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The Implications of the EU Corporate Sustainability Due Diligence Directive Proposal on the Norwegian Transparency Act

Exploring the developments of the new regulatory field of human rights law, mandatory human rights due diligence legislation, by analyzing what the implications for the Transparency Act in Norway will be if the proposed Corporate Sustainability Due Diligence Directive from the EU is adopted.

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Abstract

The 1st of July 2022, the Transparency Act entered into force in Norway, enforcing mandatory human rights due diligence on companies. Just a few months before, the 23rd of February 2022, the European Commission presented a similar legislative proposal, namely its Corporate Sustainability Due Diligence Directive. Norway as an EEA Member State will have to implement the proposed directive in its national law. It is expected that the Norwegian Transparency Act will be impacted by the EU directive due to their shared aim of enhancing companies human rights conduct and behavior through mandatory due diligence. Thus, this thesis explores the implications of the Corporate Sustainability Due Diligence Directive on the Transparency Act to establish legal certainty for Norwegian companies in their human rights obligations, and to ensure that the human rights of affected rights-holders are protected. This is done through a legal comparative content analysis of the two legal texts using a list of predetermined criteria as a framework. This will identify the similarities and differences in their due diligence approach. Thereafter, it will conduct a legal discussion on the Norway-EEA legal relations addressing how CSDDD should be implemented in Norwegian national law, and by adding the identified similarities and differences from the content analysis, it will answer what the implications for the Transparency Act will be if the CSDDD proposal is adopted.

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List of Abbreviations

MNEs	Multinational Enterprises
CSDDD	Corporate Sustainability Due Diligence Directive
UNGPs	United Nations Guiding Principles
HRDD	Human Rights Due Diligence
MHRDD	Mandatory Human Rights Due Diligence
OECD	Organization for Economic Cooperation Development
UN	United Nations
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO	International Labor Organization
EEA	European Economic Agreement
SMEs	Small and Medium-Sized Enterprises

1 Introduction

The prevailing understanding of human rights is state-centric where the state is the sole duty-bearer[1]. This has been greatly challenged by the spread of globalization, where non-state actors, such as Multinational Enterprises ('MNEs') have increased their power and influence and thus gained a greater capability to infringe human rights[2]. Attention has shifted towards their responsibility to respect and protect human rights[3]. The corporate responsibility to respect human rights have gained great significance, and important normative developments on this area have started to take place. A core problem in ensuring the corporate human rights responsibility is that most regulatory initiatives are of a voluntary nature. There is still no overarching international legal instrument imposing binding obligations on companies to respect and protect human rights. In 2011 the UN Human Rights Council unanimously endorsed the United Nations Guiding Principles ('UNGPs'), a soft law instrument which introduced the process of human rights diligence ('HRDD')[4]. HRDD is a process whereby companies assess own activities and operations, products, or services directly linked to their business relationships to "identify, prevent, mitigate and account for how they address their impacts on human rights"[5]. Simply put, human rights due diligence is a standard of expected business conduct, however it remains a voluntary process in the UNGPs[6]. Another important soft law instrument on business and human rights is the OECD Guidelines for Multinational Enterprises ('OECD Guidelines'), which consists of recommendations for responsible business conduct, including human rights due diligence. The OECD Guidelines were revised in 2011 with the introduction of the UNGPs to ensure alignment on the corporate responsibility to respect human rights. The UNGPs and the OECD Guidelines are the closest to international human rights obligations on corporations, however they remain voluntary principles as they have not been translated into international hard law. Their contribution is merely normative as they offer recommendations and standards for States and corporations to improve the corporate human rights practices and responsibilities[7]. Despite their soft law nature, the UNGPs and the OECD Guidelines are the main framework on business and human rights guiding States and companies

[1] Kanis 2015: 416

[2] Deva 2012: 3

[3] I will use the term businesses, corporations, and (business) enterprises interchangeably throughout the thesis.

[4] 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 16 June 2011

[5] United Nations Guiding Principles (HR/PUB/11/04), Principle 15(b)

[6] The Report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163)

[7] Martin-Ortega 2014: 55

on corporate responsibility to respect human rights[8]. The documents are aligned and complement each other in guiding corporations' human rights responsibilities and their responsible business conduct. However, with no international treaty regulating businesses' human rights impacts and responsibilities, there is a 'governance gap', as highlighted by John Ruggie, that scholars argue must be filled to hinder companies from escaping their human rights responsibility whenever they find it convenient [9].

The UNGPs advice states to "enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights" enabling them to fulfill their duty to protect human rights under the UNGPs[10]. Through national legislation, States can impose mandatory human rights due diligence ('MHRDD') obligations on companies operating within their borders, filling the so-called governance gap in business and human rights. In the absence of international hard law on business and human rights, a development of domestic law has started to take place to 'speed up' the development of mandatory human rights due diligence. A few European countries have already adopted such legislation at the national level, and now the European Union ('EU') has a legislative proposal on MHRDD under development, namely the Corporate Sustainability Due Diligence Directive ('CSDDD')[11]. These national legislations and legislative proposals come with a hope from stakeholders that companies will finally be held accountable for their human rights impacts and that the laws will establish new corporate duties to respect and protect human rights. Placing legal obligations on companies to respect human rights will facilitate a level playing field and it will prevent companies who are non-compliant with human rights to gain a financial advantage[12]. One of the states who have transformed the soft law principles on business and human rights[13] into hard law, including enforcing MHRDD obligations, is Norway.

The 1st of July 2022, an Act relating to enterprises and work on fundamental human rights and decent working conditions ('the Transparency Act')[14] entered into force in Norway. The

[8] McCorquodale & Nolan 2021: 456

[9] Rivera 2016: 501

[10] UN Guiding Principles, Principle 3(a)

[11] The Corporate Sustainability Due Diligence Directive will be referred to as 'CSDDD proposal', 'proposed directive', 'EU draft' and 'draft directive' throughout the thesis.

[12] Mestad 2022: 18

[13] UNGPs, ILO MNE Declaration and the OECD Guidelines on Multinational Enterprises

[14] It will be referred to as 'the Transparency Act' or 'the Act' throughout this thesis.

purpose of the Act is to "promote enterprises' respect for fundamental human rights and decent working conditions in connection with the production of goods and the provision of services"[15]. It places an obligation on companies falling under its scope to carry out human rights due diligence in accordance with the OECD Guidelines[16]. Just a few months before the Transparency Act was enforced, the European Commission presented its proposal for a Corporate Sustainability Due Diligence Directive. The proposal contains several similarities with the Transparency Act, as they both implement a mandatory human rights due diligence on companies in, and beyond, their jurisdiction. The aim of CSDDD is to "improve corporate governance practices" when it comes to the management of human rights and environmental risks and impacts, to "increase corporate accountability", to avoid fragmentation on business and human rights frameworks among European countries, and to establish a level playing field for companies operating in the European Union[17]. The CSDDD proposal is an important move towards legal harmonization of MHRDD across European countries. If the proposal is adopted, Norway, as a member of the European Economic Area ('EEA'), is obliged to ensure that the Directive is implemented in Norwegian national law to ensure legal homogeneity throughout the EEA[18]. The Directive proposal will have implications on the Transparency Act in Norway as they both impose due diligence obligations and share a similar aim, which is to guarantee the corporate human rights responsibility. Both legal texts have mandatory human rights due diligence at their core, however they do contain differences in their scope and approach. In the Norwegian consultation process on the proposed EU directive[19], the introduction of the CSDDD proposal has prompted concerns that the legislative proposal will disturb the established practices of the Transparency Act in Norway[20]. Thus, if adopted, the introduction of the CSDDD into Norwegian law raises multiple questions on what the implications will be on the Norwegian Transparency Act, as Norway must "ensure fulfillment of the obligations" of the EEA Agreement and refrain from endangering the Agreement's objectives[21]. Will the

[15] The Transparency Act, section 1

[16] Ibid, section 4

[17] Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1938, Explanatory Memorandum: 3, paras 8 – 10.

[18] EEA Agreement, article 3 & 7

[19] The Norwegian Parliament opened a consultation process in March 2022 on the CSDDD proposal whereby anyone could submit their inputs, which later formed the basis of the Norwegian Position Paper on the proposed directive, submitted to the European Commission.

[20] The Norwegian Consumer Authority's response to the European Commission's proposal for a Directive on corporate sustainability due diligence and amendments to directive (EU) 2019/19371: 4

[21] EEA Agreement, Article 3

Transparency Act have to be amended if the Directive proposal is adopted? If so, how? If the scope of CSDDD is narrower than the Transparency Act, will the scope of the latter have to be limited to ensure legal homogeneity in accordance with the EEA Agreement? Can the CSDDD co-exist with the Transparency Act in Norwegian national law? Or will this create a fragmentation of corporate human rights responsibility in Norway and lead to legal uncertainty for Norwegian companies falling under the scope of both legal texts? These questions demonstrate the current debate in Norway on the introduction the CSDDD proposal in Norwegian national law and its potential effects on regulating Norwegian companies' human rights responsibility, which will be addressed in this thesis.

1.1 Research Question

MHRDD legislation is a new regulatory field of human rights law under great developments. It is important to scrutinize the legal developments to ensure a regulatory outcome that will guarantee the corporate human rights responsibility and will reduce corporate human rights harms. Considering that a great number of states will be affected by the EU Directive proposal, it is important to discuss its potential implications on existing MHRDD national legislation to disclose its impact on the development of MHRDD. This paper intends to contribute to the current Norwegian debate on the introduction of the European Commission's proposal for a Directive on Corporate Sustainability Due Diligence to Norwegian national law and on its potential implications on the Norwegian Transparency Act. Norway is an EEA Member State and must implement the Directive into national law but does not have formal access to the EU decision-making process, but they can present their inputs and views on a legislative proposal in its preparatory phase. Norwegian authorities submitted its position paper on the EU draft in December 2022, in which they discuss the directive's objectives and the potential implications it can have on Norwegian national law. It remains to see whether the EU draft will be amended on any of the points of concern raised by Norwegian authorities or if it will be adopted as the proposal stands today[22]. Regardless of amendments, it is necessary to explore the potential implications that the CSDDD proposal can have on the Transparency Act. The rules and objectives of the Transparency Act are closely aligned with the proposed Directive, hence why this legislation is of concern. The introduction of the Directive will impact a great number of Norwegian companies and it is therefore necessary to address the proposed directive's

[22] For the points of concern raised, see Royal Ministry of Children and Families 'Norwegian Position Paper on the Commission Proposal for a Directive on Corporate Sustainability Due Diligence', December 2022

implications on relevant national legislation, the Transparency Act, to establish legal certainty on their human rights responsibility. This will ensure that Norwegian companies carry out their human rights obligations properly, and that the human rights of their affected rights-holders are protected and guaranteed. To be able to explore this problem, the research question that this thesis will address is the following:

> *What are the implications for the Norwegian Transparency Act if the current EU proposal for a Corporate Sustainability Due Diligence Directive is adopted?*

2 Methodology

This chapter will provide an overview of the methodological considerations of this thesis and illustrate the structure of how it will go forward in addressing the research question.

