



The concept of a “safe harbour” and mandatory human rights due diligence

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1. Introduction

Recent developments across Europe on national as well as European level propose the introduction of corporate liability for mandatory human rights and environmental due diligence (“mHREDD”) regulations. As part of these discussions, the concept of a “safe harbour” against liability has surfaced in various contexts. Examples include:

- During 2019, the idea of a “safe harbour” was mentioned by stakeholders in the context of European legislation, including during interviews as part of the *Study on due diligence requirements through the supply chain* for the European Commission

on Due Diligence (“EC study”).¹ Subsequently, “safe harbour” continued to be mentioned in discussions around the EU legislative initiative on mandatory human rights and environmental due diligence (“mHREDD”).²

- In 2020, an unofficial publication in Germany of Draft Key Points of a Federal law on strengthening corporate due diligence to prevent human rights violations in global value chains (Due Diligence Act) (hereafter “German Draft Key Points”)³ included a reference to a “safe harbour” exemption, which would be linked to officially recognised multi-stakeholder industry standards, and exclude civil liability except in cases alleging intent or gross negligence.
- Also in 2020, the International Organisation of Employers mentioