSDDD.[171] This I believe is not enough.

Another reason for limiting the CSDDD to bigger operative companies in the union can be found in the existing sectoral OECD guidance on high-impact sectors. This guidance has led the EU to limit the responsibility to these companies that according to them could have the highest impact and thus have the possibility to create adverse human rights impact.[172] This of course also limits the personal scope and, in my opinion, undermines the CSDDD even further.

As seen above, the CSDDD specifically targets high-impact sectors such as minerals, agriculture, garment and textiles and extractives and broadens the personal scope with regards to these areas. These high-impact areas are almost the same areas as covered by the current sector-specific OECD guidelines.[173] However, there is one failure, and that is the fact that the CSDDD does not cover the financial sector as a part of the high-impact sectors included. The financial sector traditionally includes banks, credit institutes, insurance companies, holding companies or pension companies.[174] The CSDDD states this by saying that 'the broader coverage of actual and potential adverse impacts should be ensured by also including very large companies in the scope that are regulated financial undertakings, even if they do not have a legal form with limited liability'.[175] According to Holly and Andreasen Lysgaard this means that the CSDDD leaves the 'value chain approach' by leaving out suppliers and by limiting the CSDDD to include only larger companies in this regard.[176] Here is a clear deviation from the UNGPs and the OECD Guidelines and also deviation from the Green Taxonomy as these frameworks are clear that there should be an alignment with these actors that the CSDDD leaves out.[177] In my opinion there should not be a limitation for SMEs that are in the high-risk sector as it is evident that those companies are especially sensitive to the risk of causing or contributing to human rights abuses.

<https://www.unpri.org/policy-reports/eu-corporate-sustainability-due-diligence-csdd-directive/10584.article> accessed 14 November 2022.

[171] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) preprint 14 (2).

[172] ibid explanatory memorandum.

[173] OECD, OECD Guidance Due Diligence Guidance for Responsible Business Conduct 2018 3.

[174] The Brønnøysund Register Centre, 'Financial Undertakings' (*The Brønnøysund Register Centre*) <https://www.brreg.no/en/business-2/financial-undertakings/> accessed 16 November 2022.

[175] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) 33 (22).

[176] Holly and Andreasen Lysgaard (n 124) 17.

[177] ibid.

As to the range of employees included in the CSDDD this is an area where the CSDDD on the other hand takes a quite extensive approach. It counts both full-time and part-time workers as employees as well as temporary agency workers.[178] It is my opinion that this extensive approach is beneficial to the application of the CSDDD.

4.2.2 Material Scope

The primarily material scope of the CSDDD can be found in the Annex. It is here that the CSDDD lists the rights under which the due diligence matters shall be supervised. As to the listing, the Annex starts with account for violations of rights and prohibitions found in specific international human rights agreements. Examples are the first violation mentioned in the Annex; the Violation of the people's right to dispose of a land's natural resources and to not be deprived of means of subsistence in accordance with Article 1 of the International Covenant on Civil and Political Rights; and the second violation mentioned in the Annex is the Violation of the right to life and security in accordance with Article 3 of the Universal Declaration on Human rights. The Annex goes on by mentioning a total of 21 individual rights from various international human rights and labour rights agreements without any specific order.[179] The Annex then goes by listing 15 Human rights and fundamental freedoms conventions and lastly account for 12 violations of internationally recognized objectives and prohibitions included in environmental conventions.[180]

The main critique of the rights in the Annex is that they are not listed in a conventional way of listing human rights. Some rights are even framed in a novel way.[181] This is a critique that I strongly agree with and find highly problematic. Especially the part which refers to international relevant human rights instruments seems to be there to 'catch the rest' of the important human right. I believe that, since some rights are hidden in instruments (in comparison to those explicitly accounted for in the first part) there is a risk that companies only focus on the first part of the annex, and forget about the rights included in the instruments.[182] In due course this inadequate framing can have the effect of undermining human rights by making them appear uncoordinated and inconsistent and subsequently appear as an area that is not applicable to businesses.

[178] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) art 2 (3).

[179] The authors own opinion.

[180] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) pt the annex.

[181] Holly and Andreasen Lysgaard (n 124) 12.

[182] ibid 13–14.

Other critiques include the fact that the Annex is missing key European human rights instruments such as the European Convention on Human Rights and the EU charter of Fundamental Rights.[183]

Yet another departure from the UNGPs and the OECD Guidelines is that the CSDDD introduces a requirement for a 'violation of one of the rights or prohibitions listed in the Annex' when it explains the term 'adverse human rights impact' in art. 3 (c). As described in chapter 3.3.1 the UNGPs use the term adverse impact in a way that refers to an action or an omission rather than a violation. That is, an action or omission that diminishes or entirely eradicates the individual's capability to have human rights. This narrower approach to adverse human rights impact used by the CSDDD could in my view limit the possible ways of obtaining remedy by victims as there now will be needed to establish that there is a clear human rights violation under international law instead of just an action or omission as previously.

