THE ROLE OF HUMAN RIGHTS & ENVIRONMENTAL DUE DILIGENCE LEGISLATION IN PROTECTING WOMEN MIGRANT WORKERS IN GLOBAL FOOD SUPPLY CHAINS

Research Policy Study commissioned by Oxfam Germany and ActionAid France in the framework of the EU DEAR Project 'Our Food. Our Future'

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The study was completed in May 2021.

The study was commissioned by:

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The study was co-funded by the European Union. The views expressed in the study are those of the authors and do not necessarily reflect the views of the European Union.

EXECUTIVE SUMMARY

Background, Aim & Scope of the Study:

In March 2021, the European Parliament adopted a Resolution recommending an EU Directive on Corporate Due Diligence and Corporate Accountability. The new Directive should require corporate due diligence on human rights, environmental protection, and good governance. It should also ensure that business enterprises can be held legally accountable for human rights abuses and environmental damages that they cause or contribute to in their global value chains. An earlier EU-sponsored research study on due diligence requirements through the supply chain had concluded that the prevailing 'soft-law' approach to business and human rights has proven insufficient, highlighting the growing support among States, business enterprises and civil society organisations for EU-wide human rights and environmental due diligence (HREDD) legislation. A European Commission legislative proposal is expected for summer 2021.

The present study was requested by ActionAid France and Oxfam Germany in the context of the EU DEAR Project 'Our Food. Our Future'. It examines the contribution European HREDD legislation could make to the protection of women migrant workers in global food supply chains linked to the European market. Standards and processes in international law and global governance relevant to the protection of women migrant workers are elaborated at three different levels: standards and processes that address structural causes of adverse human rights and environmental impacts in global food supply chains; standards and processes that focus on the particular vulnerabilities of women and migrant workers; and standards and processes that are tailored to intersectional forms of discrimination experienced by women migrant workers.

Adverse Human Rights & Environmental Impacts of Global Food Supply Chains on Women Migrant Workers:

The agri-food sector is characterised by significant upstream market concentrations and asymmetric power relations that translate into unfair business practices and unsustainable supply chain management. The adverse human rights impacts on women migrant workers particularly in the lower tiers of the food supply chain – precarious employment and excessive working hours, coupled with undeclared and unpaid/underpaid work – are severe. These adverse impacts are compounded by barriers to effective remedies due to material constraints (low income), the (legal) dependency of migrant workers on their employers, and the invisibilised and informal character of domestic and care work carried out by women.

Women migrant workers are exposed to multiple and intersecting forms of discrimination that prevent them from enjoying their human right to food and other internationally protected human and labour rights. Global food supply chains can reinforce women's inferior position in local labour markets and reproduce patriarchal relations at the factory floor, exposing them to hightened risks of gender-specific harms and sexual violence. Women migrant workers suffer disproportionately from rural poverty and conflicts, often linked to agricultural-induced environmental degradation, deforestation and the impacts of climate change; work hazards due to the exposure to pesticides and unsafe working conditions in food packing and processing facilities; labour exploitation, discrimination

and social exclusion; and poor housing conditions and insufficient access to healthcare and social protection.

The European Union Regulatory Framework on Business and Human Rights:

The European Union regulatory framework on business and human rights has evolved from early preoccupations with (voluntary) corporate social responsibility initiatives to a more dedicated focus on human rights impacts and corporate legal accountability following the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs); and more recent endeavours to integrate sustainable corporate governance into EU laws and policies on human rights and environmental protection, including the European Green Deal.

The EU has already adopted sector-specific due diligence legislation on illegal logging and conflict minerals. Other regulatory instruments on sustainable corporate governance that do not impose due diligence obligations but that can contribute, to a greater or lesser extent, to the protection of women migrant workers include the Non-Financial Reporting Directive and the Directive on Unfair Trading Practices in the Agricultural and Food Supply Chain. None of these legal instruments focusses (primarily) on the protection of human and labour rights, provides for civil liability, incorporates a dedicated gender perspective, or gives hightened attention to intersectional vulnerabilities of women migrant workers.

As part of the European Green Deal, the European Parliament has adopted a Resolution on corporate due diligence in relation to EU-driven global deforestation, which also focusses on protecting the human and labour rights of local communities in countries of origin and ensuring access to effective remedies for victims of corporate harm. The European Commission's Farm to Fork Strategy promises to work towards a fair and sustainable global food system that protects workers' rights, including by requiring companies in the agri-food sector to integrate sustainability into their corporate strategies. While there is a recognition of the hightened protection needs of seasonal, precarious and undeclared workers, the Strategy lacks a dedicated focus on women's rights.

Normative Sources of Human Rights and Environmental Due Diligence Legislation:

HREDD legislation contributes to the implementation of the UNGPs by translating (legally non-binding) corporate due diligence requirements into a legal standard of care that applies throughout a business enterprise's global value chain. To make an effective contribution to the protection of women migrant workers in global food supply chains, HREDD legislation needs to incorporate relevant protection standards in international law and reflect the requirements of corporate supply chain due diligence as elaborated by the UNGPs and associated international guidance.

International law requires States to respect, protect and fulfil the rights of women migrant workers to food security, healthy occupational and environmental conditions, access to land and decision-making power, and fair wages that allow for a decent living for themselves and their families. States have to end intersectional forms of discrimination against women migrant workers on the basis of their migration status, gender identity and sexual orientation, including by regulating private sector employment and

recruitment agencies. States are also required to address practical and legal barriers to access to justice and effective remedies encountered by women migrant workers.

The UNGPs and associated international guidance require HRDD from all business enterprises regardless of size, sector, operational context, ownership and structure. The UNGPs do not envisage a tier-based or control-based approach to delimiting the scope of corporate due diligence, but rather focus on the actual and potential adverse human rights impacts that a business enterprise causes or contributes to, or that are directly linked to it by its business relationships. International guidance confirms that retailers' pricing and purchasing policies can qualify as a 'contribution' to adverse human rights impacts in the lower tiers of global food supply chains.

Given the systemic and severe nature of adverse human rights impacts in the agri-food sector on women migrant workers, business enterprises need to prioritise them in their risk assessment and mitigation measures. Business enterprises need to mainstream a gender perspective into their HREDD policies and processes to prevent and remedy adverse impacts that are specific to women migrant workers or that affect them differently. Gender-based violence and sexual harassment should be treated as risks of severe human rights impacts irrespective of context-specific considerations.

Towards a European Directive on Corporate Due Diligence and Corporate Accountability:

While the inclusion of civil remedies into the envisaged EU Directive as proposed by the European Parliament may prove politically controversial, the European Union is legally competent to legislate in this area to prevent regulatory distortions of the internal market. The Directive's reference to 'effective, proportionate and dissuasive' sanctions, as *per* the European Parliament's proposal, does not exclude criminal sanctions and penalties. While Member States retain discretion in the choice of sanctions, the chosen sanctions must ensure an effective enforcement of the Directive.

Next to business enterprises domiciled in the European Union, the Directive's proposed text imposes HREDD obligations on foreign undertakings that operate in the internal market selling goods or providing services. It also covers small- and medium-sized enterprises that are publicly listed or operate in high risk sectors, with the latter arguably including companies in the agri-food sector. The personal scope of the Directive is significantly broader than in existing examples of HREDD legislation but still falls short of the UNGPs, which require human rights due diligence of all business enterprises irrespective of size or sector.

The proposed Directive imposes horizontal HREDD obligations that are envisaged to encompass international standards relevant for the protection of women migrant workers and other vulnerable and marginalised groups. The present text of the Directive does not contain a dedicated gender perspective, nor does it explicitly address the multiple and intersecting forms of discrimination encountered by women migrant workers.

The proposed Directive takes an overall robust approach to preventing adverse corporate human rights and environmental impacts in global (food) supply chains. It covers adverse impacts that a business enterprises causes, to which it contributes, and to which it is directly linked through its business relationships. However, the present text of the

Directive does not always clearly and consistently reflect the UNGPs' approach to supply chain due diligence, which could give rise to unduly restrictive or expansive interpretations of corporate HREDD obligations. In particular, the proposed exemption of certain business enterprises from HREDD requirements risks indirectly introducing a tier-based approach not envisaged by the UNGPs.

Of significant relevance for the protection of women migrant workers in global food supply chains is that the proposed Directive explicitly requires business enterprises to ensure that their purchasing practices do not cause or contribute to adverse human rights and environmental impacts. Contrary to the UNGPs, the current text of the Directive requires contributions to be 'substantial', which is likely to hamper the effectiveness of the provision.

The proposed Directive envisages various forms of guidance and stakeholder engagement to support the implementation and operationalisation of corporate due diligence requirements at different stages of the process. The present provisions on effective stakeholder consultation are rather weak by UNGPs standards and are not sufficiently tailored to the needs of vulnerable and marginalised groups, including women migrant workers.

Women migrant workers are particularly affected by practical and legal barriers to access to justice and effective legal remedies. Addressing these barriers requires a proper alignment of corporate supply chain HREDD with principles for assessing corporate liability in States' domestic public and private laws. In its current form, the proposed Directive does not attend to barriers to access to justice that stem from multiple and intersecting forms of discrimination encountered by women migrant workers, including on the basis of their gender identity and their migration status.

The proposed text of the Directive recognises the primary role of State-based enforcement and judicial remedies in redressing corporate human rights and environmental harm in global (food) supply chains. While company-level grievance mechanisms can play an important role in identifying adverse impacts, tracking the effectiveness of company responses, and providing timely relief to victims, they do not constitute an alternative to, nor should they interfere with, State-based enforcement and judicial remedies. The EP Resolution envisages imposing legal obligations on business enterprises to develop effective and legitimate grievance mechanisms, in line with the UNGPs.

The proposed Directive requires Member States to create a robust system of administrative monitoring and enforcement, supported at the EU level by a 'European Due Diligence Network'. Independent national authorities with appropriate powers and resources can instigate investigations *ex officio* and on the basis of 'substantiated and reasonable' concerns raised by third parties. Sanctions are envisaged for business enterprises that fail to take remedial action in relation to victims of corporate abuse, and may include exclusions of undertakings from public procurement and export credits.

Civil liability can be incurred by all business enterprises within the personal scope of the Directive, including foreign undertakings that operate in the internal market. According to the current proposal, business enterprises and undertakings under their control can be held liable for human rights and environmental harm occurring in their entire value chain,

provided that they caused or contributed to adverse human rights and environmental impacts. In these scenarios, the Directive appears to envisage strict liability for human rights and environmental harm, coupled with a due diligence defence. There are different conceivable approaches to extending civil liability to 'linkage' scenarios that are presently not covered by the Directive's civil liability regime.

The EP Resolution requires Member States to treat 'relevant' provisions of the proposed Directive as mandatory provisions of the forum within the meaning of Article 16 Rome II Regulation. This ensures that the Directive's requirements as implemented at the national level apply in tort litigations where the damage occurred in a third State.

Two annexes attached to a previous European Parliament Report that were not included in the final Resolution envisaged further changes of European private international law that would have contributed to addressing barriers to access to justice and effective remedies encountered by foreign victims of corporate human rights abuse. Annex I proposed to empower Member State courts to join defendants incorporated outside the European Union in proceedings against EU-domiciled (parent) companies under Article 8 Brussels I Regulation (Recast); and to introduce *forum necessitatis* jurisdiction for business-related civil claims on human rights violations within their value chains. Annex II would have allowed victims of business-related human rights violations to choose the applicable law (Rome II Regulation) between the law of the country in which the damage occurred; the law of the country in which the event giving rise to the damage occurred; and the law of the place where the defendant undertaking is domiced or (lacking an EU Member State domicile) operates.

RECOMMENDATIONS

Recommendations on the Regulatory Design and Scope of the proposed Directive:

- The European Commission's proposal should not fall behind the currently envisaged personal scope (*ratione personae*) of the Directive that imposes HREDD requirements on undertakings domiciled in the European Union and/or operating in the internal market across all economic sectors and including small- and medium sized enterprises that are publicly listed or operate in high-risk sectors. In line with the UNGPs, it should be considered to impose HREDD requirements on all business enterprises that are domiciled in the European Union and/or operate in the internal market, with size- and sector-specific requirements being taken into account when determining the appropriate means through which undertakings must discharge their HREDD obligations.
- The Directive should clarify that, in line with the UNGPs, the scope of corporate HREDD obligations is not determined by virtue of a tier-based or control-based approach but extends to a business enterprise's entire value chain. The requirements and consequences of corporate HREDD in 'cause', 'contribution', and 'linked to' scenarios should be clearly stated in the text of the Directive and comprehensively explained in EU guidance accompanying its implementation by the Member States.
- To avoid interpretations of the envisaged Directive's due diligence requirements that are incompatible with – and potentially more restrictive than – the UNGPs, the qualification of contributions as 'substantial' must be removed. The Directive should clarify that 'contribution' includes a company's acts and omissions that have a sufficient effect on another entity so as to make the abuse more likely to happen.
- The exemption of certain undertakings from the obligation to establish and implement a due diligence strategy should be removed, as this may indirectly introduce a tier-based approach into corporate HREDD incompabile with the UNGPs. Under no circumstances should undertakings be exempted from the requirement of mapping their value chain as a condition for identifying (risks of) adverse impacts.
- The Directive's provisions on stakeholder engagement should be amended, such that business enterprises are required to consult (rather than discuss) with potentially affected groups (in addition to other relevant stakeholders). Free, prior and informed consent should be required in circumstances recognised by international law, such as consultations with indigenous communities and cases involving tenure rights and shift in land uses.
- To ensure an effective enforcement of EU law and to protect victims of corporate human rights and environmental harm, Member States implementing the Directive should provide for criminal sanctions and penalties in cases of severe human rights impacts and repeated offenders.
- The Directive should fully align the scope of civil liability for human rights and environmental harm with the scope of corporate supply chain due diligence obligations.
- The present approach, according to which undertakings within the personal scope of the Directive incur civil liability for human rights and environmental harm that they, or undertakings under their control, cause or contribute to throughout their value chains must be maintained. It should be clarified that in these scenarios, the Directive imposes strict liability coupled with a due diligence defence. The qualification of contributions as 'substantial' must be dropped, in line with the UNGPs.

- It should be considered extending the scope of civil liability to include human rights and environmental harm to which undertakings within the personal scope of the Directive are directly linked by their business relationships. The determination of the appropriate standard of liability should reflect the UNGPs' HRDD requirements in linkage scenarios, including the company's leverage and the severity of the human rights abuse.
- The requirement for Member States to treat relevant provisions of the Directive (including HREDD requirements, burden of proof and limitation periods) as overriding mandatory provisions of the forum must be maintained. The amendments of EU private international law envisaged in the European Parliament Report should be further pursued in an appropriate forum.

Recommendations on the Application of the proposed Directive to Women Migrant Workers in Global Food Supply Chains:

- Having regard to the widespread and severe adverse human rights and environmental impacts of global food supply chains, small- and medium-sized undertakings in the agri-food sector should be included in the Directive's list of high-risk enterprises to be drawn up by the Commission.
- To underwrite the effectiveness of the Directive's requirement for business enterprises to ensure that their purchasing policies do not cause or contribute to adverse impacts on human rights, the environment and good governance, the qualification of contribution as 'substantial' must be removed from the text of the Directive.
- The relationship between the Directive's provision on purchasing policies and the EU Directive on Unfair Trading Practices in the Agricultural Food Supply Chain should be explored in appropriate (sector-specific) guidance by the European Commission. This guidance should also highlight the need for business enterprises to prioritise in their due diligence strategy adverse impacts of their purchasing policies on women migrant workers – having regard to the prevalence of these adverse impacts in global food supply chains and their propensity to result in severe human rights harm.
- The Annex to the Directive on international protection standards to be drawn up by the European Commission should make explicit reference to the International Convention on the Elimination of All Forms of Discrimination against Women and the ILO Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Annex' list of types of adverse corporate human rights impacts should reflect the hightened protection needs of women migrant workers against multiple and intersecting forms of discrimination, in line with CEDAW's General Recommendation No. 26 on Women Migrant Workers. It should clarify that business enterprises must always regard sexual harassment and gender-based violence as risks of severe human rights impacts, in line with the HRC Guidance on the Gender Dimensions of the UNGPs.
- A dedicated gender and intersectional perspective must be mainstreamed into the text of the Directive. Building on the HRC Guidance on the Gender Dimensions of the UNGPs, the Directive should outline concrete steps Member States (implementing the Directive) and business enterprises must take to prevent and redress adverse impacts on women migrant workers.
- The Directive must ensure that effective stakeholder engagement in the development of sectoral due diligence plans, the establishment and implementation of due diligence strategies, and the operation of corporate grievance mechanisms is

conducted in a gender-responsive way that accounts for the hightened risk of marginalisation of women migrant workers in stakeholder consultations and pays particular attention to their exposure to adverse human rights impacts linked to their gender identity and/or migration status.

- Guidelines by the European Commission and sector-specific due diligence plans should be used to clarify HREDD expectations towards business enterprises from the identification and assessment of risks to the prevention and remediation of adverse impacts, in order to address the multiple and intersecting vulnerabilities of women migrant workers. Guidelines and due diligence plans should highlight how gender-specific considerations influence the very definition of 'risk' and the severity and irremediable character of adverse impacts.
- The Directive should require business enterprises to design company-level grievance mechanisms that are accessible and acceptable for women migrant workers, including by ensuring gender diversity in their staff, involving gender committees and women counsellors in remediation process, and protecting victims from reprisals. Grievance mechanisms must account for the special needs and hightened vulnerabilities of women migrant workers.
- The European Union should support the Member States implementing the Directive, including through suitable guidelines, to attend to additional barriers to access to justice and effective remedies encountrered by women migrant workers, including barriers linked to structural discrimination and inequality and barriers relating to procedural and evidentiary requirements and practices that render judicial remedies economically, socially or culturally inaccessible to women migrant workers.

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1. Introduction

- In February 2021, the European Parliament's Committee on Legal Affairs tabled a motion for a Resolution recommending an EU Directive on Corporate Due Diligence and Corporate Accountability. The new Directive should require corporate due diligence on human rights, environmental protection, and good governance throughout the global supply chain. It should also ensure that business enterprises can be held legally accountable for adverse impacts that they cause or contribute to in their global operations. The European Parliament adopted the Resolution in a landslide vote in March 2021, with a European Commission proposal expected for early summer.
- The present study examines the contribution a European Directive on Corporate Due Diligence and Corporate Accountability could make to the protection of women migrant workers in global food supply chains. Building on legal and policy research, as well as existing examples of human rights and environmental due diligence legislation, the study makes tailored recommendations for the envisaged Directive to prevent and redress business-related human rights and environmental harm in global food supply chains linked to the European market.
- Standards and processes in international law and global governance relevant to the protection of women migrant workers are elaborated at three different levels of generality: standards and processes that address structural causes of adverse human rights and environmental impacts in global food supply chains; standards and processes that focus on the particular vulnerabilities of women and migrant workers; and standards and processes that are tailored to intersectional forms of discrimination experienced by women migrant workers.

In April 2020, European Commissioner for Justice Didier Reynders announced an EU legislative initiative on mandatory supply chain due diligence.[1] The announcement was made on occasion of the presentation of a major research study on Due Diligence Requirements through the Supply Chain.[2] Building on the UN Guiding Principles on Business and Human Rights (UNGPs),[3] the study concluded that the prevailing 'soft-law' approach to business and human rights has proven insufficient and highlighted the increasing support by states, business enterprises and civil society organisations for an EU-wide regulation of corporate human rights and environmental due diligence (HREDD) throughout the global supply chain. In February 2021, the European Parliament's Committee on Legal Affairs tabled a motion for a European Parliament Resolution recommending a European Directive on Corporate Due Diligence and Corporate Accountability (EP Report),[4] which the Parliament adopted in a landslide vote on 10 March 2021 (EP Resolution).[5]

The envisaged directive should impose horizontal due diligence obligations on business enterprises established in the territory of the European Union (EU) or

[1] European Parliament, Working Group on Responsible Business Conduct, *European Commission promises mandatory due diligence legislation in 2021* (2020), Webinar, available at: https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/.

[2] BIICL, CIVIC Consulting & LSE, *Study of Due Diligence Requirements through the Supply Chain* (European Commission, 2020).

[3] HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (21 March 2011).

[4] European Parliament, *Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL))*, A9-0018/2021.

[5] European Parliament, *Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)),* A9-0018/2021.

operating in the EU's internal market. These due diligence obligations should cover human rights, environmental and governance risks in companies' own operations and their business relationships. Supported by an EU coordination mechanism, Member States shall monitor and enforce compliance with national provisions adopted in accordance with the Directive by providing for effective, proportionate, and dissuasive sanctions. Member States shall also ensure civil liability of business enterprises for human rights and environmental harm, with corporations' exercise of due diligence serving as a defence. At the EU level, this should be accompanied by amendments of private international law to remove jurisdictional barriers to access to justice for foreign victims of business-related human rights violations; and to enable the application of the law of the (European) forum where the damage occurred in a third State.

