

# **Corporate Climate Due Diligence in the European Union**

## **A Legal Analysis of its Implications for the Climate Action of Energy-Intensive Industries**

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# Abstract

In this thesis, issues surrounding climate actions are analysed through the notion of corporate due diligence in the European Union (EU) context. The study explores how mandatory climate change due diligence schemes, potentially in the form of a legally binding instrument, may affect the critical sector of energy-intensive industries (EIIs) in the Union and further contribute to the broader EU climate actions. The focus of this research is placed on the EU proposal for a Corporate Sustainability Due Diligence (CSDD) Directive and its implications for corporate climate action. Specifically, the thesis examines the particular role of the energy-intensive sector in the EU's ambition to tackle climate change by analysing how the EU CSDD proposal – in its current version – might strengthen or undermine this role. A legal analysis of current mandatory due diligence schemes in EU Member States and their enforcement in national courts will be salutary to determine the current strengths and gaps of the EU CSDD Directive proposal and its ability to actually reinforce corporate climate action, and notably that of the EIIs. Moreover, the discussion serves as a basis for viewing EIIs – who are major greenhouse gas emitters – as crucial pillars in the Union's climate policy and legal framework. In general, the purpose is to investigate whether the proposed Directive can effectively address the current regulatory shortcomings regarding corporate responsibility towards climate change. It is also worth noting that as no such mandatory due diligence exists yet, both at the EU and international levels, the thesis examines the concept of corporate due diligence as provided for in international soft laws. Accordingly, such standards serve as a basis in order to understand the newly emerging concept of 'corporate climate change due diligence' and evaluate whether the due diligence framework proposed by the EU can enhance corporate climate action.

**Key words:** Corporate Due Diligence, Climate Change, Climate Change Due Diligence, Corporate Sustainability Due Diligence Directive, Energy-Intensive Industries, Climate Action

# Abbreviations

CSR	Corporate Social Responsibility
CSDD	Corporate Sustainability Due Diligence
CSRD	Corporate Sustainability Reporting Directive
ECHR	European Convention on Human Rights
EII	Energy-Intensive Industries
EU	European Union
GHG	Greenhouse Gas
IEA	International Energy Agency
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
MNE	Multinational Enterprises
NCP	National Contact Point
NFRD	Non-Financial Reporting Directive
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
RDS	Royal Dutch Shell
SDG	Sustainable Development Goals
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change

# 1. Introduction

## 1.1 Background

Climate change has become one of the primary global concerns since the late twentieth century. Although the rise in the average total temperature can be seen as a normal response to increased levels of greenhouse gases (GHG) in the atmosphere, it is now proven that climate change also takes root in human endeavours.<sup>1</sup> 70% of such human-based emissions have been attributed to business activities.<sup>2</sup> As climate change is an established threat both to the planet and to human beings, there is no gainsaying the necessity to support and monitor the climate action of companies – and especially multinational enterprises (MNEs) which have impacts globally – in order to curb their environmental and climate impacts. Such climate action, which is to be understood in this thesis as mitigation of climate change – through emission reductions – and adaptation thereof,<sup>3</sup> go hand in hand with corporate responsibility and namely, corporate due diligence. In fact, this study strives to demonstrate that corporate climate due diligence might have the potential of promoting and reinforcing the climate action of businesses, using the sector of energy-intensive industries (EIIs) as a case study, in order to evaluate the ability of such due diligence to mitigate climate change.

EIIs appear to be an extremely relevant playing field for corporate climate due diligence as they are at the origin of numerous industrial value chains contributing with not only raw but also processed materials.<sup>4</sup> As several studies

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<sup>1</sup> IPCC, 'Synthesis Report of the IPCC Sixth Assessment Report (AR6): Summary for Policymakers' (IPCC AR6 SYR) 4 <[https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)> accessed 1 May 2023 (IPCC AR6 Summary for Policymakers)

<sup>2</sup> IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Valérie Masson-Delmotte and others eds, Cambridge University Press Cambridge 2018) 4 <[https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15\\_Full\\_Report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_LR.pdf)> accessed 4 April 2023 (IPCC Special Report)

<sup>3</sup> United Nations, 'Climate Action: Tackling Climate Change' <<https://www.un.org/sustainabledevelopment/climate-action/>> accessed 11 April 2023

<sup>4</sup> UNECE, *Technology brief: Carbon neutral energy intensive industries* (Information Service, 2022) 4 (UNECE Technology brief)



contend, allowing the hardest to abate sectors – that is, *inter alia*, EIIs – to transition to net-zero GHG emissions by 2050 and as such respect international commitments of limiting global warming to 1.5°C requires ‘direct collaboration across the whole value chain’.<sup>5</sup> In light of such goals, the International Energy Agency (IEA)<sup>6</sup> recommends that policymakers implement mandatory CO<sub>2</sub> policies which specifically cover industry in order to promote emission reduction actions.<sup>7</sup> As this thesis tends to argue, corporate climate due diligence is an effective tool in addressing adverse climate impacts across entire value chains. Hence, implementing binding due diligence appears fundamental in order to advance climate objectives. As such, the proposal for a mandatory corporate due diligence developed by the European Union (EU) seems highly valuable and timely.<sup>8</sup>

More promisingly, this measure has been systematically included into the EU’s ‘Fit for 55’ package negotiated in 2021.<sup>9</sup> The latter contains various proposals designed to ensure that EU laws actively help achieve the climate objectives committed to in the European Green Deal including reaching net-zero emissions and establishing a circular economy.<sup>10</sup> The Union aims to become the first climate neutral continent in the world by 2050 and decrease GHG emissions by at least 55% by 2030 as provided for in the European Climate Law which implements the Green Deal.<sup>11</sup> EIIs are specifically targeted by the latter. In its Communication, the EU contends that fulfilling its climate-neutrality and circular economy objectives entails ‘the full mobilisation of industry’ who ‘accounts for 20% of the EU’s

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<sup>5</sup> Mission Possible Partnership, *Making Net-Zero Ammonia Possible: An Industry-Backed, 1.5°C-Aligned Transition Strategy* (Executive summary, 2022) 2 <<https://missionpossiblepartnership.org/wp-content/uploads/2022/09/Making-1.5-Aligned-Ammonia-possible.pdf>> accessed 26 April 2023

<sup>6</sup> The IEA is an intergovernmental organisation whose main purpose is to promote energy security, transition to renewable energy as well as economic growth by providing authoritative research and data to policymakers. For more information, see IEA, ‘International Energy Agency’ (IEA) <<https://www.iea.org/>> accessed 25 May 2023

<sup>7</sup> International Energy Agency, ‘Industry: Sectoral Overview’ (IEA, 2022) <<https://www.iea.org/reports/industry>> accessed 26 April 2023

<sup>8</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937’ COM (2022) 71 final (EU Proposal for a CSDD Directive)

<sup>9</sup> European Council and Council of the EU, ‘Fit for 55’ (2021) <<https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/>> accessed 10 April 2023

<sup>10</sup> European Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final (The European Green Deal)

<sup>11</sup> Regulation of the European Parliament and of the Council (EU) 2021/1119 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 L243/1 art 2(1) and art 4(1)

greenhouse gas emissions'.<sup>12</sup> Some of the major players targeted by the EU are the 'energy-intensive industries, such as steel, chemicals and cement' which are 'indispensable to Europe's economy, as they supply several key value chains' and which must therefore be modernized and decarbonized.<sup>13</sup> Part of this climate action framework is the EU's commitment to hamper the risk of greenwashing and ensure that companies provide 'reliable, comparable and verifiable information' in order to evaluate their environmental impacts.<sup>14</sup> As such, the concept of climate change due diligence appears, again, crucial since it specifically deals with identifying, preventing, mitigating and accounting for adverse climate impacts. Such a process enables companies to not only disclose reliable information but also act upon their findings, as aimed for in the Green Deal.

## 1.2 Purpose and research question

In its sixth assessment report of March 2023, the Intergovernmental Panel on Climate Change (IPCC)<sup>15</sup> observes that between 2011 and 2020 global temperatures have reached 1.1°C above pre-industrial levels and that GHG emissions have continuously increased; contributions to climate change originate in global 'unsustainable energy use (...) and patterns of consumption and production' among others.<sup>16</sup> Climate change has contributed to major adverse impacts entailing losses and damages both to the planet and to people.<sup>17</sup> However, there is a high confidence that 'deep, rapid, and sustained' cuts in GHG emissions would 'lead to a discernible slowdown in global warming' and to 'discernible changes in atmospheric composition' in only a few years.<sup>18</sup> Solutions must hence be found rapidly, including through legal instruments.

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<sup>12</sup> The European Green Deal (n 10) 7

<sup>13</sup> *ibid*

<sup>14</sup> *ibid*

<sup>15</sup> The IPCC is a United Nations institution whose aim is to provide scientific research related to climate change. It fosters numerous studies with respect to climate change and assesses global warming's impacts and risks to the people and to the planet. It is one of the most authoritative bodies providing policymakers with qualitative and scientifically backed studies. For more information see Intergovernmental Panel on Climate Change <<https://www.ipcc.ch/>> accessed 25 May 2023

<sup>16</sup> IPCC AR6 Summary for Policymakers (n 1) 4

<sup>17</sup> *ibid* 5

<sup>18</sup> *ibid* 12

Legal tools aimed towards hampering global warming are efficient insofar as the contributors to climate change have certain legal obligations, for instance an obligation to reduce GHG emissions or other like measures.<sup>19</sup> As no such requirements exist in the current state – apart from sectoral obligations such as vehicle emission limits as well as emission trading schemes that have limited coverage and geographic applicability<sup>20</sup> – the purpose of this study is to explore the possibility of corporate climate change due diligence to be up to this task and fill the current regulatory gap; the EU’s proposed Corporate Sustainability Due Diligence (CSDD) Directive will be analysed in this view.

This research focuses on EIIs which, as major GHG emitters, constitute crucial players in the fight against climate change. The study aims to shed light on the concept of climate due diligence and understand how it can strengthen companies’ efforts against global warming. As mandatory climate due diligence schemes seem to strengthen corporate responsibility, this thesis will analyse the proposed CSDD Directive’s strengths and shortcomings and suggest ways for how they can be addressed in order to effectively promote enterprises’ climate action. The discussion will serve as a basis for viewing EIIs as necessary pillars in the Union’s efforts against climate change.

### *Key research question*

What are the potential legal implications and challenges of implementing the EU's proposed Corporate Sustainability Due Diligence Directive for the climate action of Energy Intensive Industries?

### *Sub-questions*

- (i) What is the theoretical rationale and legal basis from international law that underpin the EU’s progressive inclination to make corporate climate change due diligence normative and legally binding for EIIs? (Chapter 2)

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<sup>19</sup> Jaap Spier, ‘The Principles on Climate Obligations of Enterprises: an attempt to give teeth to the universally adopted view that we must keep global warming below an increase of two degrees Celsius’ (2018) 23(2) *Uniform Law Review* 319, 320

<sup>20</sup> Andreas Hösli and Rolf H. Weber, ‘Climate Change Reporting and Due Diligence: Frontiers of Corporate Climate Responsibility’ (2021) 18(6) *European Company and Financial Law Review* 948, 950

- (ii) To what extent can the proposed EU CSDD Directive be regarded as an effective instrument to combat climate change and what are its implications for the EIIs? (Chapter 3)
- (iii) How is climate due diligence interpreted by domestic courts and how is it effectuated by national legislators at EU Member States' levels? In other words, what is the current potential of binding due diligence schemes based on EU Member States' experiences? (Chapter 4)
- (iv) In what sense can the CSDD proposal be viewed as a game-changer in the EU's climate policy and how can the EIIs benefit from this new regulatory framework? (Chapter 5)

### 1.3 Delimitations and definitions

This study examines the issue of climate action from the perspective of corporate responsibility at the EU-level. While numerous stakeholders such as states and civil society have engaged in extensive climate action, too little emphasis has been laid on enterprises' impacts on the climate. This thesis is thus interested in the corporate perspective and analyses the role of companies in the fight against climate change. Such corporate responsibility is examined through the concept of corporate due diligence and notably that being developed within the EU's legal framework.

Due diligence is a broad concept. Not only does it refer to a form of duty of care in tort law, and its equivalent in civil law – vigilance in French law or *Sorgfaltspflicht* in German law – but it is also used in public enforcement through financial sanctions; it should thus not be limited to the private sphere with claims in tort.<sup>21</sup> Corporate due diligence is a controversial concept. Traditionally, due diligence relates to the procedures conducted in view of a business transaction, or *ex ante*, in order to identify potential risks to the business itself.<sup>22</sup> When the United Nations (UN) consecrates this notion in its 2011 Guiding Principles on Business and Human Rights, due diligence is no longer confined to the risks to the business

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<sup>21</sup> Hösli and Weber (n 20) 969

<sup>22</sup> Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 *Business and Human Rights Journal* 241, 242

itself; it extends to external impacts such as human rights violations.<sup>23</sup> Due diligence hence becomes a set of rules that can guide corporations in addressing adverse externalities. In fact, corporate due diligence is an evolving concept which meaning differs depending on the context. In the business realm, due diligence commonly refers to the activities aimed towards the avoidance of financial or technical risks and legal liabilities;<sup>24</sup> on the other hand, lawyers equate due diligence with compliance to a set of concrete obligations.<sup>25</sup> Furthermore, there is a debate on whether such obligations strictly involve positive actions or whether omissions are included as well.<sup>26</sup> This research uses these meanings interchangeably and regards corporate due diligence as a framework that ought to be integrated in corporate strategies in order to address adverse impacts – both to the business itself and to external entities. In short, due diligence should be exercised not only with respect to the companies’ own operations but also as regards risks to people, the planet and the climate.<sup>27</sup> This study is specifically concerned with ‘corporate climate change due diligence’.<sup>28</sup> It is a rarely used concept, but which is gaining momentum in the current global warming context.<sup>29</sup> As this thesis will examine, corporate climate due diligence aims to identify, mitigate, prevent, and account for adverse impacts on the climate.

This thesis posits the necessity to clarify and interpret what is meant by climate change due diligence and aims to prompt further research in this respect. There is a current knowledge gap on how a company should address climate impacts. A study finds that companies mainly evaluate the risks that the climate pose on their businesses like ‘physical impacts of a warmer world’, with rising sea

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<sup>23</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (United Nations 2011) <[https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed on 29 March 2023 (UN Guiding Principles)

<sup>24</sup> Claire Bright and Karin Buhmann, ‘Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition,’ (2021) 13 *Sustainability* 5

<sup>25</sup> Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28(3) *European Journal of International Law* 899, 900

<sup>26</sup> Paul Krüger Andersen et al, ‘Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars’ (2022) 22(01) *Nordic & European Company Law Working Paper* para 3.2

<sup>27</sup> European Commission, Directorate-General for Justice and Consumers, *Study on Due Diligence Requirements Through the Supply Chain: Final Report* (Publications Office, 2020) 222 (Commission study on due diligence)

<sup>28</sup> In this thesis, ‘climate change due diligence’ and ‘climate due diligence’ will be used interchangeably.