2.1 Disciplinary Approach

A large part of the field of human rights is structured around norms and rules that require a legal research methodology to be able to interpret, uphold and realize human rights[23]. Legal methods focus on interpretation, looking at the underlying meaning of the language, symbols and action written in the text to comprehend their legal rules[24]. The research question of this thesis will be approached through an exploratory legal study as it explores a current legal problem which this thesis seeks to address by developing a hypothesis[25]. The focus of the thesis is to identify and explore what the implications an EU-level human rights legislation can have on an existing national human rights legislation, if the former is adopted. It is an important question as to whether the new EU human rights legislative proposal will limit or broaden existing national human rights legislation. To be able to address this problem, the thesis will conduct a legal comparative content analysis of two legal documents: the adopted and enforced national legislation in Norway, the Transparency Act, and the proposed EU draft directive, the Corporate

[23] McInerney-Lankford 2017: 38

[24] Scheinin 2017: 19

[25] The EU-level legislation this thesis is exploring is solely a legislative draft from the European Commission that has not been adopted yet, and that is likely to be amended by the European Parliament and European Council during the negotiation stage of the legislative process. Therefore, will this thesis only be able to provide a hypothesis to the problem. Further research on the implications of the CSDDD on the Transparency Act is imperative when the directive is finalized and adopted by the EU.

Sustainability Due Diligence Directive[26]. It will address and interpret the wording of the texts, explore their rules and their scope, implementing a legally interpretive method. First, the two documents will be interpreted separately to grasp their due diligence framework individually, then they will be compared to identify their similarities and differences in their approach to mandatory human rights due diligence. For the content analysis, a framework of criteria is drawn up based on academic literature on MHRDD, legal analyses of the CSDDD proposal and the Transparency Act, and the UNGPs and the OECD Guidelines[27]. The criteria are an important tool to structure and guide the analysis. The content analysis will explore the wording of the legal texts to be able to identify similarities and differences in how they apply due diligence in regulating the corporate responsibility to respect human rights, which will facilitate for the discussion on what the implications of the CSDDD proposal will be on the Norwegian Transparency Act.

The criteria will guide and structure the comparative content analysis, which enables an operationalization of the two legal texts and that will help identify their similarities and differences. The criteria on human rights due diligence identified are the following:

a) Material scope

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[26] It will analyze the proposal from the European Commission; thus, it will not look at the European Council's negotiating position ('general approach'), the draft report from the European Parliament nor the position of the European Parliament's legal affairs committee.

[27] For literature on mandatory human rights due diligence, see Bueno & Bright (2020) *Implementing Human Rights Due Diligence through Corporate Civil Liability*, McCorquodale & Nolan (2021) *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, McCorquodale, Smit, Neely & Brooks (2017) *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, Macchi & Bright (2020) *Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation.*

For analyses, see ECCJ, 'Analysis of EU Commission's Proposal on Due Diligence', April 2022, Shift, 'Shift's Analysis of the EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive', March 2022, Holly, Gabrielle, and Signe Andreasen Lysgaard. 'Analysis of the Proposed EU Corporate Sustainability Due Diligence Directive', the Danish Institute for Human Rights, March 2022, Royal Ministry of Children and Families 'Norwegian Position Paper on the Commission Proposal for a Directive on Corporate Sustainability Due Diligence', December 2022.

See United Nations, UN Guiding Principles, Office of the High Comissioner for Human Rights, New York, 2011, and Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, revised 2011.

The use of criteria for the content analysis is inspired by a former master thesis at the Norwegian Center for Human Rights, see Landøy, Helene Haugland (2020)*'A Norwegian Law on Business and Human Rights: Examining the Potential of the Modern Slavery Act (UK) and the Duty of Vigilance Law (France) as Legislative Models for a Prospective Norwegian Legal Regulation of the Business and Human Rights Field'*, https://www.duo.uio.no/handle/10852/85987.

b) Personal scope

c) Due diligence methodology

d) Supply chain / Value chain

e) Transparency

f) Enforcement

Material scope concerns the range of rights and impacts the legal texts covers. It will help to discover if the legal texts only cover a specific group of rights and whether they reflect the corporate responsibility to respect human rights as restricted and selective, or as expansive. According to the international standards, businesses are to respect internationally recognized human rights, which entails its whole spectrum[28]. The UNGPs refers to human rights as the International Bill of Human Rights, comprising the ICCPR and ICESCR, and the ILO Declaration on Fundamental Principles and Rights at Work "at a minimum"[29]. This is supported by the OECD Guidelines[30]. Thus, these conventions make up the minimum standards of the corporate human rights responsibility. In addition, it will identify whether the legal texts include environmental impacts, which would establish a broader material scope.

Personal scope looks at which and how many companies will be affected by its obligations. If the legislations set out too high of a threshold whereby only a few companies must comply with its due diligence obligations, the impact of the legislation become limited and might prevent a level playing field. The enterprise's size, sector, and economic turnover will be relevant factors when establishing who the subjects of the legislations are. The UNGPs specifies that all business enterprises are to respect human rights "regardless of their size, sector, operational context, ownership and structure"[31]. MHRDD legislation that only cover larger business enterprises will ignore the potential human rights harm of smaller business enterprises. Having a personal scope with a low threshold will ensure a broader impact of a human rights due diligence legislation. It will also look at if the legislation establishes due diligence obligations on third-country companies operating within their jurisdiction. In the absence of an

[28] UNGPs, Principle 12 with commentary, OECD Guidelines commentary para. 40

[29] UNGPs, Principle 12

[30] OECD Guidelines for Multinational Enterprises, 2011 Edition: 32

[31] UNGPs, Principle 14 with commentary

international treaty on human rights, this is important because it would entail an expansive breadth of the due diligence obligations and thus a greater effect of the legislation.

Due diligence methodology concerns the due diligence principles that the legal text presents, exploring their alignment with the UNGPs and the OECD Guidelines. The due diligence methodology should have a risk-based approach, it should be proportionate to the size and nature of the enterprise, and it should be ongoing[32]. A risk-based approach entails that it is the severity of the adverse human rights impact that should determine the measures implemented to address it[33]. If a company has identified multiple adverse human rights impacts, it should prioritize which impacts to address first based on the severity of risks. Thus, it is the impacts that are "most severe or where delayed response would make them irremediable"[34]. All companies have a responsibility to respect human rights "regardless of their size, sector, operational context, ownership and structure"[35]. According to the UNGPs, no company should be exempt from this responsibility[36]. How companies respond to this responsibility will depend on their circumstances and therefore is the principle of proportionality key in resolving this. A larger company may be expected to conduct a more comprehensive due diligence process than a smaller company due to its greater pool of resources. A proportionate and risk-based approach makes the due diligence feasible for companies and ensures for its actual improvement of human rights[37]. If the legal text has a broad personal scope, proportionality facilitates an achievable due diligence for smaller companies by adapting the measures to their size and capacity. Thus, the principle of proportionality facilitates for a broad personal scope and will ensure that no company are freed from the responsibility to respect human rights. Lastly, due diligence must be ongoing, entailing that it is not a one-time assessment, it needs to be an integral part of the management of a company, and must be carried out continuously. Human rights are never irrelevant, and the activities of a business enterprise always holds a risk of impacting human rights, hence the importance of an ongoing due diligence.

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[32] Norwegian Position Paper on the Commission Proposal for a Directive on Corporate Sustainability Due Diligence, p. 6

[33] UN Guiding Principles, Principle 14, and commentary.

[34] Ibid, Principle 24 and commentary

[35] Ibid, Principle 14

[36] Ibid, Principle 14 commentary

[37] Kommentar til Åpenhetsloven (2022) av Lunde og Tjelflaat i Gyldendal Rettsdata, note 49

Supply/Value chains relates to operations directly linked to the business enterprise, not conducted by the enterprise itself, but by suppliers and contractors that they have business relationships with. In accordance with UNGPs, this relates to impacts "directly linked to its operations, products, or services by its business relationships"[38]. Operations in the supply and value chains contain some of the more immense human rights risks, particularly at the raw material stage[39]. A large part of operations is carried out by these actors in the supply and value chains; thus, it is important that human rights due diligence legislation include these areas to avoid an exclusion of their most high-risk operations. Taking into consideration the complicated nature of supply and value chains, it is of importance to explore whether the legal texts include operations found here, and if they do, how they address this to overcome their challenges. Supply/value chain is necessary to address in order understand the breadth of the legal texts' due diligence scope. The criterion is named Supply/Value chains because the two legislative texts do not use the same term: the Transparency Act use 'supply chain' and the CSDDD proposal use 'value chain'. Both include all the stages of a product from its raw material stage to it becoming a final product for consumers, but value chain also involves the value added to the product at every stage of the process which is then sold to the consumer.

Transparency is the requirement of how publicly available the plans and policies on due diligence must be. The UNGPs set out that the policy commitment of business enterprises must be "publicly available and communicated externally and internally"[40]. Having a transparent due diligence process is important for ensuring accountability and trust in the companies. It demonstrates responsible business conduct and can enhance their credibility[41]. *Enforcement* concerns the mechanisms for ensuring compliance with the due diligence obligations and the consequences for non-compliance. The current soft law instruments do not hold any sanctioning nor enforcement mechanisms and are solely voluntary initiatives. Therefore, they do not impose consequences on business enterprises if they disregard the guidelines. Under the UNGPs, enforcement of laws falls under the State's duty to protect human rights, implying an expectation on states to enforce its guidelines and ensure effective remedy[42]. Thus, whether the

[38] UNGPs, Principle 13(b) and 17(a)

[39] Norwegian Position Paper on the Commission Proposal for a Directive on Corporate Sustainability Due Diligence, 2022: 6

[40] UNGPs, Principle 16(d)

[41] UNGPs, Principle 21, commentary, para. 3

[42] UNGPs, Principle 3

legal texts contain enforcement and sanctioning mechanisms are important for evaluating their effectiveness as it can improve compliance with due diligence requirements. Enforcement will explore whether the legal text propose a supervision of the provisions, sanctions, and civil liability measures.

These criteria will facilitate for an operationalization of the legal texts. This will shape the foundations for the subsequent analysis and discussion on the effects and implications the proposed EU Directive will have on Norwegian national legislation, more precisely on the Transparency Act. The discussion will build on the legal relations between Norway and the EEA; thus, it will be reliant on the EEA Agreement, which guides how EU Acts should be implemented in Norwegian national law. This legal discussion will help to identify the possible implications the Transparency Act will encounter, enabling the formulation of a hypothesis on the introduction of the CSDDD proposal in Norwegian national law.

Lastly, it is important to note that the research design and analysis of this thesis have been adapted specifically to the Norwegian context. This is because it intends to contribute to the current domestic debate in Norway on the implications of CSDDD in national MHRDD legislation, therefore are the findings of this thesis not generalizable to other European countries, implying limited external validity.

2.2 Limitations

The thesis will only explore the legal documents in accordance with the criteria of the methodology in 2.1, therefore will certain elements of the Transparency Act and the CSDDD proposal be disregarded, such as the proposed directive's provisions on a complaint's procedure and board of directors. This is to confine the thesis' scope to a selected criteria to maintain its focus and structure.

This thesis focuses on the Transparency Act because of its relevance as a business and human rights law. Due to this focus, this thesis will not comprehensively explore whether there are other national legislations relevant to the CSDDD, and thus might be impacted. If CSDDD is adopted, this will be necessary for Norwegian lawmakers to explore.

2.3 Structure

Chapter 3 sets out the background and context of the topic and the research question this thesis is exploring. It will firstly explore the legal relations of Norway and EEA to be able to grasp why and how an EU legislative proposal can have implications on Norwegian national law when Norway is not an EU Member State. Thereafter it will delve into the development of mandatory human rights due diligence. The chapter provides context for the research question and the analysis of this thesis.

Chapter 4 presents the analysis addressing the research question, consisting of two main parts. First, it will present the content analysis of the Transparency Act and the Corporate Sustainability Due Diligence Directive proposal, using the criteria as a framework. The legal texts will first be analyzed separately and thereafter together in a comparative analysis. The results from the content analysis will form the basis for the analysis on what the implications the CSDDD proposal will be on the Transparency Act, applying their differences and similarities and discussing them in light of the legal relations between Norway and the EEA.