According to the Terms of Reference, the present study should contribute to the EU DEAR Project 'Our Food. Our Future' that encourages the European Youth to stand up for sustainable food supply chains that respect women migrant workers' rights and reduce climate change, hunger, and poverty as key drivers of migration. Based on legal and policy research, including legislative proposals for mandatory human rights, social and environmental corporate due diligence and sustainable corporate governance, the study should propose tailored solutions to improve the situation of women migrant workers in global food supply chains linked to the European market.

In response to the Terms of Reference, the study presents an analysis of legal and policy developments in the European Union towards mandatory human rights and environmental due diligence legislation, with particular reference to the protection of women migrant workers in global food supply chains. Standards and processes in international law and global governance relevant to the protection of women migrant workers are elaborated at three different levels of generality: standards and processes that address structural causes of adverse human rights and environmental impacts in global food supply chains, whose observance is indispensable for an effective protection of women migrant workers; standards and processes that focus on the particular vulnerabilities of women and migrant workers in global food supply chains; and standards and processes that are tailored to intersectional discrimination experienced by women migrant workers, such that different forms of discrimination attached to their personal or political identities *qua* women and migrant workers intersect in such a way that they become inseparable.

Section two summarizes the well-documented obstacles women migrant workers in global food supply chains encounter in enjoying their internationally protected human and labour rights; and considers the role of business enterprises (as employers, retailers, etc.) in this predicament. Section three places the envisaged European HREDD directive in the broader context of the European Union regulatory framework on business and human rights and sustainable corporate governance. Section four elaborates on international protection standards that should inform EU HREDD legislation to prevent and redress adverse impacts on women migrant workers in global food supply chains: international legal standards of human rights and labour protection that States should implement through the domestic regulation of business actors and activities with extraterritorial effect (the 'State duty to protect'); and human rights and environmental due diligence requirements that corporations should adopt throughout their global operations (the 'corporate

responsibility to respect'). Against this background, section five analyses the European Parliament's proposal for an EU Directive on Corporate Due Diligence and Corporate Accountability.

The study has been conducted using desk-based research. It combines legal analysis with a qualitative assessment of human rights and environmental harm encountered by women migrant workers in global food supply chains linked to the European market. Throughout, the study refers to 'supply' rather than 'value' chains, on the understanding that corporate human rights due diligence as required by the UNGPs extends to entities with which a company entertains direct or indirect business relationships. It pertains to the entire agri-food sector as defined by the OECD-FAO Guidance for Responsible Agricultural Supply Chains (OECD-FAO Guidance):

> Agricultural supply chains refer to the system encompassing all the activities, organisations, actors, technology information, resources and services involved in producing agri-food products for consumer markets. They cover agricultural upstream and downstream sectors from the supply of agricultural inputs (such as seeds, fertilisers, feeds, medicines, or equipment) to production, post-harvest handling, processing, transportation, marketing, distribution, and retailing. They also include support services such as extension services, research and development, and market information. As such, they consist of a wide range of enterprises, ranging from smallholders, farmers' organisations, co-operatives and start-up companies to MNEs [multi-national enterprises] through parent companies or their local affiliates, state-owned enterprises and funds, private financial actors and private foundations.[6]

Given that, as with other examples of so-called home-state regulation, an explicit goal of the envisaged EU HREDD directive is to (also) prevent and redress extraterritorial human rights and environmental harm, the study focusses predominantly on the protection of women migrant workers located outside the European Union – whilst acknowledging the persistence of human rights abuses in segments of global food supply chains within the European (internal) market.[7] International human rights, labour, and environmental agreements are considered mainly to substantiate existing global protection standards, and thus irrespective of their state of ratification or (hard/soft) legal authority. Most of the considered standards are, however, enshrined in international legal instruments widely ratified by EU Member States and/or constitute norms of customary international law that also bind the European Union. The study builds on the concept of corporate human rights due diligence as developed in the UNGPs, which has been mainstreamed into other major international guidance on responsible business conduct, including the OECD Guidelines on Multinational Enterprises (OECD Guidelines) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration).[8]

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[6] OECD & FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (2016) p. 19.

[7] See, for example, European Union Agency for Fundamental Rights, *Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives* (2019); European Parliament, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU: The Need for a Human Rights and Gender-based Approach*, PE 604.966 (2018). In some areas, EU law provides additional protection for women migrant workers in the internal market; see *Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers* (2014); *Directive 96/71/EC concerning the posting of workers in the framework of the provision of services* (1996).

[8] OECD, *OECD Guidelines for Multinational Enterprises* (2011, 2nd edn.); ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (2017, 5th edn).

The new EU Directive is envisaged to cover business-related adverse impacts on human rights, the environment and good governance. Corporate supply chain due diligence in relation to good governance risks (bribery & corruption) is not explicitly considered in the study. More recent developments in the areas of environmental protection and climate change, including the European Green Deal, are discussed mainly with reference to these frameworks and without elaborating the distinctive requirements of corporate due diligence in the environmental sphere.[9] The study only tangentially considers the European Commission's New Pact on Migration and Asylum.[10] The Pact recognises the connections between underdevelopment and migration and commits the EU to assisting and cooperating with third countries in reducing poverty and inequality, promoting democracy and good governance, and addressing the challenges of climate change. However, these commitments are mainly presented as subservient to, on the one hand, managing irregular migration flows and, on the other hand, attracting skilled workers to the European market – with the former bearing out a hard-won political compromise during the European refugee 'crisis' to better secure the EU's external borders in exchange for a fairer distribution of protection seekers among the Member States.[11] The study's recommendations are tailored to the protection of women migrant workers in the context of the envisaged EU Directive on Corporate Due Diligence and Corporate Accountability, with a view to informing the European Commission's proposal expected for summer 2021.

[9] See, for example, D. Krebs, *Environmental Due Diligence in EU Law: Considerations for Designing EU (Secondary) Legislation* (German Enviromental Agency, 2021 (forthcoming)). On the nexus between human rights and environmental protection, see the UN Framework Principles on Human Rights and the Environment, contained in the *Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/37/59 (2018); and Colombia Law School Human Rights Institute, *Climate Change and the Right to Food* (Heinrich Böll Stiftung, 2009).

[10] European Commission, *Communication from the Commission: A New Pact on Migration and Asylum*, COM(2020) 609 final.

[11] See further, R. Bauböck, 'Refugee Protection and Burden-Sharing in the European Union', 56(1) *Journal of Common Market Studies* (2018) 141-156; and A. J. Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of Structural Crisis of European Integration', 22(4) *European Law Journal* (2016) 388-416.

2. Adverse Human Rights and Environmental Impacts of Global Food Supply Chains on Women Migrant Workers

- The agri-food sector is characterised by significant upstream market concentrations and asymmetric power relations that translate into unfair business practices and unsustainable supply chain management. The adverse human rights impacts on women migrant workers – precarious employment and excessive working hours, coupled with undeclared, underpaid or unpaid work and insufficient access to health services and social security benefits – are severe.
- Women workers are over-represented in the agri-food sector yet under-represented in terms of access to resources (land ownership & income) and decision-making power. This renders them particularly vulnerable to business-related human rights violations, including gender-specific harms and sexual violence. Global food supply chains can reinforce women's inferior position in local labour markets and reproduce patriarchical relations at the factory floor.
- Women migrant workers are exposed to multiple and intersecting forms of discrimination that prevent them from enjoying their right to food and other internationally protected human and labour rights. Intersectional discrimination exacerbates widespread violations of human and labour rights in global food supply chains, including the lack of living wages, formal labour contracts, and decent employment; rural poverty and conflicts, often linked to agricultural-induced environmental degradation, deforestation and the impacts of climate change; work hazards due to the exposure to pesticides and unsafe working conditions in food packing and processing facilities; labour exploitation, discrimination and social exclusion; and poor housing conditions and insufficient access to healthcare and social protection.
- This is compounded by barriers to access to justice and effective remedies due to material constraints (low income), the (legal) dependency of migrant workers on their employers, and the invisibilised and informal character of domestic and care work carried out by women.

According to estimates of the International Labour Organisation (ILO) and the UN Food and Agriculture Organisation (FAO), 300-500 million waged workers are engaged in agriculture and food production worldwide, with women accounting for 70% of the workforce. There is a large percentage of migrants especially among the casual, seasonal and temporal agricultural workers. While these workers play a vital role in global food production, they are often unable to secure adequate nutrition for themselves and their families.

Migrant workers inside and outside the European Union face numerous obstacles to enjoying their right to food and other internationally protected human and labour rights, including the lack of living wages, formal labour contracts, and decent employment; rural poverty and conflicts, often linked to agricultural-induced environmental degradation, deforestation and the impacts of climate change; work hazards due to the exposure to pesticides and unsafe working conditions in food packing and processing facilities; labour exploitation, discrimination and social exclusion; poor housing conditions and insufficient access to healthcare and social protection; and restrictions imposed upon freedom of movement and freedom of association to curtail migrant workers' leverage in challenging their terms of employment and adressing systemic causes of human rights and environmental harm

in global food supply chains.[12] These difficulties are compounded by barriers to access to social protection and effective remedies due to material constraints (low income), the (legal) dependency of migrant workers on individual employers, and the invisibilised and informal character of domestic and care work carried out by women.[13]

Women workers are over-represented in the agri-food sector yet under-represented in terms of access to resources (land ownership & income) and decision-making power within their local communities and in relation to other actors in food supply chains.[14] This renders them particularly vulnerable to business-related human rights violations. As noted by a recent study on protecting women's rights in global supply chains:

> Business activities can lead to gender-specific harms and discrimination, exacerbate existing inequitable gender roles and structures within a community, and create further discrimination based on intersecting identities such as race, class, age, caste, migrant status, sexual orientation, gender identity or geographical location. When seeking redress and remedy, women face additional barriers to justice due to patriarchal norms.[15]

Global food supply chains can reinforce women's inferior position in local labour markets (low paid, dependent and insecure jobs, coupled with expectations towards unpaid care and household work) and reproduce patriarchical relations at the factory floor (as evinced by widespread practices of forced labour, sexual harrassment, and gender-based intimidation and violence).[16] With no secure tenure rights and limited opportunities to acquire land ownership and/or to participate in decisions about land (re-)distribution,[17] women smallholders are particularly vulnerable to land grabbing and land consolidation to enhance the efficiency of global food production.

Many of the aformentioned obstacles intersect in the case of women migrant workers, specifically concerning the compounded effects of the invisibilised and informal character of work carried out by women and their migrant status which can prevent them from accessing social protection and challenging exploitation and gender-based violence.[18] As a consequence, women migrant workers are disproportionately affected by job insecurity, precarious working conditions, excessive overtime, and low paid or unpaid work. Their migration status may also prevent them from

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[12] The human rights and environmental harm suffered by migrant workers in global food supply chains are well-documented; see, generally, the reports published under the mandate of the UN Special Rapporteur on the Human Rights of Migrants, *Labour Exploitation of Migrants*, A/HRC/26/35 (2014) and *Right to Freedom of Association of Migrants and their Defenders*, A/HRC/44/42 (2020); and specifically on global food supply chains, V. Nelson, O. Martin-Ortega & M. Flint, *Making Human Rights Due Diligence Work for Small Farmers and Workers in Global Supply Chains* (Brot für die Welt & Fairtrade, 2020); D. Brack, *Towards Sustainable Cocoa Supply Chains: Regulatory Options for the EU* (Fern, Tropenbos International & Fairtrade, 2019); R. Willoughby & T. Gore, *Ripe for Change: Ending Human Suffering in Supermarket Supply Chains* (Oxfam, 2018).

[13] G. Le Baron & E. Gore, 'Gender and Forced Labour: Understanding the Links in Global Cocoa Supply Chains', 56(6) *The Journal of Development Studies* (2019) 1095-1117.

[14] Twin&Twin Trading, *Empowering Women Farmers in Agricultural Value Chains* (Fairtrade Foundation et al., 2013).

[15] K. Groen & L. Cunha, *We mean Business: Protecting Women's Rights in Global Supply Chains* (ActionAid, 2020) p. 4.

[16] Le Baron & Gore (n 13).

[17] OHCHR & UN Women, *Realising Women's Right to Land and Other Productive Resources* (2013).

[18] J. Elias, 'Gendered political economy and the politics of migrant workers: The view from South-East Asia', 64(1) *Australian Journal of International Affairs* (2010) 70-85.

accessing health insurance and health services, including reproductive health, and from changing employment to escape oppressive job situations, including gender-based discrimination and sexual violence.[19] These problems are exacerbated in the case of undocumented women migrant workers:

> Undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labour, and their access to minimum labour rights may be limited by fear of denouncement. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are vulnerable to sexual abuse, and then deported.[20]

There is some evidence of positive developments and best practices of responsible business conduct in global food supply chains, partly in response to increasing demands by investors and consumers for sustainably sourced food products.[21] However, existing positive examples have not been mainstreamed into global business practice and often suffer from an insufficient translation of companies' policy commitments into effective due diligence measures to identify, prevent, mitigate, and account for how they address their adverse human rights and environmental impacts. A 2019 pilot project on the implementation of the OECD-FAO Guidance for Responsible Agricultural Supply Chains identifies among the widespread implementation challenges shortcomings in supply chain mapping and traceability, particularly in relation to smallholder farmers and beyond direct (tier-one) suppliers; undue reliance on industry-wide audit and certification schemes in companies' risk management ('one-fits all' methodological approach & risk of 'box-ticking' exercise) instead of proactive stakeholder engagement and consultation with affected communities; and insufficient reporting by business enterprises of actual and potential adverse human rights impacts within their supply chains and concrete steps taken to implement human rights and environmental due diligence.[22] These findings – insufficient ('voluntary' or business-driven) uptake and implementation of HREDD, coupled with poor corporate reporting – have been confirmed by other cross-sectoral studies.[23]

According to the OECD-FAO Report, persistent challenges to responsible business conduct in the agri-food sector include:

> [T]enure rights over and access to natural resources, informal labour, child labour, and discrimination against vulnerable groups such as women and migrant workers … For many companies, managing these challenges is central to

[19] CEDAW, *General Recommendation No. 26 on Women Migrant Workers*, CEDAW/C/2009/WP.1/R (2008) paras 13-16.
[20] Ibid, para 17.
[21] On emerging standards of responsible business conduct by financial institutions and retailors in global food supply chains see, respectively, IRBC Dutch Banking Sector Agreements on International Responsible Business Conduct Regarding Human Rights, *Cocoa Value Chain Analysis* (Social and Economic Council of the Netherlands, 2018); and Oxfam's Supermarkets Scoreboard on the protection of workers' rights; Willoughby & Gore (n 11); and more recently R. Wilshaw & R. Willoughby, *Workers' Rights in Supermarket Supply Chains: New Evidence on the Need for Action* (Oxfam, 2019).
[22] OECD & FAO, *Pilot Project on the Implementation of the OECD-FAO Guidance for Responsible Agricultural Supply Chains*, Final Report (2019).
[23] See, with further references, EU Supply Chain Due Diligence Study (n 2) 214-222.

> maintaining a long-term "social licence" to operate in the countries they source from and protecting the company from operational and reputation risks'.[24]

A widely acknowledged root cause of these 'challenges' are asymmetric power relations that translate into unfair business practices.[25] Market concentration has amplified the power of a few major business enterprises over the entire food supply chain – from inputs and services through farming and processing to food manufacturing, retail and marketing.[26] As recognised by the 2019 EU Directive on Unfair Trading Practices in the Agricultural and Food Supply Chain, these asymmetric power relations

> [A]re likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction. Such practices may, for example: grossly deviate from good commercial conduct, be contrary to good faith and fair dealing and be unilaterally imposed by one trading partner on the other; impose an unjustified and disproportionate transfer of economic risk from one trading partner to another; or impose a significant imbalance of rights and obligations on one trading partner.[27]

Concessions major buyers have obtained from business partners using their market power include unwritten or insecure short-term contracts; last minute changes in volumes and order cancellations; late payments for perishable food and return of unsold or wasted products; and the imposition of buyers' costs from marketing to CSR on other actors upstream and downstream the supply chain.

Buyers' attempts to squeeze suppliers for lower costs and faster manufacturing times are often paid for by smallholder farmers and workers – entrenching structural discrimination, exploitation, poverty, and exclusion in the lower tiers of the food supply chain. Pricing policies play a central role in this predicament. Whereas major retailers have proven reluctant to adjust their prices accommodating statutory wage increases in producing countries, many suppliers sell below cost to secure future orders.[28] As noted in the EU Supply Chain Due Diligence Study, prices are 'often so low that they do not allow suppliers to pay their workers the local minimum wage or social welfare payments, and delivery times lead to unreasonable working hours'. Moreover, 'even where contractual clauses or supply codes of conduct require human rights and environmental standards, the prices paid to suppliers may not take into account the costs of adhering to [these] standards'.[29]

While relatively minor adjustments of buyers' pricing policies (as judged against their profit margins) would significantly reduce downward pressure on wages, the impacts

[24] OECD-FAO Pilot Project (n 22) p. 12. The extent to which reputational risks constitute an important driver for business enterprises to protect human rights and the environment in the lower tiers of global (food) supply chains remains subject to debate.

[25] Nelson, Martin-Ortega & Flint (n 12); Willoughby & Gore (n 12); D. Vaughan-Whitehead & L. P. Caro, *Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results* (ILO INWORK Issue Brief No. 10, 2017); BASIC, *Who's Got the Power? Tackling Imbalances in Agricultural Supply Chains* (Fairtrade, 2014).

[26] Willoughby & Gore (n 12) 9-10.

[27] *Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain* (2019), Recital 1.

[28] Vaughan-Whitehead & Caro (n 25) pp. 11-14.

[29] EU Supply Chain Due Diligence Study (n 2) p. 221.

of the present 'race to the bottom' on local labour markets – precarious employment and excessive working hours; undeclared and/or unpaid work; unsafe and unsanitary working conditions; and the evasion of social security contributions and labour tax by employers – are severe. Due to their exposure to multiple and intersecting forms of discrimination, women migrant workers are disproportionately affected by the vicious circle between insecure ('hire and fire') employment, (sub-) subsistance wages and excessive working hours.[30] This is accompanied by a decline in bargaining power of smallholder farmers and workers,[31] partly due to the dismantling of collective labour rights and the obstruction of trade union activities ('union busting') to enhance competitive advantages by lowering production costs; and partly due to attempts by host- and home-states of corporate investment, including the European Union, to tie the protection of human and labour rights to economic growth generated through trade liberalisation.[32]

When announcing the EU's commitment to enacting HREDD legislation, the European Commissioner for Justice noted how the COVID-19 pandemic has shed new light on the unsustainability of current global supply chain management.[33] While different from other sectors, global food supply chains have not been hit by a decline in consumer demand, COVID-19 has had major impacts on food security of farmers and workers in (developing) export-driven countries in the Global South.[34] Disruptions in food production caused by fear of contagion and movement restrictions, unsafe working conditions in food procedding and packaging facilities, and the expected global economic downturn coupled with a decline in remittance flows pose severe risks to smallholders' and workers' livelihoods. For women, COVID-19 comes with additional care responsibilities and increased vulnerability to work exploitation, gender-based abuse and violence at home and in the workplace.[35] Women migrant workers are particularly affected due to their informal or casual working arrangements which, one the one hand, expose them to discrimination, exploitation and safety hazards while, on the other hand, prevent them from accessing healthcare, social protection and government support in mitigating the (economic) impacts of the pandemic. According to the OECD, 'the unanticipated shock of COVID-19' for an agri-food sector already plagued by price volatility, a 'climate emergency' and other complex environmental challenges' underscores the need for a shift from "business as usual" policies to a more forward looking policy package that invests in the productivitiy, sustainability, and the resilience of the global food system'.[36]

[30] See, with focus on global tea and cocoa supply chains, G. LeBaron, 'Wages: An Overlooked Dimension of Business and Human Rights in Global Supply Chains', 6(1) *Business and Human Rights Journal* (2021) 1-20.
[31] Willoughby & Gore (n 12); Vaughan-Whitehead & Caro (n 25).
[32] See, for example, European Commission, *Report: EU trade schemes promote economic development and human rights* (19 January 2018), available at http://europa.eu/rapid/press-release_IP-18-301_en.html; for a critical assessment, see A. Lang, *World Trade Law after Neoliberalism* (Oxford University Press, 2011).
[33] EP Working Group on Responsible Business Conduct (n 1).
[34] OECD, *Covid-19 and the Food and Agricultural Sector: Issues and Policy Responses* (2020).
[35] FAO, *Migrant Workers and the COVID-19 Pandemic* (2020).
[36] OECD, Covid-19 (n 34) 10.

