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LEGAL FRAMEWORKS AND CORPORATE PRACTICES: a comparative study of corporate sustainability due diligence in France and Germany

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“It’s what you do in the present that will redeem the past and thereby change the future”

Paulo Coelho

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Abbreviations

BAFA – Bundesamt für Wirtschaft und Ausfuhrkontrolle (Federal Office for Economic Affairs and Export Control)
BHR – Business and Human Rights
BME - Bundesverband Materialwirtschaft, Einkauf und Logistik (Federal Association for Material Management, Purchasing and Logistics)
CCFD – Comité Catholique contre la Faim et pour le Développement (Catholic Committee against Hunger and for Development)
CSDDD – Corporate Sustainability Due Diligence Directive
CSR – Corporate Social Responsibility
CSRD - Corporate Sustainability Reporting Directive
ESG - Environmental, Social, and Governance
EU - European Union
LkSG – Lieferkettensorgfaltspflichtengesetz (German Supply Chain Due Diligence Act)
HRDD – Human Rights Due Diligence
IHK - Industrie- und Handelskammer (Chamber of Industry and Commerce)
ILO - International Labor Organization
MOSOP - Survival of the Ogoni People
NAPs – National Action Plans on Business and Human Rights
NCPs - National Contact Points
NGO – Non-Governmental Organization
OECD – Organisation for Economic Co-operation and Development
SA – Société Anonyme (Public Limited Company)
SARL – Société à Responsabilité Limitée (Limited Liability Company)
SAS – Société par Actions Simplifiée (Simplified Joint-Stock Company)
SMEs - small and medium-sized enterprises
SNC – Société en Nom Collectif (Partnership)
SRSG – Special Representative of the Secretary-General
UN - United Nations
UNGPs – United Nations Guiding Principles on Business and Human Rights
UNWG – United Nations Working Group on Business and Human Rights

General Notes

The body of the dissertation, including spaces and notes, occupies a total of 144.349 characters.

Abstract

This thesis discusses the evolving concepts of corporate liability in international supply chains against the backdrop of a comparative analysis between the French Duty of Vigilance Law and the German Supply Chain Due Diligence Act (*LkSG*). As globalization intensifies trade between the Global North and the Global South, human rights and environmental impact linked to supply chains have become highly contested issues. The research investigates the impact of these two legislative frameworks on corporate behaviors, highlighting their efficacy in promoting adherence and addressing ongoing limitations. Additionally, it evaluates the wider European context with the implementation of the Corporate Sustainability Due Diligence Directive (CSDDD), assessing how standardized legal frameworks may improve corporate accountability on a global scale. Modifications in light of the study advocate for broadened parameters of due diligence responsibilities, increased enforcing strategies, and a call for harmonization of domestic legislation with global benchmarks in order to increase transparency and accountability.

Resumo

Esta tese discute a evolução dos conceitos de responsabilidade das empresas nas cadeias de abastecimento internacionais, tendo como pano de fundo uma análise comparativa entre a lei francesa sobre o dever de vigilância e a lei alemã sobre a diligência devida na cadeia de suprimento (LkSG). À medida que a globalização intensifica o comércio entre o Norte Global e o Sul Global, os direitos humanos e o impacto ambiental ligados às cadeias de abastecimento tornaram-se questões altamente contestadas. O estudo investiga o impacto destes dois quadros legislativos nos comportamentos das empresas, salientando a sua eficácia na promoção da adesão e na resolução das limitações actuais. Além disso, avalia o contexto europeu mais amplo com a implementação da Diretiva relativa ao dever de diligência das empresas em matéria de sustentabilidade (CSDDD), avaliando a forma como os quadros jurídicos normalizados podem melhorar a responsabilidade das empresas à escala global. As alterações introduzidas à luz do estudo defendem parâmetros alargados de responsabilidades de diligência devida, estratégias de aplicação reforçadas e um apelo à harmonização da legislação nacional com referências globais, a fim de aumentar a transparência e a responsabilização.

Index

INTRODUCTION

Over the last decades, globalization of commerce has brought along global supply chains. They connect manufacturers from the Global South with businesses and customers from the Global North. Ideally, there would be supply chains that benefit all participants, with companies and consumers in the Global North benefiting from low production costs and, consequently, low prices, while the Global South benefited from job creation inducing economic development and progress.[1] Unfortunately, this idea does not represent the reality. Global North corporations frequently own or work with subsidiaries, subcontractors, and suppliers that often employ workers under poor and hazardous conditions, use child and forced labor, and engage in underpaid labor, all while disregarding fundamental human rights, freedoms, health and safety standards, and environmental concerns, since human and environmental rights are not always adequately safeguarded everywhere.[2]

Despite international responses, the exploitation within global supply chains is still taking place, underscoring the limitations of such responses. The collapse of the Rana Plaza factory in Bangladesh on April 24, 2013, serves as an example of the results led by the disregard of human rights by companies. Following the discovery of severe structural cracks in the eight-story building (which contained shops, a bank and garment factories), owners reportedly pressured the workers to return to work on the day after a warning was issued to evacuate the building. Ultimately over a thousand people were killed and thousands more injured when the building collapsed.[3] This tragedy exposed the severe inadequacies in existing international mechanisms, which often lack the enforcement power to compel corporate accountability for human rights violations. The international responses to such disasters have frequently been criticized for being reactive rather than proactive, focusing more on improving transparency and reporting rather than instituting substantive regulatory changes.[4] The Rana Plaza disaster highlighted not only the critical

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[1] Ruhl, G. (2020). *Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective*. Ssrn.com. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708196

[2] Clerc, C. (2021). The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.3765288

[3] Clean Clothes Campaign. (2019). *Rana Plaza*. Clean Clothes Campaign. https://cleanclothes.org/campaigns/past/rana-plaza

[4] FIDH - International Federation for Human Rights. (2014). One Year After the Rana Plaza Catastrophe : Slow Progress and Insufficient Compensation.

shortcomings in enforcing corporate accountability but also the broader difficulty of holding companies responsible for abuses occurring at lower tiers of their supply chains.[5]

In recent years, there has been growing support for implementing human rights due diligence obligations to uphold these rights in global supply chains.[6] Germany[7], France[8], and Norway[9] have enacted laws requiring companies to exercise due diligence to protect human rights across their global networks. However, there are challenges associated with implementing such domestic legislations. Though progressive, Germany's Supply Chain Due Diligence Act, for example, focuses mostly on larger companies meaning that a significant portion of a company's supply chain could still be unaccounted for. France's Duty of Vigilance Law has also received criticism because it does not provide clear means of enforcement and uses vague terminology. These challenges demonstrate that while national legislation may articulate regulations well in theory, implementation and enforceability are challenging.

Other countries, including the Netherlands[10] and Belgium[11] are considering similar legislation. The Netherlands has also adopted a specific law against child labor[12] while the United Kingdom's Modern Slavery Act of 2015 emphasizes reporting requirements over due diligence obligations.[13]

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https://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/46_fidhbdranaplaza_/46_fidhbdranaplaza_en.pdf

[5] Clerc, C. (2021). The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.3765288

[6] Ruhl, G. (2020). *Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective*. Ssrn.com. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708196

[7] *Lieferkettensorgfaltspflichtengesetz*, (2021). https://www.gesetze-im-internet.de/lksg/LkSG.pdf

[8] *Loi de vigilance*, (2017). https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/

[9] *Transparency Act* (2021). *Lov om virksomheters åpenhet om leverandørkjeder* [Law on Transparency in Supply Chains]. https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf

[10] Bill for Responsible and Sustainable International Business Conduct, (2021). *MVO Platform* (unofficial translation). 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

[11] *Draft bill on corporate social responsibility* (2021). *Chambre des représentants de Belgique* [Chamber of Representatives of Belgium]. https://www.dekamer.be/FLWB/PDF/55/1903/55K1903001.pdf

[12] *Wet aanpak modern slavery and child labour* (2019). *Staatsblad van het Koninkrijk der Nederlanden* [Official Gazette of the Kingdom of the Netherlands]. https://zoek.officielebekendmakingen.nl/stb-2019-401.html

[13] Modern Slavery Act. *UK Legislation*. https://www.legislation.gov.uk/ukpga/2015/30/contents

Despite the emergence of binding frameworks, corporate responsibility in upholding human rights remains is still predominantly a soft-law domain: companies are expected to respect human rights but are not obligated to do so.

On May 2, 2024, the European Parliament and the Council of the EU adopted the final version of the Corporate Sustainability Due Diligence Directive ("CSDDD"), which was subsequently published in the Official Journal of the European Union on July 15, 2024. Lara Wolters, the Parliament's lead on this file, hailed the CSDDD as a "historic breakthrough".[14] It will compel many EU and non-EU businesses to conduct due diligence on human rights and the environment in respect of all operations worldwide and chain of activities, and formulate a transition plan that will mitigate climate change. [15]The CSDDD seeks to address the limitations of existing national legislations by introducing a unified framework that aims to enforce due diligence more effectively across borders. It represents a significant shift towards comprehensive accountability, aiming to bridge the gaps left by fragmented national laws.

The existing national legislations provided essential context for the European Commission's proposal, serving as precedents for incorporating due diligence obligations at the European level. European legislation is crucial to prevent companies from exploiting regulatory differences between countries, as they might establish operations in nations with more lenient rules.[16] The CSDDD's approach is designed to mitigate such regulatory arbitrage by establishing a more rigorous and standardized set of requirements, which could enhance overall compliance and accountability.

This thesis aims to examine the most significant frameworks at the European level, specifically the French and German acts. By comparing these acts, this thesis aims to elucidate how these frameworks have advanced due diligence practices within

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[14] *EU Corporate Sustainability Due Diligence Directive (CSDDD)*. (n.d.). PlanA. https://plana.earth/policy/eu-corporate-sustainability-due-diligence-directive-csddd#:~:text=Who%20falls%20under%20the%20scope,EU%20and%20non-EU%20companies.

[15] Vooren, H. E.-C., Daniel Feldman, Cándido García Molyneux, Paul Mertenskötter, Emma Sawatzky, Bart Van. (2023). *Provisional Agreement on the EU's Corporate Sustainability Due Diligence Directive (CSDDD): Key Elements of the Deal*. Inside Energy & Environment. https://www.insideenergyandenvironment.com/2023/12/provisional-agreement-on-the-eus-corporate-sustainability-due-diligence-directive-csddd-key-elements-of-the-deal/

[16] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

corporations and assess their effectiveness in promoting human rights and environmental protections. The central research question this dissertation seeks to address is: **"How does the hardening of legal frameworks influence the advancement of human rights and environmental protections in global supply chains?"** By evaluating the effectiveness of current legal frameworks and their impact on corporate behavior, the thesis will provide insights into how these frameworks still are not sufficient to address corporate responsibility, and how the Corporate Sustainability Due Diligence Directive (CSDDD) can build on these precedents to foster more robust protections and ensure greater corporate accountability in global supply chains.

In the first chapter, the historical evolution of the business and human rights discourse is explored, focusing on early frameworks and the UN Guiding Principles. The second chapter examines the due diligence processes in France and Germany, detailing the French 'Duty of Vigilance' Law and the German Supply Chain Due Diligence Act. The third chapter analyzes the Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence. This is followed by a comparative analysis between the French and German Acts, focusing on the scope of application, standards of compliance, transparency, and enforcement. The thesis concludes with recommendations for improving the effectiveness of these legal frameworks.

The regulatory frameworks governing corporate due diligence in France and Germany are compared and evaluated in this thesis through a comparative legal study. The *Loi de Vigilance*, the *LkSG*, and the Corporate Sustainability Due Diligence Directive of the European Union are examples of primary sources. Academic literature, reports from non-governmental organizations (NGOs), and case law that illustrate how these laws are applied in practice are examples of secondary sources. The study employs a qualitative methodology, concentrating on how these regulations affect corporate conduct and how they help advance environmental and human rights. Case studies are used to show how these rules work in reality and where they fall short; examples include the collapse of the Rana Plaza and lawsuits against companies like EDF Renewables. This mixed-method approach ensures a comprehensive understanding of both the legal frameworks and their real-world applications.

1. EVOLUTION OF BUSINESS AND HUMAN RIGHTS DISCOURSE: FROM PRECURSORS TO THE UN GUIDING PRINCIPLES

Throughout history, corporations have inflicted environmental damage and infringed upon human rights in the pursuit of their operations since the lack of stringent regulation has hindered efforts to enforce accountability for these transgressions. Nonetheless, recent developments have signaled a change: emerging legal frameworks are beginning to address these issues, marking a shifting landscape in the relationship between corporations and both human rights and environmental preservation. Despite the remaining challenges, the ongoing discourse on Business and Human Rights (BHR) reflects incremental progress towards a more responsible and sustainable approach.

To understand the current due diligence frameworks, it is necessary to examine the pathway traveled by the business and human rights debate, highlighting key events, debates and initiatives that have shaped the current landscape. This chapter will trace the development of the discourse on business and human rights from its precursors to the UN Guiding Principles. The key themes are how the emphasis shifted from state accountability to multinational corporations and the major events that influenced this change. Through historical events, case studies, and global shifts, the aim is to illustrate the journey of the business and human rights debate, ultimately leading to an understanding of the framework of the due diligence process in specific regional contexts.

1.1. Historical development of BHR debate

The establishment of the UN after World War II constituted a milestone in the modern human rights movement, even though problems of enforcement remained. The central issue was simply that no structure existed that could effectively ensure that member states were accountable for any abuse of human rights against their citizens.[17] This was the beginning of a shift in the focus from the member states to multinational enterprises as responsible for preventing and redressing human rights violations.

[17] Santoro, M. A. (2015). Business and Human Rights in Historical Perspective. *Journal of Human Rights*, *14*(2), 155–161. https://doi.org/10.1080/14754835.2015.1025945

One event and an example of a violation of human rights by the state was the killing of the activist Ken Saro-Wiwa, which sparked a chain of events that marked the start of the BHR movement on a global scale. Ken Saro-Wiwa, also known as Kenule Beeson Tsaro-Wiwa, was a human rights activist who dedicated his life to protecting the environment of the Niger Delta region and the rights of the Ogoni people. His assassination by the military regime of Abacha in November 1995 marked a major shift in the global business and human rights landscape by exposing the roles that international companies had been playing in the Ogoni conflict.[18] Since the 1970s, Ken Saro-Wiwa had organized significant protests in opposition to the severe environmental degradation in Nigeria's Niger Delta and the destruction of the livelihoods of tens of thousands of Indigenous Ogoni people at the hands of Royal Dutch Shell, to solve these problems and promote human rights, Saro-Wiwa organized a nonviolent organization known as the organization for the Survival of the Ogoni People (MOSOP).[19] In May 1994, the Nigerian government, closely linked with the interests of foreign businesses, kidnapped Saro-Wiwa from his house and imprisoned him without cause. After, a military tribunal wrongly accused him of killing four Ogoni leaders and held a sham of a trial. On November 10, 1995, Saro-Wiwa and his eight co-defendants were hanged despite widespread condemnation and clemency petitions, their only offense was calling for equitable compensation for the destruction caused by oil production in Ogoni lands, as well as environmental justice.[20]

Saro-Wiwa activism was responsible for bringing into light the adverse environmental and human rights impacts of multinational corporations, showing the exploitation of resources in the Global South, especially by oil companies, increasing scrutiny regarding the ethical conduct of corporations, leading a shift to public perception and making the global community more alert to the need for corporate accountability and responsible business practices beyond national borders.