<sup>29</sup> Chiara Macchi, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’’ (2012) 6(1) *Business and Human Rights Journal* 93, 98

levels that could threaten their businesses’ emplacement for instance, or ‘policy risks’ translated by higher carbon prices or other taxes on emissions.<sup>30</sup> In this context, it seems necessary to understand how a company could take into account its own contribution to global warming, rather than just considering the effects of climate change on their business. In doing so, the enterprise would actively participate in the global efforts to tackle this collective issue. Climate due diligence could as such also be seen as a business opportunity.<sup>31</sup>

In order to better understand the policy importance and the legal implication of corporate climate due diligence in the present context, this study examines its relevance with respect to the sector of EIIs which will be viewed as essential pillars in the Union’s climate policy. These industries are usually manufacturing companies which produce goods, services or raw materials in order to sell them and are characterized by their high energy intensity.<sup>32</sup> EIIs are major GHG emitters: 25% of total global emissions originate in their activities.<sup>33</sup> The most significant industrial emitters in this sector are the cement, iron and steel, chemical and petrochemicals industries.<sup>34</sup> For instance, the iron and steel sub-sector accounts for about 7% of the total global GHG emissions.<sup>35</sup> As such, and with a view to the EU’s stated climate goals, it appears clear that ‘the decarbonization of these industries is a top priority’.<sup>36</sup>

However, the emissions from EIIs are considered to be especially ‘hard to abate’.<sup>37</sup> In fact, as EIIs form an incremental part of the industrialized society, they not only rely on fossil-fuel production mechanisms, but they are also themselves essential in other value chains thereby leading to a ‘carbon lock-in’.<sup>38</sup> In short, these

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<sup>30</sup> Leslie Hook, ‘World’s Top 500 Companies Set to Miss Paris Climate Goals’ (*Financial Times*, 17 June 2019) <<https://www.ft.com/content/79d8c12e-8ea8-11e9-a1c1-51bf8f989972>> accessed 27 April 2023

<sup>31</sup> Commission study on due diligence (n 27) 302

<sup>32</sup> High energy intensity is measured in energy consumed per unit value (kWh/\$) as well as high carbon intensity in carbon emissions per unit value (CO<sub>2</sub>e/\$). See UNECE Technology brief (n 4) 4

<sup>33</sup> UNECE Technology brief (n 4) 1

<sup>34</sup> *ibid*

<sup>35</sup> Mission Possible Partnership, *Making Net-Zero Steel Possible: An Industry-Backed, 1.5°C-Aligned Transition Strategy* (Executive summary, 2022) 9 <<https://missionpossiblepartnership.org/wp-content/uploads/2022/09/SteelTSExecutiveSummary.pdf>> accessed 26 April 2023

<sup>36</sup> UNECE Technology brief (n 4) 1

<sup>37</sup> Material Economics, *Industrial Transformation 2050: Pathways to Net-Zero Emissions from EU Heavy Industry* (University of Cambridge Institute for Sustainability Leadership Report, 2019) 7

<sup>38</sup> Max Åhman, ‘Perspective: Unlocking the “Hard to Abate” Sectors’ (*World Resources Institute*) <<https://www.wri.org/climate/expert-perspective/unlocking-hard-abate-sectors>> accessed 10 April 2023

industries contribute to climate change not only in their production but also in their consumption. For instance, as regards industrial processes, the burning of fossil fuels and deforestation lead to a higher concentration of GHG in the atmosphere.<sup>39</sup> With respect to the end uses of industrial products, many constitute raw materials and chemicals used in numerous other value chains and as such continue to contribute to an increase in GHG emissions.<sup>40</sup> As such, a special monitoring of these value chains appears substantial for their decarbonization which this research will try to demonstrate.

As there is a substantial gap between the current climate policies and the commitments towards climate neutrality, the role of these industries in achieving net-zero emissions by 2050 in the EU appears paramount. A study finds that the production of certain materials and chemicals by EIIs – steel, ammonia, cement and plastic – accounts for approximately 14% of the EU total CO<sub>2</sub> emissions every year.<sup>41</sup> Targeting these energy-intensive sub-sectors could hence be extremely valuable for the EU. While the Union seems to support the EIIs' transition to carbon neutrality and notably in its Clean Planet for All Communication,<sup>42</sup> as well as in its latest industrial strategy,<sup>43</sup> no framework effectively obliges EIIs to take into account their adverse climate impacts. This study argues that mandatory climate due diligence could fill these regulatory gaps, effectively curb EII's GHG emissions and as such monitor and support their transition to climate neutrality. Hence, it appears fundamental that the climate action of EIIs be reinforced in order to strengthen their responsibility as regards climate change.

This thesis examines the effectiveness of the EU's proposal for a CSDD to be up to that task. The aim is to investigate whether the proposed Directive can effectively address the current regulatory shortcomings regarding corporate responsibility towards climate change. As no such mandatory due diligence

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<sup>39</sup> Bright and Buhmann (n 24) 3

<sup>40</sup> Material Economics (n 37) 3

<sup>41</sup> *ibid* 7

<sup>42</sup> European Commission, 'A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy' (Communication) COM (2018) 773 final 12 (A Clean Planet for All Communication)

<sup>43</sup> European Commission, 'A New Industrial Strategy for Europe' (Communication) COM (2020) 102 final 7 (A New Industrial Strategy Communication)

schemes exist yet both at the EU and international level,<sup>44</sup> and as the concept of climate change due diligence is new, the thesis examines the concept of corporate due diligence provided for in international norms. Such standards serve as a basis in order to understand the concept of corporate climate change due diligence and evaluate whether the due diligence framework proposed by the EU can promote corporate climate action, and notably that of the EIIs.

## 1.4 Methodology

Spurred by the research aims and questions of this study, a systematic and synergetic portfolio of various research methods is employed throughout the thesis. A comprehensive methodology including a legal dogmatic analysis, a discourse analysis, a literature review, and a comparative study is used.

In order to understand the general ‘corporate due diligence’ that is being developed at the EU-level and its ability to achieve its intended objectives, this thesis primarily delves into a *legal dogmatic analysis*. International, regional, and national hard and soft laws will be analysed in order to understand the positive state of the law as regards corporate due diligence. In fact, the legal dogmatic research method ‘aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field’.<sup>45</sup> As such, EU legislation such as the European Climate Law, international treaties like the 2015 Paris Agreement, national laws including the French Vigilance Law and the German Supply Chain Due Diligence Act are examined. As these texts do not expressly provide for ‘climate due diligence’, this study further benefits from an examination of soft laws stemming from the UN and the Organisation for Economic Cooperation and Development (OECD). Moreover, to apply such a concept to the sector of EIIs, this thesis conducts a legal dogmatic analysis to understand the current regulatory gaps with respect to these industries’ climate action.

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<sup>44</sup> Commission study on due diligence (n 27) 225

<sup>45</sup> Jan M. Smits, ‘What is Legal Doctrine: On the Aims and Methods of Legal-Dogmatic Research’ in Rob van Gestel, Hans W- Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 210



Secondly, in order to grasp the objectives behind developing such a mandatory corporate due diligence, the study engages into a *discourse analysis* – legislative proposals and their explanatory memoranda as well as communications, press releases, and other policy documents from EU institutions are analysed. This method is also used to understand the EU’s objectives regarding EIIIs. As will be demonstrated, the Union is increasingly targeting high-emitting sectors in various policy documents.<sup>46</sup> The discourse analysis helps to determine whether there is a discrepancy between the EU’s stated objectives and its current policies in order to identify how current regulatory gaps could be filled.

Thirdly, a *literature review* of scholarly books and journal articles helps develop a better understanding of the new concept of ‘climate change due diligence’ and of how EIIIs could benefit from horizontal due diligence schemes. In order to apply a newly emerging concept (‘climate change due diligence’) which is not yet developed in any law, and which is rarely used not only in the legal context but also in the business context,<sup>47</sup> this study delves into an extensive desk research. The latter enables to grasp the characteristics of the EIIIs and notably certain incremental scientific concepts specific to these industries. The work of recognized scholars as well as reports and official publications allow to clarify how corporate climate due diligence can be understood and interpreted in the industrial sector.

Last but not least, this thesis uses a *comparative legal method* in order to understand the merits of a climate change due diligence law based on (i) the objectives of the EU, (ii) the experiments of EU Member States, (iii) the applications in rare case law, and (iv) the recommendations and warnings of various scholars and institutions. In short, this thesis conducts a comparative law research in order to understand how a mandatory corporate climate change due diligence scheme ought to be developed at the EU-level; it analyses the EU CSDD proposal in light of developments at national levels or in recognized international standards of soft law. In fact, Zweigert and Kötz argue that one of the main justifications for engaging in a comparative law research is to find the most appropriate version of a

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<sup>46</sup> See for instance the Clean Planet for All Communication (n 42): the European Green Deal (n 10); the New Industrial Strategy (n 43)

<sup>47</sup> Commission study on due diligence (n 27) 14

text allowing it to achieve the best intended result.<sup>48</sup> Examining laws and their respective applications in different countries can contribute to understanding the strengths and weaknesses of framing a law in a particular way (with different concepts or conditions for instance). Getting a sense of the rules applied in certain States can inform on the quality of such rules and hence help conclude on whether it is desirable to adopt them – and along what form – in a particular legal system. Such a method is also used to grasp how corporate due diligence has already been applied to similar sectors and how EIIs could best benefit from it.

## **1.5 Structure**

Before analysing the strengths and weaknesses of the proposed CSDD Directive and its implications for the EIIs (Chapter 3) and in that way address sub-question ii, this thesis conducts a theoretical analysis of the concept of ‘corporate due diligence’. In order to understand what climate due diligence entails for corporate climate action, it explores how due diligence has been grasped in human rights law and environmental law and answers sub-question i. This study advocates for the necessity to recognize climate change due diligence as an autonomous requirement (Chapter 2) the latter which can be confirmed by an overview of both laws and case law from EU Member States which illustrate the need to take climate adverse impacts into account when engaging in corporate due diligence (Chapter 4). The analysis of national implementations of corporate due diligence aims to answer the sub-question iii. Finally, this thesis examines the broader EU climate discourse in which the CSDD proposal is inscribed in order to answer sub-question iv and conclude that it can be viewed as an essential game-changer in the Union’s efforts to tackle climate change if the proposal takes into account certain recommendations and engages more broadly with EIIs (Chapter 5).

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<sup>48</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, (3<sup>rd</sup> edn, Clarendon Press 1998) 15

## **2. The fundamental rationale and international legal basis for the EU to impose corporate climate due diligence in the EILs**

Investigating how climate due diligence can be considered separately from human rights and environmental due diligence and suggesting it is an autonomous component of corporate responsibility (2.1), this research examines its implications for the climate action of companies, and notably in the energy-intensive sector (2.3). The inclusion of corporate climate due diligence appears highly opportune as it is increasingly alluded to in international law (2.2).

### **2.1 Due diligence in human rights, environmental and climate change law: a theoretical analysis**

Due diligence as a means to identify, mitigate, prevent, and account for adverse impacts has been applied and adapted to different legal arenas. Notably, due diligence has been used in human rights law where it aims to address adverse human rights impacts (2.1.1), as well as in environmental law in order to tackle negative effects on the environment (2.1.2). This thesis seeks to promote the newly emerging concept of ‘climate change due diligence’ and argues that it should be viewed as an autonomous requirement, departing from traditional human rights and environmental views in order to maximize its effectiveness as regards corporate climate action (2.1.3).

#### **2.1.1 Human rights due diligence**

Corporate responsible behaviour as regards human rights has long been promoted, notably in the first version of the OECD Guidelines for MNEs dating back to 1976, as well as in the International Labour Organisation’s (ILO) Tripartite Declaration

of Principles concerning MNEs and Social Policy.<sup>49</sup> The latter was first adopted in 1977 and revised multiple times since then.<sup>50</sup> These developments laid the groundwork for the emergence of the concept of ‘human rights due diligence’ which the UN enshrined in its Guiding Principles on Business and Human Rights in 2011.<sup>51</sup>

The latter explains that as part of their corporate responsibility, companies ought to take ‘adequate measures’ such as ‘a human rights due diligence process to identify, prevent, mitigate and account for’ how they ‘address their impacts on human rights’.<sup>52</sup> Corporate due diligence hence becomes a constituent of companies’ responsibility; it is one of the actions they ought to take in order to respect human rights.<sup>53</sup> Here, due diligence is a mean – a process of four distinct steps – that needs to be implemented in order to achieve the end – that is, companies meeting their responsibility to respect human rights. The UN Guiding Principles further elaborate on human rights due diligence in its Principles 17 to 22 and make a difference between *potential* adverse impacts that companies need to ‘prevent’ or ‘mitigate’ and *actual* impacts that they should ‘remediate’. The actual steps that businesses need to engage in are (i) assessing the impacts, (ii) integrating and acting upon the results of the assessment, (iii) tracking how they respond to these challenges and (iv) disclosing their actions.<sup>54</sup>

### 2.1.2 Environmental due diligence

In parallel, due diligence is also used to address adverse environmental impacts and as such further environmental goals. Developed in international public law in light of the state responsibility as regards transnational pollution and environmental

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<sup>49</sup> ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, (6 ed, ILO 2022) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf)> accessed 15 April 2023 (ILO MNE Declaration)

<sup>50</sup> Beryl ter Haar and Attila Kun, ‘The EU’s CSR Policy in a Global and National Context’ in Janice R. Bellace and Beryl ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar Publishing Limited 2019) 439, 451

<sup>51</sup> UN Guiding Principles (n 23)

<sup>52</sup> *ibid* para 15(b)

<sup>53</sup> Bonnitcha and McCorquodale (n 25) 900

<sup>54</sup> UN Guiding Principles (n 23) paras 17-22

harm,<sup>55</sup> environmental due diligence is also relied upon in private law relating to commercial transactions and the liability as concerns ‘inherited pollution’.<sup>56</sup>

Environmental due diligence is now a full-fledged part of corporate responsible behaviour. Building on the same framework laid down by the UN Guiding Principles, the OECD Guidelines for MNEs of 2011 delve into the companies’ responsibility to address environmental impacts. While not expressly mentioning ‘due diligence’ per se, Chapter VI specifies that businesses should ‘take due account of the need to protect the environment’.<sup>57</sup> However, the process whereby enterprises should take account of the environment is highly similar to the due diligence process established by the UN Guiding Principles. Companies should (i) collect and evaluate information related to their activities’ environmental impacts, (ii) establish ‘targets for improved environmental performance’, (iii) monitor and evaluate their progress, and (iv) communicate about this information.<sup>58</sup> Again, such steps should be established in view of avoiding or mitigating foreseeable impacts on the environment or minimising serious damage. More recently, the OECD published its Due Diligence Guidance for Responsible Business Conduct as a practical support to its Guidelines for MNEs of 2011. Here, the adverse impacts that enterprises should assess, prevent, mitigate and take into account include the environment.<sup>59</sup> Moreover, the OECD refines the process of due diligence and identifies six specific steps: the businesses should (i) integrate responsible conduct in their policies, (ii) identify and assess adverse actual and potential impacts, (iii) avoid, mitigate or cease these impacts, (iv) track their results, (v) disclose their due diligence activities, and finally (vi) provide for remediation

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<sup>55</sup> See Robert P. Barnidge, ‘The Due Diligence Principle Under International Law’ (2000) 8 *International Community Law Review* 81; Patricia W. Birnie & Alan E. Boyle, *International Law and the Environment* (2d edn, Oxford University Press 2002) 265

<sup>56</sup> Carsten Corino, ‘Environmental Due Diligence’ (2000) 9(4) *European Energy and Environmental Law Review* 120

<sup>57</sup> OECD, *OECD Guidelines for Multinational Enterprises*, (OECD Publishing 2011) ch VI <<http://dx.doi.org/10.1787/9789264115415-en>> accessed 20 March 2023 (OECD Guidelines for MNEs)

<sup>58</sup> *ibid* ch VI, para 1-2

<sup>59</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (OECD 2018) 15 <<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>> accessed 15 April 2023 (OECD Due Diligence Guidance)

when it is suitable.<sup>60</sup> The latter is monitored by the establishment of National Contact Points (NCPs) that make sure the Guidelines are followed.<sup>61</sup>

The OECD hence promotes environmental due diligence as part of its latest recognition of what constitutes responsible business conduct. Current due diligence frameworks thus draw on both human rights and environmental conceptions of corporate due diligence and are built upon existing mechanisms, chiefly those established by the UN Guiding Principles, the ILO Tripartite MNE Declaration and the OECD Guidelines for MNEs.<sup>62</sup> These developments can be used in order to foster what is emerging as ‘climate change due diligence’.

### **2.1.3 Climate change due diligence**

Considering that climate change largely originates in the activities of businesses, these must be involved in the fight against climate change. One possible climate action specifically concerns corporate due diligence as regards potential and actual climate impacts. While human rights due diligence is traditionally used to hold corporations accountable for their impacts on the climate, an autonomous concept of ‘climate change due diligence’ is increasingly gaining ground in the legal arena.

Firstly, human rights due diligence can be used to advance climate objectives. When the relationship between human rights and climate change was established, the concept of due diligence can be seen to have taken a new turn. In fact, human rights considerations in climate actions became the norm when the objective to ‘fully respect human rights (...) in all climate change-related actions’ was set in stone in the Cancun Agreements at the 2010 United Nations Climate Change Conference.<sup>63</sup> Regardless of the actual effects such a stipulation would entail, the significance of the relationship between human rights law and climate change was,

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<sup>60</sup> OECD Due Diligence Guidance (n 59) 21

<sup>61</sup> OECD Guidelines for MNEs (n 57) ch I, para 11

<sup>62</sup> ILO, OECD and UN OHCHR, ‘ILO, OECD and OHCHR Response to the EU Commission Proposal’ (7 March 2022) <<https://mneguidelines.oecd.org/ilo-ohchr-oecd-response-to-eu-commission-proposal.pdf>> accessed 24 April 2023

<sup>63</sup> United Nations Framework Convention on Climate Change, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, FCCC/CP/2010/7/Add.1 (15 March 2011) Decision 1/CP.16 para 8 (The Cancun Agreements)

from that point, at least recognized.<sup>64</sup> As Stephen Humphreys straightforwardly admits, global warming is ‘human-made and creates victims’ and it seems thus to involve human rights law.<sup>65</sup> In fact, climate change can be regarded as impeding the protection of human rights insofar as it threatens not only the health but also the life of human beings. Scholars contend that climate change is a violation of certain human rights, including the rights to ‘life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, development and culture’<sup>66</sup> as well as ‘land and employment’.<sup>67</sup> Human rights due diligence becomes a means of ensuring that businesses identify and address their climate impacts.

However, human rights law faces certain challenges when it comes to legally acknowledge human rights harms caused by climate change. Firstly, climate change adverse impacts are more easily considered as human rights violations insofar as a duty-bearer can be identified as having caused the harm.<sup>68</sup> The complexity of attributing such a responsibility is notable with regards to climate change since its impacts often happen in different territories than where it originated.<sup>69</sup> Moreover, while climate change does have impacts on human rights, it does not affect these rights equally.<sup>70</sup> This complicates the assessment of different rights claims and, as such, impacts the justiciability of certain human rights.<sup>71</sup> As the impact of climate change on particular rights cannot be effectively measured, using human rights due diligence as a means to ensure corporate responsibility towards the climate seems, to some extent, inefficient.

Climate change due diligence should thus be regarded as an autonomous requirement. Initially, certain scholars contend that businesses ought to engage in a ‘risk-based due diligence’ which is a concept that draws on human rights due

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<sup>64</sup> Stephen Humphreys, ‘Climate Change and International Human Rights Law’ in Rosemary Rayfuse and Shirley V. Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar Publishing Limited 2012) 30

<sup>65</sup> *ibid* 30

<sup>66</sup> Christina Voigt, ‘The Climate Change Dimension of Human Rights: Due Diligence and States’ Positive Obligations’ (2022) 13 *Journal of Human Rights and the Environment* 152, 153

<sup>67</sup> Bright and Buhmann (n 24) 1

<sup>68</sup> Humphreys (n 64) 31

<sup>69</sup> *ibid* 38

<sup>70</sup> *ibid* 35

<sup>71</sup> *ibid* 38

diligence but ‘extends it to other areas such as the environment’.<sup>72</sup> The 2011 OECD Guidelines for MNEs also use this concept. Engaging in due diligence through a risk-based approach entails addressing impacts on society, such as human rights and the environment; in that way, risk-based due diligence can be used to address climate change by preventing, mitigating and remediating ‘*climate-related* human rights and environmental impacts’<sup>73</sup> (the author’s emphasis). However, as has been developed, adverse impacts on human rights caused by climate change face certain challenges in being identified. Moreover, limiting the requirement of due diligence to human rights impacts – although they are caused by adverse climate impacts – could contribute to limiting corporate responsibility as a whole. In other words, if businesses engage in human rights due diligence as part of their climate action, they mitigate their adverse human rights impacts and indirectly decrease their contribution to climate change. However, in the hypothesis that certain impacts on the climate are not found correlated to any human rights infringements, these would be left unsanctioned. This research hence suggests that climate impacts should be identified separately from those that are implicated by human rights violations. Climate change due diligence should be viewed as an autonomous requirement.

In fact, it seems that environmental impacts including climate change are ‘more readily quantifiable’ than impacts on human rights.<sup>74</sup> Climate impacts can be evaluated based on the total GHG emissions of a given company and used as a standard to evaluate compatibility with the Paris Agreement objective to limit the increase in temperature to 1.5°C.<sup>75</sup> In terms of corporate climate action, it appears to be more efficient to target and address climate impacts *stricto sensu* rather than climate-related human rights impacts. While climate due diligence is a rarely used concept, this thesis argues that it should be established as a self-sufficient corporate obligation.

While not explicitly mentioning climate due diligence and commenting on responsible business conduct with respect to the environment, the OECD Guidelines for MNEs suggest businesses ‘continually seek to improve corporate

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<sup>72</sup> Bright and Buhmann (n 24) 5

<sup>73</sup> *ibid* 7

<sup>74</sup> Hösli and Weber (n 20) 972

<sup>75</sup> *ibid*



environmental performance’ by developing products or services that ‘are efficient in their consumption of energy and natural resources’ as well as by ‘developing strategies for emission reduction’.<sup>76</sup> In that sense, the OECD recommends certain practices that directly target impacts on the climate.<sup>77</sup> Climate change due diligence in a strict sense can thus be interpreted on the basis of such existing frameworks.

## 2.2 Climate due diligence as part of international law

It should first be stated that climate-related corporate due diligence does not yet constitute a legal obligation for enterprises at the international level. However, principles developed in the above-mentioned soft laws as well as in other international treaties can be relevant in order to develop a comprehensive understanding of the concept.

In 2015, the UN developed its Agenda 30 with its 17 Sustainable Development Goals (SDG) that need to be achieved by 2030.<sup>78</sup> SDG 13 encourages to ‘take urgent action to combat climate change and its impacts’.<sup>79</sup> The UN Resolution suggests that the achievement of these goals entails collaboration by numerous entities including Governments and the private sector.<sup>80</sup> Hence, Agenda 2030 enjoins enterprises to act in the face of climate change. This SDG makes an explicit reference to the United Nations Framework Convention on Climate Change (UNFCCC) which it characterizes as ‘the primary international, intergovernmental forum for negotiating the global response to climate change’.<sup>81</sup> In its 2015 Paris Climate Change Agreement, the UNFCCC sets in stone the objective to limit the increase in temperature to 1.5°C above pre-industrial levels.<sup>82</sup> The Paris Agreement also ‘welcomes the efforts of all non-Party stakeholders’ including the private sector to ‘address and respond to climate change’, to ‘scale up their efforts and

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<sup>76</sup> OECD Guidelines for MNEs (n 57) ch VI, para 6(b)(d)

<sup>77</sup> Hösli and Weber (n 20) 973

<sup>78</sup> United Nations General Assembly resolution 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development* (A/RES/70/1, 25 September 2015) para 18 (Agenda 30 Resolution)

<sup>79</sup> *ibid* 23

<sup>80</sup> *ibid* para 39

<sup>81</sup> *ibid* 14

<sup>82</sup> United Nations Framework Convention on Climate Change, *Conference of the Parties: Adoption of the Paris Agreement* FCCC/CP/2015/L9/Rev1 (United Nations 2015) para 17 (The Paris Agreement)

support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change’, as well as ‘demonstrate these efforts’.<sup>83</sup> While not explicitly mentioning due diligence, the Paris Agreement invites corporations to engage in climate actions as well as to be transparent about them. These climate activities can be interpreted in light of the principles developed by the soft laws examined above. Due diligence as regards climate change is thus increasingly provided for by international law.

However, a common characteristic of these texts is that they are extremely broad and leave companies a great leeway in interpreting and thus applying them. They are able to regulate specific thresholds by themselves since they only ‘should (...) take due account of the need to protect the environment’<sup>84</sup> and the Paris Agreement solely ‘invites’ them to act.<sup>85</sup> This lack of specificity makes these international standards non legally binding.<sup>86</sup> The absence of enforceability has entailed that conformity to the recommendations remains superficial.

Moreover, it has been observed that businesses mainly engage in transparency activities about their adverse external impacts but fail to actually act and hamper these. While corporations do engage in disclosures – be them voluntary in light of their CSR actions or mandatory as regards particular national or international obligations – such transparency does not amount to due diligence. In fact, disclosing what a company does in order to identify, mitigate and hamper adverse impacts is different from creating effective instruments to actually identify, mitigate and hamper diverse harms.<sup>87</sup> While disclosures are an essential part of corporate responsibility, companies do not become accountable by being transparent.<sup>88</sup>

Hence, while increasingly endorsed by international treaties and soft laws, corporate due diligence remains largely voluntary, as expressly stated in the UN

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<sup>83</sup> The Paris Agreement (n 82) paras 134-135

<sup>84</sup> OECD Guidelines for MNEs (n 57) ch VI

<sup>85</sup> The Paris Agreement (n 82) para 135

<sup>86</sup> Kasey McCall-Smith and Andreas Rühmkorf, ‘Sustainable Global Supply Chains: from Transparency to Due Diligence,’ in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks* (Edward Elgar Publishing Limited 2019) 120

<sup>87</sup> Olga Martin-Ortega, ‘Transparency and Human Rights in Global Supply Chains: from Corporate-Led Disclosure to a Right to Know’ in in Axel Marx and others (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing Limited 2022) 101

<sup>88</sup> *ibid*

Guiding Principles which, while commenting on human rights, posits a difference between the corporate responsibility to respect human rights – and thus to implement due diligence – and ‘issues of legal liability and enforcement’.<sup>89</sup> Corporate responsibility and notably due diligence has remained superficial largely because of its voluntary nature.

### **2.3 The implications of corporate climate due diligence for EIs**

The industrial sector is proven to be a large GHG emitter. In fact, Richard Heede, a climatologist, finds that almost two-thirds of the total GHG emissions from 1850 to 2010 originates in 90 enterprises working in the oil, coal and gas industries.<sup>90</sup> More recently, a 2022 study suggests that the energy-intensive sector is accountable for 25% of global CO<sub>2</sub> emissions as well as 66% of the emissions from industry.<sup>91</sup> As part of this industrial sub-sector, the highest emitters constitute the cement, the iron and steel, as well as the chemicals and petrochemicals industries which respectively account for 27%, 25%, and 14% of the total industrial share of emissions.<sup>92</sup> Enabling these specific industries to decrease their emissions, better still to decarbonize, can contribute substantially to the attainment of the Paris Agreement goals of limiting global warming to 1.5°C.

Climate due diligence in this specific sub-sector becomes highly relevant considering the significant proportion EIs hold in the global contribution to climate change. Firstly, by being a high-emitting sector per se, the question of finding a duty-bearer who should be held accountable for adverse climate impacts seems less complex. Although States are the traditional duty-bearers of the human rights and environmental obligations to address climate impacts, enterprises have also explicitly been framed as such by the UN as they ‘should be accountable for their impacts on the climate and participate responsibly in climate change mitigation and

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<sup>89</sup> UN Guiding Principles (n 23) 14

<sup>90</sup> Richard Heede, ‘Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010’ (2014) 122 *Climate Change* 229, 230

<sup>91</sup> UNECE Technology brief (n 4) 4

<sup>92</sup> *ibid*

adaptation efforts'.<sup>93</sup> Businesses ought to make sure their activities do not harm the climate and consequently, adapt their modes of production.<sup>94</sup> As EIIIs constitute high GHG emitters, it seems reasonable to address them as duty-bearers with respect to the climate.

Moreover, EIIIs seem to bear a particular responsibility with respect to climate change. In fact, certain sectors who are at a higher risk of having adverse impacts ought to conduct more extensive due diligence as per existing principles. For instance, commenting on human rights due diligence, the UN Guiding Principles holds that the corporate responsibility to respect human rights applies to all of them and notably those provided for in the International Bill of Human Rights and in the ILO's eight conventions. Moreover, it contends that certain human rights 'may be at greater risk than others in particular industries' and ought therefore to be monitored more closely.<sup>95</sup> Applying this reasoning to the climate arena, climate change has been proven to be at a greater risk in EIIIs, not least because they are the highest emitters of GHG in the industry, itself being one of the highest emitting sectors of the global economy.

In the same line of reasoning, the OECD Guidelines for MNEs provides that the 'nature and extent of due diligence' that is required of companies depends, among other factors, on 'the severity of its adverse impacts'.<sup>96</sup> The OECD encourages enterprises to adapt their due diligence to the circumstances and engage in due diligence more extensively when the propensity or the severity of the adverse impacts are high.<sup>97</sup> Again, considering that EIIIs are the highest emitters of GHG in the industrial sector, they can be regarded as major contributors to global warming and should as such engage in climate change due diligence.<sup>98</sup>

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<sup>93</sup> United Nations OHCHR, *Frequently Asked questions on Human Rights and Climate Change* (United Nations 2021) 36  
<[https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)>  
accessed 25 April 2023

<sup>94</sup> Bright and Buhmann (n 24) 3

<sup>95</sup> UN Guiding Principles (n 23) para 12

<sup>96</sup> OECD Guidelines for MNEs (n 57) 24

<sup>97</sup> See OECD Guidelines for MNEs (n 57) 20; OECD Due Diligence Guidance (n 59) 17

<sup>98</sup> Hösli and Weber (n 20) 978

Thirdly, as businesses face no obligation to decrease their GHG emissions per se,<sup>99</sup> imposing mandatory climate change due diligence could help fill current regulatory gaps. The IPCC holds that the necessity to limit the global increase in temperature to 1.5°C requires ‘a rapid phase out of CO<sub>2</sub> emissions and deep emissions reductions in other GHG and climate forcers’ in a variety of sectors, including industry.<sup>100</sup> Hence, in the absence of other obligations regarding adverse climate impacts, corporate due diligence seems a viable path to explore as it intends, as per the definition of due diligence developed in this chapter, to identify, prevent, mitigate, account for, and possibly remediate adverse climate impacts.

While the EU appears to have made significant efforts to transition towards cleaner energy sources and promote green industrial practices, the effectiveness of existing tools seems to be lacking in terms of practical implementation. In short, the EU is putting more emphasis on the necessity to help EIIIs transition to climate-neutrality. Objectives are set forward in various policy documents such as the European Green Deal,<sup>101</sup> the Clean Planet for All Communication,<sup>102</sup> as well as in the EU’s New Industrial Strategy.<sup>103</sup> Moreover, the EU has heavily regulated on the renewable energy front.<sup>104</sup> However, no scheme obliges EIIIs to curb their climate impacts. What is more, while scholars hail the ‘exponential increase’ of the EU’s ‘climate ambition level’ and the transition from climate packages to climate laws, they also highlight the increasing complexity of such schemes and the potential inconsistency – dubbed the ‘clash of the climate laws’ – which renders incompatible certain targets and weakens the EU’s climate policy.<sup>105</sup> This sheds light on a clear paradox between the EU’s overall objective to decarbonize the energy-intensive sector and the absence of effective instruments actually decarbonizing it. As demonstrated, this study suggests that mandatory climate due diligence can fill these regulatory gaps and effectively curb EII’s GHG emissions.

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<sup>99</sup> Hösli and Weber (n 20) 950

<sup>100</sup> IPCC Special Report (n 2) 112

<sup>101</sup> The European Green Deal (n 10)

<sup>102</sup> A Clean Planet for All Communication (n 42) 12

<sup>103</sup> A New Industrial Strategy Communication (n 43) 7

<sup>104</sup> See for instance Directive of the European Parliament and of the Council (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82

<sup>105</sup> Edwin Woerdman, Martha Roggenkamp, and Marijn Holwerda, *Essential EU Climate Law* (2nd edn, Edward Elgar Publishing Limited 2021) 295

## 2.4 Chapter summary and conclusion

Drawing on current frameworks of both human rights and environmental corporate due diligence, climate due diligence seems to be a viable mean to ensure corporate responsibility as regards the climate. As international treaties and soft laws increasingly provide for such responsibility – the form of which implies corporate due diligence – this research highlights the relevance of developing a mandatory climate due diligence scheme which targets climate change specifically. Such a framework can be brought into play thanks to existing and recognized principles in the area of corporate due diligence (see *infra* Table 1).

Considering the substantial impact of EIIs on the planet and their increasing contribution to global warming, closely monitoring climate due diligence within this specific sector seems paramount. Better still, EIIs can be viewed as necessary pillars in the global efforts against climate change as promoting their climate action would change the behaviour of a highly emitting sector. The next chapter will explore how mandatory climate due diligence schemes can effectively support EIIs' climate action, and, chiefly, the ability of the EU's draft CSDD Directive to fill the current regulatory gap as regards corporate climate responsibility.

Table 1 Corporate due diligence: addressing human rights, environmental and climate impacts

Corporate Due Diligence		
Procedure to identify, mitigate, prevent, and account for adverse impacts		
HUMAN RIGHTS DUE DILIGENCE	ENVIRONMENTAL DUE DILIGENCE	CLIMATE CHANGE DUE DILIGENCE
<i>Adress human rights impacts</i>	<i>Adress environmental impacts</i>	<i>Adress impacts on the climate and notably climate change</i>
<p>UN Guiding Principles: 4 steps</p> <ul style="list-style-type: none"> <li>(i) Assess the impacts</li> <li>(ii) Integrate and act upon the results of the assessment</li> <li>(iii) Monitor responses to the challenges</li> <li>(iv) Disclose actions</li> </ul> <p>[Further completed by the OECD Guidelines for MNEs, and the OECD Due Diligence Guidance]</p>	<p>OECD Guidelines for MNEs, clarified by the OECD Due Diligence Guidance: 6 steps</p> <ul style="list-style-type: none"> <li>(i) Integrate responsible conduct in corporate policy</li> <li>(ii) Collect and evaluate information about environmental impacts</li> <li>(iii) Avoid, mitigate or cease impacts</li> <li>(iv) Monitor and evaluate progress</li> <li>(v) Communicate about actions</li> <li>(vi) Provide for remediation (with the help of NCPs)</li> </ul>	<ul style="list-style-type: none"> <li>1. Using human right due diligence to advance climate objectives <ul style="list-style-type: none"> <li>(i) Climate change as jeopardizing various human rights (life, health, food, water, sanitation etc.)</li> <li>(ii) Difficulty to identify duty-bearers affects the justiciability of certain rights</li> </ul> </li> <li>2. Risk-based due diligence <ul style="list-style-type: none"> <li>(i) Address climate-related human rights and environmental impacts</li> <li>(ii) Failure to address climate impacts that are unaccounted for by human rights law</li> </ul> </li> <li>3. Climate change due diligence as an autonomous requirement <ul style="list-style-type: none"> <li>(i) Identify 'quantifiable' impacts (an increase in GHG emissions for instance)</li> <li>(ii) Act upon these targets directly</li> </ul> </li> </ul>

### **3. The EU’s proposed Corporate Sustainability Due Diligence Directive and its implications to corporate climate action**

The EU is currently developing its own tool of mandatory corporate due diligence which has been largely welcomed not only by NGOs and civil society but also by businesses.<sup>106</sup> The EU intends to harden due diligence obligations based on a number of reasons justifying its competence in the matter (3.1). As the EU’s draft CSDD Directive targets human rights and environmental adverse impacts, its efficacy with respect to climate impacts is examined along with whether the proposal actually strengthens or undermines climate action in general (3.2). The final version of the proposal is evaluated in light of the EU’s broader discourse on climate impacts in order to understand potential leverages and possibilities of enhancement of the proposal (3.3). Finally, the proposed Directive is applied to the energy-intensive industrial sector in order to grasp the aptitude of such a tool in advancing effective climate action in the fight against global warming (3.4).

#### **3.1 The EU’s path towards making corporate due diligence mandatory**

While EU companies largely engage in voluntary CSR schemes due to a growing public demand for accountability, such activities have not been satisfactory: adverse impacts from EU production and consumption have been identified both within the Union and outside its borders.<sup>107</sup> Moreover, a study reports that as businesses and their board of directors are mostly concerned with short-term impacts – especially to the company –, rather than long-term effects – ideally to third-parties and the

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<sup>106</sup> European Commission, Directorate-General for Justice and Consumers, *Sustainable Corporate Governance Initiative: Summary Report – Public Consultation* (2021) 4

<sup>107</sup> Commission study on due diligence (n 27) 214



planet – current voluntary frameworks are not sufficient considering the urgency of the climate situation.<sup>108</sup> In its proposal, the EU notes that ‘EU companies have been associated with adverse (...) environmental impacts (...) such as greenhouse gas emissions’.<sup>109</sup> Hence, in its explanatory memorandum, the EU equates environmental impacts with GHG emissions. The EU explains that such adverse impacts constitute one of the ‘reasons for’ developing this Directive.<sup>110</sup> According to EU discourse, adverse climate impacts of companies thus partly justify EU intervention in making corporate due diligence mandatory.

Moreover, the EU justifies its competence on the basis of the principles of subsidiarity and proportionality provided for in Article 5 of the Treaty on European Union (TEU).<sup>111</sup> In its proposal, the EU regards its intervention as necessary in view of international climate commitments, notably those set in stone by the Paris Agreement.<sup>112</sup> As national efforts have proven insufficient, the Union invokes the principle of subsidiarity in order to mandate such due diligence. Moreover, the Union shows its attachment to the principle of proportionality by restricting the scope of the proposed Directive to certain businesses. Are concerned by the CSDD draft Directive, four different categories: (i) ‘very large’ European companies,<sup>113</sup> (ii) EU ‘companies active in particularly high-impact sectors’,<sup>114</sup> which are targeted by the OECD sectoral guidance;<sup>115</sup> (iii) large third-country companies;<sup>116</sup> (iv) third-country companies targeted by the OECD sectoral guidance.<sup>117</sup> The proposal

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<sup>108</sup> European Commission, Directorate-General for Justice and Consumers, *Study on Directors’ Duties and Sustainable Corporate Governance: Final Report* (Publications Office, 2020) 12

<sup>109</sup> EU Proposal for a CSDD Directive (n 8) 2

<sup>110</sup> *ibid*

<sup>111</sup> Consolidated Version of the Treaty on European Union [2016] OJ C202/18, art 5

<sup>112</sup> Text to n 75 in ch 2

<sup>113</sup> Defined as limited liability companies employing more than 500 individuals and having a net turnover of more than 150 million euros. See EU Proposal for a CSDD Directive (n 8) 15

<sup>114</sup> With more than 250 employees and a net turnover of more than 40 million euros. See EU Proposal for a CSDD Directive (n 8) 15

<sup>115</sup> The sectors covered by the OECD sectoral guidance are the extractive sector, mineral, agricultural and garment supply chains, as well as the financial sector. See OECD, ‘Responsible business conduct’ (*OECD*, 2018) <<http://mneguidelines.oecd.org/sectors/>> accessed 26 April 2023

<sup>116</sup> Companies with more than 500 employees and a net turnover of more than 150 million euros. See EU Proposal for a CSDD Directive (n 8) 15

<sup>117</sup> Companies with more than 250 employees and a net turnover of more than 40 million euros. See EU Proposal for a CSDD Directive (n 8) 15

explicitly excludes SMEs from the due diligence requirement for whom, the Union contends, the cost of setting up such processes would be too high.<sup>118</sup>

The legal basis for EU competence is based on Article 50 TFEU as well as Article 114 TFEU. Firstly, as certain Member States have implemented due diligence laws, the Union is concerned about fragmentation of the internal market leading to uneven playing fields and distortions of competition. As such, the EU deems it necessary to harmonize the EU Member States' laws on corporate due diligence in order to avoid hampering the freedom of establishment.<sup>119</sup> Finally, the EU contends that such impacts on competition due to different implementations at national levels might affect the functioning of the internal market.<sup>120</sup> It seems, to that end, necessary that the EU develops a horizontal – cross-sectoral – due diligence mechanism which renders compatible national standards of due diligence.

### **3.2 The Directive proposal in and of itself: strengths and shortcomings as regards climate action**

Framing it as 'corporate *sustainability* due diligence', the instrument aims to account for both human rights and environmental adverse impacts (3.1.2) not only in companies' own operations but also in their whole value chains (3.1.1). The fact that it does not target climate impacts per se weakens this initiative considerably (3.1.3) especially considering that the enforcement mechanisms that it provides for could help enshrine due diligence in corporate behaviour (3.1.4).

#### **3.2.1 The mitigated effort to target global value chains and its indirect effect to climate action**

One of the main incentives for the EU to develop such a cross-sectoral due diligence tool is that EU businesses 'rely on global value chains'.<sup>121</sup> The Union emphasizes on their increasing complexity, the latter which is reinforced by globalisation that

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<sup>118</sup> EU Proposal for a CSDD Directive (n 8) 15

<sup>119</sup> *ibid* 11

<sup>120</sup> *ibid* 12

<sup>121</sup> *ibid* 1

has connected producers, suppliers and consumers from all around the world. Such dispersion renders more difficult the assessment of risks and impacts both on people and planet; engaging in corporate due diligence through the entire value chain would facilitate the identification (and mitigation) of such risks. Moreover, targeting global value chains has an exponential potential as numerous companies are not confined to one single value chain.<sup>122</sup> It would contribute to mitigating adverse impacts across several value chains simultaneously. Hence, if more companies engage in due diligence, more data on adverse impacts is available, and more companies can engage in mitigation strategies and as such act upon the information that is available.<sup>123</sup>

The proposed CSDD Directive which explicitly targets global value chains has been viewed as necessary and timely. In fact, a survey interviewing 334 EU companies recorded that only 16% of the business respondents were engaging in due diligence covering the entirety of their value chain. Coupled with the fact that only 7.43% were conducting environmental or climate change due diligence (excluding human rights due diligence), providing for a mandatory climate change due diligence across global value chains has been welcomed by civil society.<sup>124</sup>

However, several reports argue that the CSDD proposal insufficiently permits effective monitoring of global value chains. In fact, when it comes to preventing potential adverse impacts or bringing actual adverse impacts to an end with respect to partners in their value chains, the proposal provides that ‘the company may refer to suitable industry initiatives or independent third-party verification’ in order to verify that established business partners comply with their contractual assurances.<sup>125</sup> The EU defines ‘industry initiative’ as ‘a combination of voluntary value chain due diligence procedures, tools and mechanisms, including independent third-party verification’.<sup>126</sup> In other words, when a company has made a contract (or other forms of contractual assurances) with a business partner in order to ensure that the former’s code of conduct is respected by the latter, if both are part of an

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<sup>122</sup> The European Green Deal (n 10) 7

<sup>123</sup> EU Proposal for a CSDD Directive (n 8) 1

<sup>124</sup> Commission study on due diligence (n 27) 48

<sup>125</sup> EU Proposal for a CSDD Directive (n 8) arts 7(4) and 8(5)

<sup>126</sup> *ibid* art 3(j)

industry initiative or allow independent third-party auditing, then compliance is (presumably) effectively verified. Some contend that the latter amounts to limiting corporate due diligence to membership in such industry schemes.<sup>127</sup> However, it has been argued that the reliance on industry schemes does not provide with sufficient leverage to change behaviour.<sup>128</sup> As there is considerable research showcasing that industry schemes as well as audit and certification mechanisms do not effectively allow to detect and hamper adverse impacts across value chains, scholars argue that by relying on such third-party initiatives, the proposed CSDD Directive would only contribute to ‘replicating and crystallizing in law a decades-long approach to corporate social and sustainability compliance’ which has proven to be ineffective in mitigating negative externalities.<sup>129</sup> Hence, while the draft CSDD Directive is welcome in that it aims to target global value chains, the fact that it seems to contribute to limiting responsibility to third-party verification weakens the proposal considerably. In order to avoid creating yet another ‘tick-box’ process,<sup>130</sup> this thesis invites to rethink the proposal’s approach to global value chains and notably as regards corporate due diligence in the industrial sector.

