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Enhancing Human Rights Due Diligence in Multinational Supply Chains: Analysing Directors' Duties, Auditing Practices, and Supervisory Boards under the CS3D.

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Table of Abbreviations.

MNC - Multinational Corporation.

HRDD - Human Rights Due Diligence.

UNPG - United Guiding Principles on Business and Human Rights.

OECD - Organisation for Economic Cooperation and Development.

ILO - International labour organisation.

LksG – Lieferkettensorgfaltspflichtengesetz.

EU - European Union.

FLA - Fair Labour Association.

NGO – Non-Governmental Organisation.

Table of Contents

Enhancing Human Rights Due Diligence in Multinational Supply Chains: Analysing Directors' Duties, Auditing Practices, and Supervisory Boards under the CS3D.

1. Introduction.

1.1 Overview.

The intertwining of multinational corporations (MNCs) into global supply chains has spurred economic advancement and nurtured extensive interconnectedness in the modern world[1]. Yet, this connectivity also exposes a troubling truth: the prevalent threat of human rights violations within these intricate systems. Human rights violations by MNCs span across continents, affecting the lives of millions in significant ways[2]. Addressing these issues, the necessity for strong human rights due diligence (HRDD) practices within MNCs and their supply chains has garnered substantial traction. For centuries, companies have capitalised on economic circumstances focusing on profits rather than safeguarding essential human rights, often without facing any repercussions.

Efforts have been made to address these challenges through HRDD frameworks such as the UN Guiding Principles on Business and Human Rights[3] (UNGPs) and the OECD Guidelines for Multinational Enterprises[4]. However, these measures have often fallen short in effectively mitigating human rights violations within MNCs and their supply chains. As observed by scholars and human rights advocates, the voluntary

[1] Daniel Vaughan-Whitehead, *Behind the Rise of Global Supply Chains* (Cambridge Scholars Publishing 2022) 1.

[2] Prasadi Wijesinghe, 'Human Rights Violations by Multinational Corporations: Nestle as the Culprit' (SSRN, 14thMarch) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3136321> accessed 1 June 2024.

[3] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04.

[4] Organisation for Economic Co-operation and Development (OECD), 'OECD Guidelines for Multinational Enterprises' (2011) OECD Publishing.

nature of these frameworks has limited their enforceability and impact[5]. In light of these inadequacies, the Corporate Sustainability Due Diligence Directive (CS3D) was officially adopted in May 2024[6], marking a significant regulatory shift towards mandatory HRDD.

The commitment to a legal framework mandating a supply chain respectful of human rights is not merely a regulatory requirement but a moral duty. This directive represents a transformative step towards embedding human rights considerations into the fabric of corporate governance and operations. As noted by the European Commission, the CS3D is designed to "ensure that companies identify and address adverse human rights and environmental impacts of their actions inside and outside Europe"[7]. This directive aligns with broader international efforts to promote sustainable and responsible business practices[8], contributing to the global agenda of protecting human rights.

By mandating comprehensive HRDD, the CS3D aims to create a level playing field for companies[9], ensuring that all businesses adhere to the same standards regardless of their geographical location. This harmonisation of legal standards across the EU is expected to 'enhance corporate accountability, reduce human rights abuses in supply chains, and foster greater trust and transparency in global business practices'[10].

This thesis aims explore the implications of the CS3D for MNCs, examining how this directive reshapes the landscape of corporate responsibility and human rights due diligence. The analysis will offer insights into the responsibilities of directors, supervisory boards and audits within this new regulatory framework. It will also discuss

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[5] Liv Monica Stubholt, Nina Stærnes and Tone Sorfann Moe, *'The Norwegian Legislation on Social Sustainability: An Overview of the Transparency Act'* (2023) 10 Oslo Law Review.
[6] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.
[7] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.
[8] Lois Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law' [2024] Journal of European Competition Law and Practice 25.
[9] European Business Network for Corporate Sustainability, 'Sustainable Raw Material Sourcing: From Compliance to Impactful Engagement' (CSR, 2023).
[10] Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) 7(2) Business and Human Rights Journal 291.

how the CS3D will impact the existing due diligence laws in France and Germany. Additionally, the author will examine the 'Kik case' and explore how things might have unfolded differently if the CS3D had been in place back then.

1.2 Research Questions.

As MNCs increasingly operate within complex extended global supply chains, the need for robust HRDD practices has become paramount. The recent introduction of directives such as the CS3D reflects an effort to formalise and enforce corporate responsibilities in this regard.

This thesis is guided by the following three questions which the author aims to address and analyse regarding the CS3D:

1. <u>Directors' Duties and Human Rights Due Diligence under CS3D:</u>

Why should Human Rights Due Diligence (HRDD) be a Director's Duty under the Corporate Sustainability Due Diligence Directive (CS3D), and why should it not have been removed?

2. <u>Supervisory Boards' Roles and Responsibilities in Ensuring Compliance with CS3D:</u>

How can supervisory boards contribute to the effective implementation and running of the Corporate Sustainability Due Diligence Directive (CS3D)?

3. <u>Auditing Foreign Suppliers for Human Rights Compliance under CS3D:</u>

What are the challenges and best practices associated with auditing foreign suppliers to ensure compliance with the human rights due diligence requirements of the CS3D for MNCs?

4. <u>HRDD laws in Germany and France.</u>

How will the CS3D change the existing HRDD laws in Germany and France?

1.3 Research Methods and Materials

This thesis consists of a comprehensive research methodology, using a variety of academic articles, online sources, case law, and legislation to provide a thorough examination of HRDD and its implications under the Corporate Sustainability Due Diligence Directive (CS3D).

The primary sources of data include peer-reviewed academic articles that offer theoretical and empirical insights into HRDD practices and corporate governance. These articles provide a foundational understanding of the principles and challenges associated with enforcing human rights standards in global supply chains. Key databases such as JSTOR, Google Scholar, and institutional repositories were utilised to access these scholarly articles.

Additionally, online sources such as reports from international organisations, non-governmental organisations (NGOs), and industry analyses contribute to a broader understanding of the practical implementation and effectiveness of HRDD frameworks. These sources are important in providing up-to-date information on current practices, regulatory developments, and case studies relevant to HRDD.

Case law and legislation are another form another cmajor component of the research matter. Detailed examinations of landmark cases, such as the KiK case, and national laws like the French Duty of Vigilance Law and the German Supply Chain Due Diligence Act, are integral to understanding the legal context and enforcement mechanisms of HRDD. Legal databases and official government publications were used to gather relevant case law and legislative texts.

Overall, the combination of academic literature, online sources, and legal documents ensures a comprehensive and multifaceted approach to analysing the CS3D and its impact on corporate human rights due diligence. This methodology allows for an in-depth exploration of the subject, integrating theoretical perspectives with practical and legal considerations.

1.4 Delimitations.

This thesis delves into the CS3D and its effects on HRDD in multinational corporations (MNCs). The study sets specific delimitations to ensure a focused and concise analysis.

To start, the research primarily looks at how the CS3D is used within the European Union (EU). Although global supply chains are considered, this thesis narrows its focus to the EU to analyse relevant regulatory frameworks thoroughly.

Next, the emphasis is placed on HRDD rather than environmental due diligence, which is also part of the CS3D. This approach allows for a detailed exploration of human rights issues that are crucial but often overlooked in corporate governance conversations.

Lastly, case studies such as the KiK case are utilised to highlight particular challenges and effects of the CS3D on HRDD practices. These cases are chosen based on their relevance and availability of comprehensive data, offering practical insights into how HRDD is implemented and enforced. In addition, while this study examines laws from various countries such as the French Duty of Vigilance Law and the German Supply Chain Due Diligence Act, it does not conduct a comparative legal assessment of all EU member states. Instead, it uses these instances to demonstrate how the CS3D could affect and improve existing national regulations.

Moreover, the study draws on academic papers, online resources, legal precedents and statutes up to 2024. Any changes or updates to the CS3D or related legislation after this timeframe are not taken into account to ensure that the study reflects the most recent and pertinent information.

These limitations are established to deliver a focused and cohesive analysis, facilitating an in depth examination of the CS3D's influence on HRDD within multinational corporations operating in the EU.

2. Importance of Addressing Human Rights Issues in the Context of MNCs and Global Supply Chains.

The criticality of addressing human rights issues within MNCs operating in global supply chains cannot be overstated. MNCs, as defined by David E. Lilienthal in 1960, are "corporations...which have their home in one country but which operate and live under the laws and customs of other countries as well"[11].. According to Roach, large corporations are "economic, political, environmental, and cultural forces that are unavoidable in the globalised world"[12]. The term "unavoidable" aptly describes their ubiquitous presence, underscoring the necessity for MNCs to uphold robust human rights standards.

Supply chains play a critical role in the global economy, contributing to nearly half of global trade, yet the truth is that millions of individuals face mistreatment daily within such global supply chains[13]. Reports from the International Labour Organisation (ILO) indicate a disturbing rise in violations of fundamental work-related rights globally[14]. The lack of adequate regulation often allows MNCs to exploit workers[15], highlighting the urgency of addressing these issues. Scholars have highlighted that MNCs have 'moved like poltergeists internationally, sometimes causing devastating impacts on people[16].

Previous attempts to impose legal regulations on MNCs to safeguard human rights have frequently fallen short[17]. The UN Guiding Principles on Business and Human Rights (UNGPs) were developed to mitigate the negative impacts of business activities on human rights, worker conditions, and the environment[18]. These guidelines

[11] David Eli Lilienthal, *The Multinational Corporation* (1st edn, Development and Resources Corporation, 1960)

[12] Brian Roach, 'Corporate Power in a Global Economy' [2023] Global Development Policy Centre 3.

[13] Christina Hiessl, 'The EU's Legislative Initiatives on Corporate ESG Due Diligence in Context' [2024] Labour Rights & their Enforcement in Global Value Chains 1.

[14] International Labour Organisation, '50 million People Worldwide in Modern Slavery' (ILO 2022).

[15] Emma Aisbett and others, 'Do Multinational Corporations Exploit Foreign Workers?' in Jed Silver, *Global Goliaths*

[16] Shedrack C. Agbakway, 'A Line in the Sand: International (Dis) Order and the Impunity of Non-State Corporate Actors in the Developing World) in A. Anghie et al. (eds) The Third World and International Order: Law Politics And Globalisation 1 (2003) 3-4.

[17] Charlotte Villiers, 'A Game of Cat and Mouse: Human Rights Protection and the Problem of Corporate Law and Power' (2023) 36 Leiden Journal of International Law 418.

[18] United Nations Human Rights, 'Implementing the United Nations "Protect, Respect and Remedy" Framework' (Office of the High Commissioner 2011).

recommend comprehensive assessments of entire supply chains to evaluate and manage human rights risks[19]. However, the UNPGs proved to be inadequate in protecting human rights in supply chains due to issues such as the lack of enforceability and clarity in their wording[20].

The Corporate Sustainability Due Diligence Directive[21] (CS3D) aims to bridge these gaps by introducing a unified framework that improves the consistency and thoroughness of human rights due diligence (HRDD) practices throughout the EU[22]. This directive suggests a more extensive and enforceable set of criteria that will be applicable to a wider array of companies, thus enhancing corporate responsibility[23]. By establishing consistent requirements, the CS3D will assist in addressing issues related to legal accountability and transparency that have been problematic in previous regulatory efforts[24].

Incorporating human rights due diligence into multinational corporations is essential for ethical and sustainable business operations[25]. The CS3D signifies a significant step forward in establishing comprehensive and enforceable HRDD standards across the EU, promoting a fairer and more equitable global supply chain.