3 Background

This chapter will firstly address the legal relations between Norway and EEA to grasp how and why an EU directive will impact Norwegian law. Thereafter, it looks at the developments of mandatory human rights due diligence to understand why and how this thesis applies in the current debate on the new regulatory area of human rights law.

3.1 Norway-EEA Relations

Norway is not an EU Member State, but a member of the European Economic Area, which is established by the EEA Agreement that entered into force the 1st of January 1994. This agreement grants Norway, Iceland, and Lichtenstein access to the four freedoms of the European single market without being a member of the European Union. The four freedoms guarantee the free movement of goods, capital, services, and people[43]. The EEA countries are obliged to implement all adopted EU Acts concerning the single market in their national law. Since 1994, Norway has become increasingly more integrated into the European single market and has transposed numerous EU Acts into national law. Due to the EEA Agreement, Norway

[43] Article 2(a) – (d)

must closely observe the EU-level legal developments regarding the single market. National law in Norway still applies, but the country is subject to supranational acts coming from the EU[44]. Norway follows the principle of dualism, which entails that international law is not law until it has been applied in national law[45].

The EEA Agreement itself is static, but the application of the rules in the agreement are dynamic as they are frequently updated through regulations and directives. These rules are to be implemented in national law clearly and in conformity with the objective and aim of the EEA Agreement. The aim of the EEA Agreement is "to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties" and to create "a homogeneous European Economic Area"[46]. The EEA Member States must implement the very same laws regulating the single market as the EU Member States, establishing homogeneity of the single market rules[47]. Although EEA States must implement all relevant EU legislation on the EU internal market, they do not have a vote in the EU institutions decision-making process, meaning that they cannot take part in the actual decisions of the legislative process. But they can participate in the early stages of a proposal by preparing inputs and expertise to influence and shape the outcome. Article 99 sets out that the European Commission are to consider consultation and input from EEA States' experts in the early stages of a legislative proposal, alike as it calls for advice from experts of EU Member States. Since Norway and the other EEA States do not have a formal influence on the legislative outcome, having an active involvement in the decision-shaping process in the EU is therefore important.

The 'EEA relevance' of an EU Act is usually decided by its applicability to the single market and often has an explicit mention that the text is relevant to the EEA[48]. This can be an Act preserving the homogeneity of the EEA, either because it concerns the four freedoms or the system of fair competition, or it is in accordance with article 98 of the EEA Agreement[49]. If the text specifically mentions that the Act has 'EEA relevance', this is a clear indication, but it is

[44] Sejersted 2008: 313

[45] NOU 2012-2: 119

[46] EEA Agreement, article 1, para. 1

[47] Eriksen 2009: 233

[48] Baur 2016: 53

[49] Ibid: 54

still up to the EEA States to assess its relevancy. This assessment of 'EEA relevance' is done by the EEA states' experts. Then the legislative process in the EEA is commenced, which is carried out by EEA institutions and the national parliaments of the EEA states[50]. The EEA Secretariat drafts a decision on how the EU Act should be included in the EEA Agreement. This draft decision must be examined and approved by the European Commission and the European Council before it is finally adopted in the EEA. The Act is then integrated to the Annex of the EEA Agreement and must be implemented in the EEA States' national legislations. The Act is to be implemented and applied in national law taking "the necessary steps", found in article 7[51].

Article 7 sets out how EU Acts with EEA relevance are to be implemented in the national law of the contracting parties. The EU Acts take the form of either a regulation or a directive. Regulations "shall as such be made of the internal legal order of the Contracting Parties"[52]. Thus, an EU regulation of EEA relevance is to be incorporated in its entirety to the national law of an EEA State. A regulation cannot be altered, and its exact wording must be maintained when applied in national law, leaving no freedom of implementation. The application of directives on the other hand is given more freedom. Directives "shall leave to the authorities of the Contracting Parties the choice of form and method of implementation"[53]. How a directive is implemented into the national law of Norway is up to the Norwegian authorities to decide, as long as it remains loyal to the objectives of the EEA Agreement and that "ensure fulfilment of the obligations"[54]. The implementation into national legislation must therefore not impede the free movement of goods, services, persons, and capital, and shall not discriminate based on nationality, origins, or cross-border activities[55]. To achieve the goals of the directive, it can either be implemented in new laws or existing national legislation. Most directives in Norway have been carried out through the latter option[56]. If national legislation already contains the same rules of a newly adopted EEA directive, it is not necessary to adopt changes if the existing

[50] The details on the legislative process is not addressed in this thesis.

[51] Ibid, article 104

[52] Ibid, article 7(a)

[53] EEA Agreement, Article 7(b)

[54] Ibid: Article 3

[55] C-76/90 Säger,

[56] NOU 2012-2: 121

law is in conformity with the EEA Agreement[57]. If changes are necessary to ensure a correct implementation of the directive, Norway can do so through transposition, whereby the relevant national legislation is amended to ensure agreement with the directive[58]. Directives contain a provision on transposition setting out a deadline for when EU and EEA States must implement it, and whether a full harmonization of the provisions is required. The success of an EU Act will depend on its application to the EEA States' domestic legal; thus, they must ensure that its implementation meets the aims and objectives of the Act[59].

Although Norway as an EEA State is obliged to implement all EEA-relevant Acts into national law, it does have a 'right to reservation', which must be applied before the Act is adopted as EEA law[60]. When the Joint Committee issues the decision to commence the legislative process in the EEA, all the States' representatives must agree, "speaking with one voice"[61]. Therefore, the three States are given a right to decline an EU Act from being implemented into the EEA Agreement. This is because the EEA States did not assign a supranational legislature under the Agreement, meaning that the power to pass laws remains within the legislature of the States[62]. It is important to note that this 'right to reservation' does not prevent the Act from becoming EU law as it is not a veto, solely a reservation[63]. If an EEA State disagrees in the Joint Committee, it affects the implementation of the Act for all the EEA States and will trigger a negotiation process in accordance with article 102 of the EEA Agreement. The States are required to work towards agreement to solve the issue[64]. If agreement is unattainable, the "affected part" of the Agreement is to be "regarded as provisionally suspended" for a period of six months[65]. This will affect the EEA States access to the single market, as their access will be restricted. Refusing to implement an EU Act that has 'EEA relevance' risks jeopardizing the objective and aim to establish a dynamic and homogenous EEA[66]. Thus, the right to reservation

[57] Ibid

[58] EUR Lex, Transposition

[59] Buscemi et al 2020: 5-6

[60] NOU 2012-2, 100 - 102

[61] EEA Agreement, article 93(2)

[62] Stortinget 2021: 3

[63] NOU 2012, 2: 101

[64] EEA Agreement, art. 102(3)

[65] Ibid, art. 102(5)

[66] Ibid, preamble, para. 4

has never been applied and it is not a recommended practice as the EEA States are expected to be loyal to the Agreement[67].

This subchapter has introduced some of the most important aspects Norwegian lawmakers must consider when the CSDDD proposal is adopted and must be implemented in their national law.

3.2 Human Rights Due Diligence: Developments in the Field

Human rights due diligence was introduced by the UN Guiding Principles in 2011. Before this, due diligence for businesses was associated with identifying and addressing potential risks to the company. Today, they are expected to implement a similar practice regarding the human rights risks of the company. Human rights due diligence is a process for companies to "identify, prevent, mitigate and account for how they address their adverse human rights impacts"[68]. The aim is that it will develop a standard of conduct which ensures a change in global corporate behavior and that companies' impacts on human rights will cease[69]. Since 2011, important developments on human rights due diligence have been taking place whereby it has become an increasingly common practice, which will be explored in this subchapter.

3.2.1 International Level

Businesses are private actors with no legal obligations under international human rights law[70]. Since the 1990s, companies have gained greater global influence and power, increasing their potential to impact human rights[71]. Their activities take place across borders and their network of corporate relationships, such as their value and supply chains, have become more complex. However, this structural complexity risks that numerous human rights impacts will be neglected[72]. Thus, there is a debate on what strategic approach to business and human rights that best ensures the corporate human rights responsibility. One side argues for the enforcement of mandatory due diligence through an international legally binding instrument, another side

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[67] Sejersted 2008: 319. Fredriksen 2010: 265

[68] UNGPs, Principle 17

[69] McCorquodale & Nolan 2021: 458

[70] International human rights law only regulates the conduct of States. See OHCHR, 'International Human Rights Law'

[71] Ruggie 2013: 11 – 12

[72] Ibid: 28 - 29

argues for national legislation, and the last side argues for voluntary soft law initiatives, such as the UNGPs and OECD Guidelines[73].

3.2.1.1 UN Guiding Principles & OECD Guidelines

In 2005, the UN Commission on Human Rights established the position of a UN Special Rapporteur on the issue of human rights and transnational corporations and other business enterprises[74]. John Ruggie was appointed for this position, with a mandate to identify and clarify standards on a corporate responsibility to respect human rights, to elaborate what states can do in regulating companies' human rights conduct, and to develop a methodology for how companies can assess their human rights impacts[75]. Ruggie identified that the core problem of business and human rights was the "the governance gaps created by globalization", which is the gap of regulatory initiatives to manage and sanction wrongful corporate behavior[76].

Through his mandate, Ruggie produced several documents, most significantly the 'Protect, Respect, and Remedy' framework and the Guiding Principles on Business and Human Rights, which were adopted unanimously by the Human Rights Council in 2011 by Resolution 17/4, revealing wide support for the soft law instrument[77]. Ruggie advocated for soft law regulations as he believed that the duration of drafting a treaty on business and human rights would be complex and lengthy[78]. The UNGPs provide companies and states with "concrete and practical recommendations" on how to implement the three pillars of the 'Protect, Respect and Remedy' framework[79]. These pillars are the responsibility of the State to protect, the corporate responsibility to respect human rights, the responsibility to provide remedy to those who have been harmed. Ruggie argued that "companies can affect virtually all internationally recognized human rights" and therefore should have a responsibility corresponding to them[80]. The UNGPs recognize that States are the main duty-bearer of human rights but set out clear expectations on

[73] Andreassen & Vinh 2016: 10

[74] E/CN.4/RES/2005/69

[75] Ibid: 1(a) – (e)

[76] A/HRC/8/5, para. 3

[77] Andreassen & Vinh 2016: 8

[78] Ruggie 2013: 66 - 70

[79] A/HRC/17/31, para. 9

[80] A/HRC/8/5, para. 52 & 24

companies to respect human rights through due diligence[81]. By conducting ongoing due diligence of their "operations, products or services by its business relationships"[82], business enterprises are carrying out their responsibility to respect human rights[83].

Due diligence is the management process whereby companies assess the human rights impacts their operations, services, and products cause, contribute to, or that they are directly linked to through their supply chain and business partners[84]. This process must be ongoing; thus, due diligence should become an integral part of the management system of the company. Furthermore, it must be risk-based and proportionate. If due diligence is too complex for the company due to a large supply chain, limited resources within the company, or because it has identified too many adverse human rights impacts, it must implement proportionality in its measures and it must commence the due diligence based on its irremediability and/or severity of risks. The human rights impacts must be established before deciding the due diligence measures[85]. Due diligence in accordance with the UNGPs are designed to be feasible for all companies to conduct, reflecting a view that all business enterprises have a corporate responsibility to respect human rights.