3. The EU Regulatory Framework on Business and Human Rights

- The EU regulatory framework on business and human rights has evolved from early preoccupations with (voluntary) corporate social responsibility initiatives to a more dedicated focus on human rights impacts and corporate legal accountability following the adoption of the UNGPs; and more recent endeavours to integrate sustainable corporate governance into EU regulatory initiatives on human rights and environmental protection. Specifically in the area of foreign trade, EU policies and agreements have been challenged for their compatibility with European human rights law.
- The EU has already adopted sector-specific due diligence legislation on illegal logging and conflict minerals. Other regulatory instruments on sustainable corporate governance that do not impose due diligence obligations but that can contribute, to a greater or lesser extent, to the protection of women migrant workers include the Non-Financial Reporting Directive and the Directive on Unfair Trading Practices in the Agricultural and Food Supply Chain. None of these legal instruments focuses (primarily) on the protection of human and labour rights, incorporates a dedicated gender perspective, or gives hightened attention to the vulnerabilities of women migrant workers.
- The European Green Deal could make an important contribution to the protection of women migrant workers in global food supply chains by strenthening the EU legal framework on sustainable corporate environmental governance. The recent European Parliament Resolution on corporate due diligence obligations relating to EU-driven global deforestation includes a focus on protecting the human and labour rights of local communities in countries of origin. Victims of harm incurred through corporate violations of these obligations shall have access to justice and effective remedies. The European Commission's Farm to Fork Strategy promises to work towards a fair and sustainable global food system that protects workers' rights, including by requiring companies in the agri-food sector to integrate sustainability into their corporate strategies. While there is a recognition of the hightened protection needs of seasonal, precarious and undeclared workers, the Green Deal, as the other instruments considered in this section, lacks a dedicated gender perspective.

3.1 CSR, Business & Human Rights, and Sustainable Development

The European Treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – and the EU Charter of Fundamental Rights (CFREU), together with the European Convention on Human Rights and the European Social Charter adopted under the auspices of the Council of Europe, contain ample legal commitments by the EU and the Member States to promote and protect human rights, labour rights and the environment within Europe and globally. According to Articles 3 and 21 TEU, the European Union shall in its relations with the wider world promote, uphold and protect human rights; foster sustainable economic, social and environmental development; and contribute to 'free and fair' trade and the strict observance and development of international law. As interpreted by the European Court of Justice, the latter requirement entails an obligation 'to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union'.[37] 'Compliance with the principles of the rule of law and human rights' is required under EU law 'of all actions of the European Union', including those in the area of its Common Foreign and

[37] Case C-366/10 *Air Transport Association of America* [2011] ECR I-13755, para 101.

Security Policy.[38] According to Article 21(3) TEU, this applies not only to 'the development and implementation of the different areas of the Union's external action' but also to 'the external aspects of its other [*sic* internal] policies'.

Specifically in the area of foreign trade, EU policies and agreements have been challenged for their compatibility with EU human rights law.[39] In a decision delivered in 2016 on the EU-Vietnam free trade agreement, the European Ombudsman considered that 'the Commission should do its utmost to assure EU citizens that it has thoroughly analysed the measures negotiated in the the Free Trade Agreement in order to prevent or mitigate the negative impact on human rights in Vietnam', concluding that the Commission's refusal to carry out a prior (ex ante) human rights impact assessment constituted 'maladministration'.[40] In the case of *Front Polisario*, the EU General Court annulled a Council decision adopting an Association Agreement between the European Union and Morocco, which *de facto* allowed for the export of agricultural produce from Western Sahara – an area between Morocco and Mauritania on the UN list of non-self-governing territories over which the Front Polisario claims sovereignty.[41]

According to the Court, 'if the European Union allows the export to its Member States of products originating in [another] country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them'.[42] The Court held that the EU institutions incur human rights obligations to

> [E]xamine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights, including the rights to human dignity, to life and to the integrity of the person (Article 1-3 CFREU), the prohibition of slavery and forced labour (Article 5 CFREU), the freedom to choose an occupation and right to engage in work (Article 15 CFREU), the freedom to conduct a business (Article 16 CFREU), the right to property (Article 17 CFREU), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Articles 31 & 32 CFREU).[43]

The European Union's attempts to tackle the human rights, social and environmental impacts of business enterprises centre on three main paradigms: corporate social responsibility (CSR), business and human rights, and sustainability. In 2011, the European Commission put forward a 'modern' definition of CSR that abandoned

[38] Case C-263/14 *European Parliament v Council ('Somali Pirates II')*, OJ C 235, 21.7.2014, para 47.
[39] See, for example, A. Berkes, 'The extraterritorial human rights obligations of the EU in its external trade and investment policies', *Europe and the World: A Law Review* (2018) 1-21; C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations', *International Community Law Review* (2018) 314-393
[40] European Ombudsman, *Decision in Case 1409/2014 MHZ on the European Commission's failure to carry out a prior human rights impact asessment of the EU-Vietnam free trade agreement* (2016), available at: https://www.ombudsman.europa.eu/en/decision/en/64308.
[41] Case T-512/12 *Front Polisario*, ECLI:EU:T:2015:953. The judgment was quashed on appeal for lack of standing of the applicants under Article 263 TFEU.
[42] Ibid, paras 231, 232.
[43] Ibid, para 228.

corporate voluntarism. Corporate social responsibility now means 'the responsibility of enterprises for their impacts on society', which should be met through 'a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations'.[44] The new approach reflects core tenets of the corporate responsibility to respect human rights (the second pillar of the UNGPs).[45] Largely interchangeably with its CSR discourse, the EU also promotes 'responsible business conduct' (RBC). As coined by the OECD, RBC requires business enterprises to make a positive contribution to economic, environmental, and social progress; and to avoid and address adverse impacts related to their direct and indirect operations, products, and services.[46]

These developments suggest a gradual alignment of CSR with a business and human rights (B&HR) approach, characterised by a dedicated focus on corporate (legal) accountability through human rights and remedies.[47] In recent years, the EU has merged CSR/RBC and B&HR with its promotion of 'sustainability', implementing the UN 2030 Agenda for Sustainable Development.[48] The ensuing 'holistic and integrated approach' pursues B&HR across different intersecting policy areas, including corporate governance, environmental protection, and climate change.

3.2 Sustainable Corporate Governance

Action 10 of the 2018 European Commission Action on Financing Sustainable Growth concerns sustainable corporate governance and provides a mandate to:

> [C]arry out analytical and consultative work with relevant stakeholders to assess (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest.[49]

The first action point relates to the envisaged European HREDD Directive, anchoring corporate supply chain due diligence in European company law (Article 50 TFEU). While the HREDD Directive would impose due diligence obligations on the company as a whole (and indirectly create fiduciary directors duties' to ensure compliance with these obligations in the interest of the company), the second action point directly addresses directors' duties.

The prevailing narrow interpretation of these duties as requiring the maximisation of short-term shareholder value ('short-termism') has been identified by a recent European Commission study as a root cause of unsustainable corporate governance linked to, among others, environmental degradation, human rights violations and

[44] European Commission, *A renewed EU Strategy 2011-14 for Corporate Social Responsibility* (COM(2011) 681 final, p. 5.
[45] See further *infra*, section 4.2.
[46] European Commission, *Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress*, SWD(2019) 143 final, p. 3.
[47] See further, A. Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' 14(2) *Journal of Human Rights* (2015) 237-259.
[48] European Commission, Overview of Progress (n 46) p. 5.
[49] European Commission, *Action Plan: Financing Sustainable Growth*, COM(2018) 97 final.

growing social unequality along global supply chains.[50] The European Parliament's first draft proposal for an HREDD Directive contemplated the liability of directors for failure to abide by the legislation's due diligence obligations.[51] This provision has been removed in the final version, yet the European Commission still envisages suitable measures to ensure that 'company directors to take into account all stakeholders' interests which are relevant for the long-term sustainability of the firm or which belong to those affected by it (employees, environment, other stakeholders affected by the business, etc.), as part of their duty of care to promote the interests of the company and pursue its objectives'.[52]

In relation to the first action point, the EU has already adopted sector-specific due diligence legislation on illegal logging and conflict minerals with a legal basis in, respectively, environmental protection (Article 192 TFEU) and the Common Commercial Policy (Article 207 TFEU). The EU Timber Regulation (EUTR), which makes part of a broader set of measures introduced by the Forest Law Enforcement, Governance and Trade Action Plan (FLEGT) adopted in 2003, imposes mandatory due diligence obligations with extraterritorial effect on operators placing timber and timber products on the European market.[53] Next to a requirement for traders of timber (products) to keep records of their suppliers and customers, EUTR obliges operators to develop a due diligence system to identify, assess and mitigate the risk of illegally lodged timber (products) being sold in the European Union. EU Member States must apply 'effective, proportionate and dissuasive' penalties in case of non-compliance (Article 19), which may include fines and trading suspensions.

The same regulatory model informs the EU Conflict Minerals Regulation, which entered into effect in January 2021 and which advances beyond EUTR in two regards: it requires EU importers of minerals and metals to incorporate their supply chain policy into agreements with suppliers, thus rendering the regulation's due diligence standards legally binding between the contracting parties wherever located; and it requires EU importers of minerals and metals to establish or provide for an internal grievance mechanism that should function as an early-warning risk-awareness system.[54] Whereas the Conflict Minerals Regulation contains some broad references to 'human rights abuse' and the UNGPs, neither legislation has a dedicated focus on the protection of human and labour rights.

Two other legislative instruments that do not impose HREDD obligations but that are relevant to the regulation of sustainable corporate governance are the 2014 EU Non-Financial Reporting Directive;[55] and the already-mentioned Directive on Unfair

[50] DG Justice and Consumers & Ey, *Study on Directors' Duties and Sustainable Corporate Governance* (European Commission, 2020).
[51] European Parliament, *Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL))* (11 September 2020), Article 11.
[52] European Commission, *Sustainable Corporate Governance: Inception Impact Assessment*, Ref. Ares(2020)4034032 (2020) p. 3, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance.
[53] *Regulation (EU) 995/2010 laying down the obligations of operators who place timber and timber products on the market* (2010).
[54] *Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk* (2017).
[55] *Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups* (2014).

Trading Practices in the Agricultural and Food Supply Chain.[56] The Non-Financial Reporting Directive (NFRD) considers that 'disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection'.[57] The Directive imposes upon large business enterprises an obligation to include into their annual report a non-financial statement explaining the policies they implement in relation to environmental protection, social responsibility and treatment of employees, and respect for human rights including human rights due diligence. This cross-sectoral instrument also aspires to regulate global (food) supply chains insomuch as, 'where relevant and proportionate', a business enterprise has to report on 'its business relationships, products or services which are likely to cause adverse impacts in those areas, and how [it] manages those risks'.[58]

The NFRD encourages business enterprises to rely on international reporting guidance such as the UNGP's reporting framework and the OECD Guidelines on Multinational Enterprises. In addition, the European Commission has published non-mandatory guidelines on the disclosure of environmental and social information and climate-related information.[59] The latter covers both risks to the development, performance and position of the company resulting from climate change, and risks of negative impacts on the climate resulting from the company's activities ('double materiality'). Companies producing or processing forest and agricultural commodities, including in the agri-food sector, should address risks they may directly or indirectly cause to land use-change, including deforestation, forest degradation and greenhouse gas emissions.[60] However, neither does the NFRD impose substantive human rights and environmental due diligence obligations on business enterprises; nor does it mandate the use of specific indicators – which in combination limits the Directive's capacity to curb short-termism and promote sustainable corporate governance. While the former shortcoming is endemic to transparency (reporting & disclosure) legislation, the latter shortcoming is expected to be addressed in the course of the ongoing revision of the NFRD as announced by the European Green Deal.[61] Within these limitations, the NFRD can (*via* reference to UNGPs-based international reporting initiatives) contribute to the protection of women migrant workers as vulnerable or marginalised groups.

The Directive on Unfair Trading Practices in the Agricultural and Food Supply Chain was adopted under the EU's competences in the common agricultural policy (Article 43 TFEU) and specifically aims at the protection of primary agricultural producers

[56] Directive (EU) 2019/633 (n 27).
[57] Directive 2014/95/EU (n 45), Recital 3.
[58] Ibid, Article 19a 1(d).
[59] European Commission, *Guidelines on non-financial reporting: Methodology for reporting non-financial information*, 2017/ C 215/01 (2017); *Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-related Information*, 2019/C 209/01 (2019).
[60] Ibid.
[61] European Commission, *The European Green Deal*, COM(2019) 640 final (2019). In April 2021, the Commission tabled a proposal for a Sustainability Reporting Directive amending the reporting requirements contained in the NFRD. The proposal extends the scope of the reporting obligations to include all large companies, whether listed or not, and without the previous 500-employee threshold; it also introduces an auditing obligation and mandates more detailed reporting standards; see *Proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting*, COM(2021) 189 final (2021).

and suppliers of agricultural and food products against the direct and indirect impacts of unfair trading practices in the global supply chain.[62] The Directive has extraterritorial effects in that it includes unfair trading practices by buyers outside the European Union and protects all (domestic and foreign) farmers and suppliers selling agricultural and food products in the EU – to prevent jurisdiction shopping and trade diversions towards unprotected suppliers.[63] The directive distinguishes between 'black' unfair trading practices that are removed from the parties' contractual freedom because they are considered unfair by their very nature; and 'grey' unfair trading practices that are permitted subject to prior, clear and unambiguous agreement between the parties.[64] Examples of 'black' trading practices include delayed payments for (perishable) food products; short-notice cancellations of orders; refusal of written confirmation of supply agreements and unilateral changes of contract; the transferral of certain risks and costs to the supplier; and commercial retaliation by the buyer. Examples of 'grey' trading practices include the return of unsold products and supplier payments for the stocking and marketing of agricultural produce. Enforcement authorities designated by the Member States can act *ex officio* and upon complaint by suppliers and producers' organisations. They shall be empowered to conduct investigations, including on-site inspections; to terminate infringements by buyers; and to impose fines, interim measures, and other effective, proportionate, and dissuasive penalties.[65]

The Directive has significant potential to enhance the protection of women migrant workers in global food supply chains by curbing unfair trading practices as a root cause of business-related human rights violations. As noted in the EU-FAO Guidance, anti-competitive practices

> [S]uch as the retrospective reduction in prices without reasonable notification or unjustified payments imposed on supplier for consumer complaints', 'may not only negatively affect consumers but also weaken the bargaining power of smallholders if excessive buyer power goes unchecked, thereby affecting food security and nutrition. Similarly, dumping by large enterprises selling a product at loss in a competitive market can force competitors, including small and medium enterprises, out of the market.[66]

The Directive's prohibition of 'black' trading practices goes beyond imposing due diligence obligations in that it outlaws these practices irrespective of corporate risk and impact assessments in concrete cases. At the same time, the Directive does not have a dedicated focus on human and labour rights in general, or on the protection of women migrant workers in particular. Nor does it enable affected workers to vindicate their rights through private litigation.

3.3 The European Green Deal

The European Green Deal, which also incorporates elements of the EU's strategy on sustainable corporate governance, consists of an ambitious policy package to tackle climate change and environmental challenges by designing a 'new growth strategy'

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[62] Directive (EU) 2019/633 (n 27), Recitals 7, 10.
[63] Ibid, Recital 12.
[64] Ibid, Article 3.
[65] Ibid, Article 6.
[66] OECD-FAO Guidance (n 6) 68.

that should transform the European Union into a 'modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use'.[67] Apart from strenthening the protection of European citizens against environmental-related risks and impacts, the Green Deal promises to work towards global markets for sustainable products, with the EU using its 'economic weight' to set ambitious global environmental and climate protection standards.[68]

Regarding the agri-food sector, the European Parliament has stressed the need to curb the link between food supply chains and deforestation,[69] a link that existing voluntary initiatives and certification schemes have been unable to tackle effectively.[70] Supply chain management that sources products from, and outsources production to, countries with lesser environmental standards – for instance in the palm oil, soy, beef, coffee, tea and cocoa sub-sectors – has exacerbated environmental damage and accelerated the loss of biodiversity and natural resources at a global scale,[71] with disproportionate impacts on women.[72] In October 2020, the European Parliament adopted a resolution on an EU legal framework to halt and reverse EU-driven global deforestation.[73] The resolution calls on the European Commission to propose an EU legal framework on mandatory due diligence obligations for companies placing forest and ecosystem-risk commodities and derived products on the EU market. This framework should ensure the sustainability of the harvesting, production, extraction and processing of commodities in countries of origin, including the protection of human rights, land rights, and labour rights with particular focus on the rights of indigenous peoples and local communities. Next to administrative penalties, the resolution envisages remedies for adverse corporate impacts. If adopted, this new legal framework would significantly advance beyond existing sector-specific EU environmental due diligence legislation and could make an important contribution to protecting the human and labour rights of women migrant workers in global food supply chains.

Next to a reform of the EU common agricultural policy (CAP) expected for 2022, the European Commission presented in May 2020 a 'Farm to Fork Strategy' that should ensure sustainable food production and food security worldwide – strenthening the incomes of primary producers while also reinforcing the EU's competitiveness in global food markets.[74] The Strategy recognises the negative impacts of climate change, biodiversity loss and the COVID-19 pandemic on global food security and agri-food workers. It also commits to ensuring that 'key principles enshrined in the

[67] European Green Deal (n 61), p. 2.
[68] Ibid, p. 21.
[69] European Parliament, *Resolution on the European Green Deal (2019/2956(RSP)*, PA_9TA(2020)0005 (2020) para 71.
[70] Brack (n 12).
[71] T. Evas, A. Heflich & C. Navarra, *An EU Legal Framework to Halt and Reverse EU-driven Global Deforestation: European Added Value Assessment* (European Parliament, 2020).
[72] United Nations Framework Convention on Climate Change, *Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations*, FCCC/SBI/2019/INF.8 (2019).
[73] European Parliament, *Resolution with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL))*.
[74] European Commission, *A Farm to Fork Strategy for a Fair, Healthy, and Environmentally Friendly Food System*, COM(2020) 381 final (2020).

European Pillar of Social Rights are respected, especially when it comes to precarious, seasonal and undeclared workers. The considerations of workers' social protection, working and housing conditions as well as protection of health and safety will play a major role in building fair, strong and sustainable food systems'.[75]

While it remains presently unclear how these goals will be pursued concretely, the Strategy announces a Commission initiative 'to improve the corporate governance framework, including a requirement for the food industry to integrate sustainability into corporate strategies'.[76] The extent to which this initiative will benefit women migrant workers in global food supply chains remains to be seen, and will in part depend on how the concept of 'food sustainability' is understood.[77] There is also a discernible tension, and possible negative trade-offs, between the Strategy's emphasis on enhancing the EU's competitive position in global food markets and increasing calls for shorter food supply chains to improve access to healthy and diversified food products.[78] The Draft Action Plan annexed to the Strategy furthermore announces legislative proposals for a sustainable food system before the end of 2023, which could encompass the right to food, environmental sustainability, nutritional intake, climate-resiliance and food safety laws; and the adoption of an EU Code of Conduct for Responsible Business and Marketing Practices in the Food Supply Chain, accompanied by a monitoring framework in the second quarter of 2021.[79] The Code of Conduct is intended to address health and (environmental) sustainability issues, with no dedicated focus on workers' rights.[80]

[75] Ibid, p. 11. The European Pillar of Social Rights includes commitments to gender equality, fair working conditions, and social protection and inclusion, see European Commission, *The European Pillar of Social Rights in 20 Principles*, available at: https://ec.europa.eu/info/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

[76] Ibid, p. 12.

[77] H. Schebesta, N. Bernaz & C. Macchi, 'The European Union Farm to Fork Strategy: Sustainability and Responsible Business Conduct in the Food Supply Chain', 5 *European Food and Feed Law Review* (2020) 420-247.

[78] European Parliament, *Briefing: Short Food Supply Chains and Local Food Systems in the EU* (2016); CIDSE, Friends of the Earth Europe, et al., *Raising the Ambition on Global Aspects of the EU Farm to Fork Strategy* (2020).

[79] European Commission, *Farm to Fork Strategy Draft Action Plan*, COM(2020) 381 final (2020).

[80] Farm to Fork Strategy (n 74) p. 12.