At the time of writing, the CSDDD is only covering adverse impacts in the sense of human rights and environmental impact. The drafters have excluded adverse climate change from being covered in the CSDDD. The traditional separation of environment and climate is that environmental impact is 'the direct effect of socio-economic activities and natural events on the components of the environment' while climate impact refers to the change of environmental conditions over an extended period.[184] This might, however, be included in the review of the CSDDD and might therefore be added in the future.[185] In my opinion it is interesting that a CSDDD, so connected to the Green Taxonomy and the overall goal of climate neutrality excludes such a relevant and fundamental aspect as climate impact. As it is now, the CSDDD only establishes that a company shall 'adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement'.[186]

4.2.3 Due Diligence requirements

4.2.3.1 Integration of due diligence

Art. 5 (1) of the CSDDD sets up three requirements for integrating due diligence into companies' policies. Firstly, their due diligence policy shall have a description of the company's approach to due diligence. Secondly it shall have a code of conduct that describes the rules and requirements that needs

[183] ibid 13.

[184] OECD, 'OECD Glossary of Statistical Terms - Environmental Impact Definition' <https://stats.oecd.org/glossary/detail.asp?ID=827> accessed 17 November 2022.

[185] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) art 29.

[186] ibid 15 (1).

to be followed by employees and subsidiaries. Thirdly, they need a description of the process in place to implement due diligence, including how the company verify compliance with the code of conduct and how it extends this application to established business relationships. This shall be updated annually.[187]

According to Guiding Principle 16 of the UNGPs this is not enough. The policy commitment needs to make explicit recognition of how the company adhere to human rights. According to Holly and Andreasen Lysgaard this enhances the idea of 'obligation of means' as discussed in chapter 4.2.[188] The policy commitment made in the CSDDD further excludes other things that the UNGPs requires. Such as the policy to be 'approved at the most senior level'; that it is informed by internal and/or externa expertise; and that it is publicly available both externally and internally.[189] Nevertheless, the CSDDD has established a directors' duty of care in art. 25 that stipulates that when acting in the best interest of the company, the director shall also take into account consequences in sustainability matters such as human rights, climate change and environmental consequences. Art. 26 (1) additionally stipulates that directors are responsible for putting in place a mechanism for overseeing the due diligence policy of the company. This also includes consideration for input from stakeholders and civil society organisations. It is in my view a dangerous path to deviate from the requirements in the UNGPs. The policy commitment can benefit from the inclusion of respect human rights, be public and consider opinions from stakeholders.

4.2.3.2 Identification of actual or potential adverse impact

Where it comes to the HRDD obligation to carry out actions that identify actual or potential adverse impact in accordance with art. 6, art. 6 establishes that the 'member states shall ensure that companies take appropriate measures to identify actual and potential adverse human rights impacts'.[190] 'Appropriate measures' is defined as a measure that is 'capable of achieving the objectives of due diligence' and commensurate to the degree and likelihood of the impact as well as being proportionate to the company's influence and characteristics of the business relationship and the need to prioritise the actions needed. This is in my opinion a vague description of the type of appropriate measures that a company should take, and I believe that much clarification is needed since this aspect is crucial to identify and act upon actual or potential adverse impacts.

[187] Holly and Andreasen Lysgaard (n 124) 26.
[188] ibid.
[189] Human Rights Council (n 75) Guiding Principle 16.
[190] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) art 6 (1).

4.2.3.3 Preventing, mitigating, and ending potential or actual adverse impacts

The CSDDD offers a variety of possible ways of addressing actual or potential impacts. Those include neutralisation or minimising the extent of the impact through damages or financial compensation[191]; develop and implement a corrective action plan[192]; seek contractual assurances from a direct partner with whom it has an established business relationship that it will ensure compliance with the code of conduct[193]; necessary investments[194]; provide targeted and proportionate support for an SME with which the company has an established business relationship[195]; collaborate with other entities to bring the adverse impact to an end[196]. Here is another inconsistency with the UNGPs as the commentary to Guiding Principle 19 uses phrasing such as 'mitigating', 'ceasing' and 'preventing' impact rather than 'minimising' and 'bring the adverse impact to an end'. I disagree with Holly and Andreasen Lysgaard's opinion that the use of a different terminology should be a problem.[197] In my opinion they are in essential the same and conclusively could be applied in the same way.

4.2.3.4 Establishing and maintaining a complaints procedure

According to art. 9 of the CSDDD, companies must ensure that individuals that are or might be affected; trade unions or civil society organisations have the possibility to submit complaints to them when they have concerns regarding possible actual or potential human rights impacts.

4.2.3.5 Monitoring the effectiveness of due diligence policies and measures

According to art. 10 every 12 months, companies shall carry out periodic assessments of their due diligence policies. The findings shall be used to update their due diligence policy.

4.2.3.6 Communication on their due diligence

According to art. 11 the communication of the due diligence is left to the Corporate Sustainability Reporting Directive but establishes that reporting must be done annually.

[191] ibid 8 (3) a.
[192] ibid 7 (2) a, 8 (3) b.
[193] ibid 7 (2) b, 8 (3) c.
[194] ibid 7 (2) c, 8 (3) d.
[195] ibid 7 (2) d, 8 (3) e.
[196] ibid 7 (2) e, 8 (3) f.
[197] Holly and Andreasen Lysgaard (n 124) 30ff.