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[18] *Ken Saro-Wiwa - Human Rights Profile - The Raoul Wallenberg Institute of Human Rights and Humanitarian Law*. (2023). The Raoul Wallenberg Institute of Human Rights and Humanitarian Law. https://rwi.lu.se/blog/ken-saro-wiwa-human-rights-profile/

[19] *Nigeria: Advocates remember Ken Saro-Wiwa, convicted of murder & executed after he protested oil pollution by Shell*. (2015). Business & Human Rights Resource Centre. https://www.business-humanrights.org/en/latest-news/nigeria-advocates-remember-ken-saro-wiwa-convicted-of-murder-executed-after-he-protested-oil-pollution-by-shell/

[20] *Ken Saro-Wiwa - Human Rights Profile - The Raoul Wallenberg Institute of Human Rights and Humanitarian Law*. (2023). The Raoul Wallenberg Institute of Human Rights and Humanitarian Law. https://rwi.lu.se/blog/ken-saro-wiwa-human-rights-profile/

Nevertheless, the widespread account of the BHR movement's origins ignores the local Ogoni protests of the 1970s and places the movement's importance on its worldwide growth in the 1990s. Therefore, Ken Saro-Wiwa's death and the subsequent international demonstrations might indicate a more structured international business and human rights movement and debate, or perhaps the emergence of a broader concern about business practices related to human rights in the North.[21]

Similarly, the interactions of corporations with the South African apartheid system throughout the 1970s and 1980s often receive less attention in discussions of the BHR movement's origins. While many foreign corporations operating in South Africa adhered to and supported the racist apartheid laws and regulations, others, led by the Baptist minister and General Motors board member Leon Sullivan, objected to the unconstitutional laws and ultimately withdrew from the country.[22]

The activities of Western corporations in South Africa under the apartheid regime led Leon Sullivan to organize a group of companies around what is now known as the "Sullivan Principles" — a set of guidelines requiring companies to engage in civil disobedience, actively work to displace the apartheid regime, and ultimately leave South Africa. This set of principles was the first voluntary corporate human rights framework requiring businesses to report on their human rights policies.[23] While these principles were a step forward, they were not without limitations. They provided a model for ethical corporate conduct but lacked binding enforcement mechanisms, illustrating how early attempts at corporate responsibility were often incremental rather than transformative.

Through this process, a view could be held that the meaning of corporate responsibility has been expanding from solely economic and legal responsibilities to also include ethical and human rights. This development has increasingly supported the

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[21] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

[22] Risen, J. (1986). *GM to Pull Out of South Africa : Cites Losses, Unwillingness of Regime to Dismantle Apartheid*. Los Angeles Times; Los Angeles Times. https://www.latimes.com/archives/la-xpm-1986-10-21-mn-6561-story.html

[23] Muchlinski, P. (2021). The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights. *Business and Human Rights Journal*, *6*(2), 1–15. https://doi.org/10.1017/bhj.2021.14

argument that corporations must account for all their actions to the greater public, rather than simply being responsible to their owners or shareholders themselves.

The 1984 Bhopal gas disaster was another historical turning point for the modern business and human rights movement. On December 3, 1984, a gas leak in a Union Carbide India Ltd. factory—at the time a subsidiary of the American firm Union Carbide Corporation—released 47 tons of extremely toxic methyl isocyanate gas into the air of the heavily populated Bhopal region. To many scholars, it has been considered the worst disaster in industrial history and a prime example of the dangerous consequences of existing failures in governance. More than three decades have passed, and the victims and their families are still seeking compensation, the culprits responsible for this heinous crime are still at large, and the victims are not as yet fully compensated. [24] The struggle for justice and compensation that victims have continued to wage underlines a broader failure to develop comprehensive regulatory regimes in the aftermath of disasters. The Bhopal disaster galvanized both an academic inquiry into corporate liability and the missed opportunities that existed to establish a far stronger framework of regulation and prevention measures.

Some of the earliest scholarly contributions to business and human rights in both the legal and non-legal fields were inspired by the Bhopal tragedy and the history of companies operating in South Africa during the apartheid era. However, academic research on BHR in general remained scarce and isolated during the 1970s and 1980s, and it was only at the end of the 1990s that it started to take off.[25]

Following the dissolution of the Soviet Union in the early 1990s, there was a sharp rise in international trade. The development of complex and long-lasting international supply chains, the rise in the population involved in and affected by this kind of trade,

[24] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27
[25] *Ibidem*

and the growing dispersion of business production processes across several industries and countries have all been characteristics of global trade.[26]

Global trade growth has lowered poverty rates and improved living standards for some people.[27] Many, however, were deprived of the advantages of progress and experienced violations of their human rights such as forced labor, human trafficking, and child labor in global supply chains; occupational accidents; and work-related disease; harm to communities that lost livelihoods, access to health care, clean water, and suffered other human rights harm as a result of impacts from the growing, harvesting, or extraction of commodities for global supply chains, among many others.[28]

These experiences gave rise to the idea that multinational enterprises were skilled giants that dominated civil society and governments, especially in less developed countries, contributing to the shift of focus from state responsibility for human rights violations to those companies.[29] There was a notion that governmental control over this process was diminishing as globalization was speeding up, and modern multinational firms were increasing in size, importance, and number. According to later BHR literature, the governance gaps are the cause of the human rights crisis, and as a result, this process allowed human rights campaigners to concentrate on business as a potentially more receptive target of their campaigns since they were growing increasingly frustrated with the lack of state responsibility.[30]

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[26] Sherman III, J. (2020). *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights A Working Paper of the Corporate Responsibility Initiative*. https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf

[27] World Bank. (2017). *The Role of Trade in Ending Poverty*. World Bank. https://www.worldbank.org/en/topic/trade/publication/the-role-of-trade-in-ending-poverty

[28] *A Business Reference Guide HUMAN RIGHTS TRANSLATED 2.0 Prepared in collaboration with the Office of the United Nations High Commissioner for Human Rights and the United Nations Global Compact*. (2017). http://www.ohchr.org/Documents/Publications/HRT_2_0_EN.pdf

[29] Santoro, M. A. (2015). Business and Human Rights in Historical Perspective. *Journal of Human Rights*, *14*(2), 155–161. https://doi.org/10.1080/14754835.2015.1025945

[30] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

1.2. First frameworks on corporate human rights responsibility

It is fundamental to observe the attempts to establish and institutionalize corporate human rights responsibility. The first one reaches back to the 1970s when the UN made an early attempt to control multinational businesses' investment activity by establishing a new Center on Transnational Corporations in response to rising worries among developing countries' uncertainties about the growing influence of multinational firms. The center's primary responsibility was to develop a thorough code of conduct for multinational corporations. However, the draft code project was shelved and the Center shut down some years later due to opposition from Western governments and multinational corporations themselves.[31]

In 1976 the OECD Guidelines for Multinational Enterprises was launched, aimed at states instead of corporations, and being a voluntary alternative. Despite not being legally binding, the OECD Guidelines adopt a soft enforcement mechanism, the National Contact Points (NCPs).[32] However, the voluntary nature of the OECD Guidelines and their reliance on National Contact Points often led to inconsistent application and limited effectiveness in compelling corporate behavior changes.[33]

There was a major push for a more coordinated and robust international effort on BHR in the mid to late 1990s, as seen previously. After Ken Saro-Wiwa's death, there was a proliferation of high-profile reports by human rights NGOs regarding the relationship between Western companies and oppressive governments in the developing world.[34] This also includes prominent court developments in the United States that opened doors for suing firms that breach human rights while operating abroad, thereby raising

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[31] *Ibid.*
[32] *Ibid.*
[33] Holm, A. (2022). *Understanding the effectiveness of OECD National Contact Points: uncovering corporate commitments as outcomes of NCP dialogue on human rights issues - NOVA BHRE*. NOVA BHRE. https://novabhre.novalaw.unl.pt/understanding-the-effectiveness-of-oecd-national-contact-points-uncovering-corporate-commitments-as-outcomes-of-ncp-dialogue-on-human-rights-issues/
[34] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

more interest in a BHR discussion from around the mid-1990s to early 2000s. These high-profile "pilot" cases involved well-known companies like Chiquita, Unocal, and Shell.[35]

Both NGO campaigns and the rising possibility of human rights lawsuits have played significant roles in pressuring businesses to begin implementing explicit human rights policies, sign up for and take part in voluntary multi-stakeholder initiatives, or mention human rights in their sustainability or Corporate Social Responsibility (CSR) reporting. However, CSR was not convincing civil society to be a strong instrument since it was not legally binding, which left space for companies to avoid real accountability concerning human rights violations while embellishing their reputation. Therefore, there was pressure for stronger laws, improved application of current laws, and an international system of legal accountability.[36]

The UN Global Compact was introduced by Kofi Annan, the former Secretary General of the United Nations, in the year 2000, and is often regarded as the most effective global soft-law effort for sustainable business. Although the initiative's effect on corporate behavior suffers from some skepticism, it had a significant symbolic impact on the BHR movement. Along with recognizing corporations' relevance to the larger human rights movement and, more importantly, their significance for human rights outside of employment and labor relations, the UN also demonstrated its readiness and willingness to engage businesses on their social and environmental impacts. However, its voluntary participation in the UN Global Compact has become a common tactic for businesses to use as justification for why stricter regulation on corporate responsibility was unnecessary or even harmful, whereas, during its founding years, it was seen as a symbol of what many hoped would be the beginning of a transformation of the global economy.[37]

In 1998, the UN Sub-Commission on Human Rights launched the drafting of the "Norms on the Responsibility of Transnational Corporations and Other Business

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[35] *Ibid.*
[36] Sherman III, J. (2020). *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights A Working Paper of the Corporate Responsibility Initiative*. https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf
[37] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

Enterprises with Regard to Human Rights". While these principles were pushed differently, they had many of the same objectives as the UN Global Compact. The goal of the UN Draft Norms was to establish a legally binding international framework on corporate human rights accountability; however, the proposal was shelved in 2003 due to a lack of support and the prevailing global neoliberal stance that favored voluntary over mandatory regulations. [38] This abandonment of the Norms represents another missed opportunity for advancing binding international standards.

It is possible to say that the first BHR initiative on a global scale was the UN Draft Norms. This is because although the UN Global Compact focused on human rights, it was always intended to be a CSR program that was more comprehensive in scope with a non-binding character, focusing on a wider variety of concerns. Meanwhile, the UN Draft Norms were developed to address corporate human rights obligations in a distinctive manner and through the application of international law.[39]

By definition, CSR is a voluntary effort that businesses make to address social, environmental, and broader issues as a result of their own self-guided decisions. The BHR framework, on the other hand, establishes a universal benchmark that which corporate conduct is measured. This benchmark is based on globally acknowledged human rights principles. Human rights are consequently, at least conceptually, universal, indivisible, and interconnected, and priorities cannot be freely selected a la carte, in contrast to CSR, which is selective and discretionary.[40]

With neoliberal globalization, a binding framework for BHR obligations was far away from becoming a reality. Still, there was the need to walk forward with the theme after the failure of the UN Draft Norms. Taking that into consideration, John Ruggie - the newly created position of SRSG in 2005 – spent six years creating a set of guiding principles outlining the fundamental duties that governments and corporations have concerning human rights. They are built upon an interconnected, three-pillar "Protect,

[38] *Ibid.*
[39] *Ibid.*
[40] Marslev, K. (2020). *Doing well by doing right?* The Danish Institute for Human Rights. https://www.humanrights.dk/files/media/document/Rapport_DoingWell_tilg%C3%A6ngelig.pdf

Respect, and Remedy" framework.[41] The understanding of what it means for states and enterprises to uphold corporate responsibility to protect human rights is represented by the UNGPs.[42]

> First, states must employ appropriate legislation, policies, regulations, and adjudication to safeguard human rights against violations by outside parties, including the corporate sector (UNGPs 1–10). Second, businesses have an obligation to uphold human rights; this entails identifying, preventing, and addressing violations of human rights resulting from their operations and business relationships (UNGPs 11–24). Third, States and corporate entities have a responsibility to ensure that people who have been harmed have access to an appropriate remedy (UNGPs 25–31)[43].

The UN Human Rights Council adopted the UNGPs with unanimous consent, and they became operative in June 2011. According to the SRSG's study results, there remains a governance gap that prevents global society from responding appropriately when businesses violate human rights. The conclusion was that self-regulation and voluntary efforts alone would not solve the issue on a global scale. Simultaneously, he realized that his mandate would not allow him to achieve the goal of developing a comprehensive legal framework.[44]

The UNGPs were criticized for some reasons, some business ethicists have criticized their lack of moral foundation.[45] This might be because the UNGPs gave more attention to commercial interests while ignoring the individuals impacted negatively by business practices. Since the UNGPs are not legally binding for corporations and do not have an explicit enforcement mechanism, the lack of enforcement makes the distinction between the UNGPs and traditional corporate social responsibility less pronounced in

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[41] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

[42] United Nations. (2011). *Guiding Principles on Business and Human Rights*. United Nations. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[43] Sherman III, J. (2020). *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights A Working Paper of the Corporate Responsibility Initiative*. https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf

[44] *Ibid.*

[45] Santoro, M. A. (2015). Business and Human Rights in Historical Perspective. *Journal of Human Rights*, *14*(2), 155–161. https://doi.org/10.1080/14754835.2015.1025945

practice than in theory, despite the differences between the responsibilities of states and companies to protect human rights.

The UNGPs did, however, raise the bar and the expectations on which civil society organizations were able to launch more focused and demanding campaigns to improve domestic and global infrastructures to hold companies accountable for their human rights conduct. This was because they addressed both states and corporations and received widespread endorsement from both groups.[46]

Following his resignation as SRSG, John Ruggie's mission was taken over by the UN Working Group on BHR (UNWG), whose job it was to promote and facilitate the UNGPs' adoption and implementation process.[47]

Though recent treaty talks at the UN level have grown more tangible and concrete, the most significant and long-lasting developments are currently taking place at the national and regional levels, at least in the short and medium terms. Many states have already announced their "National Action Plans" (NAPs) on BHR or are in the process of considering taking the initial steps in that direction.[48] NAPs might be interpreted as government pledges to promote and advance, through the plans' specified methods, corporate respect for human rights. By now, the majority of existing NAPs are not very clear or decisive. They do not want to propose any new legally binding obligations, are careful about what they propose, and prefer to emphasize the past rather than the future.[49] However, they do underline the growing relevance of BHR for national policy agendas as well as indicate governments' seriousness in moving further along this dialogue.

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[46] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

[47] *Working Group on Business and Human Rights*. (n.d.). OHCHR. https://www.ohchr.org/en/special-procedures/wg-business

[48] Methven O'Brien, C., Mehra, A., Blackwell, S., & Poulsen-Hansen, C. B. (2015). National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool. *Business and Human Rights Journal*, *1*(1), 117–126. https://doi.org/10.1017/bhj.2015.14

[49] *Updated assessment of existing National Action Plans on Business and Human Rights*. (2021). European Coalition for Corporate Justice. https://corporatejustice.org/news/updated-assessment-of-existing-national-action-plans-on-business-and-human-rights/

Notwithstanding the hesitation shown in the majority of NAPs, there have been notable advancements on the subject of BHR in both domestic and regional legislation. In the field of BHR, several nations have passed historic laws in recent years. Perhaps most importantly, France established a revolutionary Duty of Vigilance Law that requires the biggest firms in the nation to undertake due diligence on human rights and environmental matters.[50] Although limited to child labor, the Netherlands has enacted a related law, while Britain's UK Modern Slavery Act, which requires businesses to investigate and report mechanisms for preventing human trafficking and modern slavery, stands out as an example for other countries[51]. Many other nations are either in the process of implementing or are now debating various efforts aimed at strengthening and enhancing local solutions.[52] These national laws represent critical steps forward but also underscore the challenges of creating comprehensive and enforceable regulations on a global scale.