4 Normative Sources of Human Rights & Environmental Due Diligence Legislation

- HREDD legislation contributes to the implementation of the UNGPs by translating corporate due diligence requirements into a legal standard of care imposed on business enterprises that are domiciled within the State's territory or that operate within its market. These legal due diligence requirements have extraterritorial effect in that they appy throughout corporate groups and global supply chains. To ensure the protection of women migrant workers in global food supply chains, HREDD legislation needs to incorporate relevant protection standards in international law and reflect the requirements of corporate supply chain due diligence as elaborated in the UNGPs and associated international guidance.
- International law requires States to respect, protect and fulfil the rights of women migrant workers to food security, healthy occupational and environmental conditions, access to land and decision-making power, and fair wages that allow for a decent living for themselves and their families. States have to end intersectional forms of discrimination against women migrant workers on the basis of their migration status, gender identity and sexual orientation, including by regulating private sector employment and recruitment agencies. States are also required to address practical and legal barriers to access to justice and effective remedies encountered by women migrant workers.
- The UNGPs and associated international guidance require HREDD from all business enterprises regardless of size, sector, operational context, ownership and structure. The UNGPs do not envisage a tier-based or control-based approach to delimiting the scope of corporate due diligence but focus on the actual and potential adverse human rights impacts of a company's own operations and its business relationships. The concrete HREDD requirements (prevent, cease, mitigate, account for, remedy) depend on whether the company caused or contributed to adverse impacts, or whether it was (merely) linked to these impacts by its business relationships. International guidance confirms that a company's pricing and purchasing policies can qualify as a 'contribution' to adverse human rights impacts.
- Given the systemic and severe nature of adverse human rights impacts in agri-food sector on women migrant workers, business enterprises need to prioritise them in their risk assessment and mitigation measures. Business enterprises need to mainstream a gender perspective into their HREDD policies and processes to prevent and remedy adverse human rights impacts that are specific to women migrant workers or that affect them differently. Gender-based violence and sexual harassment should be treated as risks of severe human rights impacts irrespective of context-specific considerations.

4.1 HREDD Legislation and the UNGPs: An Overview

The European Parliament Resolution on Corporate Due Diligence and Corporate Accountability follows a trend in various countries, especially in Europe, to impose on business actors and activities within the State's territory and/or jurisdiction legal HREDD requirements that apply throughout the corporate group and the global supply chain. HREDD legislation plays an important role in the implementation of the UNGPs because it renders human rights due diligence legally binding on business enterprises with extraterritorial effect, thus contributing to a 'hardening' of the soft-law requirements bound up with the corporate responsibility to respect human rights.[81] While the UNGPs make clear that business enterprises are required to abide

[81] C. Macchi & C. Bright, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in M. Buscemi, N. Lazzerini & L. Magi (eds.) *Legal Sources in Business and Human Rights – Evolving Dynamics in International and European Law* (Brill Publishers, 2020) 218-247.

by the domestic laws of the countries in which they operate, the corporate responsibility to respect 'exists over and above compliance with national laws and regulations protecting human rights'.[82] HREDD legislation expands the scope of domestic laws protecting human rights and the environment applicable to business enterprises by translating corporate human rights and environmental due diligence into a legal standard of care. As noted in the EU Supply Chain Due Diligence Study:

> Due diligence as a legal standard of care is based on the basic tort law or negligence principles – phrased differently but similar in nature across civil and common law jurisdictions – being that a person should take reasonable care not to cause harm to another person. This ties in with the description by John Ruggie, main author of the UN Guiding Principles on Business and Human Rights, of due diligence as a 'do no harm' requirement.[83]

At the same time, HREDD legislation is but one element in the 'smart mix of measures – national and international, mandatory and voluntary' – that States should adopt to ensure business respect for human rights.[84] To be effective, it needs to be integrated into an overarching regulatory framework on business and human rights that ensures vertical and horizontal policy coherence; and that enables home- and host states of corporate investment to maintain an adequate domestic policy space to meet their international human rights obligations when pursuing business-related policy objectives and legislating for business enterprises whose activities may impact on the enjoyment of human rights.[85]

The UNGPs are organised around three pillars: the State duty to protect human rights against corporate abuse, which draws on state obligations in international law to respect, protect and fulfil human rights (first pillar); the corporate responsibility to respect human rights, which is grounded in a global standard of expected conduct that mandates business enterprises to act with due diligence to avoid infringing the rights of others (second pillar); and requirements towards States and business enterprises to ensure access to effective remedies, both judicial and non-judicial, for victims of business-related human rights violations (third pillar). As part of their duty to protect, States have to assume a proactive role in incentivising and where necessary requiring corporate respect for human rights through appropriate policies, legislation, adjudication and enforcement.[86] Institutionalising corporate human rights due diligence is thus not only expected of business enterprises in virtue of their 'social licence to operate' but also required of States to comply with their international human rights obligations. At the same time, international legal standards of human rights, labour, and environmental protection addressed to States also form the substantive bedrock of the corporate responsibility to respect.[87] Against the background of this intertwinement between the UNGPs' 'protect, respect and remedy' pillars, sections 4.2 and 4.3 elaborate international legal protection standards and corporate human rights, labour and environmental due diligence requirements as the building blocks of HREDD legislation.

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[82] UNGPs (n 3) UN Guiding Principle 11 (Commentary).
[83] Supply Chain Due Diligence Study (n 2), p. 260.
[84] UNGPs (n 3) UN Guiding Principle 3.
[85] Ibid, UN Guiding Principles 5, 8 & 9.
[86] Ibid, UN Guiding Principle 1.
[87] Whereas the UNGPs do not envisage dedicated corporate environmental due diligence, the second pillar covers environmental harm that translates into corporate human rights abuses.

While the UNGPs do not explicitly call for supply chain due diligence legislation, such legislation is encompassed by the 'smart mix of measures' envisaged for their effective implementation.[88] To close protection gaps at the international level, States should ensure that business enterprises respect human rights throughout their global operations: 'There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses'.[89] The main extraterritorial instruments envisaged by the UNGPs are 'direct extraterritorial legislation and enforcement' and 'domestic measures with extraterritorial implications'.[90] As elaborated in an earlier report to the Human Rights Council, this distinction principally turns on whether a State is permitted to exercise jurisdiction over business entities because they are considered corporate nationals of that State or because they are domiciled within its territory.[91]

Existing examples of HREDD legislation (in Europe) largely follow the UNGPs' model of 'domestic measures with extraterritorial implications' in that they impose legal due diligence requirements on business actors and activities within the State's territorial jurisdiction that reach out into the corporate group and the global supply chain. The necessary jurisdictional link is established either in virtue of the business entity's place of incorporation in the State's territory or in virtue of products and services placed on the State's domestic market. On the former model, a business enterprise domiciled within the State's territory is legally required to exercise HREDD in relation to its foreign operations. On the latter model, market access by business enterprises is conditional upon compliance with certain product- and process (due diligence) standards protecting human rights and/or the environment abroad. Both models can be combined, for example by imposing parent-based due diligence obligations on companies with substantial business activities within the State's jurisdiction. While the concrete modalities of home-state regulation remain subject to lively political debate, its legality in public international law and its compatibility with host-state sovereignty are meanwhile widely accepted.

4.2 International Protection Standards Relevant Women Migrant Workers in Global Food Supply Chains

As underlined by General Recommendation No. 26 under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), migration is 'not a gender-neutral phenomenon', with women migrant workers being subject to multiple and intersecting forms of discrimination relating to their sexual orientation, gender identity, their migration and marital status, and their access to economic resources and location in rural areas.[92] Correspondingly, ensuring the protection of women migrant workers in international law requires addressing issues of 'gender inequality, traditional female roles, a gendered labour market, the universal

[88] Shift, *Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix" when implementing the UNGPs* (2019), https://shiftproject.org/fulfilling-the-state-duty-to-protect-a-statement-on-the-role-of-mandatory-measures-in-a-smart-mix/.
[89] UNGPs (n 3), UN Guiding Principle 2 (Commentary).
[90] Ibid, UN Guiding Principle 2 (Commentary).
[91] HRC, *Business and Human Rights: Further Steps towards the Operationalization of the "Protect, Respect and Remedy" Framework*, A/HRC/14/27 (9 April 2010) para 48.
[92] CEDAW General Recommendation No. 26 (n 19) para 5.

prevalence of gender-based violence and the worldwide feminisation of povery and labour migration'.[93]

Due to their vulnerable position in global food supply chains, women migrant workers are at hightened risk of violations of all of their human and labour rights, including violations caused by or linked to environmental harm.[94] Unsustainable supply chain management, including unfair business practices by major brands and retailers, have caused or contributed to adverse human rights impacts on these workers in the lower tiers of the supply chain.[95] These risks and impacts are further exacerbated where migrant women workers are pushed into the informal sector of the economy and/or do not enjoy a secure migration status, which deprives them of an effective protection of their human and labour rights under domestic law and exposes them to threats of deportation.[96] This despite the fact that most international human and labour rights are protected irrespective workers' nationality and without discrimination based on their migration status.[97] In an Advisory Opinion on the rights of undocumented migrants, the Inter-American Court of Human Rights (IACtHR) confirmed that

> The State is obliged to respect and ensure the labour human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.[98]

Instead of attempting a comprehensive 'listing' of relevant international legal instruments, this sub-section pursues a qualitative approach that elaborates the substantive scope of selective protection standards in international human rights and labour law pertinent to the protection of women migrant workers in global food supply chains.[99] Relevant international protection standards are discussed at three different levels of generality: standards that address structural causes of adverse human rights and environmental impacts in global food supply chains; standards that focus on the particular vulnerabilities of women and migrant workers; and standards

[93] Ibid.
[94] HRC, *Gender Dimensions of the UN Guiding Principles on Business and Human Rights*, A/HRC/41/43 (2019) paras 11-21.
[95] See further *infra*, section 2; and generally R. Locke, *The Promise and Limits of Private Power* (Cambridge University Press, 2013).
[96] ILO, *Towards a fair deal for migrant workers in the global economy*, Report VI, International Labour Conference (2004).
[97] Specifically, the ILO *Migrant Workers (Supplementary Provisions) Convention No. 143* requires States of origin and destination to ensure respect of basic human rights to all migrant workers, including those in an irregular situation and/or without documents (Art. 1). 'Basic human rights' refers to human rights protected by the UN human rights treaties and the eight fundamental ILO conventions; see ILO, *General Survey concerning the migrant workers instruments*, Report III (Part 1B) (2016) p. 90.
[98] IACtHR, *Advisory Opinion OC-18/03 requested by the Union of Mexican States: Juridical Condition and Rights of the Undocumented Migrants* (2003) para 148.
[99] As the purpose of this section is to elaborate global protection standards that should inform EU HREDD legislation, international legal instruments are considered irrespective of their state of ratification or their (hard/soft) legal authority. Apart from the European Treaties and the CFREU briefly considered in the previous section, the EU is bound 'to observe international law in its entirity, including customary international law, which is binding upon the institutions of the European Union'; see Case C-366/10 (n 37) para 101. All EU Member States are parties to the main international and regional human rights treaties, including, the ICESCR, the ICCPR, the CRC, the ICERD, the CEDAW and the ECHR.

that are tailored to the protection of women migrant workers against intersectional discrimination.

The OECD-FAO Guidance for Responsible Agricultural Supply Chains draws particular attention to State obligations under the International Covenant on Economic, Social and Cultural Rights to respect, protect and fulfil the human right to the enjoyment of just and favourable conditions of work (Article 7), the human right to adequate food (as part of the right to an adequate standard of living, Article 11) and the human right to the highest attainable standard of physical and mental health (Article 12).[100]

Food & Health

According to the UN Committee on Economic, Social and Cultural Rights (CESCR), the progressive realisation of right to adequate food should include State measures to improve methods of food production, conservation and distribution, taking into account challenges faced by food-importing and food-exporting countries and taking 'appropriate steps to ensure that activities of private business sector and civil society are in conformity with the right to food'.[101] An important condition for women migrant workers to enjoy their human right to food, and a core challenge for business enterprises operating in the agri-food sector, is securing/respecting people's access to land and natural resources.[102] Noting that between 2006 and 2009 alone (and especially in response to the global food price crisis in 2008), an estimated 15-20 million hectares of farmland in developing countries 'have been subject to transactions or negotiations involving foreign investors', the UN Special Rapporteur on the Right to Food clarified that:

> The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor. In concluding agreements on large-scale land acquisitions or leases, States should take into account the rights of current land users in the areas where the investment is made, as well as the rights of workers employed on the farms. They should also be guided by the need to ensure the right to self-determination and the right to development of the local population.[103]

At a minimum, States should ensure that local communities can effectively participate in the negotiation of investment agreements that affect their access to land and other productive resources, with shift in land uses being subject to their free, prior and informed consent; and adopt legislation to assist individuals and local communities in obtaining land titles and to prevent shift in land uses and forced evictions contrary to the rule of law.[104]

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[100] OECD-FAO Guidance (n 6) pp. 55-60.
[101] CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, E/C.12/199/5 (1999) para 27.
[102] OECD-FAO Pilot Project (n 22) p. 12.
[103] UN Special Rapporteur on the Right to Food, *Large-scale land acquisitions and leases – A set of minimum principles and measures to address the human rights challenge*, A/HRC/13/33/3/Add.2 (2009), para 4.
[104] *Id.* Annex: Minimum human rights principles applicable to large-scale land acquisitions or leases.

In its General Comment No. 14, CESCR interprets the right to the highest attainable standard of health

> [A]s an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.[105]

States Parties to CEDAW 'shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in non-monetized sectors of the economy'; and 'shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on the basis of equality of men and women, that they participate in and benefit from rural development …'.[106] In its General Recommendation No. 24, the CEDAW Committee furthermore stresses that special attention should be given to the health needs and rights of migrant women,[107] which entails obligations on the part of States to regulate private sector employment in such a way that the health and safety of women and migrant workers is effectively protected.[108] This also applies to recruitment intermediaries, which are often responsible for abusive practices in the agricultural sector.[109]

Just & Favourable Conditions of Work

Article 7 ICESCR and Article 11 CEDAW require States to respect, protect and fulfil the human right of all migrant workers to just and favourable conditions of work and fair wages without discrimination. In its 2016 General Comment No. 23, CESCR notes that:

> Almost 50 years after the adoption of the Covenant, the level of wages in many parts of the world remains low and the gender pay gap is a persistent and global problem. ILO estimates that annually some 330 million people are victims of accidents at work and that there are 2 million work-related fatalities. Almost half of all countries still regulate weekly working hours above the 40-hour work week, with many establishing a 48-hour limit, and some countries have excessively high average working hours.[110]

Specifically regarding women migrant workers in the agricultural sector, CESR calls on States 'to enact laws and policies to ensure that agricultural workers enjoy treatment no less favourable than that enjoyed by other categories of workers, considering that:

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[105] CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (2000) para 11.

[106] *Convention on the Elimination of All Forms of Discrimination against Women* (1979), Art. 14.

[107] CEDAW, *General Recommendation No. 24: Women and Health*, A/54/38/Rev.1 (1999) para 6.

[108] CEDAW (n 106) Art 11(f); CESCR, General Comment 14 (n 105) para 51.

[109] CEDAW General Recommendation No. 26 (n 19); J. S. Hainfurther, 'A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers', 24(5) *American University International Law Review* (2009) 843-895, 873.

[110] CESCR, *General Comment No. 23: The Right to Just and Favourable Conditions of Work*, E/C.1/2/GC/23 (2016) para 2.

> Agricultural workers often face severe socioeconomic disadvantages, forced labour, income insecurity and lack of access to basic services. At times, they are formally excluded from industrial relations and social security systems. Women agricultural workers, particularly on family farms, are often not recognized as workers and therefore not entitled to wages and social protection, to join agricultural cooperatives and to benefit from loans, credits and other measures to improve working conditions.[111]

To address these protection gaps in relation to women migrant workers, CEDAW calls upon States of destination to 'repeal outright bans and discriminatory restrictions on women's immigration', including indirect discrimination through visa schemes; to ensure that constitutional, civil and labour laws extend equal protection to all workers in the country, including collective labour rights; and to ensure occupations dominated by women migrant workers 'are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations'.[112]

Under the ICESCR, the right to just and favourable conditions of work is a right of 'everyone', which 'applies to all workers in all settings, regardless of gender' and includes 'workers in the informal sector, migrant workers, … agricultural workers, refugee workers and unpaid workers'.[113] Gender-based violence is prohibited under international law not only as an attack on personal integrity but also as a violation of the principle of non-discrimination.[114] Irrespective of their employment status, women migrant workers must be protected from violence and harassment at the workplace and during job-seeking.[115] The (poorly ratified) International Convention on the Protection of the Rights of All Migrant Workers and their Families is most explicit in affirming that 'employers shall not be relieved of any legal or contractual obligation' by reason of any irregularity in the workers' stay or employment.[116] All workers enjoy the right to form and join trade unions without discrimination based on their gender or migration status.[117] ILO Convention No. 19 requires contracting parties to ensure that all migrant workers (provided they are nationals of another contracting party) and their families are compensated in case of workplace accidents under the same conditions as for national workers.[118]

All workers, including women migrant workers, are entitled to wages that are 'fair' – judged by a range of objective criteria including the workers' skills, education and responsibilities and the impacts of work on health, safety, personal and family life – and that provide a 'decent living' for themselves and their families – 'sufficient' to enable them to enjoy their other human rights, 'such as social security, health care, education and an adequate standard of living, including food, water and sanitation,

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[111] Ibid, para 47(h).
[112] CEDAW General Recommendation No. 26 (n 19) para 26.
[113] Ibid, para 5.
[114] CEDAW, *General Recommendation No. 19: Violence against Women* (1992) para 6.
[115] ILO, *Violence and Harassment Convention No. 190* (2019).
[116] *International Convention on the Protection of the Rights of All Migrant Workers and their Families* (1990), Art 25(3). To date, none of the EU Member States has ratified the Convention.
[117] Art. 8 ICESCR; Art. 22 ICCPR. Art 6(1)(a)(ii) of the ILO *Migration for Employment Convention No. 97* (1949), by contrast, only protects the trade union rights of migrant workers who reside lawfully in the country. Similarly, Article 34(2) CFREU only secures social security benefits to workers residing and moving lawfully within the European Union.
[118] *ILO Convention No. 19 Equality of Treatment (Accident Compensation)* (1925), Art 1(2).

housing, clothing and additional expenses such as commuting costs'.[119] CESCR stresses that 'any assessment of the fairness [of wages] should also take into account the position of female workers'.[120] In addition, Article 11 CEDAW enshrines women workers' right to equal treatment in respect of work of equal value, which means that jobs in female-dominated sectors should not be underpaid in comparison with jobs of equal value in male-dominated sectors. It also prohibits practices commonly encountered by women migrant workers in global food supply chains, such as the payment of substandard wages and the withholding of wages.

States Parties to the ICESCR are required to take steps to the maximum of their available resources to ensure that their social security systems cover persons working in the informal economy, including women migrant workers.[121] While 'everyone' has a human right to social security, 'States should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, such as women'; and ensure that workers in the informal sector have access to social security schemes without discrimination in law or in fact.[122]

The Right to an Effective Remedy

As part of their international legal duty to protect human rights, States also have to redress business-related human rights violations, including through 'conducting prompt, thorough and fair investigations; providing access to prompt effective and independent remedial mechanisms, established through judicial, administrative, legislative and other appropriate means; imposing appropriate sanctions, including criminalising conduct and pursuing prosecutions where abuses amount to international crimes; [and] providing a range of forms of appropriate remediation, such as compensation, restitution, rehabilitation and changes in relevant laws'.[123] For example, CESCR's General Comment No. 23 provides that:

> Any person who has experienced a violation of the right to just and favourable conditions of work should have access to effective judicial or other appropriate remedies, including adequate reparation, restitution, compensation, satisfaction or guarantees of non-repetition. Access to remedy should not be denied on the grounds that the affected person is an irregular migrant.[124]

In addition, CEDAW General Recommendation No. 26 highlights the right of undocumented women migrant workers to access legal remedies, including where they are exposed to risks for their lives and subjected to cruel and degrading treatment; when they are coerced into forced labour; when they are physically or sexually abused by employers and third parties; and in cases where they 'face deprivation of fulfilment of basic needs, including in times of health emergencies or pregnancy and maternity'.[125]

[119] CESCR, General Comment No. 23 (n 110) paras 10, 18.
[120] Ibid, para 10.
[121] CESCR, *General Comment No. 19: The right to social security*, E/C.12/GC/19 (2008) para 34.
[122] CESCR, *M. C. Trujillo Calero v Ecuador*, E/C.12/63/D/10/2015 (2018) paras 13.1-13.4.
[123] HRC, *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions* (A/HRC/11/13/Add.1, 2009) para 64.
[124] CESCR, General Comment No. 23 (n 110) para 57.
[125] CEDAW General Recommendation No. 26 (n 19), para 26(l).