### **3.2.2 The encouraging differentiation between human rights and environmental due diligence for climate action**

Article 4 of the draft Directive makes a distinction between human rights and environmental due diligence. The proposal draws on the existing international frameworks developed by the UN and the OECD: not only does it extend corporate due diligence to the environment but it also provides for practical steps that companies need to engage in: integrate due diligence in their policies (Article 5); identify both actual and potential adverse impacts (Article 6); prevent potential adverse impacts (Article 7); bring actual adverse impacts to an end (Article 8);

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<sup>127</sup> Gabriela Quijano and Joseph Wilde-Ramsing, ‘A Piece, not a Proxy: The European Commission’s Dangerous Overreliance on Industry Schemes, Multi-Stakeholder Initiatives, and Third-Party Auditing in the Corporate Sustainability Due Diligence Directive’ (*SOMO*, 2022) 8 <<https://www.somo.nl/a-piece-not-a-proxy/>> accessed 26 April 2023

<sup>128</sup> Shift, ‘The EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive: Shift’s Analysis’ (*Shift Project*, 2022) 6 <[https://shiftproject.org/wp-content/uploads/2022/03/Shift\\_Analysis\\_EU\\_CSDDProposal\\_vMarch01.pdf#:~:text=Shift%20welcomes%20the%20EU%20stepping%20into%20a%20leadership.Proposal%20for%20a%20Corporate%20Sustainability%20Due%20Diligence%20Directive.](https://shiftproject.org/wp-content/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf#:~:text=Shift%20welcomes%20the%20EU%20stepping%20into%20a%20leadership.Proposal%20for%20a%20Corporate%20Sustainability%20Due%20Diligence%20Directive.)> accessed 26 April 2023

<sup>129</sup> Quijano and Wilde-Ramsing (n 127) 9

<sup>130</sup> Commission study on due diligence (n 27) 107

establish a complaints procedure (Article 9); monitor the effectiveness of their due diligence activities (Article 10); and finally, communicate about their due diligence (Article 11). Such actions seem to directly reflect the recommended steps provided for in the UN Guiding Principles and in the OECD Guidance on Due Diligence revising the Guidelines for MNEs. These steps are part of what the proposal identifies as the ‘corporate due diligence duty’.<sup>131</sup>

Secondly, the proposed Directive aims to implement ‘duties for the directors’ of the targeted companies.<sup>132</sup> The directors must make sure that due diligence is effectively integrated in the company’s policies (Article 5); they have a duty of care to act in the best interest of the enterprise which entails that they take into account the ‘human rights, climate change and environmental consequences’ of their decisions (Article 25); and finally, they have a duty to set up and monitor the due diligence activities of their company as well as adapt their corporate strategy to the adverse (human rights and environmental) impacts that they have identified (Article 26).<sup>133</sup>

By its explicit differentiation between human rights and environmental adverse impacts, the Union makes a distinction between human rights and environmental due diligence. Whether the proposed Directive targets climate impacts is less obvious.

### **3.2.3 The failure to address climate due diligence *stricto sensu***

While the EU characterizes GHG emissions as an adverse environmental impact in the explanatory memorandum of its CSDD proposal,<sup>134</sup> a deeper analysis of the text shows that the draft Directive has a limited effect as regards climate impacts.

Firstly, the denotation ‘environmental impacts’ does not target climate impacts in the proposed Directive’s current form. In fact, the main provision

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<sup>131</sup> European Commission, ‘Corporate Sustainability Due Diligence: Fostering Sustainability in Corporate Governance and Management Systems’ (2022) <[https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en#how-will-the-new-rules-be-enforced](https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en#how-will-the-new-rules-be-enforced)> accessed 5 April 2023

<sup>132</sup> *ibid*

<sup>133</sup> The Proposal explicitly refers to the impacts referred to in article 6 of the Directive; that is human rights and environmental impacts.

<sup>134</sup> Text to n 100

regarding the necessity to address adverse environmental impacts does not include global warming. Article 1 provides that ‘This Directive lays down rules (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts (...) and (b) on liability for violations of the obligations mentioned above.’ Article 3(b) sets out to define what the Union means by ‘environmental adverse impacts’: ‘an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II’. The Annex delves into environmental protection measures such as the prohibition to produce certain chemicals, to export hazardous waste, or to manufacture certain types of products such as mercury-added products, or other measures such as the protection of biological diversity and of endangered species.<sup>135</sup> In sum, climate change is not an adverse environmental impact that companies must identify, mitigate, prevent, and account for according to this proposal.

Nonetheless, it should be remarked that certain larger companies have a particular obligation with respect to the climate under their corporate due diligence duty. Article 15 obliges the very large EU and third-country companies to ‘adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement’. Such a plan should ‘identify (...) the extent to which climate change is a risk for, or an impact of, the company’s operations’ and if climate change ‘is or should have been identified’ as a ‘principal risk’ or as a ‘principal impact’, the enterprise must then include ‘emission reduction objectives in its plan’.<sup>136</sup> In other words, when a business contributes to climate change, it must communicate about it: it must first disclose not only the *potential adverse climate impacts* – when climate change is a ‘risk’ – but also the *actual adverse climate impacts*; and if these are considered ‘principal’ in line with the proposal’s provision, the company have to publicly commit to emission reduction goals and hence make compatible its corporate strategy.

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<sup>135</sup> European Commission, ‘Annex to the proposal for a Directive of the European parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937’ COM (2022) 71 final pt II

<sup>136</sup> EU Proposal for a CSDD Directive (n 8) art 15

While not expressly using the same deontology as with adverse human rights and environmental impacts, the EU seems to include climate change contributions in its scheme. However, the effect of this provision is limited in scope compared to the human rights and environmental due diligence that businesses ought to engage in. Not only is ‘combating climate change’ (as per the title of Article 15) limited to the very large companies targeted by the Directive, but all the steps considered to constitute due diligence – that is, at least the four traditional UN Guiding Principles’ actions of identifying, mitigating, preventing, and accounting for adverse impacts – are not imposed with respect to climate change. What is more, the explanatory memorandum of the proposed Directive expressly differentiates between the companies’ ‘due diligence obligations’ and ‘their obligations under Article 15’.<sup>137</sup> The draft Directive cannot thus be said to impose a corporate climate due diligence in its current form.

### **3.2.4 The missed opportunity to enforce climate due diligence**

The proposed Directive intends to provide both for sanctions as well as civil liability in case of damage. Article 20 provides for sanctions in case of ‘infringements of national provisions adopted pursuant’ to the Directive. In the absence of any other reference, this article seems to apply to all the Directive’s provisions, including those related to human rights and environmental adverse impacts (*inter alia* Article 7 and 8) and those related to combating climate change (Article 15). Regarding the latter, it can thus be deduced that a company can face sanctions when it fails to identify climate risks or impacts when it should have done so, as well as when it fails to include emission reduction objectives in its plan. Whether a company can face sanctions when it does include such objectives in its plan but does nothing to achieve them is less obvious. The extent to which the companies targeted by Article 15 are liable for their contributions to climate change should be clarified.

Moreover, the draft Directive introduces civil liability which could be seen as strengthening this proposal significantly as it intends to ‘ensure that companies are liable for damages.’<sup>138</sup> However, companies can be held liable only if two

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<sup>137</sup> EU Proposal for a CSDD Directive (n 8) 25

<sup>138</sup> *ibid* art 22(1)

cumulative conditions are met: they must have ‘failed to comply with the obligations laid down in Articles 7 and 8’ and as a result of this failure to comply with their due diligence obligations, an adverse impact has ‘occurred and led to damage’.<sup>139</sup> Article 7 and 8 respectively impose that companies prevent potential adverse impacts and bring actual impacts to an end; however, as has been examined, such adverse impacts only concern human rights and environmental ones – expressly excluding climate impacts. As such, contributions to climate change do not raise companies’ civil liability in the proposal’s current form.

Providing for more effective enforcement mechanisms as regards climate change seems necessary. Apart from the general reasons that legal sanctions often prove to be effective incentives to ensure compliance, several reasons invite to think that mandatory corporate climate change due diligence could promote and reinforce climate action itself. First, it can reinforce corporate climate action by aligning internal climate policies between a company’s departments. In the current state of voluntary CSR schemes, there are usually tensions between a company’s CSR promises and its legal strategies.<sup>140</sup> In fact, while CSR departments set in motion due diligence processes and publicly commit to certain goals, the legal departments will still fight ‘every legal issue that it can win or with which it can get away’ even if those run counter to the company’s CSR objectives.<sup>141</sup> For instance, the latter can be illustrated by the discrepancy between Vattenfall’s recent commitment to integrate emissions reduction when conducting due diligence,<sup>142</sup> and the two investor-state claims it filed against Germany, which imposed coal-restricting policies and the phasing-out of two nuclear plants.<sup>143</sup> Imposing climate due diligence would harmonize a company’s internal climate objectives and make more effective its climate action. This reasoning can also be applied to the relationship between a company and its subsidiaries and suppliers. The enforcement of climate

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<sup>139</sup> EU Proposal for a CSDD Directive (n 8) art 22(1)(a)(b)

<sup>140</sup> Cees Van Dam, *Enhancing Human Rights Protection: A Company Lawyer’s Business* (Rotterdam School of Management, Erasmus University 2015) 37

<sup>141</sup> *ibid*

<sup>142</sup> Vattenfall, ‘CO2 Roadmap: Net zero by 2040 is happening’ <<https://group.vattenfall.com/what-we-do/roadmap-to-fossil-freedom/co2-roadmap>.> accessed 27 April 2023

<sup>143</sup> Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, ‘The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v. Germany (II)’ (*International Institute for Sustainable Development Briefing Note*, 2012) <[https://www.iisd.org/system/files/publications/german\\_nuclear\\_phase\\_out.pdf](https://www.iisd.org/system/files/publications/german_nuclear_phase_out.pdf).> accessed 28 April 2023



due diligence could have significant positive effects as regards climate action by aligning the climate objectives between a company and its partners in its value chain,<sup>144</sup> for instance because it would ‘facilitate leverage with third parties by setting a non-negotiable standard.’<sup>145</sup>

### **3.3 Controversies surrounding the draft Directive: the complexity of being held accountable for adverse climate impacts**

First, it should be noted that there is an ongoing debate about whether climate impacts are actually implicitly (or expressly) included in the assessment of environmental impacts. Discourse analysis from business stakeholders show that there is a general understanding of climate impacts being implicitly included in the measurement of environmental impacts. The use of the concept of ‘climate change due diligence’ appears to be extremely rare, likewise are voluntary CSR schemes that exclusively involve climate change due diligence.<sup>146</sup> However, many stakeholders seem to include climate change considerations when conducting voluntary environmental due diligence.

Moreover, the EU also seems to include climate considerations in environmental due diligence. In numerous of its communications and other publications, the EU appears to contend that assessing environmental impacts implicitly entails the identification of climate impacts. For instance, in its Non-Binding Guidelines on Corporate Climate-Related Information Reporting clarifying its Non-Financial Reporting Directive (NFRD), the EU states that ‘climate-related information can be considered to fall into the category of environmental matters.’<sup>147</sup> In the proposal itself, the Union warns against ‘environmental impacts such as greenhouse gas emissions’.<sup>148</sup> However, contradictorily, the EU explicitly excludes climate change from the environmental

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<sup>144</sup> Van Dam (n 140) 37

<sup>145</sup> Commission study on due diligence (n 27) 147

<sup>146</sup> *ibid* 59

<sup>147</sup> European Commission, ‘Guidelines on non-financial reporting: Supplement on reporting climate-related information’ (Communication) 2019/C 209/01 para 2.2

<sup>148</sup> EU Proposal for a CSDD Directive (n 8) 2

impacts that need to be addressed. That being said, the EU doubts about the effectiveness of its own measure. In fact, in Article 29 of its proposed CSDD Directive, the EU requires a report to be made seven years after the entry into force of the Directive in order to evaluate its effectiveness ‘in reaching its objectives’ and determine whether the Union act should ‘be extended to adverse *climate* impacts’ (the author’s emphasis).<sup>149</sup>

Considering that the Union actually intends to target climate impacts, it can seem contradictory that the proposal does not entail climate due diligence in a strict sense. Although a majority of companies view climate impacts as being implicitly included in ‘environmental impacts’<sup>150</sup> the analysis of the CSDD proposal demonstrates that such an analogy is not straightforward. Under the proposed Directives’ current form, adverse environmental impacts will give rise to concrete consequences and incentives for companies to act upon, whereas adverse climate impacts will not to the same extent. This thesis argues that climate change should be identified as part of a corporation’s due diligence responsibilities and that the Directive should either include an autonomous climate change due diligence or integrate climate adverse impacts in a company’s environmental due diligence obligation.

Nevertheless, there is no denying the complexity of including climate change adverse impacts in a mandatory due diligence scheme. Researchers mention the difficulty in imputing ‘proportional responsibility’ to one particular company when climate change has ‘global contributors’.<sup>151</sup> The identification of individual contributions to climate change is not straightforward. However, studies seem to argue that conducting due diligence across the whole value chain could actually facilitate this assessment. In fact, one of the respondents in the above-mentioned survey who is responsible for conducting due diligence in the supply chain of their company states that they undertake ‘life-cycle assessment’ of their products. They explain that ‘We look at different tiers of the supply chain and their emissions of greenhouse gases, and different aspects of where the impacts are and where our environmental footprint is the biggest. And that goes all the way from the materials

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<sup>149</sup> EU Proposal for a CSDD Directive (n 8) art 29

<sup>150</sup> Commission study on due diligence (n 27) 51

<sup>151</sup> *ibid* 53

that are used to the actual used phase of the product. (...) In that full life-cycle, we focus mostly on where we can have the most influence.’<sup>152</sup> According to this testimonial, conducting precise assessments across the whole value chain seems to facilitate the measurement of climate impacts. There is a growing need for clarification about what form climate change due diligence can take; recent legislative initiatives as well as case law have started to clarify how climate impacts are actually part of a corporation’s responsibility and the CSDD Directive should take that into account.<sup>153</sup>

Hence, there is a huge potential of conducting an extensive climate due diligence across the entirety of the value chain. The fact that due diligence can be conducted along all the steps in a product’s life cycle actually seems to facilitate the measurement and identification of climate impacts. It appears thus necessary that the CSDD proposal clarifies the necessity to engage in climate change due diligence and develops a better framework targeting the whole value chain. Finally, such a framework should not be replaced by existing industry schemes or third-party verification which have proven to be ineffective.

### **3.4 The applicability of the proposed CSDD Directive to EIs: potential effects on corporate climate action**

This study has identified several reasons for imposing climate change due diligence on corporations. By analysing the proposed CSDD Directive’s current form in parallel to the EU’s broader discourse on corporate responsibility towards climate impacts, it appears that imposing climate change due diligence on EIs could heavily promote and enhance their climate action. The increasing focus on global value chains (3.4.1), the benefits of targeting climate impacts (3.4.2), and finally the development of effective enforcement mechanisms (3.4.3) could strengthen corporate climate action significantly.

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<sup>152</sup> Commission study on due diligence (n 27) 54

<sup>153</sup> See ch 4

### **3.4.1 Targeting global value chains in order to facilitate EII's transition to climate neutrality**

Promoting corporate due diligence across whole value chains appears extremely relevant as regards EIIs which are characterized by their extremely complex supply chains.<sup>154</sup> Coupled with the fact that global value chains are, by themselves, 'complex, dynamic and non-transparent'<sup>155</sup> adds a bigger incentive to impose due diligence on EIIs.