Finally, this historical review has revealed the complex development of the BHR discourse, from its early phases characterized by regional activism in the Global South to the global movements and critical moments that have brought it to the attention of the international community. It is clear from following the development of viewpoints and reactions that every stage of this story has profoundly influenced our understanding of human rights and corporate responsibility. After laying this foundation, we now focus on a thorough examination of the UNGPs, which are among the most significant—if not the most—international frameworks for due diligence procedures.

1.3.The United Nations Guiding Principles on Business and Human Rights

In 2008, the United Nations endorsed the 'Protect, Respect and Remedy Framework' for business and human rights. According to this framework, States have the

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[50] Cossart, S., Chaplier, J., & Beau de Lomenie, T. (2017). The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All. *Business and Human Rights Journal*, *2*(2), 317–323. https://doi.org/10.1017/bhj.2017.14

[51] Although both address labor issues, the Netherlands has enacted a law that imposes due diligence obligations specifically related to child labor, whereas Britain's UK Modern Slavery Act focuses on reporting obligations related to modern slavery.

[52] Wettstein, F. (2020). *The History of "Business and Human Rights" and its Relationship with "Corporate Social Responsibility."* ResearchGate. https://www.researchgate.net/publication/341164048_The_History_of_%27Business_and_Human_Rights%27_and_its_Relationship_with_%27Corporate_Social_Responsibility%27

duty under international human rights law to protect whoever is in their territory and/or jurisdiction from human rights violations perpetrated by companies. To achieve this, States must enact robust laws and regulations to prevent and deal with infringements on human rights relating to business, as well as to guarantee that individuals whose rights have been harmed have access to a proper legal remedy.[53]

The responsibility of businesses is also addressed by this framework. According to it, regardless of their size or sector, businesses have an obligation to uphold human rights anywhere they do business. So, companies must be aware of their current and potential impacts to prevent and mitigate abuses, as well as to address adverse impacts in which they participate.[54]

The UN Framework also recognizes that communities and individuals have a fundamental right to receive an effective remedy when their operations breach their rights. States are required to ensure that those affected have access to a fair and efficient legal remedy or other acceptable extrajudicial procedure. In the interim, businesses should set up or take part in efficient grievance procedures for any people or communities that they negatively affect through their operations.[55]

The UNGPs is considered the most reputable normative framework in the world for promoting ethical business practices and addressing violations of human rights in international supply chains and corporate activities.[56] Under the UNGPs, businesses and states have different but complementary duties. All States and businesses, regardless of size, sector, location, ownership, or structure, are bound to these principles.[57]

The UNGPs do not create new international law obligations, however, they do provide directions for action, establishing guidelines for the development of laws, regulations, and procedures that corporations and states should follow in accordance with

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[53] *The UN Working Group on Business and Human Rights*. (n.d.). https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.
[54] *Ibid.*
[55] *Ibid.*
[56] *European Union United Nations Guiding Principles on Business and Human Rights*. (n.d.). https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf
[57] *Ibid.*

their unique responsibilities. The UNGPs provide a worldwide reference by which the actions of nations and businesses can be evaluated.[58]

With 31 principles, the UNGPs are divided into 3 pillars – Protect, Respect and Remedy.

The first pillar, composed of the first 10 principles, stipulates the state's duty to protect human rights in the context of business operations. States are required to accomplish this by passing laws, rules, and policies that effectively clarify what is expected of businesses. By implementing this, States certify that the necessary measures are in place to prevent, investigate, punish, and redress adverse human rights impacts.[59] The UNGPs have been instrumental in encouraging the development of national laws that incorporate human rights considerations, but enforcement remains inconsistent.

The Pillar 2, composed of principles 11 to 24, specifies how companies can determine how their actions negatively affect human rights and demonstrate that they have the policies and processes in place to remedy those effects. Companies ought to have a policy guiding them to fulfill this obligation. To identify, cease, and minimize violations of human rights, businesses should also do continuing due diligence.[60] Due diligence on human rights is the process of determining and resolving how a company's operations, goods, supplier and business partner networks, and human rights are affected.[61] Nonetheless, companies ought to activate remedial actions to address the adverse effects they have either caused or allowed, even if these impacts have been carried out by suppliers or business partners and the duty to respect applies to all businesses, regardless of size, industry, or location, even though the steps that they must take to fulfill it will vary depending on their scale or complexity.[62] Despite these recommendations, many

[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] *The UN Working Group on Business and Human Rights*. (n.d.). https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.
[62] *Ibid.*

companies' due diligence procedures perform differently; some advance significantly while others fall behind.[63]

Taking this into account, hard law has been seen as having a greater ability to encourage "companies to move more rapidly towards respecting the human rights of all affected stakeholders," notwithstanding its limitations.[64]

Accessible, predictable, equitable, transparent, and rights-consistent services must be provided to victims of human rights breaches, according to Pillar 3, which is made up of principles 25 through 31. The Guiding Principles specify that a provider's obligation to safeguard human rights includes making sure that, in cases where businesses operating within its borders violate such rights, the State provides affected parties with access to an effective remedy. State-based domestic judicial mechanisms must be able to address business-related violations of human rights, and they must not erect obstacles (like administrative fees or a shortage of language interpreters) that prohibit victims from presenting their cases. This is part of the state's obligation to ensure that everyone has access to an effective remedy. It implies more than just that nations should strengthen their legal systems. In addition, as part of an all-encompassing State-based redress system, States must establish adequate and efficient extrajudicial grievance procedures that can hear and decide business-related human rights concerns. The concepts of access to remedies are not limited to State laws, they also state that businesses must set up or take part in efficient processes for receiving and handling complaints from people and communities who might be negatively impacted by their operations, highlighting the fact that the basis of operational-level initiatives should be real interaction and dialogue with the stakeholder groups whose rights are being protected.[65]

As we transition to the next chapter, it becomes evident that effective due diligence is a critical component in aligning with the UNGPs. Germany's and France's approaches

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[63] Bright, C., Duarte, A., & Pacheco, S. (2022). *Human Rights Due Diligence: From Expectations to Obligations*. PLMJ Think Tank. https://thinktank.plmj.com/pt/sustentabilidade-corporativa/forum/human-rights-due-diligence-from-expectations-to-obligations/130/

[64] *Corporate respect for human rights has gained momentum – the stage is set for regulation to speed things up*. (n.d.). World Benchmarking Alliance. https://www.worldbenchmarkingalliance.org/publication/chrb/findings/44461/

[65] *The UN Working Group on Business and Human Rights*. (n.d.). https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

to due diligence will offer insights into how specific jurisdictions operationalize these global principles, demonstrating the practical application of ethical business practices and human rights protection.

2. DUE DILIGENCE PROCESS IN FRANCE AND GERMANY

2.1.The French 'Duty of Vigilance' Law (*Loi de Vigilance*)

The tragic collapse of the Rana Plaza building in Bangladesh in April 2013 was the pivot point for the introduction of the Duty of Vigilance Law in France. The incident resulted in the loss of over a thousand lives of workers in the textile industry who were supplying products to European brands. Following numerous similar disasters, this catastrophic event underscored the inadequacy of existing standards for holding multinational corporations accountable. It also emphasized the necessity of integrating international guidelines and declarations, such as the OECD Guidelines for Multinational Enterprises (1976, notably updated in 2011 and 2023), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977, revised in 2006), the UN Guiding Principles on Business and Human Rights and the Council of Europe Recommendation on Human Rights and Business (2016) into domestic legal frameworks.[66]

Since the UN Human Rights Council adopted the "Guiding Principles on Business and Human Rights," and established a global body of soft law in June 2011, businesses have been required by morals to uphold human rights. By passing a law establishing a "duty of vigilance" for corporations on March 27, 2017, France became the first nation to codify these expectations into binding legal requirements, elevating them from simple ambitions to hard law.[67]

However, the legislative process for the French law was lengthy and heavily influenced by lobbying efforts from multinational corporations that had concerns about

[66] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

[67] Buchman, L. (n.d.). *The French Law on Duty of Vigilance Business and Human Rights – From soft law to hard law, the French experience*. La Grande Bibliothèque Du Droit. https://www.lagbd.org/images/5/52/Art_buchman_iwrz_the_french_law_on_the_duty_of_vigilance-3.pdf

the new duty negatively impacting the competitiveness of French business groups.[68] This resulted in a final version that, while progressive, was shaped by significant compromises.

In the final days of President François Hollande's term, the law was passed. It was mostly the product of the efforts of a deputy named Dominique Potier, who established a collaborative working group in 2012 with the participation of Members of Parliament, NGOs, and attorneys. Potier served as the bill's 'rapporteur' at the Commission on Legal Affairs during the entire legislative process. Despite facing opposition from the business community, trade unions consistently voiced support for the initiative and despite these challenges, the National Assembly adopted the bill by nearly unanimous vote with the act being incorporated into the Commercial Code through the addition of two new articles in March 2017.[69]

The *Loi de Vigilance* consists of these two provisions incorporated into the French Commercial Code (Articles L. 225-102-4 and L. 225-102-5 CCom). They mandate French companies to develop, publish, and execute a vigilance plan, which must encompass reasonable measures aimed at identifying and preventing violations of human rights and fundamental freedoms, as well as serious bodily harm, environmental damage, or health risks. Furthermore, they outline various sanctions if the vigilance plan is either not formulated, published, or implemented adequately.[70]

The *Loi de Vigilance* follows the primary operational principle of putting companies' responsibility to respect human rights into practice, as established by the UNGPs, by mandating companies to conduct human rights due diligence.[71] It is considered unique since it creates real obligations for due diligence on human rights, meaning that the covered enterprises must take concrete steps to safeguard human rights

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[68] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.33

[69] Clerc, C. (2021). The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.3765288

[70] Buchman, L. (n.d.). *The French Law on Duty of Vigilance Business and Human Rights – From soft law to hard law, the French experience*. La Grande Bibliothèque Du Droit. https://www.lagbd.org/images/5/52/Art_buchman_iwrz_the_french_law_on_the_duty_of_vigilance-3.pdf

[71] *French Corporate Duty Of Vigilance Law Frequently Asked Questions*. (n.d.). European Coalition for Corporate Justice. https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf

(Article L. 225-102-4 I para. 3 CCom).[72] Meanwhile some frameworks such as the UK Modern Slavery Act and the European Non-Financial Reporting Directive are limited to straightforward reporting or disclosure requirements. Moreover, it covers human rights and the environment generally, whereas, for example, the Dutch Child Labor Act and the European Conflict Minerals Regulation only safeguard certain human rights.[73]

The Act seeks to hold multinational companies responsible for catastrophes both domestically and internationally, as well as for obtaining damages for victims of environmental and human rights violations by establishing a 'vigilance plan' including reasonable but adequate measures to identify and prevent critical impacts on human rights and fundamental freedoms, on health and safety, and the environment caused by the companies' activities and its direct and indirect subsidiaries, also from the activities of subcontractors or suppliers with whom there is an established commercial relationship.[74]

Third parties being subject to human rights due diligence obligations (Article L. 225-102-4 I para. 3 CCom) is another remarkable achievement of the French Act. Companies covered by the law are required to do more than just uphold human rights, they must guarantee that their subcontractors (*sous-traitants*), suppliers (*fournisseurs*), and controlled firms (*sociétés directement ou indirectement controllées*) are doing the same. The legal entity principle, which primarily shields corporations from liability for human rights abuses carried out by their overseas subsidiaries, suppliers, or contracting partners, is thus virtually overturned by the *Loi de Vigilance*.[75]

The French Act has also accomplished the incredible task of monitoring and punishing infractions of the human rights due diligence obligation. Specifically, Article L. 225-102-4 II para. 1 CCom states that any person with a valid interest, including non-

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[72] Buchman, L. (n.d.). *The French Law on Duty of Vigilance Business and Human Rights – From soft law to hard law, the French experience*. La Grande Bibliothèque Du Droit. https://www.lagbd.org/images/5/52/Art_buchman_iwrz_the_french_law_on_the_duty_of_vigilance-3.pdf
[73] Krajewski, M., & Methven O'Brien, C. (2020). *Human Rights Due Diligence Legislation - Options for the EU Policy Department for External Relations*. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf
[74] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3
[75] Jurić, D., Zubović, A., & Čulinović-Herc, E. (2023). Large Companies Saving People and the Planet – Reflections on the Personal Scope of the Application of the Corporate Sustainability Due Diligence Directive. *InterEULawEast: Journal for the International and European Law, Economics and Market Integrations*, *9*(2), 1–42. https://doi.org/10.22598/iele.2022.9.2.1

governmental groups, may request that the vigilance plan be subjected to court scrutiny. Furthermore, and perhaps most remarkably, prospective victims may pursue damages under the terms and in compliance with Articles 1240 and 1241 of the French Civil Code (Article L. 225-102-5 CCom).[76]

This law is a milestone serving as an example for the EU Directive. The European Parliament demanded the establishment of a framework for required due diligence based on the French Duty of Vigilance Law in a report on sustainable finance dated May 4, 2018.[77]

The French framework is more concise than the German one, consisting of 3 applicable articles. The first article delineates the scope of application of the vigilance plan, specifying the measures it should encompass to facilitate risk identification and prevention of severe violations of human rights, fundamental freedoms, bodily injury, environmental damage or health risks. Additionally, it stipulates the entities responsible for drafting the plan and the mandatory measures to be included. It also mandates transparency and public disclosure of the plan and its effective implementation report, and it establishes a compliance mechanism.[78]

According to the *Loi de Vigilance*, a company's vigilance plan must include:

> — a risk map;
> — regular evaluation procedures regarding the situation of relevant subsidiaries, subcontractors and suppliers;
> — adequate actions to mitigate risks or prevent severe impacts on areas covered by the core humanitarian principles;
> — an alert mechanism regarding the existence or materialisation of risks, established in consultation with the trade unions considered as representative within the company (although the law is not specific, it is generally considered that the mechanism should
> be accessible to anyone and not restricted to employees);

[76] Chatelain, L., Rouas, V., & Sebillotte, E. (2020). *A Handbook for Practitioners | France Civil Liability for Human Rights Violations*. https://www.law.ox.ac.uk/sites/default/files/2022-10/10._civil_liabilities_for_human_rights_violations_france.pdf
[77] Report A8-0164/2018 . (2018). In *https://www.europarl.europa.eu/doceo/document/A-8-2018-0164_EN.html*. European Parliament .
[78] *Loi de vigilance*, (2017). https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/

— a system monitoring the measures implemented and evaluating their effectiveness.[79]

Article 2 introduces provisions regarding liability for failure to comply with the duties outlined in Article 1. It establishes that individuals responsible for such failures may be held liable and required to compensate for any harm that could have been prevented through due diligence. Legal actions to establish liability may be pursued by any party with a legitimate interest, with the court empowered to order publication of its decision and enforce it financially if necessary.[80]

Article 4 sets the timeline for applying Articles L. 225-102-4 and L. 225-102-5 of the Trade and Industry Code, as amended by the Law. These articles come into effect from the reporting period mentioned in Article L. 225-102 of the same Code, beginning with the first financial year following the Law's publication. However, for the financial year in which the Law is published, only Article L. 225-102-4, I of the Code applies, with exceptions outlined for the reporting requirements.[81]

The law encourages the vigilance plan to be drafted in cooperation with the stakeholders of the company; the plan has to be "effectively implemented," and both the plan and a report on its execution have to be disclosed to the public and included in the annual management report that the business submits to the shareholders' general meeting.[82] Except in cases when information is disclosed differently in the extra-financial reporting, statutory auditors do not examine the plan or its execution. Liability arises when companies fail to meet their obligations, whether due to the lack of a plan or deficiencies in its execution.[83]

Therefore, French law established the duty of vigilance as something beyond mere due diligence. While due diligence is concerned with the identification of risks every year,

[79] Clerc, C. (2021). The French “Duty of Vigilance” Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.3765288
[80] *Loi de vigilance*, (2017). https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/
[81] *Ibid.*
[82] *Vigilance Plans Reference Guidance*. (n.d.). Sherpa. https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf
[83] *French Corporate Duty Of Vigilance Law Frequently Asked Questions*. (n.d.). European Coalition for Corporate Justice. https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf

the duty of vigilance requires companies to identify and monitor risks and to act upon them by continuing preventative and mitigating actions.[84]

The law brings an innovation concerning the power of interested parties – such as affected people and communities – to hold companies accountable. They can compel judicial authorities to mandate a company to create, publish, and execute a vigilance plan, or explain its non-existence. They can also hold the company accountable through civil litigation and seek compensation if the breach of the legal obligation results in harm.[85]

> The law is an important step forward in a global context where achieving corporate accountability is hindered by the complexity, scale and reach of corporate structures; the absence of a level playing field; the legal and practical barriers faced by victims to access remedies; or the lack of enforcement of existing standards especially concerning transnational corporations with a myriad of subsidiaries and suppliers.[86]

The Duty of Vigilance Law aims to establish better prevention of adverse impacts by companies and assist victims of corporate abuse in seeking compensation. The law requires companies to identify key risks of significant impacts, whether linked to their activities or those of their business partners and take action to prevent them.[87] With this objective in mind, the law aims to facilitate the ability of victims of corporate abuses to argue that a company could have taken appropriate measures to prevent a harmful impact or influenced its production.