These international legal requirements notwithstanding, it is widely acknowledged that – in the European Union as elsewhere – existing remedies for (foreign) victims of business-related human rights violations are insufficient and fraught with legal and practical barriers to access to justice.[126] Common barriers include structural complexities within business enterprises (including the attribution of legal responsibility among members of a corporate group); difficulties in establishing jurisdiction and navigating foreign civil liability regimes (including applicable law, time limitations and the allocation of the burden of proof); non-justiciability and immunity doctrines; and obstacles in enforcing judgments and obtaining satisfactory remediation. Some of these barriers are exacerbated in the case of women migrant workers in global food supply chains. Without legally secured rights of land use, agricultural workers 'will not have access to legal remedies, and receive adequate compensation, if they are evicted from the land they cultivate, for instance, after the Government has agreed that foreign investors take possession of the land'.[127] Additionally, as noted by the UN Special Rapporteur on the Right to Food Hilal Elver:

> Women in rural areas often are unaware of their legal rights. In many rural areas, sociocultural norms make women fearful of retribution or ostracism if they pursue land claims or seek protection from violence. As a result, women tend to be denied access to justice more often than men and are also more likely to be denied justice altogether.[128]

According to the UNGPs, 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'. In particular, States should 'ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of remedy are unavailable'.[129] However, as the UN High Commissioner on Human Rights noted in May 2016, while 'the realities of global supply chains, cross-border trade investment, communications and movement of people are placing new demands on domestic legal regimes and those responsible for enforcing them', many of these regimes 'focus primarily on within-territory business activities and impacts' – which often renders foreign victims' quest for corporate human rights accountability 'elusive'.[130]

The Extraterritorial Dimension of the State Duty to Protect Human Rights

Next to obligations of international assistance and cooperation, CECSR's General Comment No. 14 also requires States 'to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable

[126] For the European context see, in particular, EU Supply Chain Due Diligence Study (n 2); A. Marx et al., *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries* (European Parliament, 2019).
[127] Large-scale Land Acquisitions and Leases (n 103) para 23.
[128] Report of the Special Rapporteur on the Right to Food, *Access to Justice and the Right to Food: The Way Forward*, A/HRC/28/65 (2014) para 33.
[129] UNGPs (n 3) UN Guiding Principle 26 (Commentary).
[130] HRC, *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse*, A/HRC/32/19 (2016) paras 2, 5.

international law'.[131] The increasing recognition of extraterritorial State obligations in European and international law complements HREDD legislation in domestic law, such that States are not only permitted but also required to prevent and redress business-related human rights violations outside their borders.[132] Following the adoption of the UNGPs, CESCR and the other UN Treaty Bodies have consolidated and elaborated their interpretation of extraterritorial State obligations in relation to globally operating business enterprises.

In its General Comment No. 24 on State Obligations in the Context of Business Activities, CESCR considers that:

> The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.
> …
> Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.[133]

Corporations domiciled within the State's territory and/or jurisdiction should furthermore be obliged 'to act with due diligence to identify, prevent and address abuses to Covenant rights by their subsidiaries and business partners, wherever they may be located'.[134] Specifically regarding the human right to remedy, States parties have a duty to 'remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, [and] facilitating access to relevant information'.[135]

A similar approach to extraterritorial state obligations to prevent and redress business-related human rights violations has been endorsed by the Inter-American Court of Human Rights (IACtHR) in its 2017 *Advisory Opinion on the Environment and Human Rights*; and is envisaged in the draft international business and human rights treaty currently under negotiation.[136]

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[131] CESCR General Comment No. 14 (n 105) para 39.

[132] On extraterritorial obligations in EU law, see *infra*, section 3.1; on extraterritorial obligations in international human rights law, see ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2011), published with extensive commentary in 34 *Human Rights Quarterly* (2012) 1084-1169.

[133] CESCR, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, E/C.12/GC/24 (2017) paras 30-31.

[134] Ibid, para 33.

[135] Ibid, para 44.

[136] See, respectively, IACtHR, *Advisory Opinion OC-23/17 requested by the Republic of Colombia: The Environment and Human Rights* (2017); Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, *Second Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Cororations and Other Business Enterprises* (2020).

4.3 International Guidance on Corporate Human Rights Due Diligence

There is a growing number of general guidances on corporate human rights due diligence (HRDD) and responsible business conduct, as well as sectoral and issue-specific guidelines. The following analysis draws mainly on UN-sponsored guidance accompaning the UNGPs' corporate responsibility to respect human rights (OHCHR Interpretative Guide);[137] the OECD Due Diligence Guidance for Responsible Business Conduct (OECD RBC Guidance) and the OECD-FAO Guidance,[138] both of which build on the OECD Guidelines for Multinational Enterprises (OECD Guidelines).[139] The analysis focusses on elements of corporate HRDD relevant to the protection of women migrant workers in global food supply chains that should inform the design of supply chain due diligence legislation, including the envisaged EU Directive on Corporate Due Diligence and Corporate Accountability.

Corporate Human Rights Due Diligence

According to the UNGPs, business enterprises should have in place 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[140] Corporate human rights due diligence is 'an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operational context, size and similar factors) to meet its responsibility to respect human rights'.[141] It consists of four main steps: identifying and assessing actual and potential human rights impacts; integrating and acting upon the findings; tracking the effectiveness of actions taken; and communicating how impacts are addressed.[142] Potential impacts should be addressed through prevention or mitigation, and actual impacts that a company has caused or contributed to should additionally be subject to remediation.[143] Similarly, the OECD-RBC Guidance requires business enterprises to embed responsible business conduct into policies and management systems; to identify and assess adverse impacts in operations, supply chains and business operations; to cease, prevent or mitigate adverse impacts; to track implementation and results; to communicate how impacts are addressed; and to provide for or cooperate in remediation when appropriate.[144]

The UNGPs require business enterprises to 'avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur'; and to 'seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships'.[145] Importantly, the UNGPs do not envisage a 'tier-based' approach to supply chain due diligence (for example, discriminating between direct and indirect suppliers), nor do they (as the earlier 'sphere of influence' approach) delimit

[137] Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012).
[138] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2016); OECD-FAO Guidance (n 6).
[139] OECD Guidelines (n 8).
[140] UNGPs (n 3) Guiding Principle 15.
[141] OHCHR Interpretative Guide (n 137) p. 6.
[142] UNGPs (n 3) Guiding Principle 17.
[143] Ibid, Guiding Principle 22.
[144] OECD RBC Guidance (n 138) p. 21.
[145] UNGPs (n 3) Guiding Principle 13.

corporate human rights resonsibilities in virtue of control or leverage a company (may) exercise over business partners or business activities. Rather, the decisive factor for determining the scope of human rights due diligence are the actual and potential adverse human rights impacts associated with a company's own activities and its business relationships.[146] The UNGPs distinguish between impacts that the company causes or contributes to from impacts to which it is linked through its operations by a business relationship. This distinction determines the HRDD expectations which apply in each of the circumstances:

> Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.[147]

Causing or contributing to human rights impacts implies a 'strict' responsibility to prevent, cease or address those impacts. Where a company does not cause or contribute to the impact but is directly linked to it through its business relationships, the 'situation is more complex' and appropriate action will be determined in the light of factors such as the company's leverage over the entities that are causing or contributing to the impacts (for instance, the company's business partners or suppliers) and the severity of the human rights abuse.[148] Corporate remediation is required for actual impacts that the company causes or contributes to, but not for those to which it is merely directly linked.[149]

Human rights due diligence is expected of all business enterprises regardless of size, sector, operational context, ownership and structure.[150] It applies to a business enterprise's entire supply chain, including direct and indirect business relationships:

> Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products and services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.[151]

While the UNGPs tie the corporate responsibility to respect human rights to a 'no harm' requirement, HRDD logically includes positive measures, including the allocation of necessary resources, to prevent, mitigate, account for and remedy adverse human rights impacts.[152] In this vein, the OECD RBC Guidance calls upon business enterprises to 'provide adequate resources and training to suppliers and

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[146] Ibid, Guiding Principle 17. 'Leverage' – the 'ability to effect change in the wrongful practices of the party that is causing or contributing to the impact' – only becomes relevant for determining a company's *response* to adverse human rights impacts; see Guiding Principle 19; and further OHCHR Interpretative Guide (n 137) pp. 48-51.

[147] UNGPs (n 3) Guiding Principle 19 (Commentary).

[148] Ibid.

[149] Ibid, Guiding Principle 22. This means that the corporate responsibility to undertake HRDD extends further than the corporate responsibility to remedy adverse human rights impacts.

[150] Ibid, Guiding Principle 14.

[151] OHCHR Interpretative Guide (n 137) p. 5.

[152] This is well-established in relation to 'negative' human rights obligations in international law commonly associated with the state duty to respect human rights, which entail positive measures necessary to ensure that States refrain from violating human rights.

other business relationships for them to understand and apply the relevant RBC policies and implement due diligence'; and to 'seek to understand and address barriers arising from the enterprise's way of doing business that may impede the ability of suppliers and other business relationships to implement RBC policies, such as the enterprise's purchasing practices and commercial incentives'.[153]

Different from commercial due diligence as a process to gauge and manage material risks to the company and its shareholders, HRDD focusses on human rights risks to people and lays down a substantive standard of conduct business enterprises must meet to discharge their corporate responsibility to respect – to prevent and remedy harm to human rights.[154] HRDD requires a business enterprise to take 'adequate' measures to address adverse human rights impacts,[155] which entails that the means through which it discharges its responsibility to respect may vary depending on its size, the sector in which it operates, and the severity of human rights impacts – judged by their 'scale, scope and irremediable character'.[156] While 'scale' refers to the gravity of the adverse impact, 'scope' concerns the reach of the impact including the number of individuals affected. For example, the OECD RBC Guidance lists as indicators for measuring the severity of impacts by scope in the area of labour rights the 'numbers of workers & employees impacted'; the 'extent to which impacts are systemic (e.g. to a particular geography, industry or sub-sector)'; and 'the extent to which some groups are disproportionately affected by the impacts (e.g. minorities, women, etc.)'.[157] The OHCHR Interpretative Guide further notes that 'depending on the operational context, the most severe human rights impact may be faced by persons belonging to groups that are at higher risk of vulnerability or marginalisation, such as children, women, indigenous peoples, or people belonging to ethnic or other minorities'.[158]

If a business enterprise cannot conduct HRDD in relation to all entities in its supply chain, it should 'identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence'.[159] If a business enterprise cannot address all of its adverse human rights impacts simultaneously, it should – in the absence of specific legal guidance – 'begin with those human rights impacts that would be most severe, recognising that a delayed response may affect remediability'.[160]

[153] OECD RBC Guidance (n 138) p. 24.
[154] This mirrors the State duty to 'protect' human rights in international law which, *qua* duty of conduct, requires States to take reasonable and appropriate measures to prevent and redress human rights abuse by third parties; see further Supply Chain Due Diligence Study (n 2) 158; and R. McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights', 28(3) *European Journal of International Law* (2017) 899-919.
[155] UNGPs (n 3) Guiding Principle 11 (Commentary).
[156] Ibid, Guiding Principle 14 (Commentary).
[157] OECD RBC Guidance (n 138) p. 43.
[158] OHCHR Interpretative Guide (n 137) p. 84.
[159] UNGPs (n 3) Guiding Principle 17 (Commentary).
[160] Ibid, Guiding Principle 14 (Commentary).

HRDD and the Protection of Women Migrant Workers

The OECD-FAO Guidance highlights the hightened protection needs of women migrant workers in global food supply chains against intersectional forms of discrimination: 'marginalised groups, such as women, youth and indigenous and migrant workers, as well as workers employed on a casual, piecework or seasonal basis, and informal workers, often face abusive or insalubrious working conditions'.[161]

The UNGPs require business enterprises to respect, at a minimum, the rights contained in the International Bill of Rights and the ILO Declaration on Fundamental Principles and Rights at Work.[162] Depending on the circumstances of their operation, business enterprises should consider additional standards to respect the human rights of individuals 'belonging to special groups or populations that require particular attention', including women and migrant workers and their families.[163] Relevant examples of additional standards listed in the OHCHR Interpretative Guide are the UN Convention on the Elimination of All Forms of Discrimination against Women and the ILO Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[164] Relatedly, the OECD-FAO Guidance calls upon business enterprises to

> [R]ecognise the vital role played by women in agriculture and take appropriate measures to eliminate discrimination against women and to help ensure their full professional development and advancement, including by facilitating equal access and control over natural resources, inputs, productive tools, advisory and financial services, training markets and information.[165]

The OECD Guidelines for Multinational Enterprises contain dedicated chapters on the environment (Chapter VI) and employment and industrial relations (Chapter V) that the OECD-FAO Guidance applies to the agricultural sector. The latter chapter promotes the observance of ILO standards and principles among multinational enterprises, including the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[166] The OECD Guidelines and the ILO MNE Declaration contain broadly worded non-discrimination provisions that include migrant workers *via* the prohibition of discrimination on grounds of national extraction. Migrant workers count among the 'vulnerable individuals, groups and communities' that 'face a particular risk of being exposed to discrimination and other adverse human rights impacts'.[167] The ILO Declaration on Fundamental Principles and Rights at Work also

[161] OECD-FAO Guidance (n 6) p. 56.
[162] Ibid. UNGPs (n 3) Guiding Principle 12; ILO, *Declaration of Fundamental Principles and Rights at Work* (1998), which includes freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elemination of discrimination in respect of employment and occupation.
[163] UNGPs (n 3) Guiding Principle 12 (Commentary).
[164] OHCHR Interpretative Guide (n 137) p. 12.
[165] OECD-FAO Guidance (n 6) p. 55.
[166] OECD Guidelines (n 8) p. 37.
[167] OHCHR Interpretative Guide (n 137) p. 11. The European Commission's *Employment & Recruitment Agencies Sector Guide on Implementing the UN Guding Principles on Business and Human Rights* (2014) make explicit reference to migrant woman workers as a vulnerable group in heightened need of protection (pp. 30-31).

recognises migrant workers as a group 'with special social needs'.[168] Given the systemic and severe (judged by 'scope') nature of adverse human rights impacts on migrant workers in global food supply chains, companies need to prioritise them in their risk assessment and mitigation measures.

According to the OECD Guidelines, business enterprises should 'promote equal opportunities for women and men with special emphasis on equal criteria for selection, renumeration, and promotion, and equal application of those criteria, and prevent discrimination or dismissal on the grounds of marriage, pregnancy or parenthood'.[169] The UN Working Group on Business and Human Rights furthermore recommends that CEDAW should always make part of the additional standards business enterprises consider for the protection of vulnerable groups, as 'adopting a gender perspective will be appropriate in all circumstances'.[170] Irrespective of the number of incidents ('scope'), business enterprises 'should always regard sexual harassment and gender-based violence as risks of severe human rights impacts'.[171] The OECD RBC Guidance specifies that business enterprises should integrate a dedicated gender perspective into their HRDD policies and processes by identifying real or potential adverse impacts that are specific to women or that affect them differently, including context- and sector-specific risks; and by adjusting their actions to identify, prevent, migitate and address these impacts in an effective and appropriate way.[172]

The UN Working Group's Gender Framework for the Guiding Principles on Business and Human Rights comprises a 'three-step cycle' of 'gender-responsive assessment, gender-transformative measures and gender-transformative remedies' that covers all three pillars of the UNGPs:

> The assessment should be responsive: it should be able to respond to differentiated, intersectional and disproportionate adverse impacts on women's human rights as well as to discriminatory norms and patriarchal power structures. The consequent measures and remedies should be transformative in that they should be capable of bringing change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping.[173]

The OECD RBC Guidance and the UN Working Group stress the importance for gender-based HRDD to collect and assess sex-disaggregated data and to consider issues of intersexuality and accumulating vulnerabilites; to develop gender sensitive warning systems, including impact assessments and the protection of whistleblowers; to ensure the equal participation of women and women's organisations in consultations and negotiations; to address both specific and systemic abuses affecting women and to track the effectiveness of responses; and to provide for, or cooperate in, the provision of gender-transformative remedies, including an assessment of whether women benefit equally from compensation and other forms of restitution.[174]

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[168] ILO Declaration of Fundamental Principles (n 162), Preamble.
[169] OECD Guidelines (n 8) p. 39.
[170] Gender Dimensions of the UNGPs (n 94) para 38.
[171] Ibid, Annex: Gender Guidance on the UNGPs, para 34 (d).
[172] OECD RBC Guidance (n 138) p. 41.
[173] Gender Dimensions of the UNGPs (n 94) para 39.
[174] OECD RBC Guidance (n 138) p. 41; Gender Dimensions of the UNGPs (n 94), Annex, paras 21-48.

Whereas States are required in international human rights law to ensure to all workers wages that are 'fair', provide for a 'decent living', and enable them to enjoy their other human rights,[175] the ILO MNE Declaration states that 'wages, benefits and conditions of work offered by multinational enterprises across their operations should be not less favourable to the workers than those offered by comparable employers in the host country'. Absent comparable employers, multinational enterprises should 'provide the best possible wages, benefit and conditions of work', taking into account the needs of workers and their families including the cost of living and social security benefits.[176] In a similar vein, the OECD-FAO Guidance calls upon business enterprises in the agricultural sector 'to provide the best possible wages, benefits and conditions of work within the framework of government policies. These should be at least adequate to satisfy the basic needs of workers and their families'.[177]

While there is some evidence of emerging best practices among companies in the agri-food sector,[178] overall these demands for responsible business conduct contrast sharply with the reality of global food supply chain management. Increasing concentrations of market power and corresponding imbalances in bargaining power translate into pricing and purchasing pratices by lead buyers that drive down wages and social and environmental protection standards – with adverse impacts on agricultural workers across the entire spectrum of human and labour rights. This is exacerbated where suppliers have to bear the costs of implementing and monitoring HREDD measures required by retailers to satisfy investor and consumer demands for sustainable agricultural produce. Without addressing this root cause of adverse human rights and environmental impacts in global food supply chains, the contribution of European HREDD legislation to sustainable corporate governance in the agricultural sector is likely to be limited. [179]

The UNGPs address root causes by tying the corporate responsibility to respect human rights to a business enterprise's involvement in adverse human rights impacts through causation, contribution, or linkages. The UNGPs place 'contribution' and 'linkage' scenarios on a responsibility continuum, with a business enterprise's concrete form of involvement being determined on the basis of context-dependent factors, including 'the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it'.[180] Even where a causal contribution to an adverse human rights impact is not immediately evident, a company may 'contribute' to that impact by repeatedly failing to exercise HRDD in respect of operations to which it is 'linked' through its business

[175] CESCR, General Comment No. 23 (n 110) paras 10, 18.
[176] ILO MNE Declaration (n 8) para 41.
[177] OECD-FAO Guidance (n 6) p. 56.
[178] See, for example, R. Wilshaw & R. Willoughby (n 21).
[179] On the importance of root cause analysis in addressing adverse human rights impacts through HRDD, see OHCHR Interpretative Guide (n 137) p. 54; and further R. Mares, 'Human Rights Due Diligence and the Root Causes of Harm in Business Operation: A Textual and Contextual Analysis of the Guiding Principles on Business and Human Rights', 10(1) *Northeastern University Law Review* (2018) 1, 44-68.
[180] Office of the UN High Commissioner for Human Rights, *Response to request from BankTrack for advice regarding the application of the UNGPs in the context of the banking sector* (2017), p. 7, available at: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

relationships. For example, where a food company sources from a supplier who violates the rights of women migrant workers and fails, over time, to exercise due diligence in respect of that supplier, it will eventually find itself contributing to the abuse. This applies *a fortiori* to the realisation of typical and well-known region-, sector-, or stakeholder-specific risks, such as in relation to global food supply chains 'tenure rights over and access to natural resources, informal labour, child labour, and discrimination against vulnerable groups such as women and migrant workers'.[181] In these scenarios, an enterprise must cease its *own* contribution to adverse human rights impacts involving other entities, and provide for or participate in remediation.[182]

International guidance confirms that a company's pricing and purchasing practices can qualify as a 'contribution' to adverse human rights impacts. According to the OHCHR Interpretative Guide, for example, decisions by a company's buying division without regard to suppliers' capacity to comply with labour standards entails a risk of 'contributing to adverse human rights impacts'.[183] A company also contributes to adverse human rights impacts when it changes 'product requirements for suppliers at the eleventh hour without adjusting production deadines and prices, thus pushing suppliers to breach labour standards in order to deliver'.[184] Similarly, the OECD RBC Guidance explains that a retailer contributes to adverse human rights impacts where it sets shorter than feasable lead time and restricts the use of sub-contracting, thus increasing the risk of excessive over time despite the foreseeability of the impact and without taking mitigating measures.[185] And according to the OECD-FAO Guidance, a large food retailer 'contributes' to adverse human rights impacts if it 'requires tight delivery schedules of seasonal and fresh agricultural products'. This 'may lead its suppliers to suddenly increase their workforce to meet the demand, and thus generate abuses of temporary migrant workers'. To cease its contribution to the adverse impact, the food retailer should ease the pressure on its supplier or increase purchasing prices to take into account the latter's cash flow constraints.[186]

[181] OECD-FAO Pilot Project (n 22) p. 12.
[182] OHCHR Interpretative Guide (n 137) p. 18.
[183] Ibid, p. 29.
[184] Ibid, p. 17.
[185] OECD RBC Guidance (n 138) pp. 70-71.
[186] OECD-FAO Guidance (n 6) p. 37.