As a result of the adoption of the UNGPs, the OECD Guidelines for Multinational Enterprises, firstly adopted in 1976, were revised in 2011 to include a chapter on human rights to reflect the Guiding Principles[86]. Chapter IV concerns the human rights responsibility of companies and has been summarized into six main steps followed with a commentary. The corporate human rights responsibility in the chapter includes a policy commitment, human rights due diligence, and effective remedy for adverse human rights impact. The OECD Guidelines and the UN Guiding Principles are closely aligned, and together they provide guidance on how the corporate human rights responsibility should be addressed. They are recognized as "the global authoritative standard on business and human rights"[87]. As soft law instruments, the UNGPs and the OECD Guidelines remain voluntary regulatory initiatives, and do not "by itself create

[81] Andreassen & Vinh 2016: 9 – 10

[82] UNGPs, Principle 17

[83] OHCHR 2012: 4.

[84] UNGPs, Principle 17

[85] McCorquodale & Smith 2017: 223

[86] OECD, New OECD guidelines to protect human rights and social development.

[87] McCorquodale & Nolan 2021: 456

legally binding obligations"[88]. They do not hold any civil and criminal punishment measures to ensure compliance with its obligations[89]. They lack the ability to prosecute companies and to mitigate poor human rights behavior[90]. Thus, the enforcement regarding due diligence are essential in addressing MHRDD in an international legally binding instrument[91].

3.2.1.2 Treaty

The 26th of June in 2014, the Human Rights Council adopted a resolution, drafted by Ecuador and South Africa, that decided "to establish an open-minded intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" with a mandate to develop a treaty on business and human rights[92]. Among the 47 members of the Human Rights Council, 14 states opposed the resolution, 20 states supported, and 13 states abstained from the vote, thus it did not hold a clear consensus. As John Ruggie warned, the drafting of a treaty has been long and difficult process. Since 2014, there has been an enduring disagreement on the treaty drafting: one side strongly supporting the development of an international legally binding instrument, and the other side arguing for the primacy of state's role and national implementation of the UNGPs (and OECD Guidelines) through own laws and national action plans[93].

Establishing an international legally binding instrument human rights due diligence is an important step in balancing out a fragmented system of business and human rights whereby companies are subject to various soft law instruments and national legislations. As most companies operate across borders, a coordinated approach at the international level might be the most effective approach in regulating their human rights responsibilities[94]. However, the enforcement measures in the third draft of a treaty are handed to the states, i.e., it is the national legislation of the state parties to ensure that companies are complying with the provisions of the treaty[95]. The International Commission of Jurists emphasized that the lack of a supranational

[88] Ruggie 2013: 60

[89] Deva 2012: 116

[90] Ibid: 117

[91] McCorquodale & Smit 2017: 222

[92] A/HRC/RES/26/9, para. 9

[93] Macchi 2022: 142

[94] Rouas 2022: 34

[95] Joseph & Kyriakakis 2022: 21

authority will require domestic institutions to enforce remedial mechanisms as the international level lacks this ability, which is reflected in the Third Revised Draft[96]. This can lead to a fragmentation and thus demonstrating the same problem of having different MHRDD national legislations and soft law instruments.

A treaty can balance out the power irregularity between the stronger and weaker actors, whereby hard law obligations could help the latter group in a conflict of interest. However, Joseph and Kyriakakis emphasize that the current treaty developments prioritize the interests of the companies and neglect the interests of victims of human rights abuses[97]. Surya Deva stress that the drafting process ahead should center around the needs of rightsholders to "build political will" around the treaty[98]. He acknowledges that many of regulatory hurdles to establish a full-fledged treaty on business and human rights will remain but affirms that if human rights and rightsholders are kept principal, the most important obstacles are discharged[99].

So far, the drafting process have been heavily impacted by disagreements. There is even a risk that important states, such as the US and certain EU states, will not accede to the treaty, which fills the uncertainty as to whether a treaty will be able to successfully implement global mandatory human rights due diligence[100].

3.2.2 Regional Level: EU

Although the EU has had an active involvement in the drafting of the treaty, they will by the time a treaty is finalized have employed its own due diligence regulations because of its development of the Corporate Sustainability Due Diligence Directive proposal. The proposed directive will enhance the EU's role in regulating corporate governance[101]. The EU draft is not the first attempt of the EU to introduce due diligence legislation[102]. In 2010, the EU adopted

[96] International Commission of Jurists. 'Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises'. 2016: 5.

[97] Joseph & Kyriakakis 2022: 27

[98] Deva 2022: 220 - 221

[99] Ibid

[100] Joseph & Kyriakakis 2023: 26

[101] See The European Commission Staff Working Document: Impact Assessment Report of CSDDD, 24 February 2022: 2 - 5

[102] Smit et al 2020

the EU Timber Regulation and in 2014 the EU Conflict Minerals Regulation, which both set out certain due diligence obligations on operators and importers of the relevant sectors. However, the CSDDD proposal stands out as it provides a more comprehensive regulatory regime and its due diligence obligations concerns specifically the risks to human rights.

3.2.2.1 The Corporate Sustainability Due Diligence Directive Proposal

A study from January 2020, requested by the European Commission, revealed that over 350 companies expressed a desire for EU mandatory human rights due diligence legislation as it would create a "single, harmonized EU-level standard" that would be advantageous to the businesses[103]. Furthermore, it would establish a level-playing field with "legal certainty, coherence and consistency"[104]. This study prompted the developments of an EU-level MHRDD legislation[105]. In April 2020, European Commission announced that they intended to develop and propose an EU Act imposing MHRDD in the EU. The Commission finally adopted its proposal on a Corporate Sustainability Due Diligence Directive in February 2023. The intention was to establish an EU legislation with common MHRDD requirements that are to be applied across all EU Member States. This would avoid fragmentation and legal uncertainty for companies in the EU internal market and it would establish a level playing field. Furthermore, it would promote companies' respect for human rights and the environment in their activities[106]. Due to the economic and political power of the Union, such EU legislation can have effect beyond the borders of the single market[107]. With a regional legally binding instrument on due diligence, the EU serve as an example encouraging other States to follow in its lead and implement similar MRHDD legislation.

The legislative proposal has not yet been adopted as it must through negotiations with the European Parliament and the European Council before adoption. The European Council have presented its 'general approach' on the proposal in December 2022. Following in April 2023, the European Parliament's legal affairs committee presented its position on the proposed directive, which the European Parliament will vote on in late-May. The negotiations in the

[103] Smit et al 2020: 142

[104] McCorquodale & Nolan 2021: 464 – 465.
Smit et al 2020: 142

[105] Ibid: 15

[106] Proposal for a Directive on Corporate Sustainability Due Diligence: 3, para. 1 & 2

[107] Rouas 2022: 317

Parliament have been slower than anticipated because of political disagreements[108]. The vote in late-May will decide the Parliament's final negotiating position on the proposed directive. Thereafter, the negotiations on the directive proposal between the Council and the Parliament can begin. The Commission's proposal has received criticism for having a narrow personal scope, limiting the scope of the value chain, and for limiting the risk-based approach of the due diligence obligations, providing the companies with a selective approach to due diligence[109]. Thus, there are expectations that the negotiations between the Council and the Parliament will broaden the scope of the proposed directive. Once agreements between the Parliament and the Council have been met, the proposed directive will be adopted and enforced, most likely with amendments. Then the directive should be implemented in the national legislation of EU Member States and EEA States. The proposed EU due diligence directive is of particular interest for the States that have already adopted MHRDD legislation at the national level because its scope can impact the existing legislation.

3.2.3 National Level

As a response to fill the void of an international legally binding instrument on business and human rights and to provide an alternative to the voluntary regulatory initiatives, many states have taken responsibility into own hands to develop its own national legislation enforcing MHRDD. The UNGPs recommend states to enforce laws to ensure that businesses take on their responsibility to respect human rights[110]. Among the countries that have adopted MHRDD legislations so far are France, the Netherlands, Germany, and Norway. These legal developments have been welcomed as an important step towards ensuring corporate human rights responsibility and in hardening the due diligence requirements of the UNGPs and the OCD Guidelines. Despite a warm welcome, their shortcomings have also been highlighted. As Joseph and Kyriakakis emphasize, national legislations "runs the risk of focusing too much on processes and means, rather on substantive business and human rights ends"[111]. The national legislation should be more than solely a reporting procedure, whereby corporate human rights harms should be addressed and remedy to victims must be easily enforced. As they attempt to translate soft law instruments to hard law, they should contain measures that go further than the

[108] Ellena, S. *EU Parliament struggles to agree on due diligence rules before key vote,* EURACTIV, 11 April 2023

[109] See 4.2.

[110] UNGPs, Principle 3(a)

[111] Joseph & Kyriakakis 2023: 15

UNGPs and the OECD Guidelines, thus imposing stronger enforcement and civil liability measures[112].

These legal developments facilitate the establishment of a new regulatory environment where a company's impacts on human rights are in focus. From neglecting companies' human rights impacts to enforcing MHRDD obligations is an important development on business and human rights.

3.2.3.1 The Norwegian Transparency Act

The Norwegian Transparency Act is one of the few national legislations enforcing mandatory human rights due diligence on companies. The development of the Act begun in 2018 when the Norwegian government requested an inquiry on a potential law governing the corporate responsibility to respect human rights. A committee was established, namely the Norwegian Ethics Information Committee, with the mandate to evaluate whether businesses should have a duty to provide information related to their corporate social responsibility and monitoring of their supply chains. The committee found that it is desirable to introduce such a duty on businesses, which prompted the assessment on the adoption of a law on businesses' human rights responsibilities[113]. This culminated eventually in the proposal for the Transparency Act, introduced by the Norwegian government in April 2021. The proposal was adopted by the Norwegian Parliament in June 2021, and entered into force the 1st of July 2022. The initial scope of the proposed Act by the Ethics Committee has been limited, for example the committee suggested that all enterprises in Norway should be covered by the act, which has been limited in the enforced Act to 'larger enterprises'[114]. The due diligence of the Act is to be carried in accordance with the OECD Guidelines, implying a strong alignment with international human rights standards[115]. The act establishes transparency on the corporate human rights responsibility in Norway and is today a prominent example of MHRDD legislation.

[112] Bueno & Bright 2020

[113] See Etikkinformasjonsutvalget, 'Åpenhet om leverandørkjeder', Høsten 2019

[114] The Transparency Act, section 2

[115] Ibid, section 4, para. 1

4 Analysis

This chapter presents the analysis, which is separated into two-main parts. First, it will conduct two separate content analyses of the Transparency Act and the CSDDD Proposal, applying the criteria introduced in 2.1. Following, it compares the two legal texts based on results from the separate content analyses. Thereafter, building on the results from the comparative content analysis, it will discuss what the implications will be for the Norwegian Transparency Act if the EU CSDDD draft is adopted.

4.1 The Norwegian Transparency Act

4.1.1. Material Scope

The aim of the Transparency Act is to "promote enterprises' fundamental human rights and decent working conditions"[116]. Fundamental human rights are defined as "the internationally recognized human rights that are enshrined, among other places, in the International Covenant on Economic, Social, and Cultural Rights ('ICESCR'), the International Covenant on Civil and Political Rights ('ICCPR'), and the International Labor Organization's core conventions on fundamental principles and rights at work"[117]. The emphasis on "amongst other places" entails that the definition of fundamental human rights is not limited to the mentioned conventions in section 3(b). They are explicitly included because they constitute the human rights foundation of the UNGPs and OECD Guidelines, i.e., the minimum standards for corporate human rights responsibility[118]. The Ministry of Children and Families ('the Ministry') emphasizes that other human rights conventions are also relevant for the corporate responsibility to respect human rights, thus the scope of fundamental human rights are to be interpreted broadly. An enterprise can identify a human right listed in another convention of those mentioned which will still fall under the Act's material scope if it is recognized as a 'fundamental human right' [119]. 'Fundamental human rights' is the complete range of internationally recognized human rights[120]. The second part of the material scope concerns 'decent working conditions', which is set out as the rights to "health, safety and environment in the workplace and that provides a

[116] The Transparency Act, Section 1

[117] The Transparency Act, Section 3(b)

[118] Prop. 150 L, 14

[119] Prop. 150 L: 41

[120] See UNGPs Principle 12 with commentary, and OECD Guidelines, Chapter IV commentary para. 40

living wage"[121] without enumerating their standards[122]. The preparatory work points to the relevant ILO conventions for such interpretation of standards. The ILO's core conventions set out the minimum standards for human rights at work, which are organized into four main categories. These are the elimination of child labor, forced labor and discrimination, and the right to freedom of association and the right to collective bargaining[123]. Decent working conditions should be interpreted beyond these standards, implying a broad interpretation, alike 'fundamental human rights'. Furthermore, the Ministry emphasize that 'decent working conditions' and 'fundamental human rights' coincides and that they must be understood in correlation[124].The material scope of the Transparency Act is not defined as an exhaustive list of fundamental human rights and decent working conditions, rather they are expansively presented to encourage broad interpretation.