Requiring businesses to conduct human rights due diligence could gradually redirect attention towards prioritizing risks to people - such as employees, communities, or other stakeholders - rather than solely focusing on risks to the company. This approach could also assist companies in proactively addressing potential risks, which carry legal, financial, and reputational consequences, while simultaneously enabling them to seize new opportunities.

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[84] Clerc, C. (2021). The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.3765288
[85] *French Corporate Duty Of Vigilance Law Frequently Asked Questions*. (n.d.). European Coalition for Corporate Justice. https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf
[86] *Ibid.*
[87] *Ibid.*

The French Law is considered one of the most developed pieces of legislation on business's obligation to comply with fundamental humanitarian principles since it "establishes a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship".[88]

Considering the aforementioned, it is evident that the *Loi de Vigilance* is a groundbreaking regulation. But, despite being advanced, the French law does not go as far as many believe and the reasons for that will be explored further ahead.

At the present time, voluntary initiatives and self-regulation have not been enough to encourage corporate respect for human rights.[89] Ensuring fair competition for companies that use responsible business practices and safeguard individuals and the environment requires a legally binding framework. France's duty of vigilance law is a significant start in the right direction, but these issues still need to be solved immediately.

2.2. German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (*Lieferkettensorgfaltspflichtengesetz – LkSG*)

The development of the German framework on due diligence also has much to do with disasters that brought attention to the matter. In 2013, several thousand people died in a factory fire in Bangladesh, one of the clients of the textile factory was Kik, a German company.[90] Although efforts were made to hold the company liable, the legal action was dismissed due to the statute of limitations under the applicable Pakistani law[91], showcasing the complexities involved in transnational litigation and the challenges in establishing corporate liability under different legal jurisdictions. Another disaster took

[88] *Ibid.*
[89] Gonzalez, E., Vargas, M., & Zubizarreta, J. H. (2016). *Business and Human Rights: The Failure of Self-Regulation | Transnational Institute*. https://www.tni.org/en/article/business-and-human-rights-the-failure-of-self-regulation
[90] *KiK: Paying the price for clothing production in South Asia*. (n.d.). European Center for Constitutional and Human Rights. https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/
[91] *KiK lawsuit (re Pakistan)*. (2015). Business & Human Rights Resource Centre. https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/

place in Brumadinho, a municipality in Brazil, where several hundred people lost their lives due to a mining dam collapse.[92] Before the disaster, the German certification company TüV Süd had declared the dam to be safe.[93] Brazil's mined iron is still being sent to Germany, but the people who have been affected are still waiting for justice and compensation. All of this raised the pressure on legislators to enact regulations, especially with the support of Initiative *Lieferkettengesetz's* campaigning.[94]

Prior to this paradigm change in business, some companies, especially the ones from the mining sector would frequently employ social benefits in the regions where they were causing harm rather than being required to mitigate adverse effects. This was a maneuverer for them to hide the bad effects of their actions; in order to reduce conflict, they were essentially spending as much as they felt necessary in these areas.[95]

> (…) they built schools, created short-term jobs and negotiated with the locals how much they would pay them for the consequential damage mining did to their land and property. This was meant to deflect attention from the negative impacts of mining operations instead of limiting or even preventing them. Similarly, responsibility along supply chains was not recognized for a long time.[96]

However, as mentioned before, the United Nations endorsed the Guiding Principles on Business and Human Rights in 2011, which presented key components for implementing corporate due diligence in relation to human rights. These principles provided a framework for governments to consider when formulating legislation addressing corporate responsibility. But, since the Guiding Principles do not impose new obligations under international law, their implementation relies on voluntary adoption by governments into domestic legislation. It was within this context that the German Supply Chain Act emerged, drawing heavily from the principles outlined by the United Nations. Thus, the endorsement of the Guiding Principles served as a foundational step that influenced the development of the German Supply Chain Act, highlighting the

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[92] *Brumadinho: ação contra alemã TÜV Süd pede R$ 3,2 bilhões*. (2024). Deutsche Welle. https://www.dw.com/pt-br/brumadinho-a%C3%A7%C3%A3o-contra-t%C3%BCv-s%C3%BCd-na-alemanha-pede-r-32-bilh%C3%B5es/a-68088285
[93] *Ibid.*
[94] Sydow, J. (2019). *Due diligence in supply chains: from nice-to-have to legal obligation*. Heinrich Böll Stiftung. https://www.boell.de/en/2023/11/02/due-diligence-supply-chains-nice-have-legal-obligation
[95] *Ibid.*
[96] *Ibid.*

international community's efforts to address corporate accountability with respect to human rights.[97]

The voluntary transposition of states of the UNGPs into their domestic laws took some time. The majority of states used NAPs for implementing the Guiding Principles.[98] But these National Action Plans—including the German one from 2016— did not impose any kind of legal requirement on businesses to exercise due diligence with respect to human rights. Instead, compared to the majority of other NAPs, the German National Action Plan - and the coalition agreement between the two parties that currently form the Federal German Government - states that if by 2020 less than 50% of all companies voluntarily comply with the Guiding Principles, a mandatory legal regime would be put in place.[99]

To assess whether companies had integrated the core elements of human rights due diligence, as outlined in the NAP, into their business processes, the German government conducted a survey in 2020. The survey revealed that only 13% to 17% of German businesses with over 500 employees had effectively implemented the key components of the UN Guiding Principles on Business and Human Rights.[100] As a result, the Ministers decided to proceed with the German Supply Chain Act (*Lieferkettengesetz*).[101]

In January 2023, the German Act on Corporate Due Diligence Obligations in Supply Chains (*LkSG*) became law. Consequently, approximately 700 companies with a presence and more than 3,000 employees in Germany are required to comply with supply chain due diligence obligations set out in the Act.[102]

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[97] Ruhl, G. (2020). *Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective*. Ssrn.com. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708196

[98] See for an overview the list available at https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[99] Ruhl, G. (2020). Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective. Ssrn.com. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708196

[100] *Monitoring of the status of implementation of the human rights due diligence obligations of enterprises set out in the National Action Plan for Business and Human Rights 2016-2020*. (2020). Auswärtiges Amt . https://www.auswaertiges-amt.de/blob/2417212/9c8158fe4c737426fa4d7217436accc7/201013-nap-monitoring-abschlussbericht-data.pdf

[101] Bayer, C. (2021). *Duty of Care Also in Germany: The Impending Mandatory Due Diligence Legislation*. iPoint. https://go.ipoint-systems.com/blog/duty-of-care-also-in-germany

[102] Weichbrodt, J., & Gerhold-Kempf, T. (2023). *The German Supply Chain Due Diligence Act and the Chemical Industry | Insights | Mayer Brown*. Www.mayerbrown.com.

Both the German and French Acts require that companies must implement extensive compliance measures for human rights and environmental risks. However, with 24 articles plus an annex, the German Act is more detailed.[103]

The act aims to enhance respect for human rights, by eradicating practices such as child labor and forced labor from global supply chains, while also addressing environmental standards, including issues like mercury usage and waste management. In Germany, businesses are obligated to fulfill specific 'due diligence' criteria, they must assess if their business operations could potentially result in any breaches of human rights or environmental harm. They must act to prevent, mitigate or end violations and it is required that they put in place a complaints mechanism for those who may be affected by violations.[104]

The German Act defines the danger as a sufficient possibility that one of the prohibitions will be breached soon, and it refers to 14 international treaties (mentioned in the Annex). The obligation of due diligence is to attempt, not to succeed (unless the infraction takes place within their own corporate domain).[105]

> The main obligation for companies is to integrate due diligence obligations as part of their corporate policy. This includes various measures that are precisely listed, namely: the implementation of a human rights-related risk management system; the implementation of an in-house body responsible for human rights protection; the implementation of human rights-related risk analyses; the declaration of basic principles for the protection of human rights in business; the implementation of preventative measures in their own business area and vis-à-vis direct suppliers; a remedial action in the event of a human rights violation; the implementation of a complaints procedure (§ 8 *LkSG*) with regard to the notification of human rights violations; the implementation of due diligence measures with regard to risks connected to indirect suppliers; and the implementation of documentation and reporting measures connected to the fulfillment of mandatory due diligence obligations. These

https://www.mayerbrown.com/en/insights/publications/2023/03/the-german-supply-chain-due-diligence-act-and-the-chemical-industry

[103] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

[104] *The German Act on Corporate Due Diligence Obligations in Supply Chains*. (2023). Federal Ministry for Economic Cooperation and Development (BMZ). https://www.bmz.de/resource/blob/154774/lieferkettengesetz-faktenpapier-partnerlaender-eng-bf.pdf

[105] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

measures are clearly adopted from the UN Guiding Principles on Business and Human Rights.[106]

The new law aims to protect people from modern slavery, forced labor, human trafficking, hazardous work, and exploitation in accordance with the standards of the International Labor Organization (ILO) and the pertinent articles of the International Covenant on Economic, Social, and Cultural Rights (UN Social Covenant), as part of the fight against human rights violations and environmental degradation. Additionally, it aims to defend the rights of the 168 million or so children and teenagers who perform the most arduous work on tobacco, coffee, and cocoa plantations—often close to pesticides—manufacture toys, electronics, and clothing in exploitative factories, or extract minerals at the expense of their health, all of whom need special protection in accordance with the principle of the best interest of the child (Article 3 CRC).[107]

However, the Act does not establish new human rights or environmental standards. Rather, it endeavors to ensure adherence to existing international agreements, thereby enhancing living and working conditions for individuals in the Global South and safeguarding the environment.[108]

The *Lieferkettensorgfaltspflichtengesetz* has 6 Divisions with sections and subsections.

The first division is entitled "General Provisions", and its first section focuses on the scope of application of the Act to enterprises while the second section defines protected legal positions, which include rights derived from specific human rights conventions and it identifies human rights risks and environment-related risks.[109]

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[106] *Ibid.*

[107] *Germany: call for an improvement of the Supply Chain Due Diligence Act*. (2021b). FIDH - International Federation for Human Rights. https://www.fidh.org/en/issues/business-human-rights-environment/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act

[108] *The German Act on Corporate Due Diligence Obligations in Supply Chains*. (2023). Federal Ministry for Economic Cooperation and Development (BMZ) . https://www.bmz.de/resource/blob/154774/lieferkettengesetz-faktenpapier-partnerlaender-eng-bf.pdf

[109] *German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz* or *LkSG)*. (2021). https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4

The second division outlines the due diligence obligations imposed on enterprises concerning human rights and environmental considerations within their supply chains. It requires enterprises to establish a risk management system, designate responsible personnel, conduct regular risk analyses, issue policy statements, implement preventive measures, take remedial action if violations occur, establish a complaints procedure, address risks at indirect suppliers, and document and report their efforts. The appropriate actions to fulfill these obligations depend on factors such as the nature of the enterprise's activities, its ability to influence risks, the severity and probability of violations, and its causal contribution to these risks. Additionally, the framework emphasizes the importance of transparency, accountability, and continuous improvement in fulfilling these obligations.[110]

The third division pertains to civil proceedings concerning the enforcement of significant rights outlined in Section 2(1). It allows individuals to empower domestic trade unions or NGOs to initiate legal actions on their behalf.[111]

The fourth division focuses on monitoring and enforcement by authorities. It involves the submission of reports by enterprises. Competent authorities then audit these reports to ensure compliance with due diligence obligations outlined in the framework. Subdivision 2 introduces risk-based controls, enabling authorities to take action to monitor and prevent violations. This includes entering premises, accessing documents, and issuing orders or measures to ensure compliance. Additionally, there are provisions for information provision and cooperation by enterprises. The Federal Office for Economic Affairs and Export Control oversees these activities, publishing handouts and an annual accountability report on its enforcement efforts.[112]

The fifth division pertains to public procurement and outlines rules regarding the exclusion of enterprises from the award of public contracts. Enterprises fined for violations established by final and binding decisions are typically excluded from participating in procurement procedures until they demonstrate compliance. Exclusion periods can last up to three years. The decision for exclusion requires a violation carrying

[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*

a specific fine amount, with variations based on the severity of the violation. Additionally, applicants have the right to be heard before any decision on exclusion is made.[113]

The last division focuses on imposing financial penalties and administrative fines for regulatory offenses. It establishes the framework for determining the number of fines and penalties for various violations outlined in the law. The fines can range from lower amounts up to 50,000 euros for administrative enforcement proceedings, and up to 800,000 euros for more severe offenses. In cases involving legal entities with high turnovers, fines can be up to 2% of their average annual turnover. The assessment of fines considers factors such as the seriousness of the offense, the entity's efforts to prevent violations, and the impact of the offense. The Federal Office for Economic Affairs and Export Control oversees the enforcement of these penalties and fines.[114]

Therefore, the German legislator wants to address the following five core elements of due diligence in the supply chain:

> 1. Assume responsibility – by including respect for human rights in the corporate philosophy;
> 2. Analyse risks – by being aware of where potential or actual human rights violations threaten in the individual business model;
> 3. Minimise risks – by taking measures to prevent human rights violations or to stop them if violations have already occurred, and by monitoring their effectiveness on an ongoing basis;
> 4. Inform and communicate – to all relevant stakeholders; and
> 5. Enable complaints – by establishing a transparent process that enables all stakeholders to claim their rights.[115]

According to Labor Minister Hubertus Heil, "This is the strongest law in Europe so far against worker exploitation. It is the end of companies weighing human rights against their economic interests".[116]

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[113] *Ibid.*
[114] *Ibid.*
[115] Everhardt, C. (2022). *The new Supply Chain Act - challenges and opportunities for the...* Rödl & Partner. https://www.roedl.com/insights/international-supply-chain-law/requirements-core-elements-transparency-chance-digitalisation-sustainability
[116] Dombreval, H. B., & Trochon, J.-Y. (2021). *A Franco-German perspective on the protection of human rights and...* Rödl & Partner. https://www.roedl.com/insights/human-rights-protection-environmental-regulations-comparison-france-germany

However, despite representing a change in perspective from the self-regulation and voluntary standards that have been in place up until this point the act also represents a politically insufficiently ambitious compromise that will not be able to effectively protect the environment and those who are victims of violations of human rights. Policymakers were unable to resist the intense pressure from business associations and certain political leaders to reduce the text on many crucial points. Consequently, the act runs the risk of becoming less effective and fails to maintain and apply the important requirements outlined in the UNGPs.

3. DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CORPORATE SUSTAINABILITY DUE DILIGENCE (CSDDD)

In February 2022, the European Commission released the first draft of the Corporate Sustainability Due Diligence (CSDDD) proposal. After the EU Council published its negotiating position on the draft bill in November 2022, the EU Parliament voted in June 2023 to adopt a revised draft of the Commission's original proposal. The three EU legislative bodies engaged in negotiations to reach a final text.[117] On May 24, 2024, the CSDDD was ratified by the EU member states.

After four years of discussions and negotiations, the Directive represents a significant political achievement and a turning point for environmental and human rights due diligence.

The CSDDD has mostly aligned with some recently passed human rights due diligence laws, such as the EU Corporate Sustainability Reporting Directive (CSRD), the German Supply Chains Act, the French Duty of Vigilance Law, and the Norwegian Transparency Act, as well as many human rights and sustainability-related reporting laws, such as the modern slavery laws in the UK, Canada, and Australia.[118] However, the

[117] *European Parliament and Council reach agreement on Corporate Sustainability Due Diligence Directive*. (2024). Norton Rose Fulbright. https://www.nortonrosefulbright.com/en/knowledge/publications/044c4b0f/european-parliament-and-council-reach-agreement-on-corporate-sustainability-due-diligence-directive

[118] *Ibid.*

CSDDD contains some important differences, meaning that these laws will need to be revised to adjust accordingly.

The CSDDD will be available for publishing in the EU Official Journal upon formal adoption, after which Member States will have two years to incorporate it into their domestic law. It was previously expected that by 2027, the rules would start to apply to the most well-known corporations and that in the next two years (2028 & 2029), other enterprises would be phased in.[119]

The Directive outlines five goals: (1) enhancing corporate governance practices; (2) preventing the fragmentation of due diligence requirements in the single market and establishing legal certainty for companies and stakeholders; (3) guaranteeing coherence for companies regarding obligations and increasing corporate accountability for adverse impacts; (4) enhancing access to remedies for individuals impacted by adverse corporate human rights and environmental impacts; and (5) completing the set of measures by providing an overarching horizontal framework that complements other measures that are in place or proposed within the EU.[120]

We can identify three groups of companies in the scope of CSDDD:

Group 1: "Very large" companies:

a.1) European companies that had in their last financial year more than 1000 employees on average and more than EUR 450 million of net worldwide turnover;

a.2) Non-European companies that generated a net turnover of more than EUR 450 million in the EU in the financial year preceding the last financial year.

Group 2: Ultimate parents of "very large" groups:

[119] *EU Corporate Sustainability Due Diligence Directive (CSDDD)*. (n.d.). PlanA. https://plana.earth/policy/eu-corporate-sustainability-due-diligence-directive-csddd#:~:text=Who%20falls%20under%20the%20scope,EU%20and%20non-EU%20companies.

[120] Bright, C., & Smit, L. (2022). *The new European Directive on Corporate Sustainability Due Diligence*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-new-european-directive-on-corporate-sustainability-due-diligence/

b.1) European companies, not falling in Group 1, that are the ultimate parent of a group reaching the thresholds outlined above for Group 1 on a consolidated basis in the last financial year;

b.2) Non-European companies, not falling in Group 1, that are the ultimate parent of a group reaching the financial threshold outlined above for Group 1 on a consolidated basis in the financial year preceding the last financial year.

Group 3: Companies with a franchising or licensing business model:

c.1) European companies that entered into – or are the ultimate parent company of a group that entered into – franchising/licensing agreements (ensuring a common identity and business concept) in the EU, and provided that, in the last financial year these royalties amounted to more than EUR 22.5 million and the company generated, individually or on a consolidated basis as the ultimate parent company of a group, a net worldwide turnover of more than EUR 80 million.[121]

Although SMEs are not included in the scope of this Directive, they could be impacted by its provisions as contractors or subcontractors to the companies that are in the scope. Businesses that collaborate with SMEs are also encouraged to assist them in adhering to due diligence procedures and to apply fair, reasonable, non-discriminatory, and proportionate standards in relation to the SMEs.[122]

CSDDD will push enterprises that fall within its scope to do risk-based human rights and environmental due diligence to identify and assess actual and possible adverse

[121] Directive (EU) 2024/1760, (2024). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401760

[122] *Ibid.*

impacts, and to (if necessary) prevent, mitigate, cease, and remediate such impacts in their own operations and "chain of activities". [123][124]

The final text of the Directive, in line with earlier drafts from the Commission, Council, and Parliament, mandates that businesses adopt due diligence policies, supported by "appropriate measures,"[125] to identify and evaluate actual or potential impacts. Following this, they must: (a) prevent potential impacts; and (b) address actual impacts by creating and implementing prevention and corrective action plans, paying compensation, making "necessary investments" in production processes and infrastructure, getting contractual guarantees from business partners, and providing targeted and appropriate support for SMEs.

In addition to identifying and addressing their own harmful impacts on human rights and the environment, companies will be required under CSDDD to consider the implications of their "chain of activities" on direct and indirect business partners. Additionally, the Directive now explicitly enables businesses to rank the severity and likelihood of negative effects in order of priority. This complies with the severity and prioritization requirements of the UNGPs.

The CSDDD further mandates that businesses create and maintain a notification system and complaints procedure, interact meaningfully with affected stakeholders, periodically assess the success of the actions taken, and openly disclose their due diligence procedures.

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[123] Unlike previous drafts which referred to the entire "value chain", the final text of CSDDD defines *"chain of activities"* as being limited to:
(a) the activities of *"upstream"* business partners related to the production of goods or provision of services by the company, including design, extraction, sourcing, manufacture, transport or development of products or services; and
(b) the activities of *"downstream"* business partners related to the distribution, transport or storage of products, where undertaken for the company or on its behalf. The disposal of products as well as activities of a company's "downstream" business partners related to the services of the company are excluded.
Business partners include entities with whom the company has a commercial agreement (direct business partners) and other entities which perform business operations related to the operations, products or services of the company (indirect business partners).

[124] *EU Corporate Sustainability Due Diligence Directive (CSDDD) passed by EU Parliament: What are the implications?* (2024). Norton Rose Fulbright. https://www.nortonrosefulbright.com/en/knowledge/publications/61fcd06c/eu-corporate-sustainability-due-diligence-directive

[125] The final text includes within the meaning of *"appropriate measures"* reference to improvements to the company's *"own business plan, overall strategies and operations, including purchasing practices, design and distribution practices"*.

Article 10 is particularly significant because it states that a company should refrain from expanding or starting new business relationships with a relevant business partner in cases where it is unable to prevent or adequately mitigate potential impacts, or to end or minimize actual impacts. Additionally, the business must, to the extent permitted by law, suspend business operations with the partner while making efforts to (as appropriate) prevent, mitigate, minimize, or end the impact, or end the relationship if the impact is thought to be severe.[126]

It is unclear how companies may comply with these standards while simultaneously trying to increase leverage over their business partner to mitigate the relevant impact, as the UNGP 19 statement suggests. Furthermore, as the UNGPs pointed out, there are circumstances in which suspending or terminating a business relationship may raise further human rights impacts that must be evaluated and managed. Termination in a business relationship is usually considered as a last resort.[127]

EU Member States will be required by CSDDD to appoint supervisory authorities to oversee adherence to its duties. Supervisory authorities will be able to launch investigations and demand information from businesses. In case of non-compliance, supervisory authorities will have the authority to impose penalties, including maximum fines of not less than 5% of the company's net worldwide annual turnover, and require the company to take corrective action, stop infringements, and refrain from repeating them in the future. When serious and irreversible harm is imminent, the supervisory authority may also take emergency action. Considerations such as the company's investments, targeted support for SMEs, cooperation with other organizations, and prioritization of severe and expected harmful impacts will all be taken into consideration when determining whether to impose sanctions.

In addition, the CSDDD will enable plaintiffs to pursue civil remedies against businesses for alleged violations of their human rights. A business can be held accountable

[126] When it is fairly predicted that terminating a financial services contract would seriously harm the counterparty, financial institutions have no obligation to do so.
[127] *European Parliament and Council reach agreement on Corporate Sustainability Due Diligence Directive*. (2024). Norton Rose Fulbright. https://www.nortonrosefulbright.com/en/knowledge/publications/044c4b0f/european-parliament-and-council-reach-agreement-on-corporate-sustainability-due-diligence-directive

for harm resulting from its deliberate or negligent inability to stop or mitigate a negative effect by taking the necessary steps.

Importantly, the CSDDD allows for joint and several liabilities in cases where the damage was produced “jointly by the company and its subsidiary, direct or indirect business partner”. However, a company will not be held civilly liable for damage caused solely by a business partner in its chain of activities. The Directive also specifies procedural rules on evidence disclosure, injunctive relief, and expenses, and it permits the filing of such claims for a period of five years.

In accordance with the Paris Agreement and the goal of reaching the intermediate and 2050 climate neutrality targets, the Directive also mandates that businesses adopt, implement, and update a climate transition plan every year. This plan is intended to guarantee, to the best of the company's abilities, that the business model and strategy are compatible with keeping global warming to 1.5 °C.

With reference to the *Loi Vigilance* and the *Lieferkettensorgfaltspflichtengesetz*, CSDDD seeks to establish a "level playing field" for human rights and environmental due diligence obligations throughout Europe. Additionally, CSDDD will support a number of distinct EU due diligence regulations that are applicable to certain industries and situations, such as those pertaining to conflict minerals, deforestation, and battery supply chains.[128] Companies operating in the EU or trading with EU counterparties should evaluate the specific obligations of each law that may apply to them and whether improvements to their current due diligence procedures are necessary, as these laws vary in terms of their scope and particular requirements. In fact, although the CSDDD seeks to establish a uniform framework for the EU, there is still a chance that Member States would use different strategies when implementing the Directive into national legislation, such as by adding new requirements ("gold-plating”).

[128] *EU Corporate Sustainability Due Diligence Directive (CSDDD) passed by EU Parliament: What are the implications?* (2024). Norton Rose Fulbright. https://www.nortonrosefulbright.com/en/knowledge/publications/61fcd06c/eu-corporate-sustainability-due-diligence-directive

4. A COMPARATIVE ANALYSIS BETWEEN THE FRENCH AND THE GERMAN ACTS

4.1. Scope of application

The French Act's applicability is outlined in Article L225-102-4, II of the Commercial Code. The Act applies to companies headquartered in France that employ at least 5,000 employees in France or 10,000 globally (across direct and indirect subsidiaries). It also applies to foreign companies with French subsidiaries, provided these subsidiaries employ a minimum of 5,000 individuals in France. The focus lies exclusively on *sociétés anonymes* and *sociétés par actions simplifiées*. Criticism has arisen due to the unequal treatment of companies based on their size, as determined by the number of employees, and their legal structure.[129]

The predominant interpretation states that only businesses having their statutory seat in France are subject to the duty of vigilance. As a result, the French law's application scope inevitably differs from the UNGPs, which apply to all commercial enterprises.[130]

From 2024, the *LkSG* enlarged its scope even more, it started to cover companies with more than 1,000 employees per average fiscal year that have their central administration, principal place of business, administrative headquarters, statutory seat or branch office in Germany - previously, it covered those with 3,000 employees.[131]

Both acts face criticism concerning the discrepancies between their scope and the scope of already existing provisions, such as the Non-financial Reporting Directive. The *LkSG* for instance goes in a different direction than the German National Plan, the last one focuses on companies with 500 employees and not 1,000 like the German Due Diligence Act. In their core criteria for a Due Diligence Act, the German Federal Ministry

[129] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

[130] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/

[131] Spinaci, S. (2023). *Corporate sustainability due diligence How to integrate human rights and environmental concerns in value chains* . European Parliament . https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf

of Labor and Social Affairs and the Federal Ministry for Economic Cooperation have listed 500 employees.[132]

It is noticeable that both legislators made a deliberate effort to consider the resources available to companies for implementing the new obligations. As a result, they targeted only large companies that would be covered by these obligations. In other words, they aimed to ensure that the requirements imposed by the legislation were feasible for companies to meet, particularly focusing on those with sufficient resources to handle the obligations effectively. Consequently, companies across various scales, including those in sectors with low labor intensity like digital technology or biotechnology, may wield considerable influence on human rights and the environment. However, despite their potential influence, these sectors are not covered by the regulations because the frameworks link the environmental and human rights impact with the number of employees a company has instead of their financial performance.[133]

Nonetheless, small and medium-sized companies that do not meet the previously mentioned minimum threshold are indirectly covered. If they take part in the supply chain of the companies directly subject to the due diligence acts, they are required to adhere to the due diligence obligations established. In France, there is a legal ambiguity regarding the scope of subcontractors and suppliers covered by the vigilance plan. The question that arises as to whether the plan should only encompass those directly associated with the company that drafted it and its controlled subsidiaries, or if it should also extend to include the "downstream" entities (economic partners of subcontractors and suppliers, essentially entities further down the supply chain).[134]

This ambiguity caught the attention of the *Conseil Constitutionnel*, the Constitutional Council in France, which is tasked with ensuring that laws passed by the government adhere to the Constitution. Their acknowledgment of this ambiguity suggests

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[132] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/

[133] Evaluation Report (n 6) 54.

[134] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

the need for clarification or further legal interpretation, regarding which subcontractors and suppliers should be included in the vigilance plan.

The Constitutional Council completed the text by harmonizing it with the OECD Guidelines for Multinational Enterprises and the UNGPs. With this change, all companies directly or indirectly controlled by the primary company have the obligation to create a vigilance plan. This means that if a company has control or influence over another company either directly or through intermediate companies, those controlled companies are included. Additionally, it encompasses any subcontractors and suppliers with whom those controlled companies have established commercial relationships. This includes any entities that provide goods or services to the controlled companies, regardless of the type of operations they undertake, the size of their workforce, their economic significance or where they are located.[135]

When analyzing the adequacy and efficiency of the French Act, NGOs pointed out that the adoption of the Act as a victory, since it argues that soft law is not enough to ensure the respect of fundamental freedoms, the health and safety of individuals, human rights and the environment.[136]

The obligation of vigilance imposed on companies must enable them to identify risks and prevent serious violations of human rights, fundamental freedoms, individual health and safety, and environmental harm stemming from their own activities, those of their subsidiaries and controlled companies, and those of subcontractors or suppliers with whom they have established commercial relationships. In the view of the NGOs, this broad definition some argue to be vague, enables the Act to cover all possible situations and any violations that occur over time.[137]

A commission appointed by the French Parliament has raised concerns regarding the adequacy and efficiency of the French Act and its report[138] also supports preserving a

[135] Decision n° 2017-750 DC du 23 mars 2017 Conseil constitutionnel Point 11.
[136] Saint-Affrique , D. (2023). *Due Diligence What NGOs think of France's 2017 Duty of Vigilance Act? Is it adequate? Is it effective?* Skema Publika. https://publika.skema.edu/wp-content/uploads/dlm_uploads/2023/10/Due-diligence_NGO-complete-survey-2023.pdf
[137] Ibid.
[138] *Rapport d'information n°5124*. (2022). Assemblée Nationale (France). https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information

broad definition of the duty of vigilance in order to keep putting a lot of pressure on big companies and prevent the risk of becoming solely procedural in nature, where businesses would only have to check boxes to comply with the 2017 Act without really taking into account the extent of any potential risks to the environment or human rights that their operations may present.

According to the Report, only a small percentage of French companies (or French subsidiaries of international groups) are required to establish a duty of vigilance program. As a result, the Report is in favor of expanding the French Act's application criteria. It first suggests that the 2017 Act be applied to all corporate forms, such as SARL ("*société à responsabilité limitée*") and SNC ("*société en nom collectif*"). This is because some significant French groups, particularly those in the retail and textile industries, do not fit under the most popular categories of SAS ("*société par actions simplifiée*") and SA ("*société anonyme*") that are covered by the French law.[139] Secondly, it suggests adjusting the threshold for the applicability of the *Loi de Vigilance* to encompass companies with a smaller number of employees. Third, the Report recommends that the company's turnover be utilized as an alternative criterion to the number of employees, with thresholds to be specified, in order to allow for flexibility in the application of the Act. It emphasizes that organizations with a minimum balance sheet total of €2 billion or a minimum turnover of €1.5 billion are already considered "large companies" under French legislation.

NGOs echo this concern that not all companies are covered by this legislation. *CCFD -Terre Solidaire* claims this could lead some companies to employ tactics to avoid compliance with the Act. Under French law, companies such as *ZARA* and *H&M*, which operate as SARLs, may not be subject to the Act despite facing scrutiny from civil society for the environmental and ethical impacts of their production practices.[140]

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[139] This is because Article L 225-102-5 of the Commercial Code is specifically incorporated into Chapter V of the Commercial Code, which pertains to public limited companies (SAs). Since there is no corresponding article in Chapter III, which addresses limited liability companies (SARLs), it can be inferred that SARLs are not subject to the Act.

[140] Saint-Affrique , D. (2023). *Due Diligence What NGOs think of France's 2017 Duty of Vigilance Act? Is it adequate? Is it effective?* Skema Publika. https://publika.skema.edu/wp-content/uploads/dlm_uploads/2023/10/Due-diligence_NGO-complete-survey-2023.pdf

Criticism also extends to the thresholds established by the French Act, NGOs argue that the thresholds, combined with the lack of transparency from companies, make it challenging to pinpoint which firms are subject to these obligations.[141]

While it's relatively easy to determine a company's corporate structure using the SIRENE database, calculating the number of employees and subsidiaries presents a more complex task. This involves identifying all direct and indirect subsidiaries of a French company, both domestically and internationally, and determining the number of employees in each of these entities. According to *Les Amis de la Terre*, this presents a significant challenge due to the lack of transparency surrounding corporate activities in today's globalized economy.[142]

The NGOs interviewed also pointed out that the requirement to prove an established commercial relationship for a company to be held accountable under the duty of vigilance introduces ambiguity, potentially allowing some companies to evade accountability.[143]

While most companies interpret the concept of "established business relationship" narrowly, limited to the immediate supplier (N-1 link), NGOs advocate for a broader interpretation. They argue for extending responsibility throughout the entire supply chain, including indirect suppliers since the most significant impacts often occur at the production level. To illustrate this, they cite the impact of cattle farms on deforestation and the subsequent legal action against the *CASINO* group.[144]

According to NGOs, end-players must take responsibility for practices throughout their supply chain.[145] However, current legal provisions lack clarity, making it difficult to quantify these impacts and define the extent of an end player's responsibility.

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[141] *Ibid.*
[142] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/
[143] Saint-Affrique , D. (2023). *Due Diligence What NGOs think of France's 2017 Duty of Vigilance Act? Is it adequate? Is it effective?* Skema Publika. https://publika.skema.edu/wp-content/uploads/dlm_uploads/2023/10/Due-diligence_NGO-complete-survey-2023.pdf
[144] The French supermarket giant Casino is being sued by a coalition of NGOs – including indigenous peoples from Brazil and Colombia – over its sale of beef linked to illegal deforestation in the Amazon.
[145] Saint-Affrique , D. (2023). *Due Diligence What NGOs think of France's 2017 Duty of Vigilance Act? Is it adequate? Is it effective?* Skema Publika. https://publika.skema.edu/wp-content/uploads/dlm_uploads/2023/10/Due-diligence_NGO-complete-survey-2023.pdf

The German law also presents some shortcomings. To start, even though its scope includes more companies since it applies to those with more than 1,000 employees, their due diligence obligations do not reach the business's indirect suppliers. Companies covered by the *LkSG* are required to contractually obligate their direct suppliers to adhere to human rights and environmental standards applicable to them. The inclusion of indirect suppliers is also important, as the obligations of direct suppliers extend to ensuring that their upstream suppliers meet the expectations set forth by their partners.[146]

Although indirect suppliers are considered in certain circumstances, there is a condition attached to their inclusion. Specifically, a company must have concrete indications or evidence that suggest a potential violation of the human rights or environmental responsibilities by these indirect suppliers.[147] In other words, the company cannot simply include all indirect suppliers by default, there must be specific reasons or indications that prompt such inclusions. Therefore, this condition is a counterbalance to the broader consideration of indirect suppliers. This is unfortunate since it is at the start of the supply chain where the majority of human rights breaches take place.[148]

In addition to that, the multiplicity of parties involved in supply chains, ranging from suppliers of raw materials to different intermediaries, makes it more difficult to monitor manufacturing conditions and environmental effects with ease. This is especially relevant to businesses that have intricate global supply networks spanning multiple nations and areas. Businesses in resource-intensive sectors, like electronics, textiles, and automotive manufacturing, face unique difficulties since their supply networks are typically extremely internationally dispersed and highly branched.[149]

Both the French and German laws could benefit from expanding their scope to include indirect suppliers and enhancing the clarity of supplier definitions. As SMEs

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[146] *Lieferkettensorgfaltspflichtengesetz*, § 6.
[147] *Ibid.* § 9 III.
[148] *Germany: call for an improvement of the Supply Chain Due Diligence Act*. (2021a). International Federation for Human Rights. https://www.fidh.org/en/issues/business-human-rights-environment/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act
[149] *The top 3 challenges of the German Supply Chain Act (LkSG) and how to…*. (2023). Envoria. https://envoria.com/insights-news/the-top-3-challenges-of-the-german-supply-chain-act-lksg-and-how-to-overcome-them

account for 99.5% of German companies,[150] their involvement as suppliers to larger corporations means they are heavily impacted by the German law's provisions. Expanding the law to cover all subsidiaries, subcontractors, and suppliers—whether direct or indirect—would enhance the framework's efficacy.[151]

Prevention measures are also essential. Strict supplier qualification procedures can be put in place to ensure that potential suppliers comply with human rights and environmental laws before collaboration begins. In addition, conducting training for suppliers could ensure that they understand and can meet the requirements. Implementing training for suppliers and using software to map complex supply chains can help centralize and monitor supplier data. However, for the tool to truly contribute value, it needs to be able to map various entities and product levels globally.

Another potential solution, although challenging to implement, is to streamline intricate supply chain connections and reduce the accompanying lack of transparency, thereby addressing the root of the issue. This might be accomplished, for instance, by collaborating with regional producers or suppliers who already openly disclose their human rights and environmental standards.

The CSDDD offers the potential to harmonize these efforts across the EU, covering more companies and setting more detailed requirements.[152] By establishing a unified framework, the Directive could address the limitations of the French and German Acts, which still rely on outdated criteria like employee count. The CSDDD, by considering a company's financial situation, would bring due diligence obligations in line with modern business practices, as larger companies with significant financial resources and broad supply chains have greater potential to cause human rights and environmental harm.[153]

In conclusion, both the French and German frameworks should shift towards financial criteria rather than employee count, extending due diligence obligations across

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[150] *Ibid.*

[151] *Germany: call for an improvement of the Supply Chain Due Diligence Act*. (2021a). International Federation for Human Rights. https://www.fidh.org/en/issues/business-human-rights-environment/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act

[152] The extent to which it covers more companies would depend on specific thresholds and the nature of businesses operating under the laws in question.

[153] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

all subsidiaries and suppliers. A clearer definition of suppliers and subcontractors is also crucial to address current ambiguities, increasing legal clarity and ensuring companies remain accountable throughout their supply chains. With these changes, both nations could more effectively align their regulations with global best practices, promoting greater accountability and transparency across their industries.

4.2. Standards of compliance

When contrasting the French and German regulatory frameworks regarding business standards compliance, the French legislation appears notably vaguer. While the French law briefly mentions the UNGPs in its introductory statement, it refrains from direct incorporation into its substantive provisions. Also, the *Loi de Vigilance* does not make references to any preceding international standards dictating corporate obligations.

Furthermore, the rights safeguarded by the French law remain unspecified, merely alluding to "serious violations of human rights, human health, and environmental safety".[154] Under this law, French companies falling within its purview are obligated to establish, effectively implement, and publicly disclose an annual risk management plan, named the "vigilance plan." This plan is aimed at identifying and mitigating risks pertaining to human rights and the environment, mandating the inclusion of "appropriate measures." However, the specific human rights covered by the legislation are left undefined.[155]

To address this ambiguity, some scholars advocate for aligning human rights definitions with established international instruments like the International Bill of Human Rights and the ILO Core Labor Standards. However, this approach still allows judges to use their discretion in deciding how serious violations are, even though the international treaties indirectly establish criteria for companies to follow.[156]

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[154] Code de commerce, Art L 225-102-4, I.
[155] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/
[156] *Ibid.*

In contrast, the German Act delineates detailed due diligence requirements, with Section 2(1) and the Annex providing a catalog of relevant human rights listing several international treaties that safeguard human rights (the eight ILO Core Labor Conventions and the two UN Human Rights Covenants are among them) while Section 3(2) sets criteria for evaluating the appropriateness of measures.[157] These conventions and committee decisions serve as the basis or reference point for understanding how to put the *LkSG* into practice. They provide the rules, procedures, and standards that should be followed when interpreting and applying the *LkSG* in various contexts. The Act also includes a specific listing of human rights-related risks that are usually linked with labor law. The consideration of environmental protection is not directly addressed or emphasized, but rather indirectly mentioned or addressed when it is associated with violations of human rights, particularly those related to human health. The *LkSG* only mentions three conventions ratified by Germany – the Stockholm Convention on Persistent Organic Pollutants, the Minamata Convention on Mercury and the Basel Convention on the control of transboundary movements of hazardous waste and their disposal – which are insufficient for comprehensively addressing all risks related to protected environmental resources like soil, water, and air, particularly at the initial stages of the supply chain,[158] whereas the French law extends further in this regard.[159]

However, others claim that it is advantageous that the French law is so imprecise because it appears to be more flexible than the German law. In fact, the German legislation would have to be amended to ensure the transfer of the EU Directive if the list appended to the German law is restricted rather than illustrative.[160]

Despite Germany's recent ratification of the only international legally binding document protecting Indigenous rights, the International Labor Organization Convention 169, the country's laws fail to provide mechanisms for strengthening these rights or protecting Indigenous peoples' habitats from violent evictions and the destruction of tropical forests. Notably, there is no mention of indigenous peoples' right to free, prior,

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[157] *Ibid.*
[158] *Germany: call for an improvement of the Supply Chain Due Diligence Act*. (2021a). International Federation for Human Rights. https://www.fidh.org/en/issues/business-human-rights-environment/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act
[159] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3
[160] *Ibid.*

and informed consent, as guaranteed by ILO Convention 169. Furthermore, gender equality remains absent in German law, despite the widespread recognition of gender-based violence and discrimination as pervasive issues in international supply chains, where they are not acknowledged as human rights violations.[161] Therefore, the German legislators should amend its legislation to guarantee and protect the right to free, prior and informed consent of Indigenous peoples and to prohibit and sanction gender-based violence and discrimination along supply chains.

The Directive from the European Commission also has an Annex that lists the relevant adverse impacts on human rights and the environment. In the Annex there are three lists - rights and prohibitions included in international human rights instruments; human rights and fundamental freedoms instruments; prohibitions and obligations included in environmental instruments. Regarding environmental impacts, the EU Directive goes further than the *LkSG*, providing a thorough list concerning environment-related violations and matters of biodiversity.[162]

With that in mind, some recommendations can be made. Firstly, the French legislation should prioritize clarity and specificity in defining standards and obligations for businesses by incorporating explicit references to international standards such as the UNGPs and specifying the safeguarded human rights to offer clearer guidance. Secondly, by aligning human rights definitions with established international instruments, such as the International Bill of Human Rights and the ILO Core Labor Standards, policymakers and legislators ensure that the legal framework within their jurisdiction is consistent with widely accepted global norms and standards. This not only enhances the credibility and legitimacy of the laws but also provides businesses with clear guidance on their human rights responsibilities, contributing to a more uniform and universally recognized framework for corporate responsibility and compliance.

Another notable divergence in the level of detail between the two laws lies in their treatment of risk management structures. Both the French and German frameworks follow a similar approach by requiring companies to implement effective systems for risk

[161] *Ibid.*
[162] Directive (EU) 2024/1760, Art 3(b) and (c). (2024). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401760

identification, analysis, and prioritization. Additionally, both legislations mandate the adoption of preventive measures, such as the development of a human rights strategy. However, while the French law consolidates these obligations within its "vigilance plan," the German Act delineates these requirements through separate provisions, providing a more compartmentalized approach to risk management.[163]

In summary, the main disparity between the two laws lies in their level of detail. While the French Vigilance Law employs broader terms, the German draft provides comprehensive provisions regarding due diligence obligations.[164]

Another issue with the French law is that whereas most vigilance plans should emphasize the risks to people and the environment, they turned to be inward-looking, concentrating on the risks to the business itself.[165] Non-compliance concerns persist, as a survey reveals that not all eligible companies are applying the legislation uniformly or sufficiently. This uneven application highlights how stakeholders' understanding of the duty of vigilance remains inconsistent and how the term itself is still somewhat ambiguous.[166]

To address these challenges, the Report recommends that enterprises engage with "stakeholders in the duty of vigilance" (trade unions and NGOs, in particular) to create their vigilance plan. According to the Report, requiring stakeholder consultation for every business is an effective strategy because it is likely to enhance the quality of individual vigilance plans and promote consistency across different companies' vigilance programs. Involving stakeholders ensures that a diverse range of perspectives and expertise is considered, leading to more robust and effective vigilance measures.

The Report further explores the disparities in vigilance plans created by companies of similar scale and economic influence. These inconsistencies underscore the need for

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[163] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/

[164] *Ibid.*

[165] Bright, C. (2021). *Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains*. https://novabhre.novalaw.unl.pt/wp-content/uploads/2021/02/DecentWorkGlobalizedEconomy_ClaireBright.pdf

[166] *Ibid.*

greater alignment in how companies address human rights and environmental risks. To tackle this, the Report introduces the concept of "multiparty plans"—an approach already implemented in the banking sector—where similar companies collaborate to formulate and execute synchronized vigilance strategies. By working together, these companies can develop cohesive approaches that address common challenges, fostering a unified commitment to upholding human rights and environmental responsibilities.

In addition to advocating for multiparty plans, the Report recommends appointing a public authority to assist in harmonizing corporate practices. This authority would play a crucial role in promoting sectoral and multi-party approaches, addressing the inconsistencies found in vigilance plans and ensuring a more uniform application of standards across companies.[167]

Furthermore, the *LkSG* introduces provisions for remedial measures in case of violations, whereas the French law does not mandate specific company-initiated remedies but allows for potential damages. Both laws, however, require the establishment of a grievance mechanism and the publication of annual reports on the company's website.[168] Therefore, introducing specific company-initiated remedial measures in case of violations, as seen in the German Act, would strengthen the effectiveness of the French Act since it would ensure that proactive steps are taken to address breaches of standards.

In summary, the comparison between the French and German regulatory frameworks for business standards compliance highlights a fundamental contrast in their levels of detail and clarity. The French law, with its broader and more flexible approach, allows for adaptation but suffers from ambiguity and inconsistent application. In contrast, the German Act offers a more detailed and structured framework, though it still falls short in addressing certain areas such as environmental protection and indigenous rights. To bridge these gaps, the legislators should incorporate explicit international standards into the French legislation and introduce specific provisions for gender equality and indigenous rights in the German law. Additionally, promoting stakeholder engagement

[167] *Ibid.*
[168] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/

and multiparty collaboration, alongside the establishment of a public authority to harmonize practices, could enhance the effectiveness and consistency of vigilance measures across both frameworks.

4.3. Transparency

The NGOs claim that since the text's approval, the French State has not fulfilled its obligation to ensure that it is being implemented properly, they claim that the Directorate of Competition, Consumer Affairs and Fraud Control divisions do not thoroughly or at all verify the multinational corporations subject to the legislation are adhering to its provisions.[169]

Also, some companies that should be following the obligations set out in the Act are evading it, mainly because the French government has not taken the necessary steps to create a list of the companies that are obliged to adhere to it.[170]

The NGOs worry that, to ensure the act's efficacy, a commission to evaluate its application has not been established. They believe that to guarantee that the complete value chain—including companies situated abroad—complies with regulatory requirements, a specialized structure must be established.

Due to this circumstance, these NGOs decided to work together to establish the "Duty of Vigilance Radar,"[171] which functions as a sort of observatory for the act's application, primarily to highlight any inadequacies in its implementation and thereby filling in for what should genuinely be a public service purpose. However, some large companies operate in opaque ways, and the publicly available data is inconsistent, making them immune to analysis.[172]

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[169] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/

[170] *Ibid.*

[171] *List of companies subject to the duty of vigilance*. (n.d.). Duty of Vigilance Radar. https://vigilance-plan.org/about/

[172] *Third edition of the Duty of Vigilance Radar: McDonald's, Lactalis, Bigard, Adrexo, Leroy Merlin, Generali, Altrad, Euro Disney ... 44 companies still breaking the law?* (2021). Sherpa. https://www.asso-sherpa.org/third-edition-of-the-duty-of-vigilance-radar-mcdonalds-lactalis-bigard-adrexo-leroy-merlin-generali-altrad-euro-disney-44-companies-still-breaking-the-law

The NGOs claim that the State should enforce laws, and they suggest that France should learn from Germany, whose due diligence act establishes the *Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)*[173] that is responsible for verifying that the companies in question truly fulfill their obligations.[174]

The NGOs that take part in the Duty of Vigilance Radar demand that the public authorities draw up, publish and annually update the list of companies subject to the duty of vigilance; make all vigilance plans accessible on a public database; strengthen transparency requirements in order to make financial and extra-financial data on companies more accessible.[175]

When analyzing the *LkSG*, one of the principal obstacles for the companies subject to it is the transparency of their own supply chain. According to a study conducted by the *BME (Bundesverband Materialwirtschaft, Einkauf und Logistik e.V.)* in 2022 more than 60% of the German companies surveyed have difficulties obtaining accurate and reliable data on their supply chain activities.[176]

In its first handout on the implementation of a risk analysis in accordance with the requirements of the *LkSG*, the *BAFA*, which is tasked with the legal mandate to monitor compliance with the *LkSG*, identified that creating transparency regarding the nature and scope of its own business operations and business relationships in the supply chain is a fundamental prerequisite for a company's implementation of an appropriate risk analysis as defined by law. However, without the prompt adoption of appropriate software solutions, such transparency will not be possible due to the sheer volume of data to be handled in this regard.[177]

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[173] Federal Office for Economic Affairs and Export Control
[174] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/
[175] *Ibid.*
[176] *The top 3 challenges of the German Supply Chain Act (LkSG) and how to…*. (2023). Envoria. https://envoria.com/insights-news/the-top-3-challenges-of-the-german-supply-chain-act-lksg-and-how-to-overcome-them
[177] Everhardt, C. (2022). *The new Supply Chain Act - challenges and opportunities for the...* Rödl & Partner. https://www.roedl.com/insights/international-supply-chain-law/requirements-core-elements-transparency-chance-digitalisation-sustainability

According to the *IHK* (Chamber of Industry and Commerce) Düsseldorf, roughly a third of the examined companies, mandated to report, are deficient in data regarding their indirect suppliers – namely, the suppliers of their own suppliers. However, such information is indispensable for meeting the stipulations of the *LkSG* concerning indirect suppliers.

Furthermore, there are frequent differences in reporting protocols and data formats amongst numerous suppliers. Because of this, businesses frequently deal with a range of data formats that make it difficult to compare and analyze the information gathered.[178]

As soon as possible, businesses—including those that will only be subject to the *LkSG* in the near future—should begin processing all supplier data in order to analyze and evaluate specific supply chain risks. First and foremost, it is critical to locate the pertinent data sources throughout the whole supply chain. The *LkSG* places a high focus on compliance with certain data points, such as supplier information, environmental indicators, and working conditions, as well as external data from international organizations or certifying authorities. Second, it's critical to create and implement precise procedures and rules for data collection. Data gathering consistency is ensured by standardizing these procedures.

Digital tool integration, such as the use of ESG reporting software, might also be beneficial. Without the early adoption of appropriate software solutions, it will be extremely difficult to handle the massive volume of data that must be processed in order to achieve the required transparency under the *LkSG*. Organizations can reduce errors and guarantee real-time data availability by automating data collecting.

4.4. Enforcement

The frameworks under consideration employ markedly distinct methodologies for monitoring compliance with due diligence requirements. German law has given control

[178] *The top 3 challenges of the German Supply Chain Act (LkSG) and how to…*. (2023). Envoria. https://envoria.com/insights-news/the-top-3-challenges-of-the-german-supply-chain-act-lksg-and-how-to-overcome-them

to an administrative authority, whereas French law has built a system of injunctions under court jurisdiction, which is supported by the mechanisms of civil liability.

In France, there are no applicable sanctions for non-compliance with the due diligence obligations.

Article 1 of the *Loi de Vigilance* introduces Article L. 225-102-4 into the Commercial Code. Paragraph I thereof requires certain companies to draw up an "oversight plan" and to implement it effectively. Paragraph II thereof punishes the breach of the obligations laid down by paragraph I.[179]

As a result of the operations of the company that created the plan, the businesses it controls, and the suppliers and subcontractors with whom these businesses have a long-standing business relationship, the oversight plan calls for "reasonable oversight measures that are capable of identifying risks and preventing serious harm to rights and fundamental freedoms, the health and safety of individuals, and the environment". A decree passed by the *Conseil d'État* may add to the oversight procedures and specify how the oversight plan is to be created and carried out.[180]

Article L. 225-102-4 of the Commercial Code, paragraph II, states that a corporation that violates the requirements outlined in paragraph I may be subject to an order to comply when formal notice is issued. It may also be required to pay a civil penalty of up to 10 million euros, according to the last paragraph.[181]

However, the applicant Members of the National Assembly and Senators have referred to the Constitutional Council the Law alleging a violation of the principle of no punishment without law arguing that the constituent elements of the violation punished by the last subparagraph of paragraph II are alleged not to be precisely defined. Specifically, it is said that the "normative reference" that is used to evaluate the risks that need to be recognized and the significant violations that need to be prevented is imprecise. There is insufficient clarity in the definition of the obligations arising from the measures

[179] Decision n° 2017-750 DC (n 11) Point 2
[180] Decision n° 2017-750 DC (n 11) Point 3
[181] Decision n° 2017-750 DC (n 11) Point 4

of oversight listed in paragraph I, subparagraphs 1 through 5. Lastly, the legislator is unable to authorize the adoption of regulations to "complete" these monitoring procedures. Likewise, the legislator did not state whether the sanction is applied to each violation or just the first one, regardless of the number of violations, the punishment is not clearly defined. The National Assembly's applicant members have the same complaints, claiming that the disputed articles go against the notions of necessity and proportionality in punishment.[182]

According to the Court, although the legislator is free to impose different obligations on companies covered by paragraph I of Article L. 225-102-4 of the Commercial Code in order to encourage respect for various rights and freedoms by these companies and their business partners since it has linked the obligations imposed by it to punitive consequences, it must sufficiently define these penalties in order to observe Article 8 of the Declaration of the Rights of Man and the Citizen of 1789 that stipulates that "The law shall only establish penalties that are strictly and clearly necessary, and one shall only be punished under a law that has been established and enacted prior to the criminal offense, and that is legally applicable". The Court highlights that the principles laid down by this Article apply not only to punishment ordered by the criminal courts but also to any sanction of a punitive nature.[183]

Therefore, considering the general nature of the terms employed by the law, the broad and indeterminate nature of the reference to “human rights” and “fundamental freedoms” and the perimeter of the companies, enterprises and operations that fall within the scope of the oversight plan established by it, the legislator could not stipulate that any company that has committed a breach defined with such inadequate clarity and precision may be required to pay a fine of up to ten million euros without violating the requirements resulting from Article 8 of the 1789 Declaration, despite the objective of general interest pursued by the law referred.[184]

As a result, the French Constitutional Council declared the unconstitutionality of the last subparagraph of Article 1 of the contested law (consequently the third

[182] Decision n° 2017-750 DC (n 11) Point 5
[183] Decision n° 2017-750 DC (n 11) Point 6 and 8
[184] Decision n° 2017-750 DC (n 11) Point 13

subparagraph of Article 2 and Article 3, which are inseparable from the former, were also declared unconstitutional).[185]

The Report does not support any other forms of punishments, including administrative, criminal, or civil, in light of the Act's broad application and the ruling made by the French Constitutional Court on March 23, 2017, and it leaves it up to the French legislator to decide whether to penalize determined behaviors through specific offenses.

Fines would have created a stronger incentive for companies to comply with the French Act. In the upcoming term of government, the NGOs and parliamentarian Dominique Potier, who presented and analyzed the legislation and expressed regret over the civil fine's rejection, are urging a revision of this provision.[186]

Another problem with the enforcement of the French law is that none of the five proceedings that have been started so far (four seeking temporary remedy, and one seeking compensation) have had their merits determined due to the ongoing discussion about which courts should have the authority to hear these cases (plaintiffs, primarily non-governmental organizations, have argued that commercial courts should have jurisdiction, while defendant companies have argued that civil courts should). Only with the enactment of Law No 2021-1729 on December 22, 2021, did the French legislature explicitly state that any actions following the French Act must be filed before the Paris Civil Court (*Tribunal judiciaire de Paris*).

The fact that so few actions have been taken is another factor contributing to the absence of sanctions for failing to comply with the due diligence requirements.[187]

An example is the case where Mexican nationals and the German organization European Center for Constitutional and Human Rights filed a lawsuit against *EDF*

[185] Decision n° 2017-750 DC (n 11) Point 14
[186] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/
[187] The cases are listed and explained by the duty of vigilance radar: <https://vigilance-plan.org/court-cases-underthe-duty-of-vigilance-law/>.

Renewables, a subsidiary of *Électricité de France*, in March 2023, requesting that the company incorporate violations of Indigenous rights into its monitoring plan concerning the construction of a wind farm in Mexico. In order to allow *EDF Renewables* to modify its vigilance plan as necessary, a judicial mediation was established.[188] The hearing ruled the claim inadmissible, on the basis that the formal notice issued by the claimants did not refer to the same vigilance plan as the lawsuit filed in 2020, even though this is not an explicit requirement under the law.[189]

The French postal union *Fédération des Syndicats Solidaires, Unitaires et Démocratiques des Activités Postales et de Télécommunications (SUD PTT)* brought a claim against *La Poste*, being the only judicial claim that has been declared admissible until now. The Paris Judicial Court issued an injunction against *La Poste* on December 5, 2023, requiring the company to add to its vigilance plan with (1) a mapping of risks designed to identify, analyze, and prioritize risks; (2) processes for assessing subcontractors; (3) a mechanism for alerting and collecting reports after consulting the trade unions; and (4) to publish concrete monitoring of vigilance measures, which goes beyond general statements.[190]

In contrast, the *SUD PTT* union's requests for the adoption of safeguards against illegal employment and psychological and safety hazards, as well as for the release of an entire list of all suppliers and subcontractors, were denied by the Judicial Court.[191]

With regard to a vigilance report's accuracy and consistency, this ruling establishes the initial criteria that the courts will follow.

There has not been a lot of litigation over vigilance programs as of yet, and since 2017, there has not been a clear national publication of rules, leaving corporations' responsibilities unclear. However, many uncertainties for corporations in the future

[188] Paris Judicial Court, n° 20/10246 (2021); It should be noted that EDF Renewables lodged an appeal for excess of power against the order of a judicial mediation by the pre-trial judge, which was rejected by the Paris Court of Appeal, n° 22/00749 (March 17, 2023).
[189] *Indigenous community seeks access to justice in important hearing before Paris Appeals Court*. (2024). European Center for Constitutional and Human Rights. https://www.ecchr.eu/en/press-release/edfs-windpark-in-mexico/
[190] Paris Judicial Court, n° 21/15827 (Dec. 5, 2023).
[191] *Ibid.*

should be eliminated with the implementation of the CSDDD.[192] In any event, while awaiting the rulings of the Court of Appeal and ultimately the French *Cour de Cassation* (the highest court), the initial orders that are accessible nationally offer an indication of the expectations of the Judicial Court.

In this regard, the Paris Court of Appeal announced in a press release dated January 18, 2024, the establishment of a chamber 5–12, focusing on ecological responsibility, the corporate duty of vigilance, and the sustainability report produced by the CSRD directive.[193] This development is expected to facilitate the harmonization of case law.

It is also important to highlight the importance that NGOs play in this scenario. A recent case concerning *Danone* displays how effective compliance with due diligence can be monitored. In September 2022, three NGOs gave formal notice to nine food and retail giants (including *Danone*) to comply with the French Act, by reducing the use of plastics. A three-month term was given to them to adopt plastic phase-out plans before taking the matter to court. On 9 January 2023, they took *Danone* to the *Tribunal judiciaire de Paris*, since the company did not repair their compliance plan. Meanwhile, the other companies have either presented plans and announced changes that seem to have convinced the NGOs.[194]

The *Loi de vigilance* establishes two private legal mechanisms. Through the *injonction de faire*, individuals can pursue judicial injunctions to compel companies to fulfill their duty of care as outlined within the legislation (cf. Art. L. 225-102-4 II. French Commercial Code). If a company fails to meet its obligations within three months following receipt of a legal notification, individuals with legitimate interests are empowered to request a court order mandating compliance with said obligations.[195]

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[192] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) n° 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[193] Création d'une chambre des contentieux émergents – devoir de vigilance et responsabilité écologique à la CA de Paris. (n.d.). Cour d'appel de Paris. https://www.cours-appel.justice.fr/paris/creation-dune-chambre-des-contentieux-emergents-devoir-de-vigilance-et-responsabilite

[194] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

[195] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/

However, the central aspect of potential sanctions lies in a liability provision detailed in Article L. 225-102-5 of the French Commercial Code. This provision references the general tort law clauses found in the French Civil Code (Articles 1240 and 1241 of the French Civil Code). In cases where a company fails to adhere to the obligations outlined in the vigilance law, it is required to compensate for damages that could have been prevented through the establishment and effective implementation of a risk monitoring plan. A primary point of contention is the burden of proof, which raises concerns regarding the efficacy of the liability framework. The initial draft of the law proposed a presumption of responsibility to the detriment of companies. However, this provision was ultimately rejected during the legislative process. As a result, under the current law, claimants are obligated to demonstrate the conditions of liability.[196]

The victim has the burden of proof, needing to provide evidence of three items. First, the existence of a fault. As to the 2017 Act, the inability to draw up, publish, and efficiently implement a vigilance plan is the cause of damage. As a result, it must be demonstrated that the harm experienced was caused by the lack of a plan, its failure, or its non-implementation.[197] Second, the injured party has to present evidence of the damage. The Act refers to serious damage as well as certain specific types of offenses. Therefore, the harm must be equivalent to serious breaches of human rights and fundamental freedoms, or the health and safety of individuals or the environment.[198] Lastly, the victim needs to prove the causal relationship between the harm they experienced and the fault. The damage must have resulted from parent and contracting companies' failure to uphold their vigilance obligations. Regarding this, the Constitutional Council has stipulated that there must be a clear causal connection between the violation and the harm.[199]

[196] *Ibid.*
[197] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/
[198] *Ibid.*
[199] Cons. Const. 23.03.17, decision no. 2017-750 DC, §27

Liability can only arise from the parent company's or contracting company's violations.[200] Any person with a legitimate interest in this regard may file a liability action.[201]

Requiring businesses to establish their innocence when accused of misconduct would have leveled the playing field for both impacted parties and multinational enterprises.[202]

According to *Les Amis de la Terre*: "Without this reversal of the burden of proof, access to justice continues to be a positive assault course, as it is very difficult for the people and civil society affected to gather the evidence needed to incur a multinational company's legal responsibility, as much of the key information is held by the company itself – even more so when such companies are located abroad. Added to this are the dangers and difficulties of collecting evidence and testimonies in the field in countries like Uganda".[203]

Despite the challenges inherent in proving liability under the *Loi de vigilance*, other critical aspects of compliance that warrant attention. One such aspect is the integration of alert mechanisms. The Report highlights a common practice among companies of merging the alert mechanisms required by the Act for vigilance purposes with those under the Sapin 2 Law (Law No. 2016-1691 of 9 December 2016, which imposes similar obligations on companies regarding corruption risks). While the French government considers officially endorsing this approach, the Report advises against it. It emphasizes the importance of maintaining a clear separation between the two mechanisms due to differences in their scope, stakeholder involvement, and triggering thresholds.[204]

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[200] *Loi de vigilance*, (2017). https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/
[201] https://publika.skema.edu/wp-content/uploads/dlm_uploads/2023/10/Due-diligence_NGO-complete-survey-2023.pdf
[202] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/
[203] Saint-Affrique, D. (2023). *Due Diligence: What do NGOs Think of France's 2017 Duty of Vigilance Act?* SKEMA Publika. https://publika.skema.edu/due-diligence-what-do-ngo-think-of-france-2017-duty-of-vigilance-act/
[204] *Rapport d'information n°5124*. (2022). Assemblée Nationale (France). https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information

In light of the ongoing issues with the integration of alert mechanisms, the Report also addresses the broader question of oversight and enforcement. It proposes the establishment of an administrative entity to oversee the implementation of the Act to guarantee its proper execution.[205] This is similar to the European Directive, which calls for the appointment of a national supervisory authority in each Member State to oversee the new regulations outlined in the directive and apply fines for noncompliance.