'Ensuring the supply of sustainable raw materials' is one of the key priorities of the EU as part of its Green Deal which promotes supply chain diversification from both 'primary and secondary sources'.<sup>156</sup> By implication, having access to 'reliable, comparable and verifiable information' in order to allow buyers 'to make more sustainable decisions' is essential in order to facilitate the transition to climate-neutral technologies.<sup>157</sup> The EU adds that such climate action should for instance be conducted in the steel industry in which it has set the objective of a 'zero-carbon steel making process by 2030'.<sup>158</sup> The steel industry is part of the energy-intensive sector and constitutes one of the 'priority areas' targeted by the Green Deal.<sup>159</sup> This thesis argues that climate change due diligence enables such a process: not only does it permit the assessment of negative climate impacts, but it promotes – obliges – to mitigate, prevent and account for them. In other words, and applied to this specific context, EIIs would have an incentive to actually deliver on the objectives set out in the European Green Deal and other international commitments.

A mandatory due diligence scheme can have the potential to strengthen the climate action of EIIs because such a legal tool would mandate EIIs to conduct thorough assessments – as well as act upon their findings to avoid seeing their liability raised – in the entirety of their value chain. Such a reasoning seems to be underlying in other EU legislation as regard global value chains and the necessity

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<sup>154</sup> Maedeh Rahnama Mobarakeh and Thomas Kienberger, 'Climate Neutrality Strategies for Energy-Intensive Industries: An Austrian Case Study' (2022) *10 Cleaner Engineering and Technology* 1, 2

<sup>155</sup> Commission study on due diligence (n 27) 70

<sup>156</sup> The European Green Deal (n 10) 8

<sup>157</sup> *ibid*

<sup>158</sup> *ibid*

<sup>159</sup> *ibid*

to transition to a circular economy to achieve its climate neutrality goals. With its new Batteries Regulation, the EU implements specific due diligence mechanisms precisely to ensure that ‘batteries placed on the EU market are sustainable, circular, high-performing and safe all along their entire life cycle’ in order to become ‘a true source of valuable raw materials’. The latter is achieved, the EU continues, thanks to ‘specific requirements at each stage of the battery value chain’. Such a new regulatory framework, the EU concludes, aims to ‘ensure that the environmental impacts of batteries is minimised’.<sup>160</sup> There is no gainsaying the paramount difference between the batteries industry and the EIIs not least because of the latter’s hard-to-abate characteristic. However, such an analogy to the Sustainable Batteries Regulation serves the purpose of illustrating the complementarity of due diligence schemes and global value chains: conducting due diligence at each stage of the value chain actually facilitates the assessment of adverse impacts and thus helps provide an adequate response to them. The latter could contribute to making more resilient the economic operators in the face of adverse impacts. Finally, it all amounts to providing more legal certainty to companies who, at the end of the day, need more guidance and more rules on what is expected of them in the face of global warming.

The EU has thus already argued that corporate due diligence in global value chains actually helps companies mitigate their adverse impacts, act upon them and as such deliver on the climate goals set out by international and European laws.

### **3.4.2 Including climate impacts in corporate due diligence: a necessary instrument for EIIs’ climate action**

The current proposal fails to fulfil its great potential, primarily due to its lack of effective consideration for adverse climate impacts. Based on the development argued for above, integrating climate change in mandatory due diligence schemes would mean that EIIs, across all their value chain, identify adverse climate impacts (increased GHG emission for instance), set in motion a process of mitigating such impact (for example, find a more energy efficient method or set in motion a process

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<sup>160</sup> European Commission, ‘Questions and Answers on Sustainable Batteries Regulation’ (2020) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2311?70ef0ed6\\_page=2](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2311?70ef0ed6_page=2)> accessed 23 April 2023

of decarbonizing), prevent such impacts (prevent an increase in emissions by changing corporate strategy) as well as account for such an increase by being transparent about it. As such, it would enable third parties to complain and raise their civil liability in case of damage or give rise to administrative sanctions. The IEA states that industrial sectors are among the major players in the transition to net-zero emissions as ‘actors all along the value chain can implement material efficiency strategies’ for instance. Such methods include ‘shifting towards secondary (...) production’, ‘reducing waste during manufacturing’ as well as ‘developing circular economy-based business models’.<sup>161</sup> Hence, if the CSDD Directive integrates climate due diligence, it would impose not only the identification of adverse climate impacts, but also action to mitigate and prevent such impacts; the proposal would thus make mandatory that companies change their behaviour.

The CSDD Directive can hence be a highly relevant tool and fill the current regulatory gap left by no obligation to decrease GHG emissions or even to mitigate or prevent an increase thereof. As the EU already sees the importance of adding ‘climate impacts’ to the adverse effects that companies ought to take into consideration, this research contends that it is essential to create a legal obligation to account for adverse climate impacts in order to promote corporate climate action.

### **3.4.3 Ensuring effective enforcement of climate obligations: the EIIIs as pillars in the EU’s climate action framework**

The current form of the proposed Directive only provides for administrative sanctions upon infringements of Article 15. As EIIIs are considered to be *de facto* climate change contributors – being the highest industrial emitters of GHG –, it seems coherent to state that Article 15 would apply to the companies operating in them, if they are targeted by the Directive altogether. As Article 15 seems to target companies in the energy-intensive sector, these would have an obligation to identify how much of a risk and/or impact climate change is as well as commit to emission reduction objectives. Drawing on above-mentioned demonstrations, such

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<sup>161</sup> International Energy Agency, ‘Industry: Sectoral Overview’ (IEA, 2022) <<https://www.iea.org/reports/industry>> accessed 26 April 2023

assessments could be made more straightforward by conducting them across entire value chains; objectives of emission reduction could hence be specifically personalized to each supplier that has been identified as having the most adverse climate impacts. In fact, such a reasoning is consistent with the UN Guiding Principles and the OECD Guidelines for MNEs which promote ‘risk-based due diligence’ that is tailored to ‘the severity’ of the identified adverse impact.<sup>162</sup>

However, Article 15 specifically targets the company’s own activities: the plan must identify ‘the extent to which climate change is a risk for, or an impact of, the *company’s operations*’ (the author’s emphasis). The obligations set forward in the sole climate change provision of the draft Directive seems thus to expressly exclude the monitoring of adverse climate impacts in global value chains. In other words, by being targeted in Article 15, companies operating in EIIs would face sanctions if they do not comply with these particular duties; however, current duties only apply to the companies’ own operations and expressly exclude that of established business relationships – which are recurrent in the rest of the proposal. This research contends that the proposed CSDD Directive could strengthen EIIs’ climate action considerably if Article 15 targets global value chains and/or if a general corporate climate change due diligence is implemented. As already argued, the best alternative would be to include climate change due diligence in a strict sense as companies operating in the EIIs could face both administrative sanctions but also see their civil liability raised if they fail to act.

### **3.5 Chapter summary and conclusion**

The draft CSDD Directive could be an effective mean of promoting EIIs’ climate action; better still, EIIs – as per their major contribution to global warming and them being part of numerous supply chains – can be seen as pillars in the EU’s objective to become climate-neutral. In order to ensure that the CSDD Directive effectively promotes corporate climate action, this research argues that three major points need to be revised: effective compliance ought to be ensured across all the value chain, climate adverse impacts should be included in corporate due diligence activities,

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<sup>162</sup> OECD Guidelines for MNEs (n 57) 24

and finally, the enforcement mechanisms of the proposed Directive as regards climate impacts should be clarified (Table 2).

Considering the mounting global efforts to tackle climate change, certain European countries have followed suit and have started to incorporate due diligence requirements into their national laws. The next chapter studies the different implementations at domestic levels as well as the lessons learned from the rare, yet crucial, emerging case law in the field.

Table 2 Strengths and weaknesses of the EU Proposal for a CSDD Directive: opportunities for improvement

### EU Proposal for a Corporate Sustainability Due Diligence Directive

	Global Value Chains	Targeted Impacts	Enforcement Mechanisms
<i>Strengths of the current proposal</i>	Mandates cross-sectoral corporate due diligence in entire value chains: in companies' 'own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship' – <i>Article 1</i>	Differentiates between human rights and environmental adverse impacts – <i>Article 3</i>  Enables specific climate action for larger companies: adoption of a plan ensuring that the corporate strategy is compatible with the Paris Agreement climate objectives – <i>Article 15</i>	Administrative sanctions in case of infringement of all obligations set out in the Directive – <i>Article 20</i>  Civil liability in case of damage arising from adverse human rights or environmental impacts – <i>Article 22</i>
<i>Shortcomings and opportunities for improvement</i>	Relies on industry schemes, audit and certification mechanisms to ensure compliance across value chains – <i>Articles 7(4) and 8(5)</i>  The sole climate obligation provided for only targets companies' operations – <i>Article 15</i>	'Environmental adverse impacts' do not include climate change – <i>Annex to the proposal part II</i>  Lacks clarity as to when climate change is a 'principal risk' or a 'principal impact' setting in motion this regime – <i>Article 15</i>	Absence of an explicit threshold triggering sanctions under <i>Article 15</i>  No civil liability raised for violations of <i>Article 15</i>



## 4. Climate due diligence in EU Member States' practice

Since corporate due diligence in the international sphere remains voluntary to this date, States have undergone a process of hardening such standards of conduct on their own. Analysing the different conceptions of due diligence by examining the laws or initiatives at the level of Member States (4.1) as well as how they are interpreted by judges (4.2) can be informative. The analysis helps to identify how EU-level mandatory climate due diligence should be framed in order to promote corporate climate action.

### 4.1 Experiments in EU Member States: laws and initiatives

Legal systems in different Member States of the EU use differing terminologies when referring to due diligence. While common law systems emphasize on the 'duty of care', civil law systems use different concepts such as 'vigilance' in France. These terminologies have different implications for how due diligence is to be conducted.<sup>163</sup> The majority of national implementations of due diligence mechanisms involve disclosure measures; however, transparency amounts to the communication step of the corporate due diligence process established by the OECD Guidance on Due Diligence.<sup>164</sup> As such, very few national legal frameworks oblige corporations to conduct an extensive due diligence with regards to climate change. The most comprehensive measures to date are the French Duty of Vigilance Law (4.1.1) and the German Supply Chain Due Diligence Act (4.1.2) which target environmental impacts and climate change to different extents. Several initiatives in other Member States depict an increased effort to make corporate due diligence mandatory (4.1.3).

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<sup>163</sup> Commission study on due diligence (n 27) 156

<sup>164</sup> Olga Martin-Ortega (n 87) 102

#### 4.1.1 The French Vigilance Law: a pioneering approach to environmental externalities

By enacting its Duty of Vigilance Law in 2017, France was the first EU country to impose a horizontal corporate due diligence.<sup>165</sup> The law targets companies established in France with more than 5,000 employees in France or employing more than 10,000 individuals globally and obliges them to establish a vigilance plan and put it in motion in ‘an effective manner’.<sup>166</sup> This plan must identify the risks as well as the serious impacts on human rights, fundamental freedoms, health and safety of persons as well as the environment. The law targets both the company’s own operations as well as that of subcontractors and suppliers with whom they are in an ‘established commercial relationship’. The vigilance plan includes five mandatory components: a risk mapping; procedures established to monitor subsidiaries, subcontractors or suppliers; measures to ‘mitigate risks and prevent serious harm’; reporting mechanisms; and frameworks to assess the effectiveness of the plan.<sup>167</sup>

In its first assessment of the Duty of Vigilance Law, the French High Council for the Economy contends that the law draws on the principles recognized by soft law; direct rapprochement can be made to the due diligence framework established by the OECD Guidelines for MNEs.<sup>168</sup> The preparatory works of the French law explicitly mention that it is also based on the UN Guiding Principles.<sup>169</sup> For instance, when conducting the risk mapping, companies must identify and hierarchize the risks based on their severity in order to be able to choose, by priority, what impact to address and decide on the actions that are necessary to prevent, mitigate and remediate them.<sup>170</sup> The Vigilance Law hence directly draws on soft

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<sup>165</sup> Loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre  
<<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>>  
accessed 15 April 2023 (French Vigilance Law)

<sup>166</sup> Code de commerce, art L225-102-4  
<[https://www.legifrance.gouv.fr/codes/article\\_lc/LEGIARTI000035181820/2022-04-27](https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/2022-04-27)> accessed 15 April 2023

<sup>167</sup> *ibid*

<sup>168</sup> Conseil Général de l’Économie, ‘Mission to Monitor the Implementation of the Duty of Vigilance Act’ (Report Abstract, January 2020) <[https://www.economie.gouv.fr/files/files/directions\\_services/cge/Duty-of-Vigilance.pdf](https://www.economie.gouv.fr/files/files/directions_services/cge/Duty-of-Vigilance.pdf)> accessed 28 April 2023

<sup>169</sup> Commission study on due diligence (n 27) 61

<sup>170</sup> Conseil Général de l’Économie, ‘Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’ (Report, January 2020) 22 <[https://www.economie.gouv.fr/files/files/directions\\_services/cge/devoirs-vigilances-entreprises.pdf](https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf)> accessed 28 April 2023 (French Vigilance Law Report)

law standards, here on the risk-based due diligence promoted by the OECD Guidelines for MNEs.

As such, the duty of vigilance can be understood as a general obligation of corporate due diligence which targets both impacts on human rights and the environment among others. Whether it targets climate impacts is less clear. First, the law in itself does not expressly mention that companies need to address climate impacts. Again, the question remains whether climate considerations are implicitly included in the duty of vigilance with respect to the environment expressly provided for. The preparatory works of the law seldom, if not never, mention climate change, as an impact that companies need to take into account.<sup>171</sup> Analysis of case law arising from after the enactment of this law clarifies the extent to which climate change is included in the vigilance duty.<sup>172</sup>

Ivano Alogna, an environmental law expert, contends that the French Vigilance law is the ‘first legislative model worldwide that places the burden of responsibility of prevention on the multinational company, which incurs its civil liability for its activities and environmental externalities.’ As such, Alogna continues, ‘this new legal model may offer a solid foundation to draft a European instrument of this kind.’<sup>173</sup> The strengths of this law have been deemed to lie in its reliance on the recognized principles established by the UN and the OECD.<sup>174</sup> The fact that it has used and adapted these frameworks into specific steps and made them mandatory – failure to comply to the law gives rise to sanctions and civil liability in case of damage – has been deemed welcome.<sup>175</sup>

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<sup>171</sup> Dossiers législatifs, LOI n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre  
<<https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000030421923/>> accessed 29 April 2023

<sup>172</sup> See infra pt 4.2

<sup>173</sup> Commission study on due diligence (n 27) 51

<sup>174</sup> French Vigilance Law Report (n 170) 7

<sup>175</sup> Code de commerce, art L225-102-5

<[https://www.legifrance.gouv.fr/codes/article\\_lc/LEGIARTI000034291364/](https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000034291364/)> accessed 15 April 2023

#### 4.1.2 The German Supply Chain Due Diligence Act: a weak environmental due diligence law

The German Supply Chain Due Diligence Act was adopted in June 2021 and imposes due diligence as regards both human rights and the environment, since 1 January 2023, on German companies with more than 3,000 employees globally. As of 1 January 2024, all companies with more than 1,000 employees will be included. As provided for in this Act, companies have ‘due diligence obligations’ in their entire supply chain which entail exercising ‘due regard for the human rights and environment-related due diligence obligations’; these are practical steps that companies must engage in, such as a risk management system, risk analyses, preventive measures, remedial action and reporting obligations among others.<sup>176</sup> The aim of these due diligence obligations is to prevent or minimise ‘any risks to human rights or environment-related risks’ or to end ‘the violation of human rights-related or environment-related obligations’.<sup>177</sup> Again, these steps and aims seem directly inspired by the recognized soft law standards.