Environmental impacts are only covered by the Transparency Act if it results in an adverse human rights impact. Thus, isolated impacts on the environment are not covered by the Act. UN Resolution A/RES/76/300, adopted in July 2022, recognized the right to a clean and sustainable environment as a human right. It emphasized that the destruction of the environment is one of "the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights"[125]. Such a correlation between human rights and the environment was also emphasized in the preparatory work of the Transparency Act[126]. Although adverse environmental impacts are not included in the Act, they can have immense effects on human rights and in such situations will be covered by the provisions of the Act.

4.1.2. Personal Scope

The companies falling under the scope of the Transparency Act are "larger enterprises resident in Norway and that offers goods and services in or outside Norway"[127]. Being resident in Norway is defined by Section 2-2 paragraph 7 of Norwegian Taxation Law: the company must be established in accordance with Norwegian company law and have an actual management in

[121] The Transparency Act, Section 3(c)

[122] Kommentar til Åpenhetsloven (2022) av Lunde og Tjelflaat i Gyldendal Rettsdata, note 14

[123] Prop. 150 L: 16

[124] Ibid: 42

[125] UN Resolution A/RES/76/300, para. 12

[126] Prop. 150 L: 43

[127] The Transparency Act, section 2

Norway at the leadership level. Foreign enterprises are not included in this definition, but are covered by the Transparency Act if they are a "larger enterprise that offer goods and services in Norway and are liable to tax to Norway pursuant to internal Norwegian legislation"[128,129]. The Act defines 'larger enterprises' as those that fall under Section 1-5 of the Accounting Act, or if they surpass two of the following conditions: have a greater sales revenue than NOK 70 million, a balance sheet total of NOK 35 million or higher, and that have an "average number of 50 full-time, or higher, employees in the financial year"[130]. This corresponds to the Accounting Act Section 1-6 threshold on small-size enterprises, entailing that medium-size enterprises are also covered by the provisions of the Act. There is no specification of limitations to industry or sector, indicating that there is no area that is completely exempt from the risks of human rights impacts. The estimates disclose that the number of enterprises directly affected by the Act amounts to around 9000 Norwegian companies[131]. However, the requirements will eventually affect a larger number of enterprises because they must also conduct due diligence of their supply chain and business partners[132]. The obligation to conduct due diligence expands beyond the enterprise's own activities[133]. Therefore, most Norwegian enterprises will have to carry out some degree of due diligence in accordance with the Act, despite not being a part of its personal scope[134]. Altogether, the Transparency Act holds a wide personal scope covering over 9000 companies.

4.1.3. Due Diligence Methodology

The Act sets out that due diligence is to be done "in accordance with the OECD Guidelines for Multinational Enterprises"[135], explicitly expressing an alignment of its due diligence methodology with the international standards. The Act do not mention the UNGPs explicitly, but the preparatory work recalls how the OECD Guidelines are grounded in the UNGPs. The Ministry emphasize that requirements of human rights due diligence in the Transparency Act

[128] The Transparency Act, section 2

[129] See section 2-3 of Norwegian Taxation Law for when a foreign enterprise is liable to Norwegian taxes.

[130] The Transparency Act, section 3(a)(1) – (3),

[131] Oslo Economics, KPMG 2021

[132] Forbrukertilsynet, (30 June 2022, updated 10 January 2023) ''Hvem er omfattet av Åpenhetsloven?'

[133] The Transparency Act, Section 4(b)

[134] Kommentar til Åpenhetsloven (2022) av Lunde og Tjelflaat i Gyldendal Rettsdata, note 7.

[135] The Transparency Act, section 3, para.1, first sentence

is to be in harmony with the international standards, thus if there is conflict between the Act and the UNGPs and OECD Guidelines, the latter shall prevail[136].

Due diligence is to "be carried out regularly"[137], corresponding to the UNGPs' requirement of it being an ongoing process[138]. Due diligence is dynamic process that must continuously be updated because human rights impacts can change at any given time. This is further emphasized in its provisions on transparency as enterprises are expected to publish a report every year to account for its due diligence and the public may request information on its due diligence at any time[139]. This underscores the continuous nature of due diligence[140]. Due diligence should correspond to the size and context of the enterprise, but also to what human rights it can impact. All due diligence processes are to follow the six steps outlined in paragraph 1 of Section 4, but it must be considered that every due diligence process will vary depending on the different factors of each enterprise, such as its sector, size, and resources. By adopting the principle of proportionality, the Act facilitates for a feasible due diligence process for all companies covered by its provisions, regardless of the resources at their disposal. This is important considering its wide personal scope, adjusting the obligations to the smaller enterprises affected by the Act. Furthermore, due diligence must be risk-based[141]. A risk-based due diligence process is based on the severity of risks to human rights. This entails that the company must prioritize its human rights impacts based on their severity, and not based on their business relationships nor on risks to the company itself. It is the severity of risks to people that is core, as reflected in paragraph 2 of Section 7. The Act does not contain any exceptions to its risk-based approach. In sum, the Transparency Act set out due diligence to be proportionate, ongoing, and risk-based, fully aligned with the UNGPs principle 17(a) – (c)[142].

[136] Prop. 150 L: 107

[137] The Transparency Act, Section 4, para. 2.

[138] Principle 17(c)

[139] The Transparency Act, Section 5 – 7

[140] See 4.1.5 on Transparency

[141] Ibid, section 4

[142] The Transparency Act, section 4(2)

4.1.4. Supply Chain

The Transparency Act's due diligence is not solely limited to its own operations, but also to its suppliers and sub-contractors in the supply chain and to its business partners[143]. Supply chain is "any party" that supplies the enterprise in their delivery of goods and services[144]. 'Any party' indicates that it can be an individual and/or a company in the supply chain[145]. The supply chain definition of the Act embodies anyone that has been involved in the process of moving or developing a product from its raw material stages to it as a final product. Business partners, set ou in section 3, paragraph 1(e), is "any party" that provides goods or services to an enterprise that does not contribute to the production of the enterprise's products, thus outside of the supply chain[146]. There are no limitations to the definition of 'supply chain' nor 'business partner' in the Act.Companies faced with more demanding due diligence due to a large supply chain must apply the principle of proportionality and a risk-based approach, explained in 4.1.3. Adverse human rights impacts identified in the supply chain, and by business partners, are to be included in the due diligence process, if they are "directly linked to the enterprise's operations, products or services"[147]. The inclusion of supply chain and business partners in the due diligence obligations broadens the effect of the Act's due diligence obligations beyond its established personal scope[148].

4.1.5. Transparency

The enterprises have a duty "to publish an account of due diligence process", in accordance with Section 4[149]. This is based on the fifth step of due diligence in the OECD Guidelines on communication[150]. It entails that the enterprise is to describe how it administers "actual and potential adverse impacts on fundamental human rights and decent working conditions"[151]. The duty to account for due diligence is to be done annually through a report that "shall be made

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[143] Ibid, section 3, para. 1(c)(d), section 4, para. 1(b)

[144] Ibid, section 3, para. 1(c)

[145] Kommentar til åpenhetsloven (2022) av Lunde og Tjelflaat i Gyldendal Rettsdata, note 17

[146] Ibid, note 20.

[147] The Transparency Act, section 4, para. 1(b)

[148] See 4.1.1 on personal scope.

[149] The Transparency Act, section 6, para. 1

[150] OECD Guidelines p 21, UNGPs Principle 17

[151] The Transparency Act, Section 5 para. 1(a)

easily accessible" and is to be "published no later than 30 June of each year"[152]. The Ministry emphasizes that this is not to be understood as an isolated reporting exercise, but as an integral component of due diligence as a ongoing process[153]. The aim is that the enterprises are to be transparent to the public on their due diligence to build confidence in their decision-making processes and their corporate human rights responsibility[154].

The Act grants the public a right to information[155]. The public can, at any time, request information on "how the enterprise addresses actual and potential adverse impacts pursuant to Section 4"[156]. This right to information is not limited to specific groups, as it is granted to 'any person', strengthening the transparency of the due diligence process. An enterprise can deny a request for information in accordance with Section 6 paragraph 2 (a) – (d). A request for information must have "sufficient basis for identifying what the request concerns" and it must be reasonable[157]. It must be established what the person requesting the information is looking for. If a request is unclear, the enterprise should communicate this with the person behind the request to try establishing clarity. However, if the request is unclear, the enterprise can deny the request on the basis that it is lacking sufficient basis[158]. An unreasonable request can be rejected. The Ministry stresses that these grounds for denial is to be interpreted narrowly, as the exception in section 5(a) is solely meant as a protective clause for the enterprise upon a request regarding trivial information[159]. The two other grounds for denial in section 5(c) and (d) is if the request concerns sensitive data, either regarding "an individual's personal affairs" or, regarding "operational and business matters" that are classified and secret. The latter is "due to competitive reasons" for the enterprise as transparency should not include disclosing important classified commercial information that can reduce companies' competitive advantage[160]. If the enterprise finds grounds for denial, it "shall inform about the legal basis for the denial" and the person with the denied request "may within three weeks from the denial was received, demand

[152] Ibid, para. 4

[153] Prop. 150 L: 69

[154] Prop. 150 L: 69

[155] The Transparency Act, section 6-7

[156] The Transparency Act, section 6, para. 1

[157] Ibid, (a) – (b)

[158] Prop. 150 L: 113

[159] Ibid:113 - 114

[160] Ibid: 114

a more detailed justification for the denial"[161]. The Ministry stress in their preparatory work that it can be a short justification with well-grounded reasoning for denial[162].

Responses to the information requests are to be provided "within a reasonable time and no later than three weeks after the request for information is received"[163]. There is one exception, which is that if "the amount or type of information requested makes it disproportionately burdensome to respond to the request for information within three weeks, the information shall be provided within two months after the request is received"[164]. If the latter happens, the person must be informed with the reasons for this extension. Providing such a time frame, three weeks and/or two months, guarantees an ongoing practice of due diligence[165]. The enterprise must always monitor their human rights impacts as they can at any time receive an information request with limited time to respond. Furthermore, such irregular information requests ensures that the enterprise cannot hide behind its annual reports and policies to establish a good corporate human rights responsibility.