The Federal Office of Economics and Export Control (*BAFA*), an administrative body under the Federal Ministry for Economy and Energy, is in charge of enforcing the law in Germany rather than the courts, demonstrating that the German act did not put private enforcement over public enforcement (Section 12 et seq.).[206] According to Section 14(1), the competent authority acts discretionary or if requested by affected parties. This is equivalent to an injunction issued by a French civil or commercial court from a functional standpoint. While there is no financial compensation in either scenario, the parties that are impacted can make sure that the duty of care is upheld.[207]

In addition to auditing company reports, *BAFA* is required by law to act upon applications from individuals who have had their human rights violated. It also conducts risk-based investigations and monitors violations of due diligence requirements. It has broad jurisdiction and the ability to impose administrative fines of up to EUR 8 million, or 2% of the annual revenue of the company under investigation. Businesses that have been hit with hefty fines might not be allowed to participate in public procurement.[208]

The *BAFA* is not the only organization responsible for the oversight of the *LkSG*. The workers' representatives could, for instance, ask about the due diligence policies followed by their employers. In addition, those who are impacted may file a complaint in an administrative court for failure to act if the federal office does nothing. It needs to be

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[205] *Ibid.*
[206] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3
[207] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/
[208] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

made clear whether environmental associations can file complaints for environmental duty violations.[209]

The *LkSG* allows victims of human rights violations to go to German courts with the help of trade unions and NGOs, using the existing limited legal options available under German law, without needing to create new ways to seek justice. Also, victims have the option to file complaints about a particular situation with the Federal Office of Economics and Export Control. Affected parties may notify the *BAFA* of violations of a company's due diligence responsibilities, and they are required to examine the accusation, take appropriate action, and, if required, impose fines proportionate to the severity of the violation and the company's overall turnover. The Supply Chain Act stipulates that major human rights abuses will result in a minimum EUR 175,000 fine as well as a temporary exclusion from public procurement. [210]

However, it is debatable if the Federal Ministry of Economics and Energy's highest federal authority, the *BAFA*, will act with the requisite guarantees of independence and take adequate measures. To address this issue, German law should establish a monitoring body independent of the Ministry of Economic Affairs.

Moreover, the Act surprisingly omits the inclusion of a civil liability provision. This omission is noteworthy given that scholarly and practitioner discourse primarily revolves around the liability of companies concerning human rights violations within their supply chains and the imperative for victims to obtain redress in cases of harm. Instead, Section 11 of the draft legislation solely introduces a special procedural status for domestic trade unions and NGOs in civil proceedings. This provision does not address substantive liability law matters or issues related to choice of law. Nonetheless, liability could potentially be established under general tort law if the duty of care stipulated in the German Draft Due Diligence Act forms the basis for a negligence claim (Section 823 (1) of the German Civil Code).[211] However, it would be preferable to have explicit

[209] *Ibid.*
[210] *Germany: call for an improvement of the Supply Chain Due Diligence Act*. (2021a). International Federation for Human Rights. https://www.fidh.org/en/issues/business-human-rights-environment/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act
[211] Nasse, L. (2021). *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences*. NOVA BHRE. https://novabhre.novalaw.unl.pt/the-french-

clarification within the text of the legislation and regulation of associated private international law concerns.

When the law fails to establish a specific civil liability regime for businesses that breach their due diligence obligations and either cause or facilitate harm—or whose commercial activities lead to abuses—it signifies a shortcoming in fulfilling the third pillar of the UNGPs. This pillar encompasses the provision of legal protection for affected individuals, the availability of effective remedies, and compensation for damages incurred. Without a system of this kind, the legislation may not be able to put the required pressure on businesses to prevent future violations.[212]

Nevertheless, since the EU Directive incorporates both enforcement strategies, both texts will need to adapt in this regard. It implies a mix of civil liability and penalties. Even if certain limitations are anticipated to avoid unnecessarily high litigation, private enforcement through civil responsibility is promoted as a successful enforcement strategy. Each Member State would be required to nominate one or more national supervisory authorities that would be a component of a European Network of Supervisory Authorities with regard to public enforcement. The European legislator once again depends on the complementarity of private enforcement and state enforcement to achieve the maximum effectiveness of the due diligence responsibilities, following lessons learned in the areas of competition law and the protection of personal data.[213] Whether the judge or the administrative authority will be more qualified to interpret the new standards is still up for debate.

The French government is not required to take the proposal's recommendations since the Report is only suggestive. On the other hand, France will have two years from the date that the Directive entered into effect to enact it into national law. This legislative reform would offer a chance to put several of the Report's suggestions into practice,

duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/

[212] *Germany: call for an improvement of the Supply Chain Due Diligence Act*. (2021a). International Federation for Human Rights. https://www.fidh.org/en/issues/business-human-rights-environment/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act

[213] Jault-Seseke, F. (2024). A Comparison of the French and German Transparency Laws. *Oslo Law Review*, *10*(2), 1–8. https://doi.org/10.18261/olr.10.2.3

harmonizing French and EU regulations, and altering the current duty of vigilance guidelines.

The enforcement mechanisms for due diligence under French and German laws exhibit notable differences, with France's reliance on court-based injunctions and civil liability facing challenges such as unclear sanctions and a demanding burden of proof, while Germany's administrative approach through *BAFA*, although more structured, lacks a civil liability provision. Both systems would benefit from the EU Directive's hybrid enforcement strategy, which combines administrative penalties with civil liability to provide a more comprehensive approach. As France moves to align its legislation with the EU Directive, there is a crucial opportunity to address existing gaps in the *Loi de Vigilance*, thereby enhancing enforcement and better aligning with international human rights standards.

5. CONCLUSION

With globalization, the trade between the Global South and the Global North has greatly increased, which has allowed businesses of all sizes to interact with suppliers throughout the globe. Benefits include increased sourcing opportunities, entry into new markets, and company expansion resulted from this. However, it has also introduced challenges such as increased supply chain complexity, heightened risks, and legal issues.

Ideally, this trade relationship should benefit both hemispheres by creating jobs and fostering economic development in the Global South, while boosting profits and making goods more affordable for consumers in the Global North. However, this balance is often skewed, with corporations from both the Global North and the Global South exploiting weaker human and environmental protections, particularly in regions where regulatory frameworks are less stringent.

Historically, accountability for violations in supply chains was lacking until tragedies like Ken Saro-Wiwa death, the South African apartheid system and the 1984 Bhopal gas disaster prompted regulatory responses after significant loss of life and injury.

In response to these challenges, the UN Guiding Principles on Business and Human Rights (UNGPs), formulated by John Ruggie in 2005, were designed to delineate the

essential responsibilities of governments and enterprises with respect to human rights. The UN Human Rights Council unanimously established these principles in 2011 in response to the shortcomings of voluntary efforts and self-regulation in addressing corporate human rights breaches. The UNGPs however faced several criticisms for lacking a strong moral foundation, prioritizing commercial interests over individuals affected by business activities, and lacking explicit enforcement mechanisms.

Currently, National Action Plans (NAPs) remain the primary tool for implementing the UNGPs at the national level. However, they also present several shortcomings, such as a lack of clarity, focus on previous commitments rather than the creation of new ones, and a cautious approach that frequently refrains from suggesting new legally binding obligations.

Following the introduction of the Guiding Principles, France became the first country to transform these voluntary objectives into legally enforceable regulations by passing the *Loi de Vigilance* in March 2017. This law mandates that French companies develop, publish, and execute a vigilance plan that includes reasonable steps to detect and stop human rights and fundamental freedom infractions, as well as serious bodily harm, environmental damage, or health hazards, being regarded as one of the most developed pieces of legislation on business's obligation to comply with fundamental humanitarian principles.

The adoption of the Guiding Principles was a crucial first step that informed the creation of the German Supply Chain Act. As a result, the German Supply Chain Act (*Lieferkettengesetz)* became law in January 2023. Therefore, businesses operating in Germany must meet certain due diligence requirements, such as determining if their operations may lead to any violations of human rights or environmental damage. Companies must take action to prevent, mitigate, or end violations, and they have to set up a complaint process for people who could be impacted by them.

At the EU level, the Corporate Sustainability Due Diligence Directive (CSDDD), ratified on May 24, 2024, represents a significant milestone in harmonizing human rights and environmental standards. CSDDD introduces mandatory human rights and environmental due diligence requirements for companies operating within the EU,

including non-EU companies that meet specific turnover thresholds. This ensures a broad and inclusive application of the Directive, promoting global adherence to rigorous standards.

While legal frameworks like the *Loi de Vigilance* and *LkSG* have indeed pushed corporations toward greater accountability and stronger protection of human rights and the environment, their impact is limited by shortcomings in scope, enforcement, and clarity. The hardening of these frameworks has undoubtedly influenced progress, but further advancements are necessary to close existing gaps.

First, it has become clear that the use of outdated and rudimentary parameters, such as the company's size or its legal structure, by which a corporation is required to apply due diligence obligations is inefficient. The frameworks should implement the company's financial situation as a criterion (similar to the CSDDD).

There are several reasons for that, first is that companies with larger assets tend to have more financial resources available to invest in robust due diligence systems and processes, meaning they have a greater ability to implement and maintain effective due diligence programs compared to smaller companies. Second, the employee criterion can facilitate evasion of the responsibility to avoid their legal obligations, meaning that they could divide their operations into several smaller companies to avoid falling into the scope of the law, by including the net worth criterion this risk would be mitigated, forcing the companies to comply with the law. Lastly, companies with larger assets usually have a broader and more complex operational footprint and supply chain. So, it is important to demand a broader scope of application to ensure that these companies with greater capacity for impact are included in the legal obligations of due diligence.

Moreover, it is crucial to expand the scope of due diligence requirements to include indirect suppliers. This extension is vital for effectively mitigating risks within the supply chain, as advocated by the recommendations of the European Directive. When including indirect suppliers within the regulatory framework, the assurance of upholding human rights and environmental stewardship throughout the entire supply chain is significantly reinforced. With this change, accountability and responsibility will be extended beyond direct interactions, including all tiers of the supply network.

Another change should be a clearer and more precise definition of suppliers and subcontractors, this would address the current ambiguities and uncertainties making it easier for companies to comply with the law and increasing the effectiveness of enforcement measures.

In comparing the French and German regulatory frameworks on business standards compliance, the French legislation is notably less detailed and more flexible than its German counterpart. The French law, while mentioning the UN Guiding Principles in its introduction, lacks specific incorporation of these principles into its substantive provisions and fails to clearly define the human rights it aims to protect. Instead, it requires companies to create and disclose a "vigilance plan" to manage risks related to human rights and the environment without specifying which rights are covered. Scholars suggest aligning these definitions with established international instruments, but ambiguity remains. In contrast, the German Act offers a detailed catalog of relevant human rights and international treaties, such as the ILO Core Labor Conventions and the UN Human Rights Covenants, setting clear criteria for evaluating measures and addressing specific human rights risks, although it falls short on explicit environmental protections.

On another hand, the *LkSG* should go into more detail in addressing environmental risks and be amended to guarantee and protect the right to free, prior and informed consent of indigenous peoples and to prohibit and sanction gender-based violence and discrimination along supply chains.

The European Commission's proposal further emphasizes environmental impacts, suggesting that flexibility in the French law might be advantageous but also necessitating updates to the German law for compatibility with the forthcoming EU Directive.

Concerning transparency, in order to increase access to financial and non-financial data about French companies, the public authorities should establish a suitable body responsible for creating, disseminating and updating a list of companies under the duty of vigilance on an annual basis. Moreover, making all vigilance plans available on a public database to strengthen transparency regulations is imperative. Regarding the

difficulty of the German Act to guarantee transparency of their own supply chain, companies should begin to process all supplier data to analyze and evaluate supply chain risks.

The French and German frameworks for monitoring compliance with due diligence requirements reveal significant differences in approach. In France, compliance is monitored through a system of court injunctions and civil liability mechanisms, but the lack of clear sanctions for non-compliance poses challenges. The *Loi de Vigilance* mandates companies to create and implement an "oversight plan" to manage risks related to human rights and the environment, yet the legislation's vagueness and imprecise definitions have led to its key punitive provisions being declared unconstitutional. Consequently, legal actions in France often result in judicial mediations rather than definitive rulings, and while some cases, such as those against *EDF Renewables* and *La Poste*, have led to injunctions, the overall effectiveness of the French law remains limited. Another important change is related to the burden of evidence that must be reversed so that companies are required to prove their innocence when accused of misconduct.

Conversely, the German law delegates enforcement to an administrative authority, the Federal Office of Economics and Export Control (*BAFA*), which possesses broad investigative powers and the ability to impose significant fines. Despite its detailed due diligence requirements, the German Act lacks a civil liability provision, raising questions about the adequacy of remedies for victims. Both frameworks require companies to establish risk management systems and publish annual reports, but they differ in enforcement mechanisms and the clarity of their provisions.

Concerning the difficulty in guaranteeing the independence and implementation of adequate measures by the *BAFA* the German Act should establish a monitoring body independent from the Ministry of Economic Affairs. The Act should also establish liability rules for businesses that violate their due diligence requirements and cause or facilitate damage.

The CSDDD aims to harmonize these approaches, blending civil liability and administrative penalties, and necessitating adjustments to both French and German laws to ensure comprehensive and effective enforcement of due diligence obligations.

Finally, both countries would be using the European Directive to bring their legislation into closer conformity with global best practices, promoting more efficacy and consistency in tackling modern issues.

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