4.2.4 Established business relationship

The term ‘established business relationship’ is an important part of the proposed CSDDD as it is a key together with the own enterprise and subsidiaries to establish a company’s value chain.[198] What is remarkable with this phrasing in the CSDDD is that it is not to be found in the UNGPs or in the OECD Guidelines. This is actually an invention drawn from the French Due Diligence Law.[199] If compared to the UNGPs and OECD Guidelines they instead take a risk-based approach in their assessment of the connection between a business and potential adverse human rights impact.[200] That essentially means that on the road to establish where and when a business enterprise must conduct HRDD it has to look at the potential adverse human rights impacts the company might or are subject to and from that conclude HRDD. Holly and Andreasen Lysgaard discuss if this can be a new higher threshold and that there now will be an uncertainty how far the due diligence duty extends. As this departs from a ‘best practice’ this could lead to a lesser willingness to do what international frameworks expects.[201] On the other hand, it can also be interpreted in broader terms as the CSDDD says that an established business relationship should cover ‘all linked indirect business relationships should also be considered as established regarding that company’.[202] I agree with Holly and Andreasen Lysgaard’s opinion that this is unexplored territory that still is to be tested and that one response could be that companies are trying to avoid longer contracts with their partners to in turn avoid being subject to the HRDD concerns of the CSDDD.

As to the business relationship something shall be mentioned about the contractual assurances that the CSDDD requires companies to engage in as soon as they have a partner with whom they have an established business relationship. The CSDDD sets up something of a checkbox mechanism for these established business’ relationships as it states that companies shall ‘seek contractual assurances from a business partner with whom it has a direct business relationship that it will ensure compliance with the company’s code of conduct and, as necessary, a prevention action plan, including by seeking corresponding contractual assurances from its partners, to the extent that their activities are part of the company’s value chain’.[203] This could be seen as another deviation from the UNGPs as they can be read as to understand that business enterprises are responsible for their own HRDD and that this HRDD

[198] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) art 6 (1).

[199] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (1) art L. 225-102-4.

[200] Holly and Andreasen Lysgaard (n 124) 15; E.g. Human Rights Council (n 75) Guiding Principle 17.

[201] Holly and Andreasen Lysgaard (n 124) 15.

[202] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) explanatory memorandum (20).

[203] ibid 7 (2) b, 8 (3) c.

should cover adverse human rights impacts that are 'directly linked to its operations, products or services by its business relationships'.[204] In my opinion the CSDDD creates a possibility for companies to delegate their HRDD to their partners in a way that is inconsistent with the UNGPs. However, this remains to be seen as there also is a possibility that this phrasing can create leverage on partners to fulfil their HRDD obligations. The contractual assurances are necessary to avoid civil liability as will be discussed in the next chapter.

4.2.5 Supervision and liability

Art. 17 of the CSDDD sets up mandatory national supervisory authorities that are intended to control compliance with the obligations adopted nationally by states in relation to the CSDDD. They shall be independent, transparent, and impartial and are connected to each member state.[205] They shall be able to carry out investigations to see if a company complies with the proposals as well as order cessation of infringements and impose pecuniary sanctions based on turnover when needed.[206]

Remediation is addressed through art. 8 (3) a. and statues that companies are required to pay damages to affected persons and financial compensation to affected communities in proportion of the adverse impact and in proportion to the company´s conduct in relation to the adverse impact. The UNGPs however mandates additional measures to be conducted. According to Guiding Principle 22, companies 'should provide for or cooperate in their remediation through legitimate processes'. That means that financial support is not enough as remedy for and adverse human rights impact.

According to art. 19 (1) any legal person is entitled to submit concerns to any supervisory authority. The only concern with this according to Holly and Andreasen Lysgaard is that the supervisory authority might rely too much on external actors such as NGOs or individuals to monitor compliance. This is something that I do believe can be resolved by providing supervisory authorities with enough financing and support to investigate allegations without the help of external actors.

Art. 22 of the CSDDD sets up the main civil liability mechanism that can hold companies liable for damage that interferes with the compliance of the obligations in art. 7 and art. 8. This civil liability mechanism is twofold as the first step is that a company has failed to take appropriate measures to prevent potential adverse impacts respectively bringing actual adverse impacts to an end and this failure has resulted in an 'adverse impact that should have been

[204] Human Rights Council (n 75) Guiding Principle 17 (b).

[205] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) art 17.

[206] ibid 18 (5) a–c.

identified, prevented, mitigated, brought to an end or its extent minimised'.[207] 'Adverse human rights impact' is clarified as something that violates a protected persons rights as defined in the Annex.[208] However, this is where matters gets problematic, because the CSDDD does not clarify it is up to domestic courts to establish if there has been a breach of international human rights law for liability to enter into force.[209] While I believe that the framing of the CSDDD makes it clear how important it is to address harm that should have been foreseen, the liability mechanism is hanging by a thread if relying on domestic courts to be the judges on international human rights law. The reason for this is the fact that they are rarely dealing with these matters and their entry into this field of law creates a risk making the application inconsistent in many ways.