The Act sets out to define what is meant by ‘environment-related risk’; climate change is not encompassed within the array of environmental impacts companies should avoid.<sup>178</sup> Moreover, while the German Act commendably extends due diligence requirements to include environmental impacts, it does so in a highly restrictive manner. In fact, an environmental risk is prohibited only when it violates the Minamata Convention on Mercury (2013), the 2001 Stockholm Convention on Persistent Organic Pollutants or the Basel Convention on Hazardous Wastes of 1989.<sup>179</sup> Furthermore, the contamination of ‘soil, water and air’ is prohibited only insofar as it infringes upon the ‘rights to food, water, sanitation and health’.<sup>180</sup> The German Due Diligence Act adopts a narrow perspective on corporate environmental due diligence as adverse impacts on the environment are

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<sup>176</sup> Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz—LkSG) section 3(1) <[https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile)> accessed 15 April 2023 (German Supply Chain Due Diligence Act)

<sup>177</sup> *ibid*

<sup>178</sup> *ibid* section 2(3)

<sup>179</sup> *ibid*

<sup>180</sup> David Weihrach, Sophia Carodenuto, Sina Leipold, ‘From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act’ (2022) *Regulation & Governance* 554

taken into consideration only if they jeopardize human rights. As discussed in the second chapter, this approach restricts corporate responsibility as a whole.<sup>181</sup> Hence, the German Act implements an extensive human rights due diligence scheme, a restricted environmental one, and does not mandate climate due diligence at all.

#### **4.1.3 A wider European effort to strengthen corporate responsibility: an unfortunate oversight of climate change**

Other EU Member States are planning to implement mandatory corporate due diligence schemes as regards the environment and several initiatives have been launched. Proposals or calls from civil society have been put forward in Member States like the Netherlands, Sweden, Austria, Luxembourg, Belgium, Austria, Denmark, Spain and Italy.<sup>182</sup> Moreover, other Member States have already enacted mandatory due diligence laws; however, they do not involve environmental due diligence. For instance, Norway has adopted the Transparency Act; environment-related impacts are solely indirectly tackled – and to a minimum extent – if they jeopardize human rights.<sup>183</sup> The Dutch proposal is, at present, the most advanced in the process of being adopted; other initiatives await actual commitment from their respective governments.

In parallel to enacting a sector-specific child labour due diligence law,<sup>184</sup> the Netherlands have started to develop a broader cross-sectoral due diligence law targeting both human rights and the environment which is, at present, formalized in the Bill for Responsible and Sustainable International Business Conduct. The latter defines due diligence as ‘the continuous process whereby enterprises identify, prevent and mitigate the actual and potential negative impacts of their activities on

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<sup>181</sup> See ch 2 pt 2.1.3

<sup>182</sup> Business & Human Rights Resource Centre, ‘National & Regional Movements for Mandatory Human Rights & Environmental Due Diligence in Europe’ (*Business & Human Rights Resource Centre*, 2023) <<https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>> accessed 27 April 2023

<sup>183</sup> Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ (2021) 6 *Business and human rights journal* 550, 554

<sup>184</sup> Business & Human Rights Resource Centre, ‘Dutch Senate Votes to Adopt Child Labour Due Diligence Law’ (*Business & Human Rights Resource Centre*, 14 May 2019) <<https://www.business-humanrights.org/en/latest-news/dutch-senate-votes-to-adopt-child-labour-due-diligence-law/>> accessed 27 April 2023

(...) the environment’ and makes an express reference to the OECD Guidelines for MNEs.<sup>185</sup> Companies must commit to due diligence in a ‘policy document’ in which a ‘due diligence plan’ (Section 2.2) sets out how the company conducts its risk analysis and action plan (Section 2.3), how they monitor their due diligence activities (Section 2.5), their reporting obligations (Section 2.6), and their remediation schemes (Section 2.7). The Bill provides for administrative sanctions in case of failure to comply with these obligations.<sup>186</sup>

Again, this legislative proposal seems to directly base the required steps for companies on recognized international standards. This suggests a potential recognition and agreement that the definition of due diligence should align with that developed by international organisations in their respective publications, and chiefly the latest 2018 OECD Due Diligence Guidance. While it is commendable that horizontal corporate due diligence is made mandatory, it is unfortunate that climate change is directly overlooked in these initiatives.

## **4.2 Corporate climate due diligence in EU Member States’ courtrooms**

Since there is no mandatory climate due diligence framework, case law has traditionally offered solutions which indirectly enable the filing of claims against adverse environmental impacts. Diverse means include criminal law, tort law and consumer protection laws.<sup>187</sup> Only a few actions have been instituted against corporations for their climate impacts.<sup>188</sup> While climate change due diligence is never expressly mentioned, several landmark cases related to climate change and corporate responsibility can be insightful in how courts interpret the concept of climate due diligence. These participate in shaping the legal landscape and provide

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<sup>185</sup> Dutch Bill for Responsible and Sustainable International Business Conduct (Unofficial translation) section 1.1(c) <<https://www.mvoplatform.nl/en/wp-content/uploads/sites/6/2021/03/Bill-for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf>> accessed 25 April 2023

<sup>186</sup> *ibid* section 3.3

<sup>187</sup> Commission study on due diligence (n 27) 19

<sup>188</sup> *ibid*

a better understanding for how companies can address their contributions to global warming.

Although it concerns the climate action of States, *The State of Netherlands v Urgenda Foundation* (2015) sheds light on the climate responsibility of corporations. Urgenda, an environmental organization, sued the Dutch government for its failure to take sufficient measures to decrease its GHG emissions. The Hague Court of Appeal gave reason to Urgenda and held that the government had a legal duty to protect its citizens from climate change impacts; it confirmed the first judgement according to which the State had to reduce its GHG emissions by at least 25% by 2020 compared to the 1990 levels.<sup>189</sup> Such an emission reduction obligation was found in the State's duty of care under Articles 2 (right to life) and 8 (right to family life) of the European Convention on Human Rights (ECHR). Hence, the Court found an obligation to reduce GHG emissions based on the duty of the State to protect and hamper the violation of the interests found in the above-mentioned articles. Moreover, while expressly targeting state action, the first ruling illustrates how a legal concept such as the 'duty of care' can be interpreted thanks to environmental conventions that do not mention it explicitly. In fact, the District Court held that the Kyoto Protocol, the UNFCCC, certain EU laws as well as the no harm principle of customary international law – all invoked by Urgenda – could not create a set of direct obligations to the State. However, they could be used as a legal basis in order to understand the 'concrete meaning' of the duty of care contained in Dutch domestic law.<sup>190</sup> In other words, the climate obligations of the state arose not only from the necessity to protect human rights but also from specific climate-related duties stemming from the interpretation of international texts and principles.

As regards claims against companies, in April 2019, the OECD National Contact Point (NCP) of the Netherlands included climate impacts in its assessment

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<sup>189</sup> *The State of Netherlands v Urgenda Foundation*, ECLI:NL:GHDHA:2018:2591, 9 October 2018 [The Hague Court of Appeal] para 53 <<https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2018:2610>> accessed 9 May 2023 (*Netherlands v Urgenda*, CA)

<sup>190</sup> Otto Spijkers, 'The Urgenda Case: a Successful Example of Public Interest Litigation for the Protection of the Environment?' in Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar Publishing Limited 2018) 305, 308

of the company's general due diligence duty.<sup>191</sup> In *Oxfam and others v ING*, the NCP deemed that the company had not followed the recommendations provided for by the OECD Guidelines for MNEs with respect to the climate and urged thus ING to set targets to reduce GHG emissions. Interestingly, the Dutch NCP here suggests that the OECD Guidelines for MNEs provides that companies must 'conduct a due diligence process in respect of their environmental impact, including climate impact.'<sup>192</sup> During its dialogue with the parties, the NCP puts forward a set of three distinct steps related to climate due diligence: measuring and disclosing total carbon footprint ('measuring'), setting specific goals ('target setting'), as well as reducing GHG emissions and aligning with the Paris Agreement ('steering').<sup>193</sup> The case thus clarifies what a company is expected to do when engaging in climate change due diligence.

The adoption of the French Duty of Vigilance Law has led several Non-Governmental Organisations (NGO) to file claims against companies in France. As this law is 'the first corporate mandatory due diligence legislation worldwide',<sup>194</sup> these cases can be viewed as among the first applications of corporate due diligence with respect to climate change. While the law in itself does not target climate impacts per se, claims have been filed against companies that have insufficiently implemented a plan targeting their contributions to climate change. Although it has been deemed that such claims might extend the duty of vigilance to subject-matters that were not provided for in the law,<sup>195</sup> these cases show that climate impacts might implicitly be included in the due vigilance expected of enterprises. In fact, in *Notre Affaire à Tous and others v Total*, several NGOs and local authorities alleged that the French oil company Total had not included climate impacts in its vigilance plan and that its corporate strategy was not in line with international climate commitments.<sup>196</sup> As such, they demanded that Total be condemned for its failure to

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<sup>191</sup> National Contact Point OECD Guidelines for MNEs, 'Final statement: *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*' (19 April 2019)

<sup>192</sup> *Oxfam and others v ING* (n 191) para 4.2

<sup>193</sup> *ibid* para 5.2

<sup>194</sup> Paul Mougeolle, 'Practitioner's Perspective: A Brief Commentary on the French Total Climate Case' (2020) 2 *Current Developments in Carbon & Climate Law* 128

<sup>195</sup> French Vigilance Law Report (n 170) 45

<sup>196</sup> Grantham Research Institute on Climate Change and the Environment, '*Notre Affaire à tous and others v Total*' (*Climate Change Laws in the World*, 2020) <[https://climate-laws.org/geographies/france/litigation\\_cases/notre-affaire-a-tous-and-others-v-total](https://climate-laws.org/geographies/france/litigation_cases/notre-affaire-a-tous-and-others-v-total)> accessed 22 April 2023



account for its contributions to climate change and to actively mitigate these climate impacts. They contend that climate change and its resulting damage are included within the scope of the Vigilance Law.<sup>197</sup> As Total responded and committed to include climate change in its second vigilance plan before the proceedings – and did so, albeit in a very limited manner – scholars argue that the company will not challenge this interpretation before the Court.<sup>198</sup> It appears that climate change could, in this way, be included in a company’s expected due diligence. As the proceedings are still pending, the question remains whether the duty of vigilance expected from companies includes climate-related risks; however, the preparatory works of the law highlight that international standards should be used in order to assess what environmental impacts must be included.<sup>199</sup> As demonstrated in the previous case, the OECD Guidelines for MNEs and their interpretation by the NCP seem to include climate risks in the expected due diligence. This case presents thus a glimpse on how climate change could effectively be integrated in a company’s due diligence duty.

Finally, the 2021 case *Milieudefensie et al v Royal Dutch Shell* (RDS) directly elucidates the ‘climate change due diligence’ that is expected of companies, and notably of a parent company – in this case RDS – which appears responsible for ‘the prevention of dangerous climate change through the corporate policy’ it puts forward in its whole value chain, here in the entire Shell group, as claimed by *Milieudefensie et al*.<sup>200</sup> It is the first time a court rules that a company has a binding legal obligation to reduce its GHG emissions. As such, the District Court of the Hague ordered Shell to reduce its emission by 45% by 2030 compared to its 2019 levels. This case implements a corporate duty to reduce GHG emissions, and namely through the implementation of a corporate policy, thus directly advocating that companies exercise climate due diligence. In fact, scholars argue that such a

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<sup>197</sup> *Notre Affaire à tous and others v Total*, 18 November 2021 [Court of Appeal of Versailles] (Unofficial English translation) 8 <[http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20221118\\_NA\\_judgment-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20221118_NA_judgment-1.pdf)> accessed 10 May 2023

<sup>198</sup> Mougeolle (n 194) 129

<sup>199</sup> Assemblée Nationale, ‘Rapport fait au nom de la Commission des Lois Constitutionnelles, de la Législation et de l’Administration Générale de la République sur la proposition de loi (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre par M. Dominique Potier’ (Report) <<https://www.assemblee-nationale.fr/14/rapports/r2628.asp>> accessed 9 May 2023

<sup>200</sup> *Vereniging Milieudefensie et al v Royal Dutch Shell plc*, C/09/571832, 26 May 2021 [The Hague District Court] para 3.2 <<https://uitspraken.rechtspraak.nl#!/details?id=ECLI:NL:RBDHA:2021:5339>> accessed 22 April 2023 (*Milieudefensie et al v Royal Dutch Shell*)

ruling has substantial implications for companies' 'due diligence expectations since exercising adequate due diligence is the operational means through which a company' can fulfil its legal obligations.<sup>201</sup> What is more, the Court explicitly refers to the UN Guiding Principles and the OECD Guidelines for MNEs and highlights that these soft law instruments are 'universally endorsed' and can be used as a 'guideline in the interpretation of the unwritten standard of care' even if RDS has not formally committed to them.<sup>202</sup>

### **4.3 Chapter summary and conclusion**

Although the examined cases do not mention 'climate change due diligence' per se, they can serve as a basis to understand not only what corporate responsibility entails in relation to climate change but also the legal implications of failing to exercise due diligence with respect to climate impacts. Judges have been able to retrieve binding emission reduction obligations from the interpretation of international treaties and established soft law standards. Hence, the development of a concrete climate due diligence duty appears fundamental in order to set in stone such emission reduction duties and provide for more legal certainty.

As such, the inclusion of hard due diligence provisions in Member States' laws appears highly commendable. The overview of current national frameworks and proposals thereof (see to that end Table 3) illustrates the lack of direct engagement with explicit climate change impacts. Although case law shows that such climate considerations can be implicitly understood as part of both States' and corporations' legal duty of care – or vigilance – towards the environment, this thesis has shown the salutary potential of creating a self-sufficient climate due diligence requirement. Such a scheme appears beneficial for strengthening corporate climate action, the latter which is, in fine, dependent on the final contours of the due diligence framework enforcing it (Chapter 5).