3. Background of Business and Human Rights.

[19] Cody Sisco, 'Supply Chains and The OECD Guidelines for Multinational Enterprises' (OECD 2010).
[20] Come back to source when I find it in UNPG section.
[21] European Parliament 2019/1937 of 24th April 2024 Corporate Sustainability Due Diligence Directive (CS3D) [2024] OJ L32/29
[22] Edouard Gergondet and Teresa Gerhold-Kempf, 'Human Rights and the Environment: What To Expect from the Corporate Sustainability Due Diligence Directive' (Mayer Brown, 19th March 2024) https://www.mayerbrown.com/en/insights/publications/2024/03/human-rights-and-the-environment--what-to-expect-from-the-corporate-sustainability-due-diligence-directive accessed 15th May 2024.
[23] Tracey Groves, 'Preparing for a New Era of Corporate Responsibility' (DWF, January 2024) < https://dwfgroup.com/en-ie/news-and-insights/reports-and-publications/true-diligence> accessed 25th March 2024.
[24] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.
[25] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company 2013).

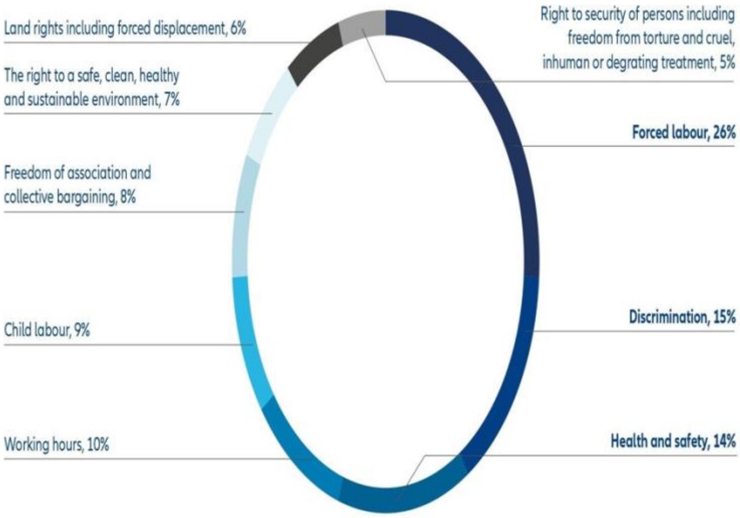
Within the modern interconnected economy, supply chains are essential for producing and distributing goods and services[26]. A supply chain is defined as "the flow of both information and material through a manufacturing company, from the supplier to the customer"[27]. Supply chains span across borders, linking suppliers, manufacturers, distributors, sellers and buyers on a global scale[28]. Essentially, they are the foundation of the economy, without having such there would be no way to source and supply goods across continents and countries. The growth of supply chains has also come hand in hand with the growth of multinational companies[29]. However, alongside the proliferation of supply chains, there has also been a surge of human rights violations, including forced labour[30].

Forced labour is "a structural phenomenon that results when predictable, system-wide dynamics intersect to create a supply of highly exploitable workers a business demand for their labour"[31]. Multinational corporations tend to focus on establishing supply chains in developing countries, mainly due to competitive material prices and reduced labour costs[32]. There are common factors within such factories in third world countries, such as, "poverty, identity and discrimination (based on gender, race, migration status), limited labour protections, and restrictive mobility regimes as political economic factors that create a supply of people vulnerable to forced labour"[33]. The reality of working in these factories is that it is a vicious cycle. Workers enter into risky and poor work due to poverty, and consequently, "these forms of work make them

[26] OECD, 'Interconnected Economies: Benefiting From Global Value Chains' (Meeting of the OECD Council at Ministerial Level OECD 2013).
[27] James R. Stock and Stefanie L. Boyer, 'Developing a Consensus Definition of Supply Chain Management' (2009) International Journal of Physical Distribution & Logistics Management 39.
[28] Zdenka Vidrova, 'Supply Chain Management in the Aspect of Globalisation' [2020] Globalisation and its Socio-Economic Consequences 3.
[29] Human Rights Watch, 'Human Rights in Supply Chains, A Call For a Binding Global Standard on Due Diligence' (*Human Rights Watch,* 2024) < https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence> accessed 25th May 2024.
[30] International Labour Organisation and others, 'Ending child labour, forced labour and human trafficking in global supply chains' (ILO 2019).
[31] Genevieve LeBaron and others, 'Confronting Root Causes: Forced Labour in Global Supply Chains' [2018] SPERI 10.
[32] Nermine Khalifa, Anthony White and Aziz Ezzat ElSayed, 'Supply Chain Challenges in Developing Countries: Cross Industry Case Studies' (2008) Cybernetic Intelligent Systems < https://www.researchgate.net/publication/224393579_Supply_chain_challenges_in_developing_countries_Cross_industry_case_studies> accessed 30th April 2024.
[33] Genevieve LeBaron, 'The Role of Supply Chains in the Business of Forced Labour' [2021] Journal of Supply Chain Management 4.

vulnerable to forced labour in supply chains, wherein their exploitation then reinforces their inability to escape poverty"[34].

Figure 1.0



Along with forced labour, there are a vast range of human rights abuses such as; child labour, poor working conditions, wage violations, forced overtime, sexual harassment, exposure to toxic substances, and other extreme occupational hazards[35]. Figure 1.0[36] provides a visual representation of the most prevalent types of allegations against human rights within supply chains. Such abuses are the reality which millions of people endure on a daily basis with no remedy, especially in sectors such as construction, fishing, farming, food, clothing, textiles and footwear[37].

It is crucial to bring attention to the mistreatment faced by millions of individuals on a daily basis and advocate for meaningful change. At present, there has been a lack of effective solutions and progress in this regard. As mentioned previously, global supply chains are a key driver of revenue and play a significant role in the economy[38]. However, these supply chains are inadequately regulated, allowing multinational

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[34] Nicola Phillips, 'What has forced labour to do with poverty?' (OpenDemocracy 2015) < https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/what-has-forced-labour-to-do-with-poverty/> accessed 24th March 2024.
[35] Human Rights Watch, 'Human Rights in Supply Chains, A Call For a Binding Global Standard on Due Diligence' (*Human Rights Watch,* 2024) < https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence> accessed 25th May 2024
[36] Nicole Papassavvas and Debroah Yomtob, [graph of human rights abuses] 'Human Rights – the weakest link in supply chains?' (Allianz 23rd September 2023) accessed 25th April 2024.
[37] Serena Dibra, 'The increasing global supply chain risks in retail manufacturing' (*Thomas Reuters* 2022) https://www.thomsonreuters.com/en-us/posts/international-trade-and-supply-chain/preventing-supply-chain-risk/ accessed 14th April 2024.
[38] Christina Hiessl, 'The EU's Legislative Initiatives on Corporate ESG Due Diligence in Context' [2024] Labour Rights & their Enforcement in Global Value Chains 1. IBIDDDD

corporations to exploit those working within them[39]. Guidelines such as the UNPGs were adopted in "attempt to reduce and prevent negative impacts of business operations on human rights"[40]. Furthermore, EU countries such as France and Germany have adopted national HRDD laws to regulate and mandate MNCs to conduct HRDD in supply chains[41].

However, until the CS3D was created, there was no legally binding directive within the EU mandating member states to conduct HRDD. The introduction of the CS3D directive is an attempt to fill in the gaps of the UNPGs. This directive is a huge step forward for HRDD, but it does raise questions about directors duties, supervisory boards and audit practices, which will be explored within this thesis.

4. What is Due Diligence?

Human Rights due diligence "is a process which includes - assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communications how impacts are addressed"[42]. While due diligence was initially associated with financial and legal matters[43], it has now expanded to encompass social, environmental and ethical considerations. This evolution has had a significant impact on human rights, where due diligence plays a crucial role in ensuring corporate accountability and ethical business practices[44]. The increasing

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[39] Emma Aisbett, 'Do MNCs Exploit Foreign Workers?' (*Brookings.edu* November 27th 2019) < https://www.brookings.edu/wp-content/uploads/2019/12/Aisbett-et-al._Brookings-draft-2019.11.26_Harrison.pdf> accessed 1st of May 2024.
[40] Office of the High Commissioner for Human Rights, 'The UN Guiding Principles on Business and Human Rights: An Introduction' (OCHR 2012).
[41] Shelley Marshall and others, 'Mandatory Human Rights Due Diligence: Risks and Opportunities for Workers and Unions' [2023] LEAH 4.
[42] United Nations Development Programme, 'Human Rights Due Diligence: An Interpretive Guide' (UNDP 2012).
[43] IONOS, 'Due Diligence, definition and history of precautionary risk assessment' (*ionos.co.uk,* 12th of September 2023) < https://www.ionos.co.uk/startupguide/get-started/due-diligence/#:~:text=Due%20diligence%20is%20a%20concept%20originating%20in%20American%20commercial%20and,a%20company%20during%20an%20IPO.> accessed 24th of April 2024.
[44] Rick Sanchez, 'Importance of due diligence when working with the private sector' (*UNtoday,* 1st of April 2024) < https://untoday.org/importance-of-due-diligence-when-working-with-the-private-sector/#:~:text=The%20UN%20places%20high%20importance,%2C%20and%20anti%2Dcorruption%20measures.> accessed 25th of May 2024.

focus on corporate social responsibility (CSR) and ethical growth[45] has led to the integration of social factors into due diligence processes. This shift demonstrates a deeper understanding of how businesses operate within a complex network of societal and environmental connections, with their actions carrying widespread consequences.

HRDD expands the core principles of due diligence to cover the identification, prevention, reduction and responsibility for human rights impacts in companies[46]. HRDD is rooted in the understanding that companies carry a duty to uphold human rights, as highlighted in the UNPGs[47]. Essentially, "HRDD aims to reduce human rights abuses within complex supply chains of multinational corporations by addressing it as a risk management issue"[48].

Many well-known and respected companies around the world have been linked to violations of human rights and a lack of corporate accountability[49]. For instance, Alan Gutterman points out how Nike relied on sweatshop practices by its suppliers and Apple employs Chinese subcontractors who do not meet basic labour standards[50]. These kinds of human rights violations happen frequently as multinational corporations prioritise profit maximisation[51]. The complexity of global supply chains and the trend towards outsourcing make it easier for these abuses to go unnoticed, often taking place far from the headquarters in Europe[52].

Engaging in due diligence offers numerous benefits for both individuals and businesses. It helps "safeguard human rights, such as labour rights, instils confidence

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45 Chih-Cheng Chen and others, 'The Role of Corporate Social Responsibility and Corporate Image in Times of Crisis: The Mediating Role of Customer Trust' (2021) 18 Int J Environ Res Public Health 5.
46 Robert McCorguodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 Neth Int Law Rev 455.
47 Kim Larsson, 'The Corporate Sustainability Due Diligence Directive's Contribution to Human Rights Universality' (Master Thesis, Uppsala Universitet 2023).
48 ibid
49 Laura Grant, 'World's largest companies are neglecting their human rights responsibilities, study finds' (*University of Aberdeen,* 8th November 2022) < https://www.abdn.ac.uk/news/16506/> accessed 20th of May 2024.
50 Alan S Gutterman*, Business and Human Rights: Advising Clients on Respecting and Fulfilling Human Rights* (American Bar Association, 2020).
51 Subhan Ullah and others, 'Multinational corporations and human rights violations in emerging economies: Do commitment to social and environmental responsibility matter?' [2020] Journal of Environmental Management 6.
52 Genevieve LeBaron and others, 'Confronting Root Causes: Forced Labour in Global Supply Chains' [2018] SPERI 10.

in companies, encourages transparency for making informed choices and simplifies the path to justice for those affected"[53]. From a business perspective, it "fosters trust with customers and employees, raises awareness of potential human rights issues, strengthens risk management strategies, attracts investors and consumers, drives innovation initiatives and improves access to financial resources"[54]. Overall, implementing human rights due diligence reinforces corporate accountability and promotes sustainable business practices.