5 Towards a European Directive on Corporate Due Diligence and Corporate Accountability

5.1 An EU Legal Instrument on Corporate Human Rights & Environmental Due Diligence

- While the inclusion of civil remedies in the envisaged EU Directive may prove politically controversial, the European Union is legally competent to legislate in this area to prevent regulatory distortions of the internal market. Empowering private parties to claim damages for violations of EU law is an important regulatory technique in internal market building that has been used across various areas of European policy.
- The Directive's reference to 'effective, proportionate and dissuasive' sanctions does not exclude criminal penalties. Member States retain discretion in the choice of sanctions, yet they are required to ensure that the chosen sanctions contribute to an effective enforcement of the Directive. This may necessitate the use of criminal sanctions in cases of severe corporate impacts and repeated offenders, as proposed in an earlier draft of the Directive.

As envisaged in the EP Resolution, the new Directive should require EU Member States to prevent business enterprises domiciled in the European Union or operating in the internal market from causing or contributing to adverse impacts on human rights, the environment and good governance through their own activities and within their business relationships. Member States shall also ensure that business enterprises can be held accountable and liable in accordance with national law for these adverse impacts, and that victims have access to effective legal remedies.[187]

If the European Parliament's recommendations survive the EU legislative process (a European Commission proposal is expected for summer 2021), the new Directive would advance significantly beyond existing and envisaged HREDD legislation in the European Union and various European States. Leaving aside transparency (reporting & disclosure) legislation such as the EU Non-Financial Reporting Directive or the UK Modern Slavery Act that do not impose substantive due obligations on business enterprises,[188] most existing examples of supply chain due diligence legislation are either sector-specific (e.g., preventing trade in conflict minerals and illegally harvested timber) or tailored to particular groups of rights-holders (e.g., protecting children).[189] Where, as in France and Germany, domestic legislation imposes horizontal due diligence obligations, it only applies to comparatively large enterprises and does not cover the entire supply chain.[190] The French Duty of Vigilance Law is presently the only HREDD legislation to explicitly provide for civil remedies.[191]

[187] EP Resolution (n 5), Article 1(1) & 1(3).
[188] Directive 2014/95/EU (n 55); *UK Modern Slavery Act 2015*, Section 54(5).
[189] See, respectively, Regulation (EU) 995/2010 (n 53); Regulation (EU) 2017/821 (n 54); and the Dutch Child Labour Due Diligence Law (not yet in force), *Wet Zorgplicht Kinderarbeid*, Kamerdossier 34 506 (2016/2017).
[190] See, respectively, the French 'Duty of Vigilance' Law, *Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (2017); and the German Draft Law on Corporate Due Diligence in Supply Chains, *Referentenentwurf des Bundesministeriums für Arbeit und Soziales, Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* (2021).
[191] Duty of Vigilance Law (n 190). A popular initiative in Switzerland to make human rights and environmental supply chain due diligence mandatory for Swiss-based companies by amending the Swiss constitution was narrowly rejected in a public referendum in late November 2020. The original proposal would have enabled foreign victims of human rights and environmental harm to seek civil redress in

The EU Supply Chain Due Diligence Study identified broad support among different groups of stakeholders for legislation to impose mandatory horizontal due diligence obligations on business enterprises operating in the internal market. It highlighted the limitations of existing voluntary initiatives and reporting requirements in ensuring corporate respect for human rights and the importance of effective enforcement mechanisms for creating an EU level playing field. This last consideration, taken together with concerns about regulatory burdens and legal uncertainty caused by the fragmentation of corporate due diligence requirements across the Member States, also explains the strong preference among business enterprises and other stakeholders for a European legislative instrument that should create a single harmonized standard.[192]

An EU-wide harmonized legal HREDD standard that applies to all business actors and business activities within the European Union is not only in the interest of business enterprises but also necessary to ensure the proper functioning of the internal market (Article 26 TFEU). As noted in the EP Resolution:

> The insufficient harmonisation of laws can have an adverse impact on the freedom of establishment. Further harmonisation is therefore essential to prevent unfair competitive advantages being created. To create a level playing field, it is important that the rules apply to all undertakings – be they Union or non-Union – operating in the internal market.[193]

The new Directive will 'prevent regulatory fragmentation and improve the functioning of the internal market' by subjecting business enterprises to 'harmonised due diligence obligations'; and 'prevent future barriers for trade' stemming from 'significant differences between Member States' legal and administrative provisions on due diligence, including as regards civil liability'.[194]

According to the EP proposal, the new Directive should be based on Articles 50, 83(2), and 144 TFEU. Article 50 TFEU, which also served as the legal basis for the EU Non-Financial Reporting Directive, empowers the Union to enact directives to attain freedom of establishment – one of the core pillars of the internal market. Article 83(2) TFEU provides the legal basis for directives establishing 'minimum rules with regard to the definition of criminal offences and sanctions'. Article 114 TFEU allows – 'safe where otherwise provided in the Treaties' – for the adoption of 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. The legal basis for the amendments of EU private international law proposed in the Annexes to the European Parliament Report is Article 81(2) TFEU.[195]

Whether, as presently envisaged in the EP Resolution, the EU Directive should require Member States to ensure civil liability of business enterprises for human rights harm is likely to prove controversial, having regard to previous experiences with negotiating HREDD legislation at the national level, as well as the political rapport

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Switzerland, with a company's exercise of adequate due diligence serving as a defence against liability; see Swiss Coalition for Corporate Justice (SCCJ), *The Initiative Text with Explanations*, https://corporatejustice.ch/about-the-initiative/.

[192] EU Supply Chain Due Diligence Study (n 2) pp. 93-154.

[193] EP Resolution (n 5) Recital 10.

[194] Ibid, Recitals 12 & 11.

[195] EP Report (n 4) Annexes I & II.

between the EU institutions and Member State governments.[196] Such questions of political feasibility, however, need to be distinguished from the EU's legal competence to regulate civil liability for adverse corporate human rights and environmental impacts in European law. Reportedly, concerns have been raised in the parliamentary process that – different from minimum harmonisation in criminal matters – the European Treaties do not contain an explicit legal basis for regulating tort liability as envisaged in the EP Resolution. Moreover, EU law could not (directly) govern the relationship between companies and workers regarding human rights abuses committed outside the European Union and civil liability claims that flow from this relationship.

These concerns fail to convince. Regarding the first concern, Article 114 TFEU applies *unless* the European Treaties contain a more specific legal basis (as in the case of Article 83(2) TFEU for criminal matters). Against this background, it is not obvious why/how Article 114 TFEU – which as interpreted by the European Court of Justice confers significant discretion on the EU legislature – would discriminate between the regulation of civil liability and other regulatory measures aimed at the proper functioning of the internal market.[197] Enabling private parties to claim damages for violations of EU law has long been an important regulatory technique in internal market-building that has been used across various areas of European policy.[198] More specifically, it is not clear why tort damages should be treated any different from other forms of (civil) damages covered by European directives adopted under Article 114 TFEU.[199] Given that the envisaged Directive (as existing examples of HREDD

[196] See, for example, the interview with MEP Heidi Hautala by B. Fox, *EU Chance for 'Brussels Moment' on Human Rights Reporting, says Lawmaker* (23 March 2021), available at: https://www.euractiv.com/section/economy-jobs/interview/eu-chance-for-brussels-moment-on-human-rights-reporting-says-leading-lawmaker/.

[197] See, for example, Case C-66/04 *United Kingdom v. Parliament and Council (Smoke Flavourings)*, EU:C:2005:743 (noting at para 55 with regard to the meaning and scope of 'approximation' that 'in Article [114 TFEU] the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result'); Case C-2019/03 *R v. Secretary of State for Health, ex parte Swedish Match*, EU:C:2004:802 and Case C-58/08 *Vodafone*, EU:C:2010:321 (endorsing a pre-emptive approach under Article 114 TFEU to prevent Member States from adopting different laws on tobbaco products and roaming charges that could create future obstacles to trade); Case T-526/10, *Inuit Tapiriit Kantami*, EU:T:2013:215, upheld on appeal C-398/13P, EU:C:2015:535 (holding that the Union legislature is not prevented from using Article 114 TFEU where the decisive factor motivating regulation is not market harmonisation but the pursuit of a legitimate objective in the public interest (*in casu*, animal welfare)).

[198] J. Oster, 'Privatrechtliche Schadensersatzansprüche zur Durchsetzung des Unionsrechts am Beispiel der Schadensersatzrichtlinie 2014/104/EU', 54 *Europarecht* (2019) 578-601.

[199] For example, under the EU Competition Damages Directive, based on Articles 103 and 114 TFEU, 'Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm'. Regulating the right to compensation in EU law is considered necessary because 'the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market'; *Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (2014) Article 3(1) and Recital 8. To take another example, Directive 2019/2161, adopted on the sole legal basis of Article 114 TFEU, contributes to the proper functioning of the internal market by improving the enforcement of consumer rights and consumer redress. For this purpose, Member States are required to ensure that 'consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer'; *Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of*

legislation at national level) regulates adverse corporate human rights and environmental impacts across Member State borders, leaving civil liability at the latter's discretion is likely to give rise to significant regulatory distortion in the internal market.

Regarding the second concern, the EP Resolution does not (directly) regulate tort remedies for corporate human rights abuse in the relationship between foreign companies and workers but establishes civil liability of business enterprises domiciled in the European Union or operating in the internal market for *their own* contribution to adverse human rights impacts in their supply chains. While on the one hand, EU regulation of (corporate) human rights and environmental impacts with extraterritorial effect is nothing unusual,[200] the Directive's civil liability regime, on the other hand, only aims at establishing a single harmonised standard *within* the internal market.[201]

Whereas the European Parliament's first draft of the proposed Directive explicitly required Member States to ensure that repeated infringements of HREDD requirements by business enterprises constitute a criminal offence,[202] the present EP Resolution refers more broadly to 'effective, proportionate and dissuasive' sanctions that 'shall take into account the severity of the infringements committed and whether or not the infringement has taken place repeatedly'.[203] This broader formulation is arguably owed to the limitations of EU competence to minimum harmonisation in criminal matters under Article 83(2) TFEU and rehearses the standard formula ('effective, proportionate and dissuasive') used by the European legislature. *Qua* minimum harmonisation, it does not preclude the Member States from reverting to criminal sanctions and penalties. While Member States retain discretion in this regard, they are required to take all measures necessary to ensure that the chosen sanctions contribute to an effective enforcement of EU law.[204]

5.2 Preventing Adverse Corporate Impacts on Women Migrant Workers through HREDD Legislation

- The scope of the envisaged Directive is significantly broader than existing examples of HREDD legislation. Next to business enterprises domiciled in the European Union, the Directive imposes HREDD obligations on ('foreign') companies operating in the internal market. It also covers small- and medium-sized enterprises that are publicly listed or operate in high risk sectors, with the latter arguably including companies in the agri-food sector. This still falls short of the UNGPs that require human rights due diligence of all business enterprises irrespective of size and sector.
- The proposed Directive imposes horizontal HREDD obligations that protect all international human rights for the benefit of all groups of rights-holders. An Annex to be drawn up by the European Commission is envisaged to incorporate into the Directive international standards relevant to the protection of women migrant workers and other

the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (2019) Article 11a.

[200] See for pertinent examples *infra*, section 3; and more generally J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* (2014) 87-126.

[201] EP Resolution (n 5) Recitals 10-12.

[202] European Parliament, Draft Report (n 51) Article 19.

[203] EP Resolution (n 5) Article 18(2).

[204] Case 68/88 *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1989:339.

vulnerable and marginalised groups. The proposed Directive does not contain a dedicated gender perspective, nor does it explicitly address the multiple and intersecting forms of discrimination encountered by women migrant workers.

- The proposed Directive takes an overall robust approach to preventing adverse corporate human rights and environmental impacts in global (food) supply chains. It covers adverse impacts that a business enterprises causes, to which it contributes, and to which it is linked through its business relationships. However, the present text of the Directive does not always clearly and consistently reflect the UNGPs' approach to supply chain due diligence, which could give rise to unduly restrictive or expansive interpretations of corporate HREDD obligations. In particular the proposed exemption of certain business enterprises from HREDD requirements risks to indirectly introduce a tier-based approach not envisaged by the UNGPs.
- Of significant relevance for the protection of women migrant workers in global food supply chains is that the proposed Directive explicitly requires business enterprises to ensure that their purchasing practices do not cause or contribute to adverse human rights and environmental impacts. Contrary to the UNGPs, the present text of the Directive requires corporate contributions to human rights abuses to be 'substantial', which is likely to hamper the effectiveness of the provision.
- The proposed Directive envisages various forms of guidance and stakeholder engagement to support the implementation and operationalisation of corporate due diligence requirements at different stages of the process. The present provisions on effective stakeholder consultation are rather weak by UNGP standards and not sufficiently tailored to the needs of vulnerable and marginalised groups, including women migrant workers.

As stated in the EP Resolution, 'due diligence is primarily a preventative mechanism that requires undertakings to take all proportionate and commensurate measures' to identify and assess potential and actual adverse impacts and to adopt policies and measures to prevent, mitigate and account for how they address these impacts.[205] According to the UNGPs, HRDD applies to all business enterprises regardless of size, sector or country of operation; refers to all internationally recognised human and labour rights relevant to business operations; and covers all groups of rights-holders. At the same time, HRDD is a context-specific standard that accounts in its operationalisation ('the means through which enterprises meet their responsibility [to respect human rights]') for factors such as the company's size and sector of operation, the severity of its adverse human rights impacts, and the particular needs of vulnerable groups.[206] To be UNGPs-compliant, HREDD legislation that translates the corporate responsibility to respect human rights into a legal standard of care should take due account of these requirements.

Scope of the EU HREDD Directive

According to the EP Resolution, the Directive should apply to undertakings 'governed by the law of a Member State or established in the territory of the Union' and 'undertakings which are governed by the law of a third country and are not established in the territory of the Union when they operate in the internal market selling goods or providing services'.[207] This combines existing models of 'parent-based' and 'market-based' HRDD legislation that establish the required jurisdictional

[205] EP Resolution (n 5) Recital 30.
[206] UNGPs (n 3) Guiding Principle 14 (Commentary). The concrete requirements bound up with corporate HREDD are further elaborated *infra*, section 4.3.
[207] EP Resolution (n 5) Article 2.

nexus, respectively, in virtue of the company's place of incorporation within the State's territory and in virtue of products and services placed on the State's domestic market.[208] It entails that the Directive also imposes HREDD obligations of 'foreign' companies with business activities in the internal market.

In addition to large undertakings,[209] the Directive should cover small- and medium-sized undertakings that are publicly listed or that operate in high-risk sectors.[210] Given the documented widespread and severe adverse human rights and environmental impacts of global food supply chains,[211] the definition of 'high risk' small- and medium-sized enterprises to be drawn up by the European Commission should include undertakings in the agri-food sector.

The Directive is intended to cover private and state-owned enterprises in all economic sectors, including the financial sector, and to protect all groups of rights-holders.[212] It presently only makes sparse reference to the hightened protection needs of women (noting that 'adverse impacts on human rights, the environment and good governance are not gender-neutral' and encouraging enterprises to integrate a gender perspective into their due diligence processes) and vulnerable groups.[213] Commenting on the proposed Directive, the EU Committee on International Trade:

> Recalls that women constitute the majority of workers in sectors such as garment and textile manufacturing, telecommunication, tourism, the care economy and agriculture, in in which they tend to be concentrated in more low-wage or low-status forms of formal and informal employment than men; calls therefore for rules that requires companies to apply a gender-sensitive approach to due diligence, and to explicitly consider if and how women could be disproportionately impacted by their operations and activities.[214]

The envisaged Directive imposes horizontal HREDD obligations that protect all international human rights for the benefit of all groups of rights-holders. An Annex to the Directive to be drawn up by the European Commission that will list types of business-related adverse human rights impacts is envisaged to include UN human rights instruments on the rights of persons belonging to vulnerable groups or

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[208] See further *infra*, section 4.1

[209] Defined in Article 4 of Directive 2013/34/EU (n 55) as 'undertakings which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250'.

[210] EP Resolution (n 5) Article 2. By way of comparison, the French Duty of Vigilance Law (n 190) applies to companies (including direct and indirect subsidiaries) with 5000 employees (if registered in France) or 10000 employees (if registered abroad); the German Draft Supply Chain Due Diligence Law (n 190) applies to companies domiciled in Germany (including subsidiaries) with at least 3000 employees and, as of 01 January 2024, 1000 employees; the Dutch Child Labour Due Diligence Law (n 189) applies to all companies, regardless of size and whether domiciled in the Netherlands or abroad, that deliver products and services to Dutch end-users. The differences between, on the one hand, the French and the German law and, on the other hand, the Dutch law, may be explained in virtue of the different regulatory modalities of 'parent-based' and 'market-based' HREDD legislation; see *infra*, section 4.1.

[211] On the severity of the relevant impacts within the meaning of the UNGPs, see in particular *infra*, section 4.3.

[212] EP Resolution (n 5) Recital 17. Expectations towards in the area of public procurement are formulated more stringently in relation to business enterprises owned or controlled by the State (Recital 19).

[213] Ibid, Recital 25.

[214] Opinion of the Committee on International Trade, annexed to the EP Report (n 4) p. 62.

communites, next to various ILO Conventions relevant to the protection of women migrant workers.[215]

A gender perspective should be mainstreamed into the text of the Directive. Building on the HRC Guidance on the Gender Dimensions of the UNGPs, the Directive should outline steps Member States (implementing the Directive) and business enterprises must take to identify and prevent adverse corporate human rights impacts on women migrant workers.[216] The envisaged Annex includes numerous international protection standards relevant to the protection of women migrant workers.[217] It should make explicit reference to the CEDAW Convention and the ILO Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
The Annex' list of types of adverse corporate human rights impacts should reflect the hightened protection needs of women migrant workers against intersectional discrimination, in line with CEDAW's General Recommendation No. 26 on Women Migrant Workers.[218]

Supply Chain Due Diligence

The EP Resolution aims for a regulation of HREDD in line with the UNGPs and associated international guidance that covers the entire supply chain. As explained in more detail in section 4.3, the UNGPs distinguish between (potential and actual) adverse human rights impacts that a business enterprise causes, contributes to, or to which it is linked through its business relationships.[219] This distinction determines a business enterprise's HRDD responsibilities in each of the scenarios. The present text of the proposed Directive does not always clearly and consistently reflect this conceptual framework, with a number of Articles deploying ambiguous terminology that could give rise to unduly restrictive or expansive interpretations of HREDD obligations.[220] To ensure the effectiveness of the envisaged Directive in preventing

[215] Ibid, Recital 22. The European Parliament envisages the Annex to include 'the international human rights conventions that are binding upon the Union or the Member States, the International Bill of Human Rights, International Humanitarian Law, the United Nations human rights instruments on the rights of persons belonging to particularly vulnerable groups or communities, and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as well as those recognised in the ILO Convention on freedom of association and the effective recognition of the right to collective bargaining, the ILO Convention on the elimination of all forms of forced or compulsory labour, the ILO Convention on the effective abolition of child labour, and the ILO Convention on the elimination of discrimination in respect of employment and occupation … the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and a number of ILO Conventions, such as those concerning freedom of association, collective bargaining, minimum age, occupational safety and health, and equal remuneration, and the rights recognised in the Convention on the Rights of the Child, the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and national constitutions and laws recognising or implementing human rights.
[216] Gender Dimensions of the UNGPs (n 94); see further *infra*, section 4.3.
[217] On international standards relevant to the protection of migrant (women) workers see *infra*, section 4.2.
[218] CEDAW General Recommendation No. 26 (n 19).
[219] UNGPs (n 3) Guiding Principle 13; see further *infra*, section 4.3.
[220] For example, Article 1(1), while otherwise clearly aligned with the UNGPs, is poorly worded as concerns the suggested/implied distinction between 'business relationships' and the 'value chain'. The UNGPs use the expression 'business relationships' in a broad sense, to include all value chain relationships and all business partners. For the purpose of assigning responsibility, they do not discriminate between different types of business partners but focus on a business enterprise's involvement (cause / contribute to / linked to) in adverse human rights impacts. This ambiguity is also consequential for the unclear attribution of

adverse corporate impacts in global (food) supply chains, it is important to properly align the scope of HREDD obligations with the UNGPs.