Another way of imposing civil liability is when the obligations with regards to contractual assurances are not met. Art. 22 (2) gives that a company is liable to adverse impact according to art. 7 (2) b and art. 8 (3) c when it has not verified compliance with an indirect partner whom it has an established business relationship with. This is accordingly to art. 22 (2) highly dependable on the company's efforts and how they are related to the damage. In the end it is up to national law to establish if the company's action was reasonably adequate.[210] As discussed in the previous section, I believe that this is a dangerous approach to liability as it might lead to different application throughout the EU.

Holly and Andreasen Lysgaard argue that the scope of liability is too narrow, which is something that I agree with. Both the UNPGs and the OECD Guidelines express that the due diligence obligations should be as broad as possible to protect rightsholders. As discussed in the previous chapter both the term 'established business relationship' and 'contractual assurances' raise the bar and makes it harder to establish business interlinkage, subsequently limiting the effectiveness of the CSDDD.

[207] ibid 22 (1) a–b.

[208] ibid 3 (c).

[209] Holly and Andreasen Lysgaard (n 124) 24.

[210] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (n 156) explanatory memorandum (58).

5 Discussion

5.1 Research question

As explained in the introduction of this thesis, this thesis sets out to analyse the correlation between the two regulations of the Taxonomy and the CSDDD out of a human rights perspective. This is done to determine how they work together out of a human rights perspective and what linkage there is to human rights. After the linkage is established, the further discussion will be aimed at determining how they promote human rights obligations collectively. Lastly, upon determination on the level of interlinkage and level of human rights application the thesis will pinpoint the limitations of and inherent differences between the two instruments.

In this section I return to the overall objective of this thesis, which is to answer the following question:

How does the Corporate Sustainability Due Diligence Directive intersect with the minimum safeguards in the Green Taxonomy to promote human rights?

This question is answered by addressing the following sub-questions:

What is the interlinkage between the Green Taxonomy and the Corporate Sustainability Due Diligence Directive?

How do they promote a business conduct which is human rights compliant?

What are the potential limitations?

5.2 What is the interlinkage between the Green Taxonomy and the Corporate Sustainability Due Diligence Directive?

This first chapter of this discussion will present the overall linkage between the two instruments analysed in this thesis. How they are aligned and how are they meant to work together. When discussing the linkage between the Green Taxonomy and the CSDDD, the reader must not forget that the CSDDD is only proposed and have not yet been adopted. Therefore, the linkage discussed in this chapter is for now to be considered as hypothetical, since changes to the proposed CSDDD could still be made.

A simple answer to the question of how the two instruments relate would most probably provide that the CSDDD is linked with the Green Taxonomy to ensure the fulfilment and realization of the aspirations and objectives of the Green Taxonomy. However, as will be shown in the further discussion, there is much more to it. For the easiness of explanation, the account for the interlinkage can be divided into two levels.

On the first level is the inherent structure of the Green Taxonomy and the way the Green Taxonomy is dependable on the CSDDD for its realisation. This linkage builds upon the fact that the environmentally sustainable objectives are covered by the MS provisions which in turn account for overarching duties demanded from companies in the human rights regard. Those overarching duties are, as discussed in chapter 2.3, the conformity with the UNGPs; the OECD Guidelines; the Foundational International Labour regulations and the Bill of Human Rights. In this regard it is important to notice that the MS provisions do not create specific requirements but rather, in my opinion, create quite broad obligations without any clear substance. The internal link between the MS provisions of the Green Taxonomy and the CSDDD has its footing in the fact that the CSDDD substantiates the overarching obligations that are established in the MS and gives them material substance. Without the CSDDD, the Green Taxonomy would be missing an important piece in its function, and it would in my opinion be hard for anyone who is not well versed in human rights to establish what necessary international human rights obligations flow from the MS provisions of the Green Taxonomy. This is further supported by the statement that the CSDDD itself explains it as that the Green Taxonomy does not impose any substantive duties on companies other than reporting requirements.[211] Conclusively, the first level of interlinkage can be found in the structure created internally between the Green Taxonomy and the CSDDD and how they depend on each other for the human rights considerations to be a functional part of the whole.

On the second level of intersection, we instead look on what obligations are mandated upon the different actors by the first level of linkage. First, it must be stated that the reporting mandated by the CSDDD help investors to make well informed decisions on investments and subsequently allocate capital to companies that are responsible and sustainable. That, in turn, enables the realisation of the Green Taxonomy and in turn the EGD. Without the reporting requirements set up by the CSDDD, it would be challenging for investors to see if a company is adhering to environmental sustainability objectives as they would most probably have to rely on audits that could have a multitude of variance and no alignment. The second level of interlinkage between the Green Taxonomy and the CSDDD can also be clarified by the Platform on Sustainable Finances' Final Report where they conclude that non-compliance with minimum safeguards can either be done through a lack of established HRDD in the company or human rights abuses that stems from the lack of a

[211] ibid 5.

properly implemented HRDD.[212] The report makes it clear how important the work of external actors is when it comes to discovering both HRDD breaches and human rights abuses. External actors here are both the state-controlled surveillance mechanisms but also NGOs and other external parties that will investigate and monitor the HRDD of the companies. Without clear guidelines on what these entities can expect in terms of material from companies, the MS regulation in the Green Taxonomy would be completely toothless in my opinion. Consequently, the second level of interlinkage is related to how the two instruments are perceived by external actors and the external alignment that the two instruments create. It is evident that the two instruments work together to create obligations on external actors to be human rights compliant.