4.1.6. Enforcement

The Norwegian Consumer Authority is granted the power to "monitor compliance" and supervise the subjects of the Act[166]. Its role is to guide and make sure enterprises comply with the provisions of the Act[167]. If non-compliance is identified "the Consumer Authority shall obtain a written confirmation that the illegal conduct will cease or issue a decision"[168]. The decisions they can issue are prohibitions and orders[169], enforcement penalties[170], and/or infringement penalties[171]. The enforcement measures in the Transparency Act are limited to financial sanctions for the enterprises when in breach of its provisions. The Ministry explains

[161] The Transparency Act, section 7, para. 4

[162] Prop. 150 L: 114

[163] The Transparency Act, section 7 para.2

[164] Ibid

[165] UNGPs, Principle 17(c)

[166] The Transparency Act, Section 9, paras 1 - 3

[167] Ibid

[168] Ibid, Section 9, para. 3

[169] Ibid, Section 12

[170] Ibid, Section 13

[171] Ibid, Section 14

this limitation by illustrating that subjects of the Act are entities conducting financial activities, and thus sanctions that directly affect this kind of activity will have the strongest and most effective effect on the enterprises to ensure compliance with the provisions of the Act[172]. Thus, the financial sanction must be strong enough to have an impact on the company's behavior and conduct[173]. A financially strong enterprise should receive a penalty so great that it will prevent the enterprise from repeating the wrongful behavior, i.e., it must have a mitigating effect.

The Act does not introduce a regime of civil liability, implying that an enterprise will not be held legally liable for the damages it has caused for not complying with the obligations of the Act. Thus, a victim of an adverse human rights impact cannot take the enterprise to court to pursue judicial remedy for the damages, thus restricting the access to justice. A non-compliant enterprise can receive financial sanctions for wrongful behavior, but they will not risk a lawsuit, thus a company will not be held accountable for the human rights harms it causes. In this way, the Act limits the effect of its enforcement, and reduces the rights of affected rightsholders.

4.2 The European Corporate Sustainability Due Diligence Directive Proposal

4.2.1 Material Scope

The human rights scope of the CSDDD proposal can be found in an Annex, which contains a list of international conventions[174]. Companies are to identify, prevent and mitigate adverse human rights impacts on "protected persons resulting from a violation of one of the rights or prohibitions listed in the Annex"[175]. The list in the Annex is separated into two sections: section 1 lists "violations of rights and prohibitions included in international human rights agreements" and section 2 lists "human rights and fundamental freedoms conventions". The conventions found in the second section are reduced to 'violations of specific rights and prohibitions' found in these conventions, thus the international instruments listed in section 2 are only included for reference[176]. The proposed directive establishes a selective human rights scope filled with

[172] Prop. 150 L, p. 100

[173] OHCHR & Shift, October 2021: 17

[174] Proposal for a Corporate Sustainability Due Diligence Directive, Article 3(c)

[175] Ibid

[176] OHCHR, 23 May 2022: 5

ambiguity[177]. The UNGPs emphasizes that "business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights"[178]. Thus, the corporate responsibility to respect human rights concerns all human rights and by limiting it to specific rights, the CSDDD proposal conflicts with international standards. Furthermore, the legislative proposal requires an "adverse human rights impact" to correspond to a "violation" of the listed rights or prohibitions in the Annex. This sets a high threshold in establishing whether an adverse human rights impact is covered by its provisions, and it limits the due diligence obligations[179].

The CSDDD proposal includes 'adverse environmental impacts', covering companies' responsibility to respect and protect the environment. This environmental aspect of the Directive proposal establishes a broader material scope. 'Adverse environmental impact' defined in a similar manner as adverse human rights impact'. It is a "violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II"[180], thus limiting it the impacts to specific provisions of the listed conventions. This carries the same risk as 'adverse human rights impacts' in that it provides an exhaustive list and establishes a narrow interpretation of 'adverse environmental impacts'.

4.2.2 Personal Scope

The CSDDD proposal affect three groups of companies. The first group are companies with "more than 500 employees on an average and had a net worldwide turnover of more than EU 150 million in the last financial year"[181]. The second group are companies not satisfying the thresholds of the first group, but "had more than 250 employees on an average and had a net worldwide turnover of more than EUR 40 million in the last financial year (…) provided that at least 50% of this net turnover was generated in one or more of the following sectors (…)"[182]. These sectors are "the manufacture of textiles, leather and related products"[183], "agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale

[177] ECCJ 2022: 4

[178] UNGPs, Principle 12, Commentary, first sentence

[179] The Danish Institute for Human Rights, 2022:4, ECCJ, 2022: 8

[180] Article 3(b)

[181] Proposal for a Corporate Sustainability Due Diligence Directive, Article 2(1)(a)

[182] Ibid, Article 2(1)(b)

[183] Ibid, Article 2(1)(b)(i)

trade of agricultural raw materials, live animals, wood, food, and beverages"[184], "the extraction of mineral resources (…), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (…), and the wholesale trade of mineral resources, basic and intermediate mineral products"[185]. Article 2(1)(b) limits the scope of companies to high-impact sectors. This is at odds with the UNGPs and the OECD Guidelines which states that companies should respect human rights, regardless of their sector[186]. Furthermore, this limitation of sectors does not correspond with the OECD sectorial guidelines, found in the proposal's exception for the financial sector[187].The third group are non-EU companies that "generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year"[188] and "generated a net turnover of more than EU 40 million but not more than EU 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b)"[189]

This amounts to a narrow personal scope as the three groups outlined corresponds only to large companies. An estimate from BI Business School suggests that the EU proposed directive will directly affect around 50 of the largest Norwegian companies, namely the first group of subjects. When the Directive have been in force for 2 years, the Directive will directly affect around 250 of the Norwegian largest companies, belonging to the second group of subjects[190]. Thus, only 300 of the largest companies in Norway will have to comply with its due diligence requirements. Small and medium-sized enterprises ('SMEs') do not have any obligations under the Directive proposal. This provides the largest companies with a competitive advantage and disturbs the establishment of a level playing field, conflicting with the aim of the proposed directive[191].

[184] Ibid, Article 2(1)(b)(ii)

[185] Ibid, Article 2(1)(b)(iii)

[186] OECD Guidelines 2011 Edition, chapter IV, para. 37

[187] CSDDD, Article 6(3)

[188] Ibid, Article 2(2)(a)

[189] Ibid, Article 2(2)(b)

[190] Regjeringen.no, 'Aktsomhetsdirektivet', EØS Notat, 14 February 2022

[191] Proposal for a Corporate Sustainability Due Diligence Directive, Explanatory Memorandum, chapter 1, para.8

4.2.3 Due Diligence Methodology

The CSDDD proposal presents the due diligence process is presented in detail, step-by-step. It does not explicitly indicate that due diligence is to be carried out in accordance with the international standards, namely the UNGPs and the OECD Guidelines. However, the introduction of the CSDDD proposal emphasize that the proposal intends to "promote the implementation of the UNGPs and the OECD Guidelines"[192], implying that the legislative proposal have been developed in alignment with these guidelines. Therefore, it is sets out an expectation that its due diligence approach is ongoing, proportionate, and risk-based.

Article 5(2) specifies that the enterprise must update its due diligence policy annually, and they must carry out "periodic assessment of their own operations and measures"[193]. The annual update of their policy and a periodic monitoring assessment implies that due diligence must be ongoing as a new assessment "every 12 months and whenever there are reasonable grounds to believe that significant new risks of the occurrence of those adverse impacts may arise"[194] will continuously require new and updated data on companies' human rights responsibility. Thus, the due diligence of the CSDDD proposal is an ongoing process, aligned with the UNGPs and OECD Guidelines.

The legislative proposal expects companies to take the "appropriate measures" when identifying, preventing, mitigating, and ending actual and potential adverse human rights impacts and adverse environmental impacts[195]. 'Appropriate measure' is defined as "measures that is capable of achieving the objectives of due diligence" that considers the different circumstances relevant to the specific case[196]. This entails that there is a certain level of proportionality in the due diligence requirements of the proposed Directive, as it will depend "the risk of severe human rights impacts, and the nature and context of its operations"[197]. Thus, this understanding of 'appropriate measures' aligns with the proportionality provision of the

[192] Ibid, Preamble, para 12

[193] Ibid, Article 10

[194] Ibid, Article 10, second sentence

[195] Ibid, Article 6(1), 7(1) and 8(1)

[196] Ibid, article 3(q)

[197] UNGPs, Principle 17(b)

UNGPs but has limited effect when considering the personal scope of the CSDDD proposal[198]. The proposed directive does not apply to SMEs, excluding most companies in the Union as they amount to 99% of all companies in the EU[199]. The Explanatory Memorandum of the proposed directive justifies this exclusion by explaining that its provisions would affect SMEs disproportionately due to the high costs establishing and conducting due diligence[200]. However, by excluding SMEs the directive actively ignores the impact smaller companies can have on human rights and disregards the principle of proportionality. All companies should be required to implement a due diligence process, despite its size and financial capacity, emphasized by the international standards[201].

The due diligence process must correspond to "the degree of severity" of the risks[202]. This is notably reduced through the reduction of due diligence obligations in the value chain to "established business relationships" in Article 1(a). An established business relationship is "expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain"[203].This reduces the risk-based approach to due diligence because it provides the companies with an incentive to conduct a selective due diligence where it is based on the formalization of their business relationships and not on the severity of risks. This can lead to a selective management of their value chain, whereby they keep the entities and companies that they know are more prone to adverse human rights and environment impacts, remote in their value chain and avoid establishing formal business relationships with them, to prevent responsibility for their human rights harms[204]. This can result in the most adverse human rights impacts in the value chain to be neglected. It is first and foremost the severity of risks that should guide the company on what adverse human rights impacts they must prioritize, not the format of their business relationships. Thus, the proposed directive's emphasis on 'established business relationships' conflicts with the risk-based approach of the UNGPs and the OECD Guidelines.

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[198] See 4.2.2.

[199] Proposal for a Corporate Sustainability Due Diligence Directive, Explanatory Memorandum, chapter 2, p. 14

[200] Ibid

[201] UNGPs, Principle 11

[202] Ibid, Article 3(q)

[203] Proposal for a Corporate Sustainability Due Diligence Directive, article 3(f)

[204] Ibid

Additionally, the selection of covering specific sectors and providing exceptions for companies in the financial sector further reduces the risk-based approach of the proposal's due diligence[205]. This is at odds with Principle 14 of the UNGPs that assures that the corporate responsibility to respect human rights shall have no exceptions and should apply to all business enterprises, regardless of their sector.

4.2.4 Value Chain

The due diligence requirements of the proposed directive extend to operations in the value chain, as specified in Article 1(1)(a). But the value chain is limited to "established business relationships", as briefly mentioned in 4.2.3. This reduces the value chain significantly by excluding operations done by entities or companies that the company has informal relationships with. This can be operations down at the raw material stage, which are generally more exposed to risks of adverse human rights and environmental impacts. It is not specified why the value chain is limited to 'established business relationships', but it could be understood in context of complex and large value chains. It can be difficult to carry out a due diligence across a value chain with many entities. If read against this backdrop, it could be the intention of the European Commission to simplify complex value chains by reducing them to 'established business relationships' to ensure an achievable due diligence assessment of the value chain. However, this is at odds with the UNGPs and the OECD Guidelines which suggest that the solution to complex and large value chains is a risk-based approach[206]. The EU draft's approach to value chains risks leaving brief, unstable, and informal business relationships out of the due diligence obligations, which is where the most serious human rights impacts are more probable take place[207]. Thus, the use of 'established business relationships' limits the scope of due diligence and weakens the aim of the proposed directive to enhance the corporate human rights responsibility in the value chain[208].