5. United Nations Guiding Principles on Business & Human Rights.

Until the CS3D was proposed in February 2022[55], there was no single legally binding legislation specifically dedicated to mandating human rights due diligence for businesses. The main body of work dedicated to HRDD was the UNPGs, which gave recommended guidelines for businesses to follow in order to prevent human rights abuses. For this reason, the author will mainly focus on the UNPGs and CS3D for the purpose of this thesis.

The UNPGs [56] represent a significant milestone in the global effort to address human rights abuses linked to business activities. Endorsed in 2011, these principles serve as the first globally agreed standards for preventing and addressing human rights violations within corporate operations and supply chains[57] . The UNPGs were built on the long debated idea of the "highly problematic and contested issues for companies – how to deal with human rights abuses"[58]. While the UNPGs are not legally binding,

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[53] Financer Worldwide, 'Sustainable and responsible corporate behaviour: unpacking the CSDD' (*Financerworldwide,* April 2023) https://www.financierworldwide.com/sustainable-and-responsible-corporate-behaviour-unpacking-the-csddd accessed 12th of March 2024.
[54] ibid
[55] IHRB, 'What is the Proposed EU Corporate Sustainability Due Diligence Directive' (*IHRB,* 2022) < https://www.ihrb.org/explainers/what-is-the-proposed-eu-corporate-sustainability-due-diligence-directive> accessed 21st of May 2024.
[56] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04.
[57] European Justice, 'Business and Human Rights' (*e-justice.europa,* 12th February 2020) https://e-justice.europa.eu/580/EN/business_and_human_rights#:~:text=The%202011%20UN%20Guiding%20Principles,is%20aligned%20with%20the%20UNGPs. Accessed 12th of April 2024.
[58] Andreas Rasche and Sandra Waddock, 'The UN Guiding Principles on Business and Human Rights: Implications for Social Responsibility Research' (2021) 6 Business and Human Rights Journal

they play a crucial role in galvanising efforts to promote corporate respect for human rights[59].

One of the key strengths of the UNPGs lies in their articulation of three fundamental pillars: the state duty to protect, the corporate responsibility to respect human rights, and the provision of access to remedy for victims of human rights abuses[60]. The state duty to protect requires governments to enact "effective policies, legislation, and regulations to prevent, investigate, punish, and redress human rights abuses by businesses operating within their jurisdiction"[61]. This principle "underscores the importance of regulatory frameworks that hold companies accountable for their human rights impacts"[62].

Similarly, the corporate responsibility to respect human rights places the onus on businesses to avoid "infringing on the human rights of others and to address adverse human rights impacts with which they are involved"[63]. This includes situations where there is no direct contribution by a business actor but "involves its commercial partners, other enterprises in the value chains and other entities with links to the business"[64]. This principle emphasises the need for businesses to conduct HRDD processes to identify, prevent, mitigate, and address potential human rights risks throughout their operations and value chains[65].

Furthermore, the UNPGs recognise the importance of access to remedy for individuals and communities affected by business-related human rights abuses[66]. Principle 25

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[59] John Sherman, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' (2020) Harvard Kennedy School Working Paper No.71 https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf Accessed 24th of April 2024.
[60] Claire Methven O'Brien,' Business and Human Rights: A handbook for legal practitioners' (Council of Europe 2018).
[61] Sorcha MacLeod, 'Towards normative transformation: re-conceptualising business and human rights' (PhD thesis, University of Glasgow 2012).
[62] ibid (148)
[63] United Nations Human Rights, 'Implementing the United Nations "Protect, Respect and Remedy" Framework' (Office of the High Commissioner 2011).
[64] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04.
[65] Ibid (3)
[66] United Nations Human Rights, 'Access to remedy' *(ohchr*, 2012) < https://www.ohchr.org/en/special-procedures/wg-business/access-remedy#:~:text=Access%20to%20effective%20remedy%20is,their%20territory%20and%2For%20jurisdiction.> accessed 21st of April 2024.

outlines that states are required to ensure access to effective remedies, including state-based judicial and non-judicial grievance mechanisms, as well as non-state-based grievance mechanisms[67]. This principle underscores the critical role of both state and non-state mechanisms in providing avenues for victims to seek justice and redress for human rights violations.

Despite the significance of the UNPGs in promoting corporate respect for human rights, several challenges and criticisms have emerged. One notable criticism pertains to the lack of binding requirements within the UNPGs, which has raised concerns about the enforceability of human rights standards[68]. It ultimately falls on each business to decide whether they wish to uphold human rights and adhere to due diligence; if they choose not to, there are no repercussions. This is a huge flaw of the UNPGs as there is no pressure on businesses to follow the guidelines. Human Rights Watch has accused the Human Rights Council of having "squandered an opportunity to take meaningful action to curtail business-related human rights abuses"[69].

Moreover, there has been commentary by Jagers and van Genugten that "the UNPGs are not worded strongly enough and that by not requiring business actors to respect human rights, the GPs fail to acknowledge business actors as duty holders"[70]. Consequently, directors and supervisory boards are not held to a degree of accountability in ensuring human rights due diligence is conducted as they are not obliged to do so and it is not outlines within the guidelines. This limits the reach of the concept of due diligence and also restricts the emerging idea of due diligence being a directors duty, because unless a business is driven to protect human rights then they have the choice to easily disregard the UNPGs.

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[67] ibid

[68] John Sherman, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' (2020) Harvard Kennedy School Working Paper No.71 https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf Accessed 24th of April 2024.

[69] Sorcha MacLeod, 'Towards normative transformation: re-conceptualising business and human rights' (PhD thesis, University of Glasgow 2012).

[70] Nicola Jagers and Willem va Genugten, 'Corporations and Human Rights: Moving Beyond Principled Pragmatism to Ruggie-Plus' (*SSRN,* 26th of May 2011) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844203> accessed 12th of May 2024.

In addressing these concerns, the CS3D seeks to address the shortcomings of the UNGPs by introducing a legally binding structure. This directive requires thorough evaluations of overseas vendors to ensure adherence to human rights standards[71], thereby bolstering corporate responsibility. Moreover, the directive marks a notable progression in regulatory standards, striving to impose stricter due diligence measures and guarantee enhanced safeguarding of human rights across global supply chains[72].

6. The CS3D.

The CS3D represents a pivotal advancement in the European Union's regulatory framework aimed at addressing human rights and environmental impacts in global supply chains[73]. Proposed in February 2022 and adopted by the European Parliament, the CS3D is set to be fully implemented by 2028, introducing binding legal obligations for MNCs operating within the EU[74].

This directive mandates comprehensive HRDD processes[75], thereby rectifying the issues of previous non-binding guidelines such as the UNGPs. As summarised by Sinan, “the CS3D sets out a horizontal framework for EU businesses and non-EU businesses operating in the EU internal market to take account of human rights…in their own operations, as well as across their entire chain of operations”[76].

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[71] IHRB, ‘What is the Proposed EU Corporate Sustainability Due Diligence Directive’ (*IHRB,* 2022) < https://www.ihrb.org/explainers/what-is-the-proposed-eu-corporate-sustainability-due-diligence-directive> accessed 21st of May 2024.

[72] Seyfarth, ‘EU Corporate Sustainability Due Diligence Directive: Raising the Stakes on ESG Regulations’ (*Seyfarth*, June 3rd 2024) < https://www.seyfarth.com/print/v2/content/113418/eu-corporate-sustainability-due-diligence-directive-raises-the-stakes-on-esg-regulations.pdf?> accessed June 4th 2024.

[73] European Commission, ‘Corporate sustainability due diligence’ (*European Commission*, 6th of May 2022) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en#:~:text=The%20aim%20of%20this%20Directive,actions%20inside%20and%20outside%20Europe. Accessed 20th of April 2024.

[74] ibid

[75] Edouard Gergondet and Teresa Gerhold-Kempf, ‘Human Rights and the Environment: What To Expect from the Corporate Sustainability Due Diligence Directive’ (Mayer Brown, 19th March 2024) https://www.mayerbrown.com/en/insights/publications/2024/03/human-rights-and-the-environment--what-to-expect-from-the-corporate-sustainability-due-diligence-directive accessed 15th May 2024.

[76] Izzet Sinan and others, ‘Corporate due diligence: EU supply chain directive adopted against all odds’ (*Morgan Lewis*, April 25th 2024) https://www.morganlewis.com/pubs/2024/04/corporate-due-diligence-eu-supplychain-directive-adopted-against-allodds#:~:text=The%20CS3D%20sets%20out%20a,their%20entire%20chain%20of%20activities accessed 30th May 2024.

6.1 Scope and Objectives of CS3D

The CS3D introduces a comprehensive framework that requires both EU and non-EU businesses operating within the EU internal market to consider human rights and environmental effects across their entire operational chain. This policy represents a notable transition from optional CSR initiatives to compulsory due diligence standards, with the goal of promoting sustainable and ethical business practices[77].

According to the European Commission, the primary objectives of the CS3D are to:

1. Enhance Corporate Accountability: Ensure that companies identify, prevent, mitigate, and account for their human rights and environmental impacts[78].
2. Level the Playing Field: Create uniform standards for all companies operating within the EU, thus eliminating competitive disadvantages for businesses that proactively engage in sustainable practices[79].
3. Protect Human Rights and the Environment: Strengthen protections for individuals and communities affected by business operations, particularly in global supply chains[80].

The CS3D will mandate companies to integrate HRDD into their core operations and business strategies. As stated in Article 2, the directive is expected to apply to over 6,000 EU companies which employs over 1000 employees and has over 450 million turnover and 900 non-EU companies with a turnover exceeding 450 million[81]. This ensures a broad applicability and significant impact on global business practices[82].

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[77] European Commission, ‘Making Mandatory Human Rights and Environmental Due Diligence Work for All’ (ITC 2022).
[78] European Commission, ‘Corporate sustainability due diligence’ (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.
[79] ibid
[80]ibid
[81] European Parliament 2019/1937 of 24th April 2024 Corporate Sustainability Due Diligence Directive (CS3D) [2024] OJ L32/29.
[82] Edouard Gergondet and Teresa Gerhold-Kempf, ‘Human Rights and the Environment: What To Expect from the Corporate Sustainability Due Diligence Directive’ (Mayer Brown, 19th March 2024) https://www.mayerbrown.com/en/insights/publications/2024/03/human-rights-and-the-environment--what-to-expect-from-the-corporate-sustainability-due-diligence-directive accessed 15th May 2024.

The key motivation behind the CS3D is to create a harmonised legal framework across the EU, thereby eliminating the fragmentation of national regulations that has often hindered effective HRDD. This harmonisation is expected to enhance corporate accountability, improve risk management, and foster a more level playing field for businesses[83].

6.2 Key Provisions of CS3D

The CS3D mandates that companies integrate HRDD into their core operations and business strategies. This includes identifying potential and actual adverse human rights impacts arising from their own operations, those of their subsidiaries, and from their established business relationships throughout their value chains[84]. It is essential for companies to proactively mitigate potential negative impacts and take action on actual impacts as they arise to prevent any involvement in human rights violations[85].

6.3 Enforcement Mechanisms

To ensure compliance, the CS3D introduces robust enforcement mechanisms, including administrative supervision and civil liability (Article 29)[86]. As stated in Article 24 of the directive, Member States are required to designate authorities to oversee the implementation of the directive, enforce injunctive orders, and impose fines for non-compliance[87]. The directive also establishes a civil liability regime, allowing victims to seek compensation for damages resulting from a company's failure to conduct adequate HRDD[88]. In the case of non-compliance, there is also the threat of fines up

[83] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.

[84] Edouard Gergondet and Teresa Gerhold-Kempf, 'Human Rights and the Environment: What To Expect from the Corporate Sustainability Due Diligence Directive' (Mayer Brown, 19th March 2024) https://www.mayerbrown.com/en/insights/publications/2024/03/human-rights-and-the-environment--what-to-expect-from-the-corporate-sustainability-due-diligence-directive accessed 15th May 2024.

[85] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.

[86] European Parliament 2019/1937 of 24th April 2024 Corporate Sustainability Due Diligence Directive (CS3D) [2024] OJ L32/29

[87] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.

[88] Christopher Patz, 'The EU'S Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) 7 Business and Human Rights Journal 291.

to “5% of a company’s worldwide turnover, along with ‘naming and shaming’ under Article 27”[89].

6.4 Benefits of CS3D

The CS3D is expected to yield multiple benefits:

1. **For Citizens**: Improved protection of human rights, increased transparency, and better access to justice for victims of human rights abuses[90].
2. **For Companies**: A harmonized legal framework within the EU, enhanced risk management, increased resilience, and greater attractiveness to sustainability-oriented investors and public procurers[91].
3. **For Developing Countries**: Enhanced protection of human rights, sustainable investment, and improved living conditions through better corporate practices in global value chains[92].

This new directive represents a significant change from the voluntary HRDD frameworks that have been prevalent until now. While guidelines such as the UNGPs offered valuable direction, their voluntary nature limited their effectiveness and enforceability[93]. The CS3D addresses these weaknesses by introducing mandatory requirements, thereby improving human rights protection and advancing sustainable business practices.

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[89] Caroline MacDonald, ‘A BDO Legal Guide to the Corporate Sustainability Due Diligence Directive’ (*BDO,* May 2024) https://www.bdo.cr/getmedia/10895c71-8e5b-4c94-878c-1841c9054486/A-BDO-Legal-Guide-to-the-CSDDD.pdf accessed 1st of June 2024.
[90] European Commission, ‘Corporate sustainability due diligence’ (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.
[91] ibid
[92] ibid
[93] John Sherman, ‘Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights’ (2020) Harvard Kennedy School Working Paper No.71 https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf Accessed 24th of April 2024.

7. Directors duties and the CS3D

7.1 What are Directors Duties?

Directors are key players in the world of business, and take on many responsibilities and duties in fulfilling their role. A brief summary of the role of directors is as follows -

“directors are in charge of the management of the company’s business; they make the strategic and operational decisions of the company and are responsible for ensuring the company meets its statutory obligations”[94].

Directors encompass a wide range of duties but there are seven core duties;

1. to act within powers,
2. to promote the success of the company,
3. to exercise independent judgment,
4. to exercise reasonable care, skill and diligence,
5. to avoid conflicts of interest,
6. not accept benefits from third parties and
7. to declare interests in proposed or existing transaction arrangements with the company[95]

Directors hold huge power over the running of the business and their decisions essentially determine every aspect of the business[96]. Taking into consideration how influential directors are, it seems quite illogical that directors are not held to a higher degree of responsibility to ensure HRDD is conducted within their business.

The European Commission released a study on directors duties three years ago, which highlighted the pressure “corporate decision makers face to generate financial

[94] Burges Salmon, ‘A guide to responsibilities and duties of a company director’ (*Burges Salmon,* April 2024) https://openpublications.burges-salmon.com/a-guide-to-responsibilities-and-duties-of-a-company-director-2023/68616316 accessed 1st of May 2024.
[95] Renee B.Adams, Benjamin E.Hermalin and Michael S.Weisbach, ‘The Role of Board of Directors in Corporate Governance: A Conceptual Framework and Survey’ [2010] Journal of Economic Literature 58.
[96] Renee B. Adams, Benjamin E. Hermalin and Michael S. Weisbach, ‘The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey’ (2010) 48 Journal of Economic Literature 58.

return in a short timeframe and provide shareholders with dividends, which is often detrimental to human rights"[97]. In return, this pressure creates risks related to modern slavery, unhealthy working conditions, a living wage, product safety, and other human rights issues[98]. Furthermore, Drimmer stated that "financial materiality and stockholder welfare should no longer be the sole end of corporate governance and that a stakeholder-orientated approach must start at the very top of business organisations, with board of directors"[99].

7.2 Directors' Duties in Relation to the CS3D

When the CS3D was first introduced by the European Commission in February 2022, it included clear responsibilities for company directors. These responsibilities aimed to incorporate HRDD into their decision making processes, align directors performance based pay with the company's long term sustainability objectives and supervise due diligence activities under Articles 24 and 26[100]. The aim was to incorporate sustainability and human rights concerns into corporate governance at the executive level, guaranteeing that these vital matters were given the necessary attention and supervision[101].

During discussions on legislation, the Council of the European Union suggested removing these specific duties of directors[102]. Their argument was that determining

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[97] Jonathan C. Drimmer, Tara K. Giunta and Renata Parras, 'The Evolving Role of Boards of Directors Regarding Business and Human Rights' (*Paul Hastings*, August 17th 2023) <https://www.paulhastings.com/insights/international-regulatory-enforcement/the-evolving-role-of-boards-of-directors-regarding-business-and-human-rights> accessed 21st April 2024.

[98] Directorate-General for Justice and Consumers, 'Study on directors' duties and sustainable corporate governance' (July 2020) < https://libguides.swansea.ac.uk/c.php?g=667943&p=4913608> accessed April 21st 2024.

[99] Jonathan C. Drimmer, Tara K. Giunta and Renata Parras, 'The Evolving Role of Boards of Directors Regarding Business and Human Rights' (*Paul Hastings*, August 17th 2023) <https://www.paulhastings.com/insights/international-regulatory-enforcement/the-evolving-role-of-boards-of-directors-regarding-business-and-human-rights> accessed 21st April 2024.

[100] Gabby Heyns, 'Understanding Directors' Duties with the new Corporate Sustainability Due Diligence Directive' (*Ardea International*, 23rd June 2023) <https://www.ardeainternational.com/thinking/understanding-directors-duties-with-the-new-corporate-sustainability-due-diligence-directive/> accessed 1st of April 2024.

[101] Ashurst, 'EU adopts Corporate Sustainability Due Diligence Directive' (*Ashurst,* 29th April 2024) <https://www.ashurst.com/en/insights/eu-adopts-corporate-sustainability-due-diligence-directive/#:~:text=The%20original%20proposal%20to%20expand,included%20in%20the%20final%20version > accessed 1st of May 2024.

[102] Catalina Hierro and Isabella Kelly, 'The European corporate sustainability due diligence directive: it's a marathon, not a sprint' (*Herbert Smith Freehills*, 4th April 2023) <

directors fiduciary obligations should primarily be handled by the company and its relevant bodies or shareholders[103]. This proposed removal has a potential impact of weakening the directive as the lack of clearly defined responsibilities for directors leaves a notable gap. Directors are vital in shaping company policies, upholding regulatory compliance and promoting ethical business conduct[104]. Therefore, the lack of clear legal mandates and instructions for directors could hinder the success of HRDD programs, putting at risk the drive to integrate a stakeholder cantered approach into corporate governance.

7.3 The Importance of Including Directors' Duties

Within this section, the author will outline reasons in which they believe that directors should have been explicitly mentioned within the CS3D.

7.3.1 Enhanced Accountability and Governance

Incorporating responsibilities for directors within the CS3D would improve accountability at the highest echelons of corporate governance. Directors have a critical role in defining a company's strategic direction and ensuring adherence to legal and ethical norms[105]. By explicitly requiring directors to supervise due diligence processes, this directive would guarantee that human rights concerns are not overlooked but are instead woven into the core business strategies. Therefore, in order for effective corporate governance, directors should be held answerable for the human rights implications of their choices[106].

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https://www.herbertsmithfreehills.com/insights/2023-04/the-european-corporate-sustainability-due-diligence-directive-its-a-marathon-not-a> accessed 24th April 2024.

[103] ibid

[104] Business Roundtable, 'Principles of Corporate Governance' (*Harvard*, September 8th 2016) < https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/> accessed 14th May 2024.

[105] John Sherman, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' (2020) Harvard Kennedy School Working Paper No.71 https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf Accessed 24th of April 2024.

[106] Robert McCorquodale and Stuart Neely, 'Directors duties and human rights impacts: a comparative approach' 22 (2022) Journal of Corporate Law Studies 605.

7.3.2 Aligning Incentives with Sustainable Goals

Linking directors' variable remuneration to sustainability outcomes[107] would align their financial incentives with the long-term goals of the company. This alignment is vital for instigating significant transformations, as it pushes directors to prioritise human rights and environmental sustainability on par with profitability[108]. Without such measures, there is a danger that short term financial targets might persist in overshadowing longer term sustainability goals[109].

7.3.3 Preventing Legal Loopholes

Furthermore, without clear guidelines, there is a risk of divergent practices and enforcement mechanisms, creating potential gaps that may undermine the effectiveness of the directive. The lack of specific duties for directors could lead to inconsistent application of due diligence requirements, ultimately diminishing the directive's effectiveness. Having clear guidelines can ensure that all companies are held accountable to the same standards and provide enforcement agencies with a structured approach to follow, thereby strengthening the overall impact of the directive.

7.4 Conclusion

In conclusion, the exclusion of directors responsibilities from the CS3D is a lost chance to boost the directive's influence on corporate governance and sustainability. Directors play a vital role in the running of MNCs and as we enter an era of human rights due diligence, they should have a duty of care to ensure that the company is effectively implementing the CS3D. Reintegrating these provisions would improve responsibility, align motivations with sustainable objectives and maintain compliance with global norms. As the directive progresses towards the final adoption, policymakers need to rethink the significance of directors functions in advocating for and supervising human rights.

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[107] Martha Cook, Katherine Savage and Frederic Barge, 'Linking Executive Pay to Sustainability Goals' (*Harvard Business Review,* February 7th 2023) < https://hbr.org/2023/02/linking-executive-pay-to-sustainability-goals> accessed 4th June 2024.

[108] Uku Lillevali, 'Putting Sustainability on the Payroll: Linking directors' pay to companies' sustainability targets incentivises effective management of sustainability risks, impacts and opportunities' (*WWF*, 21st April 2023) https://www.wwf.eu/?10089466/PUTTING-SUSTAINABILITY-ON-THE-PAYROLL accessed 20th May 2024.

[109] ibid

In a statement, the European Commissioner for justice stated

"Besides the corporate due diligence duty, the duty of care of directors is also important, as it encourages them to integrate stakeholders' interests into corporate decisions alongside the interests of shareholders, to embed sustainability into corporate strategies and to adopt science-based target"[110]

8.Supervisory Boards' Roles and Responsibilities in Ensuring Compliance with the CS3D.

8.1 Overview of Supervisory Boards' Roles in MNCs.

Supervisory boards play a crucial role in the corporate governance framework, especially in MNCs operating under a two tier board system like Germany[111] and the Netherlands. These boards supervise the management board to ensure that the company's activities are in line with legal, ethical and strategic objectives[112]. Their main responsibilities usually involve monitoring financial performance, ensuring regulatory compliance and safeguarding the interests of shareholders and other stakeholders[113].

8.2 Specific Responsibilities Under the CS3D

Under the CS3D supervisory boards should play a pivotal role in ensuring compliance with HRDD requirements. While recent changes to the CS3D no longer outline specific

[110] EU Initiative on Sustainable Corporate Governance, Ref. Ares(2020)4034032 – 30/07/2020 <https://ec. europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> accessed 21st May 2024.
[111] Klaus J. Hopt, 'The German Supervisory Board' (*Faculty of Law Blog Oxford*, 2nd December 2022) < https://blogs.law.ox.ac.uk/oblb/blog-post/2022/12/german-supervisory-board > accessed 3rd May 2024.
[112] Knut Bleicher and Herbert Paul, 'Corporate Governance Systems in a Multinational Environment: Who knows what's best?' 26 (1986) Management International Review 4.
[113] Patrick Downes, 'The Responsibilities of the Board' (*Lionheart,* October 3rd 2023) < https://www.linkedin.com/pulse/responsibilities-board-patrick-downes/> accessed 23rd May 2024.

obligations for directors, supervisory boards will continue to hold substantial responsibilities under the directive. Supervisory boards should take on the role of ensuring that due diligence policies are successfully implemented and integrated into the company's risk management structures.

Supervisory boards could be tasked with overseeing the identification, prevention, mitigation, and reporting of adverse human rights impacts throughout the company’s supply chain. Within this section, the author will discuss the potential specific responsibilities of supervisory boards in the context of the CS3D.

8.2.1 Integration of Due Diligence into Company Policies

Article 7 of the CS3D mandates that companies must integrate due diligence into all relevant policies and risk management systems[114]. It is crucial for supervisory boards to oversee this process, making sure that not only are due diligence policies established, but also effectively put into practice across the organisation. This oversight is key in ensuring that the company's approach to due diligence is thorough and in line with the directive's risk based standards.

8.2.2 Monitoring and Reporting

Under Article 15[115], companies must conduct regular evaluations and assess the efficacy of their due diligence policies. Supervisory boards could have the role of overseeing these evaluations and ensure accurate reports are generated. This includes examining the execution of due diligence measures, pinpointing any shortcomings and guaranteeing that necessary corrective actions are taken. The oversight provided by the supervisory board is essential for upholding the integrity and efficiency of the company's due diligence procedures.

In order to meet the directive's guidelines, supervisory boards should have to verify that companies perform routine evaluations of their own operations as well as those of their subsidiaries and business associates. These evaluations are instrumental in

[114] European Parliament 2019/1937 of 24th April 2024 Corporate Sustainability Due Diligence Directive (CS3D) [2024] OJ L32/29.
[115] ibid

assessing the sufficiency and effectiveness of detecting, preventing, mitigating and reducing negative impacts. By closely scrutinising these assessments, the board ensures that the company complies with the directive's standards and continually enhances its due diligence protocols.

8.2.3 Transparency and Accountability

Transparency is a core requirement under Article 16[116] of the CS3D, which necessitates public reporting on due diligence efforts. Supervisory boards could be tasked with ensuring that these reports are comprehensive and accurately portray the company's actions and results. This transparency helps to establish trust with stakeholders and holds management responsible for their diligence practices. By ensuring thorough and truthful reporting, boards contribute to upholding the company's reputation and compliance with the directive.

The directive stipulates that companies should disclose their due diligence efforts through an annual statement on their website[117]. Supervisory boards should have the responsibility of overseeing this process to guarantee detailed and honest reports, promoting transparency and accountability. This not only meets regulatory standards but also boosts the company's credibility and stakeholder confidence.

8.2.4 Stakeholder Engagement

Furthermore, Article 13[118] highlights the importance of stakeholder engagement in the due diligence process. Supervisory boards should oversee this engagement to ensure it is meaningful and effective. This involves ensuring that the company actively seeks input from stakeholders, takes their opinions into consideration and deals with their issues. By engaging with stakeholders effectively, potential risks can be identified and the company's overall due diligence strategy can be enhanced.

Supervisory boards should be responsible for ensuring that these engagements are comprehensive and constructive, addressing stakeholder concerns and incorporating their feedback into the company's due diligence procedures. Taking this proactive

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[116] ibid
[117] ibid
[118] ibid

approach can greatly improve the company's risk management practices and ethical performance.

8.2.5 Remediation and Corrective Actions

When adverse human rights impacts are identified, Article 11 requires companies to take appropriate remedial actions[119]. Supervisory boards should monitor these actions to ensure they are promptly, and effectively address and alleviate any negative effects. This oversight ensures not only the mitigation of risks but also the rectification of any harm caused, thereby meeting the company's obligations of due diligence under the CS3D.

8.2.6 Sustainability Board within the Supervisory Board.

MNC's could also consider establishing a separate 'sustainability board' within the supervisory board, solely dedicated to the oversight of HRDD implementation. A sustainability committee is "a body that is accountable for the sustainability strategy and performance of the business"[120]. This could be extremely effective, considering the increased responsibilities and potential liabilities which will be introduced by the CS3D. This way, no HRDD issue will fly under the radar.

Delegating responsibility to a sustainability board could provide several strategic advantages. Firstly, it could enable a more focused and expert oversight of sustainability practices[121], ensuring that due diligence processes are robust and effective. The committee's knowledge and experience may enable a comprehensive evaluation of risks, recognising both actual and potential negative effects on human rights. By leveraging their deep insight into sustainability risks, committee members could devise and execute better risk mitigation plans. This guarantees a thorough examination of all facets of the company's activities and supply chain, minimising the chances of errors or violations.

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[119] ibid

[120] Junice Yeo, 'All You Need to Know About Sustainability Committees' (Bursa Malaysia, 26th September 2018) < https://bursasustain.bursamalaysia.com/droplet-details/sustainability/all-you-need-to-know-about-sustainability-committees> accessed 13th June 2024.

[121] Mary Porter Peschka, 'Focus 15 Sustainability Committees: Structure and Practices' (IFC, 2020) https://www.ifc.org/content/dam/ifc/doc/mgrt/focus-15-sustainability-committees.pdf (accessed 16th June 2024).

Additionally, within the CS3D, HRDD entails intricate processes that demand careful preparation and precise execution. A specialised committee could supervise and support the establishment of thorough corporate due diligence frameworks, incorporating strong monitoring, auditing and reporting systems. This would enhance the company's capacity to adhere to legal requirements and manage risks effectively.

Furthermore, including a sustainability committee in the supervisory board would guarantee that decisions concerning human rights matters are approached with a thorough grasp of their consequences. This committee could furnish the board with in depth assessments and suggestions grounded on prevailing sustainability patterns, regulatory demands and industry standards. By following this well informed decision making approach, the company could effectively tackle sustainability issues in advance and leverage chances for enhancement.

Lastly, by establishing a sustainability committee, members of the supervisory board would not be likely to be held accountable for HRDD non-compliance. The committee would be clearly delegated with responsibility related to HRDD issues. This delegation is critical for liability management because it delineates which members of the supervisory board are accountable for overseeing HRDD. By assigning these tasks to a specialised committee, other board members can potentially be shieled from direct liability, as long as the delegation is carried out properly and the committee functions effectively.

8.3Conclusion.

Ultimately, supervisory boards should play a vital role in the effective implementation and operation of the CS3D. Their responsibilities should include overseeing the execution of robust HRDD measures, conducting regular audits, engaging with stakeholders, providing ongoing training, and establishing clear performance indicators. Through proactive involvement, supervisory boards can significantly enhance a company's ability to address human rights issues and foster sustainable business practices. By ensuring strict adherence to the CS3D guidelines, supervisory boards can aid in embedding human rights considerations into the fundamental strategy of multinational corporations, thus promoting responsibility and ethical governance. Furthermore, establishing a sustainability committee dedicated solely to overseeing HRDD could yield multiple benefits, such as; expert opinions, delegating liability and effective adherence to HRDD.

9. Auditing Foreign Suppliers for Human Rights Compliance under CS3D

9.1 What is Auditing?

Auditing involves the "review of products, services or processes as to whether or not they are in conformity with a given norm or standard"[122]. For the CS3D, auditing is crucial in verifying that MNCs adhere to HRDD requirements across their global supply chains. This includes examining the effectiveness of due diligence measures, identifying potential human rights violations, and ensuring transparency and accountability in reporting practices[123]. This is a huge step forward, as before the creation of the CS3D, "brands although morally obliged to enforce socially and environmentally sound practices, had a greater flexibility to decide whether and how to report actual improvement procedures, as well as their outcome"[124].

9.2 Auditing Requirements under the CS3D

The CS3D states that businesses should "carry out an in-depth assessment of their own operations, those of their subsidiaries and, where related to their chains of activities, those of their business partners"[125] to identify and assess actual and potential adverse impacts on human rights. Examples of such procedures are as follows:

1. **Risk-Based Approach:** The CS3D mandates that companies take a risk oriented method to auditing, giving importance to suppliers and business

[122] Claudia Muller-Hoff, 'Human rights fitness of the auditing and certification industry?' (EECHR, 2021).
[123] ibid
[124] Iva Jestratijeciv, James O. Uanhoro and Md Rafiqul Islam Rana, 'Transparency of sustainability disclosures among luxury and mass-market fashion brands: Longitudinal approach' 436 (2024) Journal of Cleaner Production 1.
[125] Ameena Y. Majid, Matthew Banham and Fiona Maguire, 'EU Corporate Sustainability Due Diligence Directive: Raising the Stakes on ESG Regulations' (*Seyfarth*, June 3rd 2024) https://www.seyfarth.com/print/v2/content/113418/eu-corporate-sustainability-due-diligence-directive-raises-the-stakes-on-esg-regulations.pdf? Accessed June 4th 2024.

partnerships according to the seriousness and probability of negative human rights effects. This strategy guarantees effective allocation of resources, concentrating on areas with high risks where infractions are more probable to happen[126].

2. **Transparency and Reporting:** Companies must ensure transparency in their auditing processes by publicly reporting the findings and actions taken in response to identified risks[127]. This level of transparency encourages responsibility and empowers stakeholders, such as customers and investors, to make well informed judgments regarding the organisation's approach to human rights[128].

9.3 Challenges in Auditing Foreign Suppliers

Auditing foreign suppliers for compliance with HRDD presents several significant challenges. These challenges stem from variations in legal frameworks, transparency issues, cultural differences, and logistical complexities. In this piece, the author will discuss these auditing challenges and provide suggestions for businesses to enhance their auditing practices under the CS3D.

The first major challenge is the disparity in legal and regulatory standards across different countries. Labour laws and their enforcement can vary widely, creating gaps in compliance and enforcement[129]. This disparity makes it difficult for MNCs to ensure their suppliers adhere to consistent standards. As Barrientos and Smith highlight,

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[126] European Commission, 'Corporate sustainability due diligence' (European Commission, 2024) https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en accessed 29th May 2024.
[127] Sidley, 'Unprecedented ESG Due Diligence Obligations – EU Adopts Corporate Sustainability Due Diligence Directive' (*Sidley,* 24th May 2024) <https://1npdf11.onenorth.com/pdfrenderer.svc/v1/abcpdf11/GetRenderedPdfByUrl/Unprecedented%20ESG%20Due%20Diligence%20Obligations.pdf/?url=https%3a%2f%2fwww.sidley.com%2fen%2finsights%2fnewsupdates%2f2024%2f05%2funprecedented-esg-due-diligence-obligations%3fpdf%3d1%26type%3dletter> accessed June 1st 2024.
[128] Ethical Trading Initiative, 'Towards greater transparency: the business case' (*ethicaltrade.org,* 2021) <https://www.ethicaltrade.org/sites/default/files/shared_resources/eti_transparency_business_case.pdf> accessed May 4th 2024.
[129] Haroon Bhorat, Ravi Kanbur and Benjamin Stanwix, 'Compliance with labour laws in developing countries' (*IZA,* 2019) < https://wol.iza.org/articles/compliance-with-minimum-wage-laws-in-developing-countries/long> accessed May 1st 2024.

ethical trade codes are effective only when supported by robust local legal frameworks, which is often not the case in many supplier countries[130].

Challenges also arise from transparency and access concerns as. Suppliers may withhold information about their operations out of a lack of familiarity with human rights norms or concerns about losing business[131]. This lack of openness can impede thorough auditing and monitoring efforts. For instance, Nike encountered difficulties with its suppliers in Southeast Asia, where factories were discovered to be violating labour standards[132]. Suppliers frequently shared inaccurate details or concealed violations during audits, prompting the need for stricter and more frequent inspections, including unannounced visits and external auditors[133].