I am aware that the linkage puts significant pressure on states and external actors to investigate and audit the companies HRDD reports. I am also aware that this discussion tends to portray companies as the big culprit in this context. Nonetheless, I want to make it clear that even though multinational enterprises possess the greatest risk to create adverse human rights breaches, both the state-controlled surveillance mechanisms and the external parties such as NGOs have a huge responsibility in this linkage to discover and to help mitigate such adverse human rights breaches. Without their part in this linkage, the whole context of the interlinkage between the Green Taxonomy and the CSDDD would be very fragile indeed and, in many cases, leave the human rights abuses under the companies' own scrutiny. Therefore, it must always be considered that the interlinkage created between the Green Taxonomy and the CSDDD puts many actors on the stand.

5.3 How do they promote a business conduct which is human rights compliant?

As seen in chapter 2.2, the Green Taxonomy regulation is a complicated regulation with the objective set high. On the surface, the six environmental objectives give the appearance of being thorough and comprehensive but in my opinion, there are problems to be found in all places, which is the same for the CSDDD. This is of course an inherent error that undermines business conduct which is human rights compliant, but before I go into that I will elaborate the more positive aspects of the promotion of a business conduct which is human rights compliant.

As discussed in the previous chapter the CSDDD is highly interlinked with the Green Taxonomy and an enabler of the Green Taxonomy. The Green

[212] Platform on Sustainable Finance (n 57) 33.

Taxonomy's overall aim, apart from classifying environmentally sustainable activities, is in fact to allocate resources to those objectives. In other words, the CSDDD is not only a classification tool but also a significant investment tool. When discussing the promotion of a business conduct that is both sustainable and human rights compliant this is important to bear in mind. This is in my opinion one of the factors that will help support the implementation of the Green Taxonomy and the CSDDD the most. Because without the incentive of being able to turn a profit from the regulations it is my opinion that the impact will be less pervading. However, this does only answer the question of how the Green Taxonomy and the CSDDD will be supported in general. Not how they will promote a human rights compliant business conduct.

In terms of how they will promote a human rights compliant business conduct, in my view this will depend on how the regulations engage several actors in understanding the importance of the human rights concerns. They engage both policymakers, companies, and civil society in relevant concerns around human rights. The question here is if the human rights concerns in the instruments are prominent enough to make an impact or if they will fall short in the shadow of the environmental sustainability objectives? That is, if human rights concerns will be downgraded to something of a checklist compliance that has no real value. This is in my opinion a big risk with the current structure. I believe that the MS of the Green Taxonomy make it relatively clear how important the human rights concerns are, but, when it comes to their realisation the CSDDD falls short of implementing them in a way that is consistent with current human rights implementation, protection and promotion. What supports this argument, I believe, is the evident deviations from the UNGPs and the existing applicable human rights framework. This topic will be discussed further in chapter 5.5.5.

In theory, the concept of the Green Taxonomy together with the CSDDD draws heavily on the idea of 'polycentric governance' as discussed in chapter 3.3.1. One can argue that this concept has not been tested in this scale. The public governance part is constituted by essentially three parts, the regulations that govern the whole structure in the Green Taxonomy, the screening criteria and other criteria as set up in the delegated acts and the HRDD requirements as set up in the CSDDD. The Business governance part of the polycentric governance framing is mainly constituted through the CSDDD. Whereas the CSDDD sets up requirements for HRDD policy implementation and mitigation, and suspension of adverse impacts on human rights. The last part, of civil governance, is represented by the CSDDD together with the CSRD. Without going too much into detail on the CSRD, it is important to note that the CSRD sets requirements for the sharing of the findings in the CSDDD. Conclusively, enabling for civil governance through public knowledge of the HRDD concerns of the company. In turn, providing for investors and NGOs to scrutinize and make informed decisions on companies. The key question in relation to this is if it will work in practice. Will the separation of power

lead to a conduct that is human rights compliant? My opinion is that it has potential. The way the different actors are engaged and how the realization is not subject to the states alone, in my view is a considerable advantage in comparison to mechanisms that are only subject to state-controlled mechanisms. However, the problem lies in the amount of engagement that will be seen from the different actors. Because, if one actor falls short of exercising their governance part, there is also a risk that the human rights compliant conduct that this system is supposed to create will be falling apart. That leads this discussion to the next question. What are the potential limitations?

5.4 What are the potential limitations?

This is one of the most important questions of the analysis of this thesis and must be divided into different sections to provide clear answers. As stated previously there are inherent limitations to almost all provisions. Ranging from the inherent difficulty of the UNGPs to the controversies in the Green Taxonomy to the CSDDD. Several issues are to be found. Starting with the most general limitations, namely those pertaining to international human rights law, and continuing by moving to more specific matters such as the Green Taxonomy and the CSDDD. All of which plays an essential part when deriving the limitations from these instruments.