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<sup>201</sup> Bright and Buhmann (n 24) 8

<sup>202</sup> *Milieudéfensie et al v Royal Dutch Shell* para 4.4.11

Table 3 Mandatory corporate due diligence in EU Member States

Laws and proposals	Targeted companies	Due diligence requirements	Considered impacts
<p><b>French Duty of Vigilance Law</b></p> <p>(Adopted 27 March 2017)</p>	<p>Companies based in France with more than 5,000 employees in France or employing more than 10,000 individuals globally</p>	<p><u>Aim</u>: Establish a vigilance plan to identify risks and serious impacts</p> <p><u>Due diligence obligations</u>:</p> <ol style="list-style-type: none"> <li>1. Risk-mapping</li> <li>2. Established procedures to monitor subsidiaries, subcontractors or suppliers</li> <li>3. Measures to mitigate risks and prevent serious harm</li> <li>4. Reporting mechanisms</li> <li>5. Processes to assess the effectiveness of the plan</li> </ol>	<p>Impacts on human rights, fundamental freedoms, health and safety of persons, the environment</p> <p><u>Climate impacts</u>: not expressly mentioned in the law</p>
<p><b>German Supply Chain Due Diligence Act</b></p> <p>(Adopted 11 June 2021)</p>	<p>German companies with more than 3,000 employees</p> <p>Extended to companies with more than 1,000 employees by 1 January 2024</p>	<p><u>Aim</u>: Prevent or minimise risks; End violation of due diligence obligations</p> <p><u>Due diligence obligations</u>:</p> <ol style="list-style-type: none"> <li>1. Risk management system</li> <li>2. Designate responsible person</li> <li>3. Risk analyses</li> <li>4. Policy statement</li> <li>5. Preventive measures in own operations and with direct suppliers</li> <li>6. Remedial action</li> <li>7. Establish a complaints procedure</li> <li>8. Implement mechanisms to address risks at the level of indirect suppliers</li> <li>9. Transparency</li> </ol>	<p>Human-rights or environment-related impacts</p> <p><u>Climate impacts</u>: not included and environmental impacts are only considered insofar as they jeopardize human rights</p>
<p><b>Dutch Bill for Responsible and Sustainable International Business Conduct</b></p> <p>(Submitted March 2021)</p>	<p>Dutch enterprises or companies engaged in activities in the Netherlands which exceed at least 2 of the 3 following criteria:</p> <ol style="list-style-type: none"> <li>1. Balance sheet total: €20 million</li> <li>2. Net revenue: €40 million</li> <li>3. 250 average number of employees</li> </ol>	<p><u>Aim</u>: Identify, prevent and mitigate actual and potential negative impacts</p> <p><u>Due diligence obligations</u>:</p> <ol style="list-style-type: none"> <li>1. Policy document with due diligence plan</li> <li>2. Risk analysis and action plan</li> <li>3. Monitoring of due diligence activities</li> <li>4. Reporting processes</li> <li>5. Remediation schemes</li> </ol>	<p>Human rights, labour rights and environmental impacts</p> <p><u>Climate impacts</u>: not included</p>

## **5. Concluding remarks: mandatory corporate due diligence in the EU – to what extent is corporate climate action dependent on the contours of the final CSDD Directive?**

This thesis focuses on corporate due diligence specifically because it seems to be, by and of itself, a crucial component of corporate climate action. The current EU regulatory framework puts forward objectives; the CSDD proposal would set explicit expectations on how to achieve these goals and would as such guide companies in fulfilling their legal obligations. However, this study has also shown that implementing binding corporate due diligence obligations with regards to the climate faces considerable challenges (5.1). Nonetheless, as such difficulties can be addressed through the EU CSDD Directive, this suggests that these challenges are within the EU's capability to overcome, presenting an opportunity for a turning point in its climate policy (5.2).

### **5.1 Challenges standing at the interface of mandatory climate due diligence and corporate climate action**

The primary challenge appears to be the inclusion of *climate* adverse impacts into the EU's proposed mandatory corporate due diligence scheme. It is a heavily debated issue as the latest developments show an increased will to make corporations account for their climate impacts. In fact, MEPs on the Legal Affairs Committee adopted their position on the CSDD proposal on 25 April 2023. Not only did they agree on extending the scope of the draft Directive to encompass more companies, but they also suggested amending Article 15 in order to target 'all company directors' (the author's emphasis) who would be 'obliged to implement a

transition plan compatible with a global warming limit of 1.5°C'. Moreover, the directors of the enterprises comprising more than 1000 employees would be held directly liable for ensuring the implementation of this climate plan.<sup>203</sup> While such an amendment is commendable, the proposal is far from final. The Parliament will further debate, suggest amendments and vote on this adopted position in the plenary session and if approved, the legislation would move on to negotiations with the Council. However, the consensus in the Legal Affairs Committee was broad (19 in favour against 3 and 3 abstentions) demonstrating an increased will to impose corporate responsibility with respect to climate impacts.

Civil society also contends that the CSDD Directive should include climate adverse impacts. Sherpa, the French NGO who has taken up the task of identifying French companies in violation with their duty of vigilance, states that 'the draft directive, in its current form, must be strengthened so that companies are required to identify and prevent all the risks for the environment and climate and to effectively reduce their greenhouse gas emissions'.<sup>204</sup> It welcomes the latest developments aimed at strengthening enterprises' duties with respect to global warming and praises the effectiveness of setting concrete targets for GHG emissions reduction.

As the overview of specific case law has illustrated, there is a deep knowledge gap as to how companies ought to engage in such climate due diligence. However, corporations and notably industry seem to have a particular duty in this respect. In the *Urgenda* case, while it highlights the State's duty of care as regards climate-related risks stemming from Articles 2 and 8 ECHR, the Hague Court of Appeal also mentions that 'this obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous.'<sup>205</sup> The latter illustrates yet another challenge standing at the interface of effective climate due

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<sup>203</sup> European Parliament, 'Corporate Sustainability: Firms to Tackle Impact on Human Rights and Environment' (Press release, 25 April 2023) <<https://www.europarl.europa.eu/news/en/press-room/20230424IPR82008/corporate-sustainability-firms-to-tackle-impact-on-human-rights-and-environment>.> accessed 29 April 2023

<sup>204</sup> Sherpa, 'Directive on Corporate Due Diligence: Conservative MEPs Go Against Citizens' Expectations' (Asso Sherpa, 12 April 2023) <<https://www.asso-sherpa.org/directive-on-corporate-due-diligence-conservative-meps-go-against-citizens-expectations>.> accessed 29 April 2023

<sup>205</sup> *Netherlands v Urgenda*, CA para 43

diligence; not only does its current implications depend on the meaning conferred to it by judges – which in itself commends to legislate in order to provide for legal certainty – but there is also disagreement as to the sources giving rise to this duty. In the *Urgenda* case, duty towards the environment can be retrieved from human rights law; latter cases also emphasize the persuasive authority of the UN and OECD soft laws in establishing corporate climate due diligence.

As this thesis has argued, implementing climate due diligence as an autonomous requirement seem more effective than addressing climate-related risks through human rights due diligence. In fact, the duty with respect to climate change as applied in *Milieudefensie et al v Royal Dutch Shell* resulted in a binding legal obligation for Shell to reduce its GHG emissions. Here, the standards of the OECD and the UN were expressly used to interpret the ‘unwritten standard of care’ provided for in the Dutch Civil Code, which *ipso facto* led to the binding legal obligation for Shell to reduce its emissions.<sup>206</sup> In *Netherlands v Urgenda*, as this study has analysed, the District Court expressly states that the diverse international conventions and laws invoked – and notably Articles 2 and 8 ECHR – does not create direct obligations but can only lead to clarifying the concept of duty of care with respect to the climate.<sup>207</sup> On the contrary, the Court of Appeal contends that *Urgenda* can invoke these articles directly.<sup>208</sup> This suggests the difficult assessment of climate responsibility in human rights law. While such a dynamic interpretation did lead, *in fine*, to an emission reduction obligation, the obligation was found based on the States’ ‘power to control the collective Dutch emission level’ and resulted in a particular duty towards the fate of individuals.<sup>209</sup> While targeting State action, this case shows the main challenge in climate litigation be it against public or private actors: the ‘political intractability of the climate change problem’ complicates the identification of specific duty-bearers and makes it difficult to impose concrete obligations on how to address climate change. As this research has argued, these

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<sup>206</sup> *Milieudefensie et al v Royal Dutch Shell* paras 4.4.2 and 4.4.11

<sup>207</sup> *Netherlands v Urgenda*, CA para 35

<sup>208</sup> *ibid* para 45

<sup>209</sup> *The State of Netherlands v Urgenda Foundation*, ECLI:NL:RBDHA:2015:7196, 24 June 2015 [The Hague District Court] para 4.66 <<https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2015:7196>> accessed 9 May 2023 (*Netherlands v Urgenda*, DC)

difficulties seem exacerbated when using human rights law to evaluate entities' expected climate due diligence.

These judicial developments appear to be valuable opportunities to elucidate companies' concrete obligations as regards the climate and seem to foster the need for a comprehensive corporate due diligence scheme. Mandatory procedures would not only provide clear guidelines for companies on how to assess and address their climate impacts, but it would also establish a benchmark under which a company becomes negligent as regards the climate. Mandatory corporate climate due diligence could thus help identify the companies' specific responsibilities in relation to climate change.

## **5.2 Climate due diligence as a game-changer in the Union's climate policy: the necessity to engage with ELLs and revise the CSDD Directive proposal**

As civil society urges to take action, businesses have engaged in corporate social responsibility activities on a voluntary basis.<sup>210</sup> Although numerous companies actually have, many businesses have not and some even deliberately avoid it.<sup>211</sup> In response to such a lack of engagement, the EU has imposed disclosure obligations on larger European companies. In line with its environmental goals, the EU's 2014 Non-Financial Reporting Directive (NFRD) imposes companies to disclose (i) their current and potential environmental impacts, (ii) their use of renewable and non-renewable energy sources, (iii) their total GHG emissions, and finally (iv) their water and air pollution.<sup>212</sup> The NFRD thus makes obligatory certain elements of the due diligence process; namely, the transparency step. Climate change is also commendably considered. While companies have a duty to report on their contribution to climate change they have, however, no obligation to prevent and mitigate adverse impacts. Arguably, the Commission contends that the NFRD has

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<sup>210</sup> McCall-Smith and Rühmkorf (n 86) 113

<sup>211</sup> Irene Lynch Fannon, 'Apple tax: the core issues' in Clair Gammage and Tonia Novitz (eds), *Sustainable trade, investment and finance: toward responsible and coherent regulatory frameworks* (Edward Elgar Publishing, 2019) 336

<sup>212</sup> Directive of the European Parliament and of the Council 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1 para 7 (Non-Financial Reporting Directive)

not led to ‘sufficient action’ from companies which, in majority, overlook the ‘adverse impacts in their value chains’.<sup>213</sup> In parallel, the Union obliges businesses in the financial sectors to disclose their impacts on sustainability and on the environment in order to avoid greenwashing; these transparency obligations are provided for in the EU’s Taxonomy Regulation<sup>214</sup> and in its Sustainable Finance Disclosure Regulation.<sup>215</sup>

This brief overview of the EU's policy provisions concerning corporate responsibility underscores a significant gap in their approach to climate action. The current emphasis largely rests on disclosure, with less focus on prevention and mitigation, which are the true cornerstones of effective climate action. In its latest legislative developments, the EU seems to acknowledge the necessity to include prevention and mitigation activities. The newly adopted Corporate Sustainability Reporting Directive (CSRD) revising the NFRD aims to add ‘a substantive corporate duty for some companies to perform due diligence to identify, prevent, mitigate, and account for external harm resulting from adverse (...) environmental impacts in the company’s own operations, its subsidiaries and in the value chain.’<sup>216</sup> Moreover, the CSRD requires companies to disclose plans ensuring that their business model and strategy is compatible with the Paris Agreement objectives to limit global warming to 1.5 °C.<sup>217</sup> As such, the EU’s new legal direction highlights the lacunas in its current climate policy provisions regarding corporations. First, they insufficiently target climate impacts. Second, they do not mandate companies to engage with their entire value chains. Lastly, even though they impose transparency, they lack direct action to prevent and mitigate climate impacts which could be incentivized through effective enforcement mechanisms.

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<sup>213</sup> EU Proposal for a CSDD Directive (n 8) 4

<sup>214</sup> Regulation of the European Parliament and of the Council (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13 (Taxonomy Regulation)

<sup>215</sup> Regulation of the European Parliament and of the Council (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1 (Sustainable Finance Disclosure Regulation)

<sup>216</sup> EU Proposal for a CSDD Directive (n 8) 4

<sup>217</sup> Directive of the European Parliament and of the Council (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15 art 19(a) para 2(a)(iii) (Corporate Sustainability Reporting Directive)



While the proposed CSDD Directive aims to address all these issues, this thesis has argued that the proposal is ineffective in its current form. The study of the energy-intensive sector has helped understand the current shortcomings of the CSDD draft Directive. In fact, the complexity of EIIs' global value chains is specifically considered to be the root cause of their difficult decarbonization.<sup>218</sup> As this thesis has demonstrated, this sector is not only hard to abate in itself, but the globalization of its value chains hampers its capability to trace and monitor the life cycle of its products.<sup>219</sup> As such, the potential of mandatory corporate due diligence to facilitate the identification of adverse impacts across all the value chain is widely hailed. However, the CSDD proposal does not allow such effective monitoring of global value chains as it seems to rely on industry schemes – which have proven to be ineffective – for ensuring compliance across a company's global operations. Secondly, as EIIs currently face no direct obligation to decrease their emissions, integrating climate impacts in the corporate due diligence expected from them seems highly opportune. While the EU seems hesitant as to whether the denotation 'environmental impacts' includes climate considerations, analysis of the CSDD proposal illustrates that companies would not be held liable for their adverse climate impacts; as such, Article 15 – the sole provision targeting climate change – appears fundamentally insufficient. Finally, this same Article, which seems to target EIIs, enforces climate action duties on companies' operations expressly excluding global value chains. This study has demonstrated that the proposed CSDD Directive could promote corporate climate action, and notably that of the EIIs, if Article 15 targets global value chains or if a general climate change due diligence is mandated as an autonomous requirement.

Voluntary models have become obsolete. In fact, little effort has been made on the corporate front to drastically reduce GHG emissions and contribute to the attainment of the global climate objectives. While some companies have committed to the energy transition and climate neutrality objectives, the actions of some private actors are not sufficient to ensure that global climate change mitigation is effective. New regulatory instruments must ensure that companies reduce their emissions

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<sup>218</sup> Sebastian Oberthür, Gauri Khandekar, and Tomas Wyns, 'Global governance for the decarbonization of energy-intensive industries: Great potential underexploited' (2021) 8 *Earth System Governance* 1, 3

<sup>219</sup> *ibid*

both on the domestic and the international level. Mandatory corporate due diligence schemes seem effective in accounting for adverse human rights and environmental impacts; the potency of the actual climate situation commends that *climate* impacts are more efficiently accounted for. By ensuring that companies identify, prevent, mitigate and account for their adverse human rights and environmental impacts both domestically and abroad, the CSDD proposal is a welcome addition to the EU legal framework; integrating climate change due diligence as part of corporate responsibility would make the CSDD proposal a game-changer in the Union's climate policy. As the analysis of the implications of mandatory climate due diligence for the EIIs has demonstrated, such a revision of the proposal would not only promote but also facilitate corporate climate action.

This thesis has thus strived to shed light on the opportunity for a pivotal shift in the Union's climate agenda. Given that the EU actually has the possibility to include climate due diligence in its CSDD proposal, it appears to be a mere amendment away from enshrining climate due diligence in corporate climate action; in this way, the proposal can be seen as a game-changer in the EU's climate action framework. By integrating mandatory climate due diligence, the CSDD Directive would mark a significant turning point in the Union's policy, thereby heralding a new era in its approach to climate change mitigation.

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