4.2.5 Transparency

The CSDDD proposal requires companies to publish a statement on their website reporting on the company's due diligence assessment "in a language customary in the sphere of international

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[205] Proposal for a Corporate Sustainability Due Diligence Directive, article 6(3)

[206] UNGPs, Principle 17, commentary para. 5

[207] ECCJ Analysis, p. 5

[208] Ibid, p. 5

business"[209]. It is not provided what this annual statement should include of information and how detailed it should be, but the Commission are to define this via delegated acts be adopted later[210]. There are strong expectations that these delegated acts will be aligned with the international standards of the UNGPs and the OECD Guidelines[211]. The article does not set out any further communication measures, lacking more regular measures of communication. The CSDDD proposal does not contain any measures whereby the public can request timely and detailed insights on the company's operations, its value chain, and its due diligence assessments. This reduces the possibility of scrutiny and accountability. The lack of such disclosure measures can undermine the trust in the company's corporate human rights responsibility. The companies are not required to undertake regular documentation of their due diligence process, which would be important for ensuring whether the company is complying with the due diligence obligations to be able to evaluate the degree of compliance[212].Thus, the transparency of due diligence in the proposed directive is limited.

4.2.6 Enforcement

The companies will have to "designate a legal or natural persons as its authorized representative"[213]. This authorized representative shall cooperate closely with the supervisory authority of the relevant Member State. The supervisory authorities are given the power to "supervise compliance with the obligations laid down in national provisions adopted pursuant to Articles 6 to 11 and Article 15(19 and (2)"[214]. Thus, the job of the supervisory authority is to ensure that companies are complying with the due diligence obligations of the CSDDD proposal. There should be minimum one supervisory authority in each state. Every supervisory authority is to be a member of a European Network of Supervisory Authorities, set up by the Commission, which is to ensure coordination and cooperation between states[215].These supervisory authorities shall be independent to ensure that they "exercise their power impartially, transparently and with due respect for obligations of professional secrecy"[216]. This

[209]Proposal for a Corporate Sustainability Due Diligence Directive, article 11

[210] Ibid, para. 2

[211] ECCJ Analysis, April 2022: 16

[212] Ibid: 17

[213] Proposal for a Corporate Sustainability Due Diligence Directive, article 16(1)

[214] Ibid, article 17(1)

[215] Ibid, article 21

[216] Ibid, article 17(8)

is important to ensure that no conflict of interests occurs and that investigations of companies will produce fair results, particularly for affected stakeholders and rightsholders. The supervisory authorities can "request information and carry out investigations related to compliance"[217], and they can open an investigation "on its own motion or as a result of substantiated concerns"[218]. Companies shall be notified before such investigations takes place, unless it will prevent an adequate investigation from taking place, then it should be disregarded[219]. Substantiated concerns can be submitted by "natural and legal persons (…) when they have reasons to believe (…) that a company is failing to comply with the national provisions adopted pursuant to this Directive"[220]. Thus, any person can submit a concern. When a supervisory authority identifies non-compliance, the company is given a deadline to adopt remedial action[221]. This remedial action does not remove administrative actions or civil liability measures. The administrative sanctions the supervisory authority can impose are of a financial nature and must be "effective, proportionate and dissuasive"[222]. The nature of the sanctions will be dependent on the how the company works to fulfil the remedial action[223]. The provision on sanctions does not account for what the sanctions specifically should be. As emphasized by ECCJ's analysis, the company might have been prepared for financial sanctions on their risk-filled operations but regarded the money and competitive advantage generated from these operations as compensating for any potential financial sanctions[224]. The details and criteria for the sanctions are not specified, leaving it to the Member States to form such a regime, which can risk disturbing a level playing field and create a fragmentation of sanctions[225].

The proposal suggests a civil liability framework, in which companies can be held legally liable for damages. The provision on civil liability signifies an important progress of the corporate responsibility to respect human rights, providing access to justice for victims of corporate human rights damages and goes beyond solely administrative sanctions. Damages are set out in

[217] Ibid, article 18(1)

[218] Ibid, article 18(2)

[219] Ibid, article 18(3)

[220] Ibid, article 19(1)

[221] Ibid, article 18(4)

[222] Ibid, article 20(1)

[223] Ibid, article 20(2)

[224] ECCJ Analysis: 19

[225] Ibid

article 1(a) and (b), which are if "they failed to comply with the obligations laid down in Articles 7 and 8", and "as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimized through the appropriate measures (…) occurred and led to damage". If such damages occur, the company can be held accountable and judicial remedy for victims can be provided. The article does not specify who are to determine whether such a damage has occurred, other than it must be a violation of one of the international human rights instruments listed in the Annex[226]. As mentioned in 4.2.1, defining adverse human rights impacts as a 'violation' of international human rights law risks raising the threshold for identifying damage and thus makes it more difficult for a claimant to access justice[227]. This would risk placing victims in an even more difficult and vulnerable situation, as the pathway to judicial remedy is unclear. Furthermore, exceptions to civil liability arises if "damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship with" in which the company has verified, through contract, that the partner has implemented necessary actions to ensure compliance with the due diligence obligations[228]. Providing exemptions based on contractual assurances creates another barrier to justice for victims.

4.3 Comparison of the Transparency Act and the CSDDD Proposal

This comparative analysis will outline the main differences and similarities of the Norwegian Transparency Act and the EU Corporate Sustainability Due Diligence Directive proposal.

4.3.1 Material Scope

Firstly, the CSDDD proposal includes 'environmental adverse impacts', which the Transparency Act does not, implying a broader material scope. If an enterprise's operations result in an impact on the environment, it will only raise due diligence obligations under the Transparency Act if it results in an adverse human rights impact. But the material scope of human rights in the Transparency Act is more expansive. This can be found in its emphasis on "amongst other places" when listing where the fundamental human rights enterprises are expected to respect can be found. It does not set out an exhaustive list and encourages for a

[226] The Danish Institute for Human Rights, March 2022: 22

[227] Ibid: 24

[228] Ibid, article 2

broad interpretation of its material scope. The human rights scope of the EU proposed directive is limited as it lists only specific articles of international conventions. Furthermore, the adverse human rights impact must be identified as a 'violation' in the CSDDD proposal, setting a higher threshold for establishing an adverse human rights impact.

In summary, the human rights scope of the Transparency Act is aligned with international standards and presents broader human rights obligations; however, it lacks the inclusion of environmental aspects found in the CSDDD proposal.

4.3.2 Personal Scope

Both legal texts cover third-country companies, establishing an expansive personal scope. Aside from this, the personal scope of both legal texts diverges. The CSDDD proposal suggests a high threshold in which only the largest companies are to be covered, excluding 99% of EU companies. This indicates that smaller companies are exempt from the responsibility to respect human rights, which is at odds with international standards. The Transparency Act sets out that 'larger enterprises' are to be covered by its due diligence obligations; but its criteria have a much lower threshold in comparison to the CSDDD proposal. For a brief comparison, the Transparency Act requires that the number of employees on average in the company must be 50 at a minimum, while the CSDDD proposal requires 250 at a minimum. Further, the minimum sales revenue in the Transparency Act is NOK 70 million, corresponding to around EUR 6 million, while the minimum net turnover in the CSDDD proposal is EUR 40 million, corresponding to around NOK 470 million. Furthermore, the EU draft covers specific sectors, limiting its personal scope further. The Norwegian Act is not sector-specific, entailing that any company qualifying as a 'larger enterprise' is subject to its due diligence obligation.

The threshold of the CSDDD proposal suggests that around 300 of the largest companies in Norway will be covered by its due diligence obligations. The Transparency Act will cover around 9000 Norwegian companies, holding a much broader personal scope than the CSDDD proposal. The UNGPs stress that the responsibility to respect human rights concerns all companies, thus the broader personal scope of the Transparency Act corresponds with international standards[229]. Another important element to mention is that the EU proposed directive limits the companies' value chain to 'established business relationship'. This reduces

[229] UNGPs, Principle 14, commentary

the number of entities in the value chain that will be subject to the due diligence obligations. The Transparency Act does not contain such a limitation, and its obligations extend to the supply chain and business partners, affecting enterprises beyond the established 9000 enterprises, thus preserving the broader personal scope.

In short, the due diligence obligations of the Transparency Act will expand to a larger number of companies in Norway than the CSDDD proposal, ensuring a broader impact and greater effect of the legislation.

4.3.3 Due Diligence Methodology

The Transparency Act has a clear emphasis that due diligence must be performed in alignment with the OECD Guidelines, while the EU draft have imposed limitations on its due diligence, conflicting with the international standards. The CSDDD proposal expects due diligence to be an on-going process[230]. This is also expressed in the Transparency Act[231]. Due diligence in the Transparency Act is to be proportionate. Considering the Act's broad personal scope, proportionality is important to ensure that due diligence is achievable for the smaller companies subject to its provisions. The EU proposed directive emphasize proportionality in its use of 'appropriate measures'. However, as it only covers the 300 largest companies in Norway, the proportionality of 'appropriate measures' loses its relevance. Based on their personal scope, the Transparency Act have a stronger emphasis on proportionality. Another difference between the two legal documents is their emphasis on a risk-based approach. The Transparency Act sets out that due diligence is to be based on the severity and probability of adverse human rights impacts and contains no limitations to this approach. The CSDDD proposal have reduced its risk-based approach, which can be found in its delimitation of its personal scope and its value chain scope. Firstly, the narrow personal scope of the proposed directive is not explained with a risk-based justification[232]. It is unclear why only companies of certain sectors and a certain size is covered, and others left out. Further, the scope of value chain is reduced to 'established business relationships', which allows companies to prioritize adverse impacts based on its business relations and not on the severity of risks, which can result in companies neglecting its most serious impacts in the value chain. The severity of risks is at the core of the Transparency Act's

[230] Proposal for a Corporate Sustainability Due Diligence Directive, article 10

[231] The Transparency Act, section 4, para. 2

[232] Shift Analysis, March 2022: 2

due diligence, while the CSDDD proposal places contractual relationships at the center, conflicting with the UNGPs and OECD Guidelines.

In sum, the Transparency Act has a more clearly defined alignment with the due diligence methodology of the international guidelines on the corporate responsibility to respect human rights than the CSDDD proposal. The proposed EU directive lacks an explicit mention that due diligence should be risk-based and proportionate, which the Norwegian Act includes.

4.3.4 Supply / Value Chain

The scope of value/supply chain affect the legal documents' due diligence scope because it determines the expansion of their obligations[233]. As discussed in 4.3.3., the value chain is reduced to 'established business relationships', setting a high threshold on activities covered by the due diligence requirements of the proposed directive. This is in contrast with the Transparency Act that expects enterprises to address adverse human rights impacts throughout the entire supply chain[234]. Where a company has a complex supply/value chain with many entities and faces the challenge of conducting due diligence across the whole chain, the Transparency Act suggests prioritizing impacts based on risk, while the CSDDD proposal proposes to select impacts based on its 'established business relationships'. The approach of the proposed EU directive is at odds with the international guidelines, while the Norwegian Act is in conformity. The former suggests a limited value chain scope and the latter suggests a broader supply chain scope. However, a value chain scope will encompass more operations than supply chain as it would include the stages after the final product, such as its disposal, distribution, sale, and consumers, while a supply chain end at the final product[235]. Thus, the use of the value chain in the EU draft, without the limitations, expands the due diligence obligations in comparison with supply chain, as used in the Transparency Act.

In short, the CSDDD proposal use of value chain corresponds to the international standards, encompassing a broader aspect of a business' activities than the Transparency's Act use of supply chain, but is largely limited by 'established business relationships'.

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[233] The Danish Institute of Human Rights: 5

[234] The Norwegian Consumer Authority's response to the CSDDD proposal, 23 May 2022: 5

[235] Regjeringen.no. 'Aktsomhetsdirektivet'. EØS notat, 14 February 2022.