5.4.1 The human rights limitations

As stated in this thesis, human rights are not seamlessly integrated in the various areas law. The reader must bear in mind that human rights is a fragile system that is mainly build around consent. As concluded in chapter 3.2.2, I assert that both states and multinational enterprises are subjects of international law to a certain extent and subsequently duty bearers. This puts certain obligations upon these actors and do furthermost not exclude multinational enterprises from adhering to human rights in certain places where the state does not uphold human rights. However, there is a difference between establishing the need to adhere to human rights and the actual application of human rights where the last is always a challenge and thus poses a limitation in itself. It cannot be overlooked that the subject of human rights implementation is exceptionally political and diversified in its usage. One clear example of this can be found in chapter 3.2 with regards to political ideologies that led to the creation of both the ICESCR and the ICCPR. Even though the design of these two instruments goes back almost half a century, it is evident that several human rights questions are still controversial. A modern-day example is the debate around abortion in relation to the right to life that is highly controversial.

I do not contend that it is a bad idea to integrate human rights into the CSDDD and the Green Taxonomy but what I want to make clear is that since the area of human rights integration is such a fragile part of the international law,

human rights do not always create a solid ground. Therefore, it is important to keep this in mind when continuing the discussion of limitations. Nevertheless, I believe that there is a necessity to incorporate human rights and that this in fact is crucial for the success of the instruments. The option if not included or considered, in the situations that the Green Taxonomy or the CSDDD covers, would probably be more severe in many cases and leading to a potentially worse situation for many actors. Conclusively, the area of Human Rights is highly needed in these new legalisations but has inherent limitations as this is a challenging area of application.

5.4.2 The application of the Bill of Human Rights

As have been concluded in chapter 2.3.3 with regards to the Green Taxonomy and the MS and in chapter 4.2.2 with regards to the CSDDD both these instruments rely heavily on the provisions of the Bill of Human Rights. The Green Taxonomy makes it clear in art. 18 regarding the MS and the CSDDD makes an indirect reference to the Bill in the Annex part two where it states all the conventions of the Bill. On the surface I believe that this might look like a strong reference to human rights, but it is my opinion that this reference in fact provides for constraints on the human rights application. As discussed in the previous chapter, human rights considerations are complex in its application since they are so politicised and fragile. I can also see why the drafters have chosen to make explicit reference to the conventions of the Bill of Human Rights as it is a foundational framework within international human rights law. Nevertheless, the inherent difficulty with making such a reference is that the wording can be interpreted in such a way as to exclude other more recently recognised human rights. This essentially means that human rights which are not explicitly enshrined in the Bill of Human rights may be overlooked and discarded.

As mentioned in chapter 3.2, it must not be ignored that all human rights are interlinked and interdependent. By limiting the obligations on multinational companies to the Bill of Human Rights provisions the policymakers set out a dangerous path that I believe will get newer rights rejected. It must not go unnoticed that most actors that apply the Green Taxonomy and the CSDDD will not be human rights lawyers and subsequently will most probably use the phraseology inside the regulations and subsequently not exceed those limitations. Conclusively the application of the Bill of Human Rights can pose unforeseen limitations if the practitioners only stay true to the wording of the MS and the CSDDD, which I think is a likely outcome. There is however a small highlight in this and that is the fact that the CSDDD is not limited to the provisions of the Bill of Human Rights alone, unlike the Green Taxonomy, the drafters have chosen to include additional human rights. Though the fact that the CSDDD could be static in its application of human rights remains. As

we will see later in this discussion, the human rights considerations of the CSDDD also pose a challenge.

5.4.3 The limitations of the BHR frameworks

As discussed in chapter 3.3 BHR considerations have not been a straight road to success. Where we are today in the light of BHR have been a challenging development and as discussed, the UNGPs and the OECD Guidelines are currently the main comprehensive frameworks for BHR. Unlike the common conception that seems to be that the UNGPs is the best solution I initially want to be clear that it is not my opinion that these frameworks are anyway the ultimate solution. I believe that we need a framework that have more exhaustive focus on the application of human rights throughout the value chain. The same argument goes here as was discussed in the previous chapter. The UNGPs are limited to certain human rights and though there can be need to consider additional standards this is not framed other than in the comments.

It must not be ignored that the UNGPs represent a bare minimum of BHR and that many multinational enterprises have been part of the multistakeholder process that led to their creation. I believe that this both have its benefits and shortcomings. Benefit as incorporating the many perspectives they represent and shortcomings as in the fact that multinational enterprises aided the direction of the UNGPs in their favour. Therefore, I believe that the UNGPs should be scrutinized so as not to play in the hands of the multinational enterprises too much.

It is obvious that the realization of the OECD Guidelines possesses the same problem. The OECD Guidelines are built around the consensus of a small number of privileged states and consequently they risk being overinfluenced by them and thus not being limited in their reach and acceptance. Here I believe that the scrutinization should be regarding the agendas of the states instead of the companies as they have created the guidelines from their perspective. Thus, bearing that in mind when implementing the guidelines.