By way of illustration, the French Duty of Vigilance Law limits HREDD in the supply chain to 'established commercial relationships', which is a narrower standard than the UNGPs' notion of 'business relationships'.[221] While not necessarily confined to first-tier suppliers, the French standard would appear inadequate to fully account for adverse human rights and environmental impacts in the agri-food sector – notoriously plagued by arms-length supply relationships based on insecure, short-term, and often unwritten contracts.[222] The recent German Draft Supply Chain Due Diligence Law is more narrowly focussed on first-tier (direct) suppliers, with HREDD in relation to lower tiers of the supply chain only being required where a company fraudulently circumvents the direct supplier or obtains substantiated knowledge of potential human rights abuses by indirect suppliers.[223] As noted in a recent assessment, not only does this approach fall behind attempts by more progressive food retailers to proactively trace and mitigate adverse human rights impacts in the lower tiers of their supply chains; it is also largely ineffective on its own terms because the covered contractual suppliers are mainly agencies or intermediaries incorporated in Germany or the European Union.[224]

The envisaged Directive differs from the French and the German model in that it does not determine the scope of HREDD obligations on the basis of the relationship between different business entities ('established commercial relationship'; 'direct suppliers') but on the basis of a business enterprise's involvement ('cause', 'contribute', 'linked to') in adverse impacts throughout the entire supply chain. The envisaged Directive takes a robust approach to corporate supply chain due diligence obligations that apply in relation to a business enterprise's own operations and its business relationships. Business enterprises need to develop and implement a 'due diligence strategy', including supply chain mapping; the adoption of 'proportionate and commensurate' policies and measures in relation to adverse impacts on human rights, the environment and good goverance; and a prioritisation strategy taking into account the nature and context of business operations and the 'severity, likelihood and urgency' of potential or actual adverse impacts.[225] As elsewhere in the text of the proposed Directive, it would be helpful to set out more clearly what 'proportionate and commensurate measures' are required in the light of the business enterprise's involvement (cause / contribute to / linked to) in the adverse impact.

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remediation responsibility under Article 1 (2), which appears to mandate corporate remediation of adverse impacts 'of their value chains and business relationships' irrespective of the business enterprise's concrete involvement – with Article 10(1) (correctly by UNGP standards) limiting corporate remediation to 'cause' and 'contribution' scenarios. Inversely, Article 1(3) overlooks that corporate accountability may also arise in relation to adverse impacts to which a business enterprise is 'directly linked', for example because it failed to put into place a due diligence strategy to monitor its suppliers and exert leverage over them.

[221] Duty of Vigilance Law (n 190). In French law, an 'established commercial relationship' requires a stable and regular relationship with a certain business value; see S. Brabant, C. Michon & E. Savourey, 'The Vigilance Plan. The Cornerstone of the Law on Corporate Duty of Vigilance', *Revue Internationale de la Compliance et de L'Etique des Affairs* (2017) 1, 3-4.

[222] See further *infra*, section 2.

[223] Draft Law on Corporate Supply Chain Due Diligence (n 190) §§ 5, 9.

[224] Initiative Lieferkettengesetz, *Rechtliche Stellungnahme zum Regierungsentwurf 'Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten'* (2021) p. 12.

[225] EP Resolution (n 5) Article 4.

Article 4(3) exempts certain undertakings from the obligation to establish and implement a due diligence strategy, provided their risk assessment and impact identification yields the conclusion that they do not cause, contribute to, or are directly linked to, adverse impacts. Oddly, this exemption also covers a company's supply chain mapping,[226] which would appear a precondition for identifying (risks of) adverse impacts. Undertakings also benefit from the exemption of Article 4(3) if their risk assessment and impact identification shows that all of their direct suppliers perform HREDD in line with the Directive. While this does not, strictly speaking, limit HREDD obligations to first-tier suppliers (but rather resembles an approach taken by the Dutch Child Labour Due Diligence Law that permits for a 'delegation' of due diligence requirements),[227] it indirectly introduces a tier-based approach into supply chain due diligence that is not envisaged by the UNGPs.

Article 4 (8) explicitly requires undertakings to 'ensure that their purchase policies do not cause or contribute to potential or adverse impacts on human rights, the environment or good governance'. As further elaborated in section 4.3, the effectiveness of this provision will significantly depend on the interpretation of 'contribution'. According to the EP Resolution, the assessment of the nature of the contribution should take into account: (i) the extent to which an undertaking may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring; (ii) the extent to which an undertaking could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability; and (iii) the degree to which any of the undertaking's activities actually mitigated the adverse impact or decreased the risk of the impact occurring'.[228] As regards the first and the third criterion, it should be recalled that 'contribute' and 'linked to' exist on a responsibility continuum, such that a company facilitating over time human rights abuses linked to its business operations may put it into a position of contribution (with associated responsibilities for remediation).[229] This applies *a fortiori* to the realisation of typical and well-known region-, sector-, or stakeholder-specific risks that a business enterprise should have foreseen (the second criterion), including in global food supply chains 'discrimination against vulnerable groups such as women and migrant workers'.[230]

The EP Proposal additionally requires a contribution to human rights abuses to be 'substantial' (as opposed to 'minor' and 'trivial').[231] This '*substantial* contribution' requirement, modelled after the OECD RBC Guidance, is absent in the UNGPs. As explained by OHCHR, 'the UNGPs do not include this same requirement that a contribution meet a certain level to be counted as such', although the element of causation inherent to the concept of contribution 'may in practice exclude activities

[226] Ibid, Article 4(3) ii.
[227] Dutch Child Labour Due Diligence Law (n 189). Under the Dutch model, business enterprises can discharge their due diligence obligations by sourcing from (lower tier) companies that have issued a due diligence statement. The same applies if they participate in a joint action plan agreed with civil society organisations, trade unions and/or employers' organisations and approved by the Dutch Minister for Foreign Trade and Development (the Dutch Covenants on International Responsible Business Conduct).
[228] EP Resolution (n 5) Article 3(10); OECD-RBC Guidance (n 138) p. 70.
[229] See, with particular reference to food retailers' pricing and purchasing practises *infra*, section 4.3.
[230] OECD-FAO Pilot Project (n 22) p. 12.
[231] EP Resolution (n 5) Article 3 (10).

that have only a "trivial or minor" effect'.[232] In order to avoid interpretations incompatible with – and potentially more restrictive than – the UNGPs, the qualification of contributions as 'substantial' should be removed from the text of the Directive. In line with the UNGPs, it should be clarified that contribution includes a company's acts and omissions that have a sufficient effect on another entity 'so as to make the abuse happen or make it more likely to happen'.[233] The requirements and consequences of corporate HREDD in 'cause', 'contribution' and 'linked to' scenarios should be clearly stated in the text of the Directive and comprehensively explained in EU guidance accompanying its implementation by the Member States.

It should also be considered to include into the HREDD Directive a reference to the recent EU Directive on Unfair Trading Practices in the Agricultural Food Supply Chain, next to existing references to sector-specific EU due diligence regulation.[234] It would furthermore be useful to link this Directive to Article 4 (8) in the EP Resolution, for example through appropriate (sector-specific) guidance. Whereas Directive 2019/633 prohibits certain ('black') trading practices and predicates other ('grey') trading practices upon a prior, clear and unambiguous agreement between the parties,[235] the envisaged HREDD Directive imposes additional and context-dependent requirements on business enterprises to take all proportionate and commensurate measures necessary to avoid that power disparities in global food supply chains materialise in adverse impacts on human rights, the environment, and good governance.[236]

HRDD Guidance and the Role of Stakeholder Consultation

The EP Resolution notes that 'due diligence should not be a "box-ticking" exercise but should consist of an ongoing process and assessment of risks and impacts, which are dynamic and may change on account of new business relationships or contextual developments'.[237] General and sector-specific guidance on the operationalisation of the Directive's due diligence requirements by business enterprises and a proactive approach to stakeholder consultation at the various stages of the due diligence process can play an important role in this regard.

According to Article 14 of the envisaged Directive, the European Commission shall publish general non-binding guidelines on 'how proportionality and prioritisation, in terms of impacts, sectors and geographical areas, may be applied to due diligence obligations'. The European Commission may also publish specific non-binding guidelines for undertakings operating in certain sectors. In addition, the EP Resolution envisages Member States to encourage the adoption of voluntary sectoral or cross-sectoral 'due diligence plans' at Member State or EU level which should coordinate the due diligence strategies of business enterprises, with 'relevant

[232] OHCHR, BankTrack (n 180) pp. 5-6. Legal practitioners have interpreted the UNGPs' notion of 'contribution' as requiring a company's acts or omissions to 'materially increase the risk of the specific impact which occurred *even if* they would not be sufficient, in and of themselves, to result in that impact; see Debevoise & Plimpton, *Practical Definitions of Cause, Contribute and Directly Linked to Inform Business Respect for Human Rights* (Discussion Draft, February 2017) p. 8.
[233] OHCHR, BankTrack (n 180) p. 6; UNGPs (n 3) Guiding Principle 13 (Commentary).
[234] Directive (EU) 2019/633 (n 27); EP Resolution (n 5) Recital 6.
[235] See further *infra*, section 3.
[236] EP Resolution (n 5) Article 4.
[237] Ibid, Recital 34.

stakeholders' having a 'right' to participate.[238] Guidelines and due diligence plans, elaborated in gender-responsive consultation with all relevant stakeholders, including migrant women workers, can help to avert the risk of corporate due diligence turning into a mere box-ticking or reporting exercise, with business enterprises failing to properly comprehend or implement the different steps of the HREDD process.[239]

Both avenues should be used to clarify the gender dimension of HREDD from the identification and assessment of risks to the prevention and remediation of adverse impacts, and to highlight the heightened need for protection of vulnerable groups including migrant workers.[240] Either or both avenues should be explored for developing sector-specific guidance for companies operating in global food supply chains, building on the OECD-FAO Guidance.[241] The guidance should highlight the need for business enterprises to prioritise the actual and potential human rights impacts of their pricing and purchasing policies, including on women migrant workers, in their due diligence strategy – having regard to the prevalence of these adverse impacts in global food supply chains and their propensity to result in severe human rights harm.

The EP Resolution highlights the important role of effective stakeholder engagement in the development of sectoral due diligence plans,[242] the establishment and implementation of due diligence strategies,[243] and the operation of corporate grievance mechanisms.[244] Pursuant to Article 5(1), 'discussions with relevant stakeholders' should be carried out in good faith, and in a manner that is effective, meaningful and informed and that is appropriate given the size of the business enterprise and the nature and context of its operations. Business enterprises also have to 'ensure that affected or potentially affected stakeholders are not put at risk due to participating in the discussions' (Article 5(3)). For a proper alignment with the UNGPs, Article 5 should clarify throughout that business enterprises are required to *consult* (rather than discuss) with *potentially affected groups* (in addition to other relevant stakeholders); and that 'in this process, business enterprises should pay special attention to particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalisation, and bear in mind the different risks that may be faced by women and men'.[245] This women migrant workers who are at a high risk of marginalisation in stakeholder consultations due to underlying cultural norms, lack of trade union representation, and more generally their 'invisibility' linked to irregular employment or migration

[238] Ibid, Article 11 (1). These due diligence plans appear to be modelled after the Dutch Responsible Business Conduct (RBC) Agreements; see https://www.government.nl/topics/responsible-business-conduct-rbc/responsible-business-conduct-rbc-agreements. Article 11 makes clear that participating business enterprises will not be exempt from the obligations of the Directive.

[239] See, in the context of the agri-food sector, OECD-FAO Pilot Project (n 22); and with regard to the implementation of the French Duty of Vigilance Law, E. Savourey & S. Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges since its Adoption', 6 *Business and Human Rights Journal* (2021) 141-152.

[240] As detailed in section 4.3 *infra*.

[241] OECD-FAO Guidance (n 6).

[242] EP Resolution (n 5) Article 14.

[243] Ibid, Article 5.

[244] Ibid, Article 9.

[245] UNGPs (n 3) UN Guiding Principle 18 (Commentary); OHCHR Interpretative Guide (n 135) 44-45.

status.[246] In addition to consultation, free, prior, and informed consent should be required in appropriate circumstances, for example in cases involving tenure rights and shift in land uses.[247]

5.3 Redressing Adverse Corporate Impacts on Women Migrant Workers through HREDD Legislation

- Women migrant workers are particularly affected by practical and legal barriers to access to justice and effective legal remedies. Addressing these barriers requires a proper alignment of corporate supply chain HREDD with principles for assessing corporate liability in States' domestic public and private laws. The present text of the EU Directive does not attend to barriers to access to justice that stem from multiple and intersectional forms of discrimination encountered by women migrant workers, including on the basis of their gender identity and their migration status.
- The proposed Directive recognises the primary role of State-based enforcement mechanisms and judicial remedies in redressing corporate human rights and environmental harm in global (food) supply chains. These are complemented by legal obligations for business enterprises to develop effective corporate grievance mechanisms, in line with the requirements of the UNGPs.
- The proposed Directive requires Member States to create a robust system of administrative monitoring and enforcement, supported at the EU level by a 'European Due Diligence Network'. Independent national authorities with appropriate powers and resources can instigate investigations *ex officio* and on the basis of 'substantiated and reasonable' concerns raised by third parties. Sanctions are envisaged for business enterprises that fail to take remedial action in relation to victims of corporate abuse, and 'may' include exclusions of undertakings from public procurement and export credits.
- Civil liability can be incurred by all business enterprises within the personal scope of the Directive, including foreign undertakings that operate in the internal market, and by undertakings controlled by these business enterprises. These entities can be held liable for human rights and environmental harm in their entire supply chain, provided that they caused or contributed to adverse human rights and environmental impacts. In these scenarios, the Directive envisages strict liability for human rights and environmental harm, coupled with a due diligence defence. There are different conceivable approaches to extending civil liability to 'linkage' scenarios that are presently not covered by the Directive's civil liability regime.
- Member States are required to treat relevant provisions of the proposed Directive as mandatory provisions of the forum within the meaning of Article 16 Rome II Regulation. This ensures that the Directive's requirements as implemented at the national level apply in tort litigations where the damage occurred in a third State.
- Two Annexes attached to the European Parliament Report that were not included in the final Resolution envisaged further reforms of the rules of jurisdiction and applicable law in EU private international law. It was envisaged to amend the Brussel I Regulation (Recast) to permit Member State courts to join defendants incorporated outside the European Union in proceedings against EU-domiciled (parent) companies; and to introduce *forum necessitatis* jurisdiction for business-related civil claims on human rights violations within the supply chain of a company domiciled in the European Union and/or operating in the internal market. In the area of applicable law, an amendment of the Rome II Regulation would have allowed victims of business-related human rights violations to choose between the law of the country in which the damage occurred; the

[246] See in particular *infra*, section 4.2

[247] As requested by the UN Special Rapporteur on the Right to Food; Large-scale land acquisitions and leases (n 101), Annex.

law of the country in which the event giving rise to the damage occurred; and the law of the place where the defendant undertaking is domiced or (lacking an EU Member State domicile) operates.

As noted in the EP Resolution, 'existing international due diligence instruments have failed to provide victims of human rights and environmental adverse impacts with access to justice and remedies because of their non-judicial and voluntary nature'.[248] Existing judicial remedies are often inaccessible due to practical and legal barriers to access to justice, especially in the case of foreign claimants. The OHCHR's Accountability and Remedy Project identifies three cross-cutting challenges in this regard: structural complexities in the legal organisation of business enterprises linked to the company law doctrine of separate legal personality; insufficient attention to extraterritorial remedies and international cooperation in cross-border cases; and a lack of policy coherence in the development of laws and policies on business and human rights:

> Weak, incoherent or inconsistent regulation not only undermines the effectiveness of legal regimes, but also creates additional barriers to accountability by adding to the costs and complexities of enforcement and creates legal uncertainties and compliance dilemmas for companies.[249]

Addressing these shortcomings requires a proper alignment of corporate HREDD obligations with principles for assessing corporate liability under States' domestic public and private law regimes. More specifically, States should ensure that their legal orders 'take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities'; and 'make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts'.[250]

States and business enterprises also need to attend to additional barriers to access to justice and effective remedies enountered by women migrant workers due to multiple and intersecting forms of discrimation, including on the basis of their gender identity and migration status.[251] As stressed by CEDAW, barriers to access to justice

> [O]ccur in a structural context of discrimination and inequality, due to factors such as gender sterotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial remedies are physically, economically, socially and culturally accessible to all women.[252]

The UNGPs note in the context of access to effective remedies that 'legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where … certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population'.[253] The UN Accountability and Remedy Project calls upon States to put into place systems 'to ensure that enforcement agency

[248] EP Resolution (n 5) Recital 5.
[249] Improving Accountability & Access to Remedy (n 130) paras 20-30.
[250] HRC, *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability*, A/HRC/38/20/Add.2 (2018) Annex I.
[251] See further *infra*, sections 2, 4.2 & 4.3.
[252] CEDAW, *General Recommendation No. 33 on Women's Access to Justice*, CEDAW/C/GC/33 (2015) para 3.
[253] UNGPs (n 3) Guiding Principle 26 (Commentary).

employees are aware of and take proper account of issues relating to gender, vulnerability and/or marginalisation in their dealings with relevant individuals or groups'.[254] Women adversely affected by business activities also face additional barriers to access to justice.

The EP Resolution remains silent on the disproportionate impacts of practical and legal barriers to access to justice and effective remedies on women migrant workers and other vulnerable and marginalised groups. A gender perspective should be mainstreamed into the text of the Directive, building on the HRC Guidance on the Gender Dimensions of the UNGPs.[255] The Directive should outline steps Member States (implementing the Directive) and business enterprises must take to ensure that women migrant workers benefit equally from all remedies provided for in the Directive.

A 'Bouquet' of Remedies

The UNGPs make clear that 'State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy', including corporate operational-level grievance mechanisms. While the latter can play an important role in identifying adverse human rights impacts, tracking the effectiveness of company responses, and providing timely relief to victims, they need to be distinguished from, and should not interfere with, the State duty to investigate, punish and redress business-related human rights violations when they occur.[256] They should not be presented to victims as an alternative to judicial remedies.

Empirical research shows that company-level grievance mechanisms often fail to offer safe and effective avenues for redress to women who are victims of abuses, impose unreasonably strict time-limitations, do not adequately involve the victims in the choice of the most appropriate remedy options, and/or are scarcely known by women workers.[257] These mechanisms are particularly inadequate in case of serious crimes (e.g. sexual assault) perpetrated by the company's own personnel or contractors (e.g. security personnel), which put the victim in a condition of high vulnerability. Grievance mechanisms should be designed to be accessibile and acceptable for women migrant workers, including by ensuring gender diversity in their staff, involving gender committees and women counsellors in remediation processes and protecting the victims from reprisals.[258] The Directive should stress the need for these mechanisms to be gender-responsive, taking into account the specific needs of women workers and the higher vulnerability of women migrant workers.

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[254] Improving Accountability & Access to Remedy (n 130) para 7.2.

[255] Gender Dimensions of the UNGPs (n 94).

[256] UNGPs (n 3) Guiding Principle 25. The Commentary to Guiding Principle 25 notes in this regard that 'since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, [operational-level grievance] mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism'.

[257] C. Coumans, 'Do no harm? Mining industry responses to the responsibility to respect human rights', *Canadian Journal of Development Studies* (2017) 272-290.

[258] Gender-Responsive Due Diligence Platform, 'Step 6 – Provide for remediation', available at: https://www.genderduediligence.org/implement-grdd/step-6/.

The EP Resolution recognises the primary role of the State in ensuring access to justice and effective remedies for victims of corporate abuse:

> The primary duty to protect human rights and provide access to justice lies with States, and the lack of public judicial mechanisms to hold undertakings liable for damages occurring in their value chains should not and cannot adequately be compensated by the development of private operational grievance mechanisms. Whereas such mechanisms are useful in providing emergency relief and fast compensation for small damages, they should be closely regulated by public authorities and should not undermine the right of victims to access justice and the right to a fair trial before public courts.[259]

This approach finds a concrete expression in the way the proposed Directive relates 'extra-judicial' to judicial remedies:[260] on the one hand, Member States shall ensure that an undertaking that has caused or contributed to an adverse impact provides for, or cooperates in, the remediation process; on the other hand, Member States shall ensure that this does not prevent victims from bringing civil proceedings in accordance with national law or otherwise impedes their access to court. The proposed Directive complements State enforcement and judicial remedies with legal requirements towards business enterprises to establish grievance mechanisms that are 'legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable as set out in the effectiveness criteria for non-judicial grievance mechanisms in Principle 31 of the UNGPs'.[261]

The EP Resolution envisages Member States to create a robust system of administrative monitoring and enforcement, supported at the EU level by a 'European Due Diligence Network' to coordinate regulatory, investigative and supervisory practices and monitor the performance of national authorities.[262] Independent national authorities with appropriate powers and resources can instigate investigations *ex officio* (taking a 'risk-based' approach) and on the basis of 'substantiated and reasonable' concerns raised by any third party.[263] Where a failure to comply with the Directive may lead to irreparable harm, national authorities are empowered to adopt interim measures up to a temporary suspension of market operations.[264] Member States shall provide for sanctions that are 'effective, proportionate and dissuasive and shall take into account the severety of the infringements committed and whether or not the infringement has taken place repeatedly'.[265] Sanctions are also envisaged for business enterprises that fail to take remedial action in relation victims of corporate abuse.[266] Apart from fines, sanctions 'may' include the temporary or indefinite exclusion of undertakings from public procurement and Export Credit Agencies and loans.[267]

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[259] EP Resolution (n 5) Recital 5.
[260] Ibid, Article 10.
[261] Ibid, Article 9(2).
[262] Ibid, Article 12, Article 16 (1).
[263] Ibid, Article 13 (2). By way of comparison, § 14 of the German Draft Supply Chain Due Diligence Law (n 190) requires a significantly higher treshold for 'affected' third parties to trigger administrative investigation and does not foresee submissions by civil society organisations and trade unions.
[264] Ibid, Article 13 (6).
[265] Ibid, Article 18 (1).
[266] Ibid, Article 13 (7).
[267] Ibid, Article 18 (2).