Furthermore, auditing procedures are made more complex by cultural and linguistic variations[134]. Diverse perspectives and behaviours concerning labour rights can create confusion and breaches of rules. In China, for example, the understanding of labour unions and collective bargaining differs significantly from the European Union's approach, making it challenging to enforce HRDD practices that involve worker participation and advocacy for rights.[135]

Moreover, logistical complexities add another layer of difficulty. Supply chains are often vast and multi-tiered, making it challenging to trace and monitor all suppliers and sub-

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[130] Stephanie Barrientos and Sally Smith, 'Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems' 28 (2007) Third World Quarterly 713.

[131] Brian Stauffer, 'Obsessed with Audit Tools, Missing the Goal' (*Human Rights Watch*, 15th November 2022) < https://www.hrw.org/report/2022/11/15/obsessed-audit-tools-missing-goal/why-social-audits-cant-fix-labor-rights-abuses> accessed 21st May 2024.

[132] Christopher L. Avery, 'Business and Human Rights in a Time of Change' (Amnesty International, February 2000) ch 5.

[133] Richard Locke, Matthew Amengual and Ashkay Mangla, 'Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labour Conditions in Global Supply Chains' 37 (2009) Politics & Society 319.

[134] Eloise Savill, 'The inadequacies of social auditing: why we need worker-led solutions' (Antislavery, February 16th 2022) < https://www.antislavery.org/latest/social-auditing-inadequate-why-we-need-worker-led-solutions/> accessed May 26th 2024.

[135] Transparentem, 'Hidden Harm: Audit deception in apparel supply chains and the urgent case for reform' (*Transparentem.org,* October 2021) < https://transparentem.org/wp-content/uploads/2021/09/Hidden-Harm-Audit-Deception-in-Apparel-Supply-Chains-and-the-Urgent-Case-for-Reform.pdf > accessed April 21st 2024.

suppliers[136]. Volkswagen's extensive supply chain, which spans multiple countries, illustrates this challenge. The company's expansive network necessitates that audits are not only comprehensive but also frequent enough to detect and address issues promptly[137].

9.4 Best Practices and Recommendations for Ensuring Compliance with Human Rights Due Diligence Requirements.

Ensuring compliance with HRDD requirements under the CS3D necessitates the adoption of several best practices. MNCs can enhance their auditing processes and overall compliance by implementing these strategies, which address the challenges previously discussed.

9.4.1 Risk-Based Auditing

Risk focused auditing is a crucial strategy that centres on conducting audits in accordance with the risk levels of suppliers. This technique guarantees that resources are directed to areas where they are most essential, concentrating on regions and suppliers with high risks[138]. Identifying and prioritising suppliers with greater risks enables companies to better concentrate their due diligence endeavours and reduce the likelihood of human rights infringements[139].

9.4.2 Utilising Independent Third-Party Auditors

Having impartial third party auditors involved can offer unbiased evaluations and boost the credibility of the audit procedure[140]. External auditors bring fresh insights that internal auditors may miss. Their external position guarantees thorough and fair audits

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[136] Mohammed Najjar and Mahmoud M. Yasin, 'The management of global multi-tier sustainable supply chains: a complexity theory perspective' (2021) International Journal of Production Research 18.
[137] Volkswagen, 'Supply Chain and Human Rights' (2022) < file:////Downloads/Chapter_SupplyChain_engl.pdf> accessed June 1st 2024.
[138] BSI, 'Risk-based supply chain auditing' (*bsi,* 2020) < https://www.bsigroup.com/globalassets/localfiles/es-mx/supply-chain-solutions/bsi-whitepaper-risk-based-supply-chain-auditing.pdf> accessed 21st May 2024.
[139] Jenny Vaughan, 'Human Rights Assessments: Identifying Risks, Informing Strategy' (*BSR,* December 9th 2021) < https://www.bsr.org/en/reports/human-rights-assessments-identifying-risks-informing-strategy > accessed May 4th 2024.
[140] Huang JinLing and Ooi Kok Loang, 'Impact of external auditors on corporate governance of the manufacturing industry in China' 8 (2023) International Journal of Accounting, Finance and Business 75.

free from any company influence[141]. By utilising external auditors, MNCs can ensure that there are no human rights violations within their supply chains and therefore are in compliance with the CS3D.

9.4.3 Engaging with Local Stakeholders

Involving local stakeholders, such as non-governmental organisations and labour unions can offer valuable perspectives on local circumstances and possible challenges that may not be uncovered solely through official inspections. Local stakeholders possess a profound grasp of the ground realities and can draw attention to concerns that might go unnoticed otherwise[142]. Their participation can enhance the precision and thoroughness of audits.

9.4.4 Continuous Improvement Approach

Adopting a continuous improvement approach to auditing involves using feedback from audits to fine tune and elevate HRDD procedures. This continual improvement guarantees that auditing methods stay pertinent and impactful over time[143]. Insights gained from audits may pinpoint persistent challenges that require attention through enhanced training initiatives or modifications in organisational regulations. This method not only enhances adherence but also nurtures a culture of perpetual learning and improvement within the organisation.

9.4.5 Transparency and Accountability

Increasing transparency by publicly reporting audit findings and corrective actions builds trust with stakeholders and holds companies accountable for their HRDD efforts[144] . This transparency can lead to increased pressure on companies to improve their practices and can also enhance their reputation as socially responsible entities[145]. For instance, companies like H&M and Nike have introduced detailed reporting

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[141] ibid
[142] CSR Europe, 'Engaging with NGOs: challenging but rewarding?' (7th July 2004) <file:///Downloads/study_on_partnership_ngo_enterprises.pdf> accessed 21st May 2024.
[143] Niklas Egels-Zanden and Henrik Lindholm, 'Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation' 107 (2014) Journal of Cleaner Production 2.
[144] Craig E Carroll and Sabine Einwiller, 'Disclosure alignment and transparency signalling in CSR reporting' [2014] SSRN Electronic Journal 1.
[145] Elisa Baraibar-Diez and Ladislao Luna, 'The mediating effect of transparency in the relationship between corporate social responsibility and corporate reputation' 20 (2018) Review of Business Management 5-21.

methods that outline their auditing procedures, results and follow up steps[146]. This approach has helped them earn trust from stakeholders and enhance their reputation as ethical organisations[147].

9.5 Case Study of Nike in Analysing of Auditing Practices in MNCs

Nike Inc. has historically faced significant scrutiny over labour practices within its supply chain, particularly concerning sweatshops and poor working conditions. In response to these criticisms, Nike has taken substantial steps to enhance its auditing and compliance programs[148].

Nike's approach includes comprehensive auditing programs that involve both internal and independent external auditors. The company conducts regular audits of its suppliers to ensure adherence to labour standards and human rights policies. These audits are unannounced and include a thorough examination of working conditions, wage practices, and worker treatment[149].

In addition, Nike works together with local non-governmental organisations (NGOs) and labour groups to tackle issues identified during inspections[150]. This partnership allows Nike to gain various viewpoints and effectively address challenges. For instance, following intense criticism in the 1990s, Nike joined forces with the Fair Labour Association (FLA) to enhance labour conditions throughout its supply chain[151]. This joint effort has resulted in improved transparency and accountability, promoting enhanced working conditions and adherence to human rights standards.

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[146] Anna Larsson, 'Assessment methods for corporate responsibility on the fashion scene' (June 2011) https://www.diva-portal.org/smash/get/diva2:1552090/FULLTEXT01.pdf accessed May 21st 2024.
[147] Richard M. Locke, Ben A. Rissing and Timea Pal, 'Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains' 51 (2013) British Journal of Industrial Relations 519.
[148] Albise Fiorellini Bernardis, 'The Labour issues and workers' rights in the global supply chain – how to manage the work environment: the Nike Case' (Masters thesis, Universita Ca'Foscari Venezia 2019).
[149] ibid
[150]Nike, '*Corporate Sustainability Report'* (Nike, 2005).
[151] Richard M. Locke, Ben A. Rissing and Timea Pal, 'Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains' 51 (2013) British Journal of Industrial Relations 519.

Furthermore, Nike has established the "Nike Code of Conduct," outlining expectations for suppliers concerning labour practices, environmental initiatives and workplace safety. This code undergoes regular revisions to align with evolving standards and best practices, guaranteeing that suppliers maintain high standards consistently[152].

9.6 Conclusion.

In summary, verifying if foreign suppliers adhere to human rights standards as outlined in the CS3D entails a detailed and systematic procedure. The emphasis on comprehensive audits by the CS3D acts as an incentive for MNCs to address HRDD across their international supply networks.

The challenges associated with auditing foreign suppliers, such as disparities in legal standards, transparency issues, cultural differences, and logistical complexities, underscore the need for MNCs to adopt best practices tailored to these challenges. Employing risk-based auditing, leveraging independent third-party auditors, engaging with local stakeholders, investing in supplier training, and adopting a continuous improvement approach are critical strategies that can enhance the effectiveness of HRDD. By incorporating these effective practices and complying with the CS3D, MNCs can make substantial contributions towards promoting human rights and ethical business standards globally.

10. HRDD Laws in France and Germany

Conducting an analysis of regulatory approaches of different countries in enforcing human rights due diligence is beneficial for the understanding of the practical implementation of HRDD. Germany and France have established national laws on the mandatory implementation of HRDD and the author will focus on these two countries for the purpose of this thesis.

[152] Albise Fiorellini Bernardis, ‘The Labour issues and workers’ rights in the global supply chain – how to manage the work environment: the Nike Case’ (Masters thesis, Universita Ca’Foscari Venezia 2019).

10.1 The Act on Corporate Due Diligence Obligations in Supply Chains

The 'Act on Corporate Due Diligence Obligations in Supply Chains' ('The Act') adopted by the Bundestag in 2021, and effective from January 2023, represents a landmark legal framework aimed at reinforcing human rights within global supply chains[153]. This comprehensive legislation imposes rigorous obligations on companies, significantly affecting the responsibilities of corporate supervisory boards, auditors, and directors.

The recent legislation has introduced new legal responsibilities for companies, requiring them to ensure HRDD not only within their own operations but also across their supply chains[154]. Companies must "make reasonable efforts, at their own discretion, to ensure that there are no violations of human rights and environmental obligations specified in the law in their own business operations and in the supply chain"[155].

The Act mandates rigorous auditing practices to monitor compliance with HRDD obligations. Companies are expected to establish risk management systems, conduct regular risk assessments, and fulfil various documentation and reporting requirements[156]. These audits have the goal of detecting and addressing potential human rights violations within the supply chain. Directors are also given responsibility under Section 5, stating that 'results of the risk analysis are communicated with the relevant decision-makers, such as the board of directors'[157]. Given that German companies typically hold the board of directors accountable for the overall efficiency of operations, it is likely that directors also need to ensure alignment with due diligence standards as part of their corporate governance responsibilities.

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[153] Business and Human Rights, 'Supply chain Act' (*CSR-in-deutschland,* March 2023) https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html accessed April 21st 2024.

[154] Federal Ministry for Economic Cooperation and Development, 'The German Act on Corporate Due Diligence Obligations in Supply Chains' (January 2023) < https://www.bmz.de/resource/blob/154774/lieferkettengesetz-faktenpapier-partnerlaender-eng-bf.pdf > accessed 1st June 2024.

[155] Wynee Lawrence, Henning Schaloske and Nigel Brook, 'Recent developments in human rights and environmental due diligence regimes and extraterritorial biodiversity cases' (*Clyde & Co*, August 14th 2023) < https://www.clydeco.com/en/insights/2023/07/recent-developments-in-human-rights-and-environmen#:~:text=Germany's%20Supply%20Chain%20Due%20Diligence,their%20own%20business%20operations%20and >

[156] Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz- LkSG) [2021].

[157] ibid

Initially, the Act targeted companies with a workforce of over 3,000 in Germany[158]. However, starting in 2024, this requirement will include companies with a minimum of 1,000 employees, expanding the scope to encompass a broader range of businesses[159]. This expansion means more companies will need to develop and maintain comprehensive HRDD practices, overseen by their supervisory boards and directors.