4.3.5 Transparency

Both legislative texts set out a requirement to annually publish a report on their due diligence process, aligned with the fifth step of the OECD Guidelines and Principle 16(d) of the UNGPs, that they communicate on how they address their adverse human rights impacts. However, the transparency requirements of the Norwegian Act are more prominent than of the CSDDD proposal due to its inclusion of information requests, which allows for more comprehensive insights on the due diligence process. The proposed EU directive does not contain such measures and therefore limits the public's access to a company's due diligence assessments. The right to information in the Transparency Act is accessible to any person. This widens the scope of transparency and contributes to strengthen the public's awareness on the corporate human rights responsibility and on how adverse impacts is addressed by companies. In sum, the Transparency Act contains greater transparency measures than the CSDDD proposal, facilitating for a more trustworthy due diligence in accordance with the international standards.

4.3.6 Enforcement

Both legal texts suggest the establishment of supervisory authority bodies that will ensure that companies comply with their due diligence obligations. Besides this, the CSDDD proposal presents a greater enforcement regime than the Norwegian Transparency Act. If non-compliance is identified, the sanctions enforced in the Transparency Act is only of an administrative and financial nature, and the Act does not impose any civil liability measures. The CSDDD proposal set out an enforcement regime consisting of both administrative sanctions and civil liability measures, allowing for victims of corporate human rights damages to obtain judicial remedy. The proposal contains ambiguity as to how a victim is to go forward with the civil liability measures which retains the already-existing barriers to justice for corporate human rights damages[236]. However, in short, the CSDDD proposal inclusion of civil liability demonstrates a more prominent enforcement than the Transparency Act.

4.4 The Implications of the CSDDD Proposal on the Transparency Act

If adopted, the proposed Corporate Sustainability Due Diligence Directive will have to be implemented in Norwegian national legislation because the proposal is specified as 'text with

[236] OHCHR, 2022: 11

EEA relevance'; thus, holding a clear indication that the EU Act must be implemented in the EEA. Since the obligations of the proposed directive concerns the rules of the single market, Norway must implement it in its national legislation. Norway as an EEA State is granted access to the four freedoms of the single market and consequently are subject to EU Acts regulating this. This is to ensure a uniform adoption of all laws on the single market establishing legal homogeneity[237]. Norway must implement the final EU Act; it has no formal power in changing and formulating its provisions during the process of decision-making. Aligned with the EEA legislative process[238], EEA States can only provide the European Commission with input and expertise to the decision-makers of the legislative proposal. Norway submitted a position paper expressing their opinions on the CSDDD proposal. They emphasized concern for the limitations found in the CSDDD proposal, and advises the Commission to broaden the scope, and points at the Transparency Act as an example, highlighting its provisions on transparency. The position paper is an important tool for Norway to get a say in the decision-making process, but whether their inputs are included is not guaranteed. Therefore, it is important that Norway closely monitors the development of the CSDDD proposal to ensure a favorable implementation of it in its own national law.

The EEA legislative process is yet to commence as the proposed directive is still in the decision-making process of the EU. The following discussion is based on the assumption that the Commission's proposal from February 2022 is adopted in its entirety, acknowledging that the process of adopting the Directive is far from finally conducted. It will focus on the considerations that must be addressed in the national implementation of the CSDDD proposal in Norway.

As the CSDDD proposal is a directive, it must become a part of the domestic legal order of Norway in accordance with Article 7(b) of the EEA Agreement. Accordingly, the authorities of the Norwegian State that decide how they implement the CSDDD in their national law to best achieve its goals, either through new or existing law. As Norway already have in place the Transparency Act with a shared aim as the CSDDD proposal, the directive will likely be integrated into existing national law, and not established as a new legal act. Both the Transparency Act and the CSDDD proposal aims to integrate the corporate human rights

[237] EEA Agreement, article 1

[238] See 3.1

responsibility to the activities and governance of companies to reduce their negative impacts on people[239]. Therefore, it would be the most reasonable that the obligations of the CSDDD proposal is carried out through the Transparency Act to guarantee that Norway will achieve the goal of the directive. The proposed EU directive contains an additional goal which is to reduce companies' negative impacts on the environment. Norway has in place the Environmental Impacts Act from 2004, whereby companies are obliged to attain information on their impacts on the environment and the public may request such information from companies. The due diligence obligations can be transposed to this act to ensure that Norwegian national law satisfy the environmental due diligence aim of the EU draft. However, to ensure a uniform Norwegian regulatory regime on due diligence, it is more sensible to transpose the environmental aspect to the Transparency Act.

Albeit regulating the same legislative field, the EU draft and the Transparency Act contain numerous differences in their scope and approach to human rights due diligence. For example, the range of companies subject to the obligations of the Transparency Act is greater than of the CSDDD proposal. If the EU draft is transposed to the Transparency Act, Norwegian lawmakers are faced with a problem on whether they can preserve the broader personal scope of the Transparency Act, or if it must be reduced in accordance with the CSDDD proposal's personal scope. The latter situation would result in the number of companies subject to due diligence obligations in Norway being adjusted from, approximately, 9000 to 300. The current proposal does not hold a provision requiring a full harmonization, meaning that the obligations set out in the proposed directive is a minimum standard, and Norway can implement obligations beyond the standards of the directive[240]. Thus, the Norwegian authorities may keep the original personal scope of the Transparency Act, on the assumption that it does not disturb the legal homogeneity of the single market and the level playing field[241]. A wider personal scope of the CSDDD provisions in Norway would extend its due diligence obligations, decrease fragmentation, and facilitate a level playing field in the single market, which corresponds to the aims of the EEA Agreement and of the CSDDD proposal[242].

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[239] See section 1 of the Transparency Act and para. 12 of the Preamble of the CSDDD proposal

[240] Article 30 of the CSDDD proposal only sets out a deadline for implementation, but no requirement for full harmonization

[241] See EEA Agreement, see Article 1(1)

[242] See EEA Agreement Article 1 and CSDDD Proposal, Explanatory Memorandum: 1 - 3

The human rights due diligence obligations of the CSDDD proposal have proven to be limited compared to the Transparency Act, thus most of its minimum standards are already satisfied[243]. However, the proposed directive includes adverse environmental impacts, cover the value chain, and suggests a civil liability regime, which the Norwegian Transparency Act lacks. The environmental impacts will either broaden the material scope of the Transparency Act, or the obligations of the Norwegian Environmental Impacts Act. Regardless of which legislation the environmental aspect will be implemented in, due diligence of adverse environmental impacts will have to be implemented in Norwegian law to ensure that the goal of the proposed directive is attained. The supply chain scope of the Transparency Act may be extended to cover operations in the value chain, which includes the stages after the product is finalized. However, it should be careful on adopting the CSDDD value chain limitation on 'established business relationships' as this could limit its due diligence scope. Furthermore, as the provisions of civil liability of the CSDDD proposal demonstrate a stronger enforcement of due diligence than the Transparency Act, this must be included in the latter. Altogether, transposing these three elements would expand the due diligence scope of the Transparency Act.

Beyond civil liability, value chain and environmental impacts, the Transparency Act sets out more comprehensive and stricter due diligence obligations. The Ministry emphasized in its preparatory work of the Transparency Act that the stricter obligations of the Norwegian Act could disturb the free movement of goods and services and the right to establishment because it makes it more burdensome for companies to operate in Norway than in the rest of the EU internal market[244,245]. However, the Ministry respond to this by illustrating that such restrictions are allowed if they are grounded in the public interest. They argue that the Transparency Act's objective in managing and protecting human rights and decent working conditions, and securing transparency regarding the corporate human rights responsibility is in the interest of the public, and therefore its stricter obligations does not restrict the EEA Agreement[246].

[243] See 4.3 for the comparative analysis.

[244] Prop. 150 L: 33

[245] See article 11, 31, 33, 36 and 39 in EEA Agreement for the prohibition on restrictions regarding the free movement of goods and services and the right to establishment.

[246] Prop. 150 L: 33

Another element to consider is whether Norway will use its 'right to reservation' if the proposed directive is adopted[247]. This thesis regards this as an unlikely situation. Firstly, because the proposed directive is not expected to restrict the Transparency Act on the provisions where its human rights due diligence obligations go further than the EU draft, and the additional scope of CSDDD will solely expand its scope and strengthen the Act. Secondly, Norway is committed to the EEA Agreement and, as this thesis is aware of, have never used its right to reservation[248]. Furthermore, the subject matter of the CSDDD proposal is familiar to Norwegian lawmakers due to the similarity of the Transparency Act. Thus, it is unlikely that Norway will reserve itself against an implementation of the CSDDD proposal.

To summarize, if the CSDDD proposal is adopted, Norwegian lawmakers must carefully observe the aims and objective of both the EEA Agreement and of the proposed EU directive to ensure satisfactory implementation in relevant national law, the Transparency Act. The Transparency Act will preserve its provisions where it demonstrates a stronger and broader due diligence, but lawmakers will likely have to alter its use of 'supply chain' to 'value chain', broaden the obligations to 'adverse environmental impacts', and establish civil liability in its enforcement. This is to guarantee that the Transparency Act achieve the goals of the proposed directive. Thus, the implications of CSDDD on the Transparency Act will be positive by solely broadening its due diligence scope.

5 Conclusion

This thesis has explored a new emerging regulatory field of human rights law, mandatory human rights due diligence. Companies' impacts on human rights have for a long time been unregulated and their irresponsible conduct and behavior causing harm to people have been overlooked. Therefore, the introduction of mandatory human rights due diligence has been significant as it introduces an obligation on companies to manage their risks to human rights, not just to the company itself. In the absence of an international legally binding instrument, several states have adopted their own national due diligence legislation. The Transparency Act in Norway impose such mandatory due diligence obligations on companies. Joined in this development is the European Union who have proposed a Corporate Sustainability Due Diligence Directive. This proposed directive will have implications on related-due diligence

[247] EEA Agreement, article 93(2) & article 102

[248] NOU 2012-2: 100 - 106

legislation in Norway, the Transparency Act, because of their EEA membership and the EEA relevance of the directive. The CSDDD proposal have prompted various concerns in Norway regarding the Transparency Act, such as whether its due diligence obligations will be restricted and thus weaken its potential to protect and guarantee human rights, and whether the directive will require immense amendments to the existing Norwegian MHRDD legislation. To address this, the background chapter laid out the legal relations between Norway and the EEA, exploring how an EU Act becomes a part of Norwegian law, to understand how the implementation of CSDDD will impact the Transparency Act. The same chapter also addressed the development of mandatory human rights due diligence which illustrated how this research applies to the ongoing debate on the new regulatory area of human rights law.

This research asked, '*what are the implications for the Norwegian Transparency Act if the current EU proposal for a Corporate Sustainability Due Diligence Directive is adopted?'.* To be able to answer this, the thesis conducted a two-part analysis whereby the first part consisted of a comparative content analysis of the Transparency Act and the Proposal for a Corporate Sustainability Due Diligence Directive which identified their differences and similarities. This facilitated the second part of the analysis which explored what the implications of the identified similarities and differences will be on the Transparency Act if the proposed CSDDD is adopted, largely determined by the Norway-EEA legal relations.

The thesis found that the implications the CSDDD proposal will have on the Transparency Act will be minimal, which makes it unlikely that Norway will abstain from adopting the proposed directive. Due to the broader human right due diligence scope of the Norwegian Transparency Act, it meets the minimum standard set out in the CSDDD proposal and thus does not have to limit its scope. It did find that the scope of the Transparency Act should be broadened to cover adverse environmental impacts and value chains, and it should introduce a civil liability regime to achieve the goals of the CSDDD proposal. To conclude, the introduction of the proposed Corporate Sustainability Due Diligence Directive in Norwegian national law will solely generate positive implications for the Transparency Act by broadening its scope and strengthen its human rights due diligence obligations.

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