The conclusion here is without doubt that both these frameworks are stained by their creators. Their application should be subject to scrutiny and be taken as a bare minimum where multinational enterprises must be welcomed to always conduct more BHR and HRDD efforts.

5.4.4 The Green Taxonomy limitations

Moving on to the Green Taxonomy this regulation reflects a very ambitious plan but also houses many limitations. One, that have been highlighted on several occasions in this thesis, is the fact that the Green Taxonomy is intended to be built on science-based considerations. It is my opinion that this ambition has been increasingly neglected along the way, as the Green

Taxonomy has become more politicised. By looking at the last Complementary Climate Delegated Act it is evident that the Commission have made concessions on the science-based consideration in favour of promoting a competitive energy strategy in the EU. What the immediate effect is of incorporating gas and nuclear energy as 'green' sources of energy is to directly undermine the Green Taxonomy, and even though the Commission has made several considerations that are to make these sources of energy as green as possible, it ultimately undermines the reliability and credibility of the Green Taxonomy in the eyes of the public. This in turn makes the cause for establishing a green politic that is human rights compliant even more shaky.

Another clear example of a limitation of the Green Taxonomy is the new bar for when harm is done. By incorporating the word 'significant' to the 'no harm' criterion my opinion is that confusion is created. The confusion lies in how this term should be interpreted and by whom. Not only does it give the impression that the threshold for when harm is done is lowered, but it also creates a new obligation that is not to be found in the international human rights considerations until this day. This is yet another structural limitation that undermines the Green Taxonomy and subsequently undermines human rights concerns.

Further, the binary problem as discussed in chapter 2.2 is a great problem that challenge the application of the Green Taxonomy. That is, the Green Taxonomy presents the problem of excluding environmentally beneficial activities from investments on the basis that they are not included in the Green Taxonomy and therefore not considered 'sustainable'. This is yet another crucial limitation of the Green Taxonomy. It can be argued that the Green Taxonomy cannot foresee all environmentally beneficial activities and therefore that that the Green Taxonomy is an impossible project. This is something that I agree on and can only hope that the legislators will be aware of this and have an ear on the ground to the changes that will need to be incorporated.

There is also the problem of equality in strength between the objectives that potentially can lead to misalignment. It is my opinion that investors and companies will aim to do the easiest, most cost-effective activities that adhere to the Green Taxonomy and then, if some objectives are easier to fulfil than others, I have no doubt that these objectives are the ones that will be used the most, even if they are not the most environmentally beneficial.

Lastly it is important to pinpoint that non-EU companies do not have a lesser ambition outside of the EU than they should have within. I believe there is a risk that the MS alignment can be too burdensome for some companies and that they then might be relocate outside of the EU to avoid regulation. However, the Green Taxonomy is regulated in such a way that most such relocations will not do any overall difference in my opinion.

5.4.5 The limitations of the CSDDD

As with many regulations, the more detailed they get the greater is the possibility to subject them to scrutiny which also is the case with the CSDDD. As established in chapter 5.2. the CSDDD is a realisation of the MS provisions of the Green Taxonomy and subsequently creates narrow obligations on different actors. In chapter 4 of this thesis, it is concluded that the CSDDD presents several inherent limitations. This chapter will try to make sense of the limitations and put them in a broader context to see how they relate to the overall linkage with the Green Taxonomy.

There is no doubt that there is a need for the CSDDD since states have started to produce their own HRDD laws. The national laws do, however, not create an alignment within the EU which the CSDDD on the other hand would. Neither are the national law harmonized in their provisions. While the CSDDD serves as a highlight in this regard, the benefit with the CSDDD is that it establishes a consistent HRDD obligation for certain companies. The UNGPs state that the most important part of alignment with BHR is that companies must have a due diligence process in place. Here is where the first limitation comes in. A recent study of the market practices in the EU and their due diligence requirements to identify, prevent, mitigate, and account for abuses of human rights concluded that only 37,14 % of the EU companies asked are undertaking due diligence in these areas.[213] This is direct and far better dissimilarity to the CSDDD which is only directed towards bigger companies. In fact, only 1 % of the EU companies are covered by the CSDDD and even though the Commission suggest that the CSDDD will create a ripple effect to medium and small sized companies the fact is that the CSDDD is provocative small in its application and in my view very optimistic in this regard.

The small number of companies covered is also something that can be criticised from an international law perspective. Because if multinational enterprises are subjects of international law, there is no reason to exclude them just because of their size. They too are duty bearers with regards to a healthy environment and in my opinion, it is clear that they shall not be excluded. Another question that must be raised in this regard is why there is no obligation for medium-sized companies to do a due diligence if they work in the financial sector? This is directly contradictory to the OECD Guidelines that explicitly state that they must carry out HRDD. This must not go unnoticed when discussing the CSDDD.