Furthermore, under Section 4, the Act necessitates that companies establish and maintain risk management systems 'to comply with due diligence obligations' and delegate this responsibility to monitor such risk management[160]. Supervisory boards in German companies are typically accountable for overseeing the management board and ensuring adherence to corporate governance standards, which includes compliance with HRDD requirements. Supervisory boards typically ensure that robust risk management systems are established and maintained, regular risk assessments are conducted, and detailed reporting is carried out[161]. Therefore, it is reasonable to presume that supervisory boards hold responsibility within German companies to ensure compliance.

The Act on Corporate Due Diligence Obligations in Supply Chains marks a significant advancement in human rights due diligence. By enforcing a compulsory law on companies that outlines their responsibilities for conducting due diligence and threatening fines for non-compliance, it creates an effective approach as companies will feel more obligated to adhere to the regulations. While the Act is still in its early stages, over time, implementing HRDD will become standard practice for companies. Supervisory boards and directors must play active roles in this process to ensure compliance and uphold corporate governance standards

[158] Hannes Lubitzsch and Alexander Cappel, 'The German Supply Chain Act, Overview and the practical challenges for companies' (*Norton Rose Fulbright*, March 2024) <https://www.nortonrosefulbright.com/en/knowledge/publications/ff7c1d04/the-german-supply-chain-act> accessed May 24th 2024

[159] ibid

[160] Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz- LkSG) [2021].

[161] Patrick Downes, 'The Responsibilities of the Board' (*Lionheart,* October 3rd 2023) <https://www.linkedin.com/pulse/responsibilities-board-patrick-downes/> accessed 23rd May 2024.

10.2 The French Duty of Vigilance Law

The French Law on the Duty of Vigilance, which was put into effect in 2017, serves as a significant legal framework aimed at upholding human rights standards across the operations of French corporations and their global supply chains[162]. The law applies to companies established in France which at the end of two consecutive financial years employs at least 5,000 employees or have at least 10,000 employees working for the company and its direct/indirect French or foreign subsidiaries.[163]. The primary goal of this Act is to ensure that companies establish and execute comprehensive vigilance plans in line with the UNPGs[164]. These plans must encompass measures to identify, prevent and address any negative impacts on human rights arising from both the company's activities and those of its subsidiaries, subcontractors, as well as suppliers with established business relationships[165].

The auditing standards prescribed under the Duty of Vigilance law are rigorous. Companies are obligated to conduct risk mapping of their subsidiaries, subcontractors and suppliers[166]. This process entails periodic evaluations along with implementing targeted measures to mitigate identified risks and prevent significant repercussions[167]. Moreover, it is crucial for businesses to set up a system to alert them about possible risks and consistently assess the effectiveness of their watchful measures[168]. The

[162] Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' 22 (2020) Human Rights Review 109-127.
[163] Sophie Scemla, 'The French Duty of Vigilance Law: a new litigation risk for European companies' (*International Bar Association*, 1st December 2023) < https://www.ibanet.org/The-French-Duty-of-Vigilance-Law-a-New-Litigation-Risk > accessed 11th May 2024.
[164] European Coalition for Corporate Justice, 'French Corporate Duty of Vigilance Law: Frequently Asked Questions' (*corporatejustice,* 23rd February 2022) < https://media.business-humanrights.org/media/documents/files/documents/French_Corporate_Duty_of_Vigilance_Law_FAQ.pdf > accessed 11th May 2024.
[165] Elsa Savourey and Stephane Brabant, 'The French law of the duty of vigilance: theoretical and practical challenges since its adoption' 6 (2021) Business and Human Rights Journal 141-152.
[166] French Corporate Duty of Vigilance Law [2019].
[167] ibid
[168] Elsa Savourey and Stephane Brabant, 'The French law of the duty of vigilance: theoretical and practical challenges since its adoption' 6 (2021) Business and Human Rights Journal 141-152.

focus on thorough documentation and reporting guarantees transparency and responsibility across the supply chain[169].

The implementation of the Duty of Vigilance legislation has faced its share of obstacles. Determining which companies fall under its jurisdiction has proven challenging, with some companies either lacking awareness or intentionally avoiding compliance.[170] Additionally, there has been a significant variation in the level of detail required in vigilance plans and how effectively they are put into practice among different companies.[171] Many organisations have treated compliance as a mere checkbox task rather than a sincere dedication to human rights, proving to be "ineffective in terms of risk management"[172]. Furthermore, the law states that the vigilance plan must be 'created alongside company's stakeholders'[173], leaving a broad interpretation of who exactly is responsible. Stakeholders range from "employees and management, but also consumers, NGOs, international organisations and trade unions"[174]. If the law gave the responsibility specifically to directors of the company or supervisory boards, the law could potentially be more effective as there would be no room for uncertainty.

In short, the Duty of Vigilance law marks a significant progress in holding businesses accountable for their effects on human rights and the environment. The focus on comprehensive audits and continuous monitoring ensures that companies are accountable for their actions and those of their suppliers, fostering higher standards of corporate governance and transparency. Nonetheless, there are still areas in the legislation that could be improved, which could potentially be addressed by the CS3D.

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[169] Tiphaine Beau de Lomenie, 'Vigilance Plans Reference Guidance' (*Sherpa,* February 2019) < https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf> accessed May 24th 2024.
[170] Elsa Savourey and Stephane Brabant, 'The French law of the duty of vigilance: theoretical and practical challenges since its adoption' 6 (2021) Business and Human Rights Journal 141-152.
[171] ibid
[172] Juliette Camy, 'The French law on the duty of vigilance: the challenges of the preventive approach' *(Cambridgecore,* June 29th 2023) < https://www.cambridge.org/core/blog/2023/06/29/the-french-law-on-the-duty-of-vigilance-the-challenges-of-the-preventive-approach/ > accessed May 24th 2024.
[173] Sophie Scemla, 'The French Duty of Vigilance Law: a new litigation risk for European companies' (*International Bar Association*, 1st December 2023) < https://www.ibanet.org/The-French-Duty-of-Vigilance-Law-a-New-Litigation-Risk > accessed 11th May 2024.
[174] ibid

10.3 The impact of the CS3D on National Laws.

The enforcement of the CS3D will impact the current HRDD laws of EU member states. Within this section, the author will outline how the mandatory implementation of the CS3D will lead to modifications of HRDD laws in Germany and France.

10.3.1 Impact on France.

Firstly, the CS3D will enhance the French Vigilance Law by introducing more detail regarding due diligence requirements and the implementation of such. As mentioned previously, the French Vigilance Law has been criticised for being too vague and lacking guidance. The CS3D will hopefully amend these issues and result in more effective implementation of HRDD throughout French companies.

Another significant impact will be the reduction of thresholds for applicability. While the French law pertains to companies with over 5,000 employees in France or 10,000 globally[175], the CS3D would broaden these requirements to encompass companies with only 1000 employees, including smaller businesses that were previously excluded from the national law's scope. This adjustment ensures that more companies are involved in conducting due diligence processes, thus broadening the scope of safeguarding human rights.

Lastly, the CS3D introduces stricter enforcement mechanisms and penalties. While the Duty of Vigilance Law includes measures for legal enforcement, the CS3D suggests establishing a European network of supervisory authorities to ensure uniform application and adherence across member states[176]. This system could help coordinate efforts and establish a stronger enforcement system, which could result in increased adherence rates and better safeguarding of human rights.

In summary, the CS3D strives to improve due diligence practices in French companies by addressing the ambiguity and lack of direction in the French Vigilance Law. Extending the reach to include smaller businesses widens the spectrum of companies

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[175] Sherpa, 'The law on the duty of vigilance' (*Duty of vigilance radar*, 2020) < https://vigilance-plan.org/the-law/ > accessed 21st May 2024.
[176] ibid

obligated to uphold human rights standards, promoting a more thorough approach to due diligence. Moreover, implementing stricter enforcement measures and forming a network of supervisory bodies at the European level aims to establish a consistent and strong enforcement environment, ultimately boosting compliance rates and enhancing human rights protection within member states.

10.3.2 Impact on Germany.

The introduction of CS3D is expected to improve and broaden the requirements of the German Supply Chain Due Diligence Act (LsKG). A key outcome is the alignment of due diligence standards across the EU, easing the regulatory obligations on multinational companies operating in various member states. This standardisation guarantees that German firms adhere to similar rules as their counterparts in other EU nations, fostering fair competition and consistent protection of human rights[177].

The CS3D has a wider scope compared to the LkSG in German HRDD law. While both the CS3D and the LkSG currently apply to companies with over 1,000 employees, the CS3D introduces an extraterritorial element. In essence, this means that the CS3D will impact companies outside the EU that generate over 450 million euro of revenue within the EU[178]. This broadened scope means that more companies will be required to meet due diligence responsibilities, potentially including numerous German companies not previously subject to the LkSG[179].

Another key difference between the LkSG and the CS3D is the scope of coverage across the value chain. The LkSG focuses mainly on direct suppliers and incorporates indirect suppliers only when there is solid evidence of violations[180]. In contrast, the CS3D requires due diligence responsibilities to cover the entire value chain or 'chain of activities.' This encompasses both upstream and downstream business partners

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[177] Francois-Charles Laprevote and others, 'The Corporate Sustainability Due Diligence Directive' (*Cleary Gottlieb*, 24th March 2022) < https://www.clearygottlieb.com/-/media/files/alert-memos-2022/the-eus-new-corporate-sustainability-due-diligence-directive.pdf > accessed April 20th 2024.
[178] Nadine Robinson and Oliver Bolthausen, 'CS3D vs the LkSg – key differences between the EU CS3D and German LKsG' (*DWF*, 15th March 2024) < https://dwfgroup.com/en/news-and-insights/insights/2024/3/cs3d-vs-the-lksg > accessed April 20th 2024.
[179] ibid
[180] ibid

involved in producing, transporting, storing and disposing of products[181]. By including indirect suppliers more extensively, the CS3D calls for a more detailed evaluation and handling of risks throughout the supply chain.

The last key differentiator between the LkSG and CS3D is the introduction of civil liability under the latter. The CS3D explicitly provides for civil liability for breaches of due diligence obligations, extending this liability to include not only the company's own actions but also those of subsidiaries and business partners[182]. This heightened accountability framework compels companies to ensure rigorous compliance mechanisms and thorough monitoring of their entire supply chain.

In conclusion, the CS3D will introduce more rigorous and comprehensive rules in contrast to the LkSG, affecting businesses within Germany regardless of their EU status. The wider coverage, increased diligence requirements and inclusion of civil responsibility will prompt German companies to strengthen their compliance and risk management frameworks significantly. This change is intended to promote accountable and sustainable business conduct by aligning German HRDD procedures with the elevated criteria established by the CS3D.

11. The KIK Case.

11.1 Detailed Overview of the KiK Case

In September 2012, a tragic fire broke out at the Ali Enterprises factory in Karachi, Pakistan, claiming the lives of 260 workers and causing severe injuries to 32 others[183]. This factory was responsible for manufacturing clothing for various global clients, with the German retailer KiK being the main recipient of around 70% of its products[184]. The incident shed light on serious safety deficiencies, such as insufficient fire exits and locked doors that trapped numerous employees inside. Investigations uncovered that the factory lacked essential safety precautions, leading to a high number of

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181 ibid
182 ibid
183 ECCHR, 'Pakistan – cheap clothes, perilous conditions' (August 2019) < https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_August2019.pdf > accessed 17th May 2024.
184 ibid

casualties[185]. It was argued that KiK, given its significant business ties with Ali Enterprises, held a responsibility to ensure adherence to safety regulations but failed to fulfil this duty[186]

11.2 Analysis of the Human Rights Violations Involved

The human rights violations in the KiK case were severe and multifaceted. Workers at Ali Enterprises endured unacceptable working conditions, such as inadequate fire safety precautions, a lack of proper exits and insufficient emergency response procedures. The factory's doors were locked, preventing workers from escaping the fire, leading to a high number of casualties. These circumstances highlight a broader issue of neglect and exploitation within global supply chains, where safety and human rights are often sacrificed for cost cutting measures. KiK's failure to ensure compliance with safety standards in its supply chain represents corporate negligence in safeguarding worker rights, revealing the vulnerabilities faced by workers in developing nations manufacturing clothes for European companies[187].