Existing examples of corporate due diligence legislation that employ criminal sanctions include the Dutch Child Labour Due Diligence Law and, in the area of 'good governance', the UK Bribery Act 2010.[268] While, as argued in section 5.1, Article 18 of the proposed Directive does not explicitly mention criminal sanctions and penalties, Member States are not prevented from using criminal law – and may be legally required to do so where administrative sanctions prove ineffective. As envisaged in a previous draft of the EU Directive, criminal sanctions are particularly appropriate in cases of severe adverse human rights impacts and repeated offenders.[269]

Civil Liability in Domestic Tort Law

A structural obstacle to ensuring effective civil remedies for victims of human rights and environmental harm with implications for both substantive liability (tort) law and private international law (jurisdiction & applicable law) is the organisation of business enterprises within corporate groups (parents & subsidiaries) and the global supply chain (contractual suppliers, subcontractors, etc.) as distinct entities endowed with separate legal personality and limited liability. These legal fictions shield EU-based parent or controlling companies from liability in tort for human rights and environmental harm caused by their (foreign) subsidiaries and suppliers. As separate legal entities, EU-based parent or controlling companies will not generally be held legally responsible for acts, omissions, or liabilities of subsidiaries and suppliers in their supply chain. Different from the so-called 'piercing' or 'lifting' of the corporate veil in company law that removes, in exceptional situations, the legal separation between the company and its shareholders, HREDD legislation has tended to address this obstacle through tortious liability for violations of human rights and environmental due diligence requirements imposed upon business enterprises as a legal standard of care.[270]

Keeping in mind that the UNGPs do not explicitly link the corporate responsibility to respect human rights with legal liability,[271] there are principally three ways to align companies' exercise of human rights and environmental due diligence to tortious liability in domestic private law.[272] First, HREDD legislation can characterise corporate human rights and environmental due diligence requirements as a legal standard of care, negligent non-compliance with which attracts tort liability.[273] The

[268] The Dutch Law (n 189) envisages criminal liability of directors whose companies have repeatedly failed to conduct due diligence in line with the legislation. The UK Bribery Act 2010 makes it a criminal offence for companies not to prevent bribery in their supply chains, with the exercise of due diligence serving as a defense.

[269] European Parliament, Draft Report (n 51) Article 19.

[270] Both the common law notion of a 'duty of care' and the French (civil law) notion of a 'duty of vigilance' maintain the separate legal personality of parent and subsidiary companies while establishing duties of diligent conduct that reach out into the corporate group; see, *Chandler v Cape Plc* [2012] EWCA Civ 525; French Duty of Vigilance Law (n 190).

[271] UNGPs (n 3) Guiding Principle 12 (Commentary).

[272] HRC, *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse: Explanatory Notes for Guidance*, A/HRC/32/19/Add.1 (2016) paras 21, 45-56.

[273] See, OHCHR Accountability & Remedy Project, Add.2 (n 250) para 19: 'The concept of negligence is a basis for corporate liability in many jurisdictions, and the extent to which a company conducts human rights due diligence can be relevant when determining whether it negligently caused or contributed to harm. While the tests of negligence very from jurisdiction to jurisdiction and from context to context, they frequently include the following elements: (1) the existence of a legal duty of care towards an affected person (i.e., a legal obligation to act in such a way that others are not harmed by one's actions or, in some

second possibility is to impose strict liability on business enterprises for human rights and environmental harm, with the exercise of HREDD serving as a defence against liability. Under this model, the company (as defendant) bears the burden of proof that it should not be held liable for some harmful conduct.[274] Finally, legal human rights and environmental due diligence requirements may inform assessments of corporate liability under general rules of domestic tort law even where HREDD legislation does not explicitly provide for civil liability.[275]

The EU Directive envisaged by the European Parliament Resolution appears to follow the second model, such that business enterprises are liable for human rights and environmental harm unless they can prove that they acted with due diligence:

> Member States shall ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions.[276]

This suggests a standard of strict liability for harm, which Article 19(3) complements with a due diligence defence that requires business enterprises to prove that they acted with all due care (within the meaning of the Directive) or that the harm would have occurred even if all due care had been taken. Article 19(3) provides for a due diligence defence against liability where an undertaking can prove that it acted with all due care (within the meaning of the Directive) or that the harm would have occurred even if all due care had been taken. Article 19(1) makes clear that respecting due diligence obligations will not automatically absolve the undertaking 'of any liability which it may incur pursuant to national law'.[277]

Civil liability can be incurred by all business enterprises within the personal scope of the Directive, thus both undertakings incorporated in the European Union and foreign undertakings operating in the internal market.[278] Civil liability can be incurred for human rights and environmental harm across the entire supply chain, on the condition that undertakings within the personal scope of the Directive or

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cases, omissions); (2) a breach of the applicable standard of care by the defendant; and (3) a resulting injury to the affected person (4) caused by the breach'.

[274] Ibid, para 26. Strict liability means 'the presumed liability of a direct perpetrator for engaging in certain prohibited conduct, regardless of the intentions of the actor'.

[275] For example, in the context of the recent German Draft Supply Chain Due Diligence Law (n 190) that does not explicitly provide for civil liability, it is being discussed whether companies could be held liable under general principles of tort law, either because the Draft Law qualifies as a 'protective law' (*Schutzgesetz*, § 823 II BGB) or because its due diligence obligations may inform the interpretation of a company's 'safety duties' (*Verkehrsssicherungspflichten*, § 823 I BGB); see more generally, P. Wesche & M. Saage-Maaß, 'Holding Companies Liabile for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v. KiK', 16(2) *Human Rights Law Review* (2016) 370-385.

[276] EP Resolution (n 5) Article 19(2).

[277] This exclusion of a 'safe harbour' is also in line with the UNGPs. According to the Commentary attached to Guiding Principle 17, 'conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses'.

[278] EP Resolution (n 5) Article 2; with further size- and sector-specific qualifications concerning certain undertakings covered by the envisaged Directive.

undertakings under their control have caused or contributed to the adverse impacts – with control being defined as:

> [T]he possibility for an undertaking to exercise decisive influence on another undertaking, in particular by ownership or the right to use all or part of the assets of the latter, or by rights or contracts or any other means, having regard to all factual considerations, which confer decisive influence on the composition, voting or decisions of the decision making bodies of an undertaking'.[279]

This interpretation is supported by Article 1(3) of the proposed Directive, which shall 'ensure that undertakings can be held accountable and liable in accordance with national law for the adverse impacts on human rights, the environment and good governance that they cause or to which they contribute in their value chain [and] that victims have access to legal remedies'.[280] It is also in line with the UNGPs' approach to corporate remediation under pillar two.[281] In practice, the extent to which the Directive's present civil liability regime will benefit victims of human rights and environmental harm, including women migrant workers, in the lower tiers of global food supply chains will significantly depend on the interpretation of a business enterprise's 'contribution' to adverse human rights and environmental impacts.[282]

The appropriate legal test for establishing civil liability for human rights and environmental harm in the supply chain remains subject to ongoing debate,[283] and there are various conceivable approaches to extending its scope beyond 'cause' and 'contribution' to 'linkage' scenarios. The French Duty of Vigilance Law establishes parent liability for harm caused by the activities of the company and of those companies it controls, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship.[284] The second revised draft of an international business and human rights treaty provides for civil liability of business enterprises for human rights abuses in their business relationships, where these enterprises should have foreseen risks of such abuses and failed to adopt adequate measures to prevent them.[285] Similar proposals are considered in the European debate.[286]

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[279] Ibid, Article 3(9).

[280] Ibid, Article 1 (3); see also Recital 14.

[281] As explained in section 4.3, the UNGPs focus on the modalities of an undertaking's involvement in adverse human rights impacts rather than on the control (or 'decisive influence') it does/may exercise over other entities in its global supply chain. Correspondingly, while business enterprises are not expected to remedy adverse impacts merely 'directly linked to' their operations, remediation is required for adverse human rights impacts they 'cause' or 'contribute to' across the entire supply chain.

[282] See further *infra*, sections 4.3 & 5.2. For example, international guidance suggests that a business enterprises pricing and purchasing policies can qualify as 'contributions' to adverse human rights impacts.

[283] EU Supply Chain Due Diligence Study (n 2) 274-276; C. van Dam & F. Gregor, 'Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care', in J. Álvarez Rubio & K. Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge, 2017) 119-138.

[284] French Duty of Vigilance Law (n 189). It should be noted, though, that the envisaged Directive differs from the French model in that it does not determine the scope of civil liability on the basis of the relationship between different business entities ('established commercial relationship') but on the basis of a business enterprise's involvement ('cause' & 'contribute') in adverse impacts throughout the entire supply chain. This corresponds to the UNGPs' approach to corporate remediation under the second pillar; see further *infra*, section 4.3.

[285] Draft B&HR Treaty (n 136) Article 8(7).

[286] According to the European Coalition for Corporate Justice (ECCJ), for example, undertakings should be 'liable for harm arising out of human rights and environmental abuses directly linked to their products, services or operations through a business relationship, unless they can prove they acted with due care and

Article 19(4) requires Member States to 'ensure that the limitation period for bringing civil liability claims concerning harm arising out of adverse impacts on human rights and the environment is reasonable'. Limitation periods are considered 'reasonable and appropriate if they do not restrict the right of victims to access justice, with due consideration for the practical challenges faced by potential claimants … taking into account their geographical location, their means and the overall difficulty to raise admissible claims before Union courts'.[287] The Directive should further require Member States to assess the reasonableness of limitation periods in the light of gender barriers and other barriers to access to justice and effective remedies encountered by women migrant workers and other vulnerable and marginalised groups.

Applicable Law

Article 4 (1) Rome II Regulation provides that, as a general rule, the domestic law which governs transnational civil liability claims shall be the law of the place where the damage occurred (*lex loci damni*).[288] A relevant exception are tort litigations for environmental damage or damage sustained to persons or property as a result of such damage, for which the Rome II Regulation allows claimants to choose between the law of the place where the damage occurred and the law of the place in which the event giving rise to the damage occurred.[289] In tort litigations for corporate human rights abuse brought by foreign claimants in EU Member State courts, the Rome II Regulation will – notwithstanding further exceptions – regularly lead to the application of the law of the third (host) State. Case-law reviewed in the European Parliament Study on Access to Legal Remedies confirms that this can constitute a significant barrier to accessing remedies for victims of corporate human rights abuse by foreign subsidiaries and suppliers of EU-domiciled companies.[290]

Of particular relevance for the present purpose is that Article 4(1) Rome II Regulation would usually preclude the application of the Directive as implemented by the Member States in tort litigations for damages that occurred in a third State – largely debilitating the civil liability limb of HREDD legislation. The European Parliament Resolution addresses this predicament by requiring Member States to 'ensure that relevant provisions of this [HREDD] Directive are considered overriding mandatory provisions' which, pursuant to Article 16 Rome II Regulation, leads to the application of the law of the (EU Member State) forum irrespective of the otherwise applicable

took all reasonable measures that could have prevented the harm'; see ECCJ Legal Brief, *EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment* (2020) p. 6. Similarly, a study conducted by the British Institute of International and Comparative Law envisages a 'failure to prevent' approach to corporate civil human rights liability. Modelled on the UK Anti-Bribery Act, a failure to prevent mechanism should establish a duty to prevent human rights harms in the company's own activities and the activities of its business relationships. A failure to prevent such harms would result in possible civil liability for damages to those affected, unless the company could show that it has undertaken the due diligence required in the circumstances; see I. Pietropaoli, L. Smit, J. Hughes-Jennett & P. Hood, *A UK Failure to Prevent Mechanism for Corporate Human Rights Harm* (2020).

[287] EP Resolution (n 5), Recital 54.

[288] *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* (Rome II Regulation).

[289] Ibid, Article 7.

[290] A. Marx et al. (n 123) 112-115.

law.[291] This is a convincing solution to ensuring the application of the Directive's substantive (HREDD) and procedural (burden of proof & limitations) requirements apply to transnational tort litigations in EU Member State courts, even if the damage occurred in a third State.

Reforms of EU Private International Law

Two Annexes attached to the previous European Parliament Report envisaged further going reforms of EU private international law. While the Annexes were not included in the final European Parliament Resolution, they are considered by the study because they would have made a significant contribution to addressing barriers to access to justice and effective remedies for foreign victims of business-related human rights violations in EU Member State courts.

According to the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), EU Member State courts are competent to adjudicate civil liability cases (for human rights and environmental harm) against corporate defendants domiciled in an EU Member State, with a company's 'domicile' being determined on the basis of its statutory seat, its central administration, or its principal place of business.[292] The Brussels I Regulation establishes compulsory jurisdiction of EU Member State courts over EU-domiciled defendants, irrespective of the (foreign) location of the victim of corporate human rights and environmental harm. Jurisdiction over foreign defendants, including subsidiaries and suppliers of EU-based companies, generally falls outside the scope the Brussels I Regulation,[293] and is instead governed by Member States' private international law (so-called residual jurisdiction). For the same reason (limited scope of application), claimants cannot rely on Article 8 Brussels I Regulation to join foreign defendants in proceedings against an EU-domiciled parent or controlling company, even where the claims are closely connected. There are various legitimate reasons why victims of corporate human rights and environmental harm may opt for suing a non-EU based subsidiary or supplier together with an EU-domiciled parent or controlling company in a Member State court, including *prima facie* evidence that both entities contributed to the harm; limited assets of the foreign subsidiary or supplier; significant barriers to access to justice in the third (host) state; and more generally reasons of process economy. [294]

[291] EP Resolution (n 5) Article 20. To be effective, 'relevant provisions' must include all substantive HREDD requirements whose violation could lead to civil liability and procedural requirements (burden of proof, limitations) that address barriers to effective civil remedies.

[292] *Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (2012)* Article 4(1), Article 63(1) (Brussels I Regulation).

[293] Except where it is arguable that companies incorporated outside the EU have their central administration or principal place of business in an EU Member State. A genuine exception to the rule of Article 4(1) Brussels I Regulation are claims for non-contractual damages by consumers, which can be brought in the Member State where the consumer is domiciled irrespective of the (foreign) domicile of the defendant (Article 18(1)).

[294] The well-known tort litigations for oil spills brought by Nigerian farmers and fisherfolks against the Shell group in the Netherlands illustrate some of these reasons. Having joined the Nigerian subsidiary as a defendant in the proceedings against the Dutch parent company under Dutch private international law, the Court decided in January 2021 that Shell's Nigerian subsidiary was liable for damages resulting from leakages in oil pipelines; and that both the subsidiary and the Dutch parent company were obliged to design a better warning system to prevent future oil spills; for the court files and a brief case summary in English, see De Rechtspraak, *Shell liable for oil spills in Nigeria* (2021), available at:

Annex I attached to the European Parliament Report envisaged an amendment of Article 8 Brussels I Regulation, such that 'an undertaking domiciled in a Member State may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship'.[295] The category of undertakings other than subsidiaries appeared limited to contractual suppliers.[296] The proposed amendment aimed to extend the jurisdiction of Member State courts in 'business-related civil cases against EU undertakings on account of violations of human rights caused by their subsidiaries and suppliers in third countries'.[297] Yet from a systematic perspective, it is not clear why the imputation of damage to a foreign subsidiary or contractual supplier should be the decisive criterion for joining foreign defendants in proceedings against EU-domiciled companies. Moreover, building a substantive imputability requirement into a regulation on jurisdiction is unlikely to enhance legal certainty and predictability for claimants. A more straightforward and systematically sound solution in relation to Article 8 Brussels I Regulation, recommended in a study for the European Parliament on access to legal remedies, would be to extend the jurisdiction of the Member State court where the EU parent company is domiciled over foreign subsidiaries and business partners 'when the claims are so closely connected that it is expedient to hear and rule on them together'.[298] Alternatively, it could be considered to create a special jurisdictional basis for foreign defendants in business and human rights cases, modelled after Article 18 Brussels I Regulation on consumer protection.

Annex I furthermore envisaged the introduction of *forum necessitatis* that would have enabled EU Member State courts with otherwise no jurisdiction under the Brussels I Regulation to hear a case 'if the right to a fair trial or the right to access to justice so requires' and provided that the claim has 'a sufficient connection with the Member State of the court seized'.[299] The proposal followed a recommendation by the EU Parliament study on access to legal remedies and drew on existing *forum necessitatis* provisions in other areas of EU law.[300] Different from an earlier European Commission proposal to include a general *forum necessitatis* provision into the Brussels I (Recast) Regulation,[301] the present approach was confined to 'business-related civil claims on human rights violations within the value chain of a company domiciled in the Union or operating in the Union within the scope of the [HREDD] Directive'.[302]

A second Annex attached to the earlier European Parliament Report proposed an amendment of the Rome II Regulation to offer claimants a choice of applicable law in

https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx.

[295] EP Report (n 4), Annex I, Article 1.

[296] EP Report (n 4), Annex I, Recital 5.

[297] Ibid.

[298] A. Marx et al. (n 126) p. 111.

[299] EP Report (n 4), Annex I, Article 2. Failing the envisaged reform of the Brussels I Regulation, Member States can still join foreign defendants under their domestic rules of private international law (residual jurisdiction).

[300] A. Marx et al. (n 126) p. 112; European Parliament Report (n 4), Annex I, Recital 6.

[301] See, European Commission, *Commission Staff Working Document: Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, SDW(2015) 144 final, p. 25.

[302] EP Report (n 4), Annex I, Article 2.

human rights torts. According to the original proposal, a new Article 26a should be inserted into the Rome II Regulation which – extending beyond the choice of law rules for environmental torts (Article 7) – allows victims of business-related human rights violations to choose between the law of the country in which the damage occurred; the law of the country in which the event giving rise to the damage occurred; and the law of the place where the defendant undertaking is domiced or (lacking an domicile in a Member State) operates.[303]

6 Conclusion

The study examined the contributions an EU Directive on Corporate Due Diligence and Corporate Accountability as envisaged in the European Parliament Resolution of March 2021 could make to the protection of women migrant workers in global food supply chains. On this basis, it developed tailored recommendations that should inform the European Commission's proposal expected for summer 2021.

The study documented the numerous obstacles women migrant workers in global food supply chains encounter in enjoying their international human- and labour rights. Patterns of multiple and intersectional discrimination expose women migrant workers to hightened risks of corporate human rights abuse and create additional barriers to access to justice and effective remedies. In an agri-food sector notoriously plagued by power asymmetries and unfair trading practices, a vicious circle between unstable and precarious working conditions, underpaid or unpaid work, and excessive working hours drives women migrant workers particularly in the lower tiers of the supply chain into poverty and exploitation. At the same time, discrimination on the basis of their gender identity and/or migration status inhibit women migrant workers' access to legal protection, unionisation, and social security.

The study traced the EU regulatory framework on business and human rights from early preocupations with voluntary CSR intitiatives to a dedicated focus on business and human rights and more recent attempts to integrate various EU policy and regulatory initiatives on human rights and environmental protection into sustainable corporate governance. The study elaborated standards of international human rights- and labour protection and requirements of corporate supply chain due diligence that should inform the envisaged EU Directive to ensure an effective protection of women migrant workers in global food supply chains. The final section drew on these findings to develop a more fine-grained analysis of HREDD legislation. It clarified a number of legal and governance issues raised by the present text of the EP Resolution and recommended amendments to the proposed Directive to enhance its capacity to prevent and redress adverse corporate human rights and environmental impacts on women migrant workers in global food supply chains.

[303] EP Report (n 4), Annex II, Article 1.

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