The next limitation in my opinion is the risk that the CSDDD will not meaningfully engage companies to find the right balance so it will fully comply

[213] European Commission; Directorate-General for Justice and Consumers, *Study on Due Diligence Requirements through the Supply Chain: Final Report* (Publications Office of the European Union 2020) 48 <https://data.europa.eu/doi/10.2838/39830> accessed 27 September 2022.

with the process of due diligence as envisaged in the UNGPs. This is an opinion that I share with Holly and Andreasen Lysgaard.[214] The new regulations put enormous pressure on the state-controlled mechanisms and even more, in my opinion, on the external subjects that are thought to work as a second control-mechanism and audit all the companies HRDD implementation. I believe that there is a great risk that human rights abuses will go unnoticed since companies have the possibility to drown NGOs and external actors in HRDD paperwork. The solution could be an even clearer mechanism to make breaches or omissions visible.

Another limitation is that the CSDDD is focused on the process of HRDD and contains no explicit obligation to respect human rights. I interpret this as the CSDDD is having a focus on actual impact, that is identifying and mitigating human rights effects that have already occurred instead of having a provision that establishes the obligation to respect human rights as a proactive duty. This is in direct contrast to the UNGP and the OECD Guidelines that makes explicit reference to respecting human rights. This is troublesome and could quite possibly have effects that undermines the entire area of BHR in my opinion.

This can be linked to another major challenge which has been mentioned on several occasions in this thesis: the CSDDD is not entirely aligned with the UNGPs. One of many examples is the term 'Business relationship' that cannot be found in the UNGPs and OECD Guidelines. These framework takes a more risk-based approach to establishing the extent of the relationships between different actors and consequently have a different scope. This leads to questions as to which is the higher threshold and how far the due diligence duty extends. Although the UNGPs can be said to be far from being perfect, they still are the best standardisation of rules that states have been able to agree until this date. The risk that the CSDDD takes is, accordingly, that it undermines the importance of the UNGP. That is, the CSDDD regulates businesses in its own way and by doing so also sets a standard for how HRDD should be done. I would consider it strange if large parts of the world are not looking towards the way in which the EU regulates companies. Something that supports this opinion is the fact that Australia recently became a member of the Platform on Sustainable Finance and conclusively is looking to implement something similar.

The last part of this chapter shall be directed at discussing the potential higher threshold the CSDDD sets when it comes to the applicability of human rights. As mentioned before, the CSDDD sets an entirely new structure for categorizing international human rights. It has both a set of 'selected' human rights and a section of human rights instruments. It is my opinion that this is a big limitation since the categorization is without any consideration to the normal way of categorizing human rights. Furthermore, the CSDDD now has an

[214] Holly and Andreasen Lysgaard (n 124) 9.

explicit demand for a violation of international human rights obligation for remedy to occur. The OECD Guidelines and UNGPs only have the criteria that an action fulfils the violation if it removes or reduces the ability of human rights enjoyment. This new criterion of a violation of human rights will most probably leave the human rights considerations under the scrutiny of domestic court judges of which most are not used to rule in such matters. This I see as a problematic aspect as this provides the potential risk of a judgement unconformity with human rights considerations.

There is no question that the Green Taxonomy presents many shortcomings, and its effectiveness Green Taxonomy will depend on how effectively the Commission will address them in the coming stages of implementation.

6 Conclusion

The thesis has set out to establish the intersection between the two instruments of the CSDDD and the Green Taxonomy from a human rights perspective. On the one hand it is quite clear that there is a need for the proposed CSDDD to implement several of the human rights considerations of the MS. On the other hand, the investigation has made clear that the way the proposed CSDDD implements the MS is far from aligned with the human rights considerations that is normally utilized. While the MS of the Green Taxonomy also possesses inherent limitations that could be linked to human rights, such as the new DNSH criterion, it is undoubtedly the CSDDD that holds the most constraints in relation to promoting human rights and subsequently intersect the least with both conventional human rights considerations and the structure of the area of BHR.

For the sake of implementing the MS of the Green Taxonomy through the CSDDD, the thesis recognises several noticeable dangers that depart from conventional human rights application within the field of business and human rights. Examples are the CSDDD coverage of only 1 % of the EU companies as well as the deviation from the risk-based approach that will have the possibility to limit how far the due diligence obligations extends. Yet another danger is the reactive focus on limiting human rights breaches that have already occurred instead of working more proactive to restrain human rights breaches. My conclusion with regards to this is that the many deviations and limitations to the intersection of the CSDDD to the MS undermine the human rights application of both these instruments and subsequently, in the overall view, have the potential to harm the efficiency of the transition to sustainable activities in the EU as this part of the EGD is incomplete.

Further, the risk with having pieces of legislation that deviate from regular human rights application and considerations is undoubtedly that they can serve to demote human rights on a general level as this structure becomes widely used and transferred to other parts of the world. However, the problem with these instruments is that it may be too late to turn back on much of the Green Taxonomy and the CSDDD. The Green Taxonomy and the CSDDD have come too far to be abandoned and too much money and effort have been invested by the EU for the instruments to be discarded. The only hope lies in that the European Parliament will see the limitations of the CSDDD and work on a better alignment with human rights before the proposal is enacted. How that will turn out remains to be seen, as this is a highly politicized area with a potential costly burden for many parties.

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