11.3 Hypothetical Analysis of How the CS3D Would Have Influenced the Case Outcomes.

If the CS3D had been enforced during the KiK case, things could have turned out quite differently. The CS3D calls for thorough assessments of human rights and environmental impacts, requiring companies to regularly evaluate risks, take preventive actions and set up channels for addressing complaints. If the CS3D had been in effect, KiK would have had to identify and address risks in its supply chain, including those concerning worker safety at Ali Enterprises.

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[185] ibid

[186] Miriam Saage-Mass, 'Legal interventions and transnational alliances in the Ali Enterprises case – Struggles for workers' rights in global supply chains' (*UCLA,* 2020) < https://promiseinstitute.law.ucla.edu/wp-content/uploads/2022/08/Legal-interventions-and-transnational-alliances-in-the-Ali-Enterprises-case-%E2%80%93-Struggles-for-workers-rights-in-global-supply-chains.pdf > accessed May 18th 2024.

[187] ECCHR, 'Pakistan – cheap clothes, perilous conditions' (August 2019) < https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_KiK_Pakistan_August2019.pdf > accessed 17th May 2024.

Supervisory boards under the CS3D would have played a crucial role in overseeing the implementation of due diligence procedures and ensuring compliance with safety regulations. The directive would have made it mandatory for KiK's supervisory board to periodically assess and validate the company's monitoring plans and audit findings to ensure prompt handling of any identified risks. This supervision could have led to stricter adherence to safety protocols and proactive risk management practices.

The rigorous auditing standards set by the CS3D would have called for frequent and thorough inspections of the factory's safety conditions. Independent third party auditors required by the CS3D might have uncovered the serious safety breaches at Ali Enterprises. This external oversight could have ensured more accurate assessments and unbiased evaluations, potentially leading to early identification and correction of safety hazards.

Moreover, by placing a strong emphasis on transparency and accountability, the directive would have made sure that any risks identified were effectively communicated and addressed. The CS3D mandates companies to publicly disclose their diligence efforts, enhancing transparency and allowing stakeholders to oversee compliance. This increased transparency could have pushed KiK to uphold higher safety standards, giving workers channels to voice concerns and seek resolution.

Furthermore, the implementation of grievance mechanisms as per the CS3D could have empowered affected employees and their families to pursue justice more efficiently. This measure might have facilitated legal recourse and compensation for those impacted by the Ali Enterprises fire, holding KiK responsible for safety oversights in its supply chain. The potential legal and financial consequences under the CS3D would have incentivised KiK to enforce strict safety protocols and prevent similar tragedies.

11.4 Conclusion

The CS3D would have provided a robust framework to prevent the human rights violations observed in the KiK case by mandating proactive and preventive measures, stringent auditing, and supervisory board oversight. The directive aims to hold companies accountable for their supply chains, thereby fostering a more ethical and sustainable business environment. By embedding due diligence obligations into corporate governance structures and ensuring regular, transparent audits, the CS3D could significantly enhance the protection of worker rights and safety in global supply chains.

12. Findings.

This thesis aimed to explore the implications and impacts of the CS3D on directors' duties, auditing practices, and supervisory boards in multinational corporations. Through an extensive review of academic literature, case studies, and legislative texts, several key findings have been identified.

Firstly, the CS3D signifies a substantial regulatory change in the European Union by making human HRDD mandatory for multinational corporations instead of voluntary. This directive seeks to harmonise legal standards across EU countries to improve corporate responsibility and promote transparency in global supply chains.
The introduction of the CS3D is expected to address the inadequacies of previous frameworks, such as the UN Guiding Principles on Business and Human Rights, by providing enforceable requirements.

The study revealed that although the initial proposal for the CS3D included explicit responsibilities for directors in integrating HRDD into their decision-making processes, these provisions were removed during legislative negotiations. This omission has implications for the effectiveness of the directive as it may weaken accountability mechanisms at top levels of corporate governance. Directors remain critical in shaping company policies and ensuring compliance with regulatory requirements, yet the lack of clear legal mandates within the CS3D could compromise the directive's overall impact on corporate governance and sustainability practices.

Furthermore, the thesis highlights the crucial role of supervisory boards in ensuring compliance with the CS3D. Supervisory boards, particularly in countries like Germany with a two-tier board system, are integral to monitoring management and safeguarding stakeholder interests. Under the CS3D, supervisory boards are expected to oversee the implementation of HRDD processes, ensuring that companies identify, prevent, and mitigate adverse human rights impacts within their operations and supply chains. The author also outlined the potential importance and positive impacts of incorporating a sustainability board into the supervisory board. This responsibility underscores the importance of robust governance structures in achieving the objectives of the directive, as was highlighted by delving into the ‘Kik’ case.

In the context of auditing practices, the CS3D introduces new challenges and best practices for auditing overseas suppliers to ensure compliance with HRDD requirements. The directive requires thorough audits of supply chains, prompting companies to establish effective methods for evaluating and addressing human rights risks. The thesis outlines best practices like transparency in supply chains, engaging third-party auditors, and fostering collaboration with suppliers to enhance compliance efforts. Auditing practices are essential for the protection of human rights within supply chains, as seen in the ‘Kik case’.

Lastly, the CS3D's impact on existing HRDD laws in France and Germany is significant. Both countries have established national HRDD laws—the French Duty of Vigilance Law and the German Supply Chain Due Diligence Act. The CS3D is set to align these national frameworks, creating a unified approach to HRDD throughout the EU. This alignment is expected to increase legal clarity for businesses operating across various regions and encourage a more uniform enforcement of human rights standards.

13. Conclusion

In conclusion, the CS3D represents a significant step forward in corporate accountability, establishing a model for integrating human rights considerations into business practices and governance. While there are challenges ahead, especially regarding the absence of explicit directors responsibilities, the directive establishes a strong groundwork for promoting sustainable and ethical behaviours in global corporations. Continuous assessment and adjustment will be crucial as the CS3D is put into action to tackle emerging obstacles and ensure the directive's goals are met.

This thesis contributes to the understanding of the CS3D's implications and provides a foundation for further research on corporate governance, human rights, and sustainability in the context of multinational corporations.

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Abstract (Deutsch).

Diese Arbeit untersucht die Auswirkungen der Corporate Sustainability Due Diligence Directive (CS3D) auf die Verbesserung der menschenrechtlichen Sorgfaltspflicht (HRDD) in multinationalen Unternehmen (MNCs). Diese Studie konzentriert sich auf die Pflichten von Direktoren, Prüfungspraktiken und die Rollen von Aufsichtsräten und soll klären, wie das CS3D die Komplexität globaler Lieferketten bewältigen kann. Die Forschung beginnt mit einer umfassenden Einführung in die Bedeutung von Menschenrechtsfragen in multinationalen Unternehmen und einem Überblick über den historischen Kontext von Wirtschaft und Menschenrechten. Anschließend geht es auf das Konzept der Due Diligence ein und untersucht die Leitprinzipien der Vereinten Nationen für Wirtschaft und Menschenrechte, um die Grundlage für eine detaillierte Analyse des CS3D zu schaffen.

Die wichtigsten Bestimmungen, Durchsetzungsmechanismen und die erwarteten Vorteile des CS3D werden untersucht, gefolgt von einer kritischen Analyse der Pflichten der Direktoren in Bezug auf die Richtlinie. Die Studie unterstreicht die Notwendigkeit, die Pflichten von Direktoren in die Unternehmensführung zu integrieren, um die Rechenschaftspflicht zu verbessern, Anreize an nachhaltigen Zielen auszurichten und Gesetzeslücken zu verhindern. Die Arbeit untersucht außerdem die spezifischen Verantwortlichkeiten von Aufsichtsräten im Rahmen des CS3D und hebt ihre Rolle bei der Integration von Richtlinien, der Überwachung, Transparenz, der Einbindung von Interessengruppen und der Sanierung hervor.

Die Prüfungspraktiken für HRDD werden unter die Lupe genommen, wobei besonderes Augenmerk auf die Herausforderungen bei der Prüfung ausländischer Lieferanten und die Best Practices für Compliance gelegt wird. Die Analyse umfasst eine Fallstudie von Nike, um die praktische Anwendung der Wirtschaftsprüfung in multinationalen Unternehmen zu veranschaulichen. Die Arbeit vergleicht auch die HRDD-Gesetze in Frankreich und Deutschland und untersucht, wie sich CS3D auf die nationale Gesetzgebung auswirken wird, insbesondere auf das deutsche LkSG und das französische Wachsamkeitspflichtgesetz.

Eine detaillierte Fallstudie des KiK-Falls bietet eine hypothetische Analyse, wie CS3D die Ergebnisse beeinflusst haben könnte, und bietet Einblicke in die potenzielle Wirksamkeit der Richtlinie. Die Ergebnisse deuten darauf hin, dass das umfassende Rahmenwerk des CS3D die HRDD in globalen Lieferketten erheblich stärken wird, was robuste Risikomanagement- und Prüfungspraktiken erfordert. Die Schlussfolgerung unterstreicht die Bedeutung des CS3D für die Förderung eines nachhaltigen und verantwortungsvollen Unternehmensverhaltens und unterstreicht seine umfassenderen Auswirkungen auf die Unternehmensführung und globale Menschenrechtsstandards.

Diese Studie trägt zum akademischen Diskurs über Wirtschaftsethik, Unternehmensführung und internationales Recht bei und bietet praktische Empfehlungen für politische Entscheidungsträger und Unternehmensführer, die darauf abzielen, die Personalentwicklung in multinationalen Unternehmen zu verbessern.

Abstract (English).

This thesis investigates the impact of the Corporate Sustainability Due Diligence Directive (CS3D) on enhancing human rights due diligence (HRDD) within multinational corporations (MNCs). By focusing on directors' duties, auditing practices, and the roles of supervisory boards, this study aims to elucidate how the CS3D can address the complexities of global supply chains. The research begins with a comprehensive introduction to the significance of human rights issues in MNCs and an overview of the historical context of business and human rights. It then delves into the concept of due diligence and explores the United Nations Guiding Principles on Business and Human Rights, setting the stage for a detailed analysis of the CS3D.

Key provisions, enforcement mechanisms, and the expected benefits of the CS3D are examined, followed by a critical analysis of directors' duties in relation to the directive. The study underscores the necessity of integrating directors' duties into corporate governance to enhance accountability, align incentives with sustainable goals, and prevent legal loopholes. The thesis further explores the specific responsibilities of

supervisory boards under the CS3D, highlighting their roles in policy integration, monitoring, transparency, stakeholder engagement, and remediation.

Auditing practices for HRDD are scrutinised, with particular attention to the challenges of auditing foreign suppliers and the best practices for compliance. The analysis includes a case study of Nike to illustrate the practical application of auditing in MNCs. The thesis also compares HRDD laws in France and Germany, examining how the CS3D will impact national legislation, particularly the German LkSG and the French Duty of Vigilance Law.

A detailed case study of the KiK case provides a hypothetical analysis of how the CS3D could have influenced the outcomes, offering insights into the directive's potential efficacy. The findings indicate that the CS3D's comprehensive framework will significantly strengthen HRDD in global supply chains, necessitating robust risk management and auditing practices. The conclusion reinforces the importance of the CS3D in promoting sustainable and responsible corporate behaviour, highlighting its broader implications for corporate governance and global human rights standards.

This study contributes to the academic discourse on business ethics, corporate governance, and international law, offering practical recommendations for policymakers and corporate leaders aiming to enhance HRDD in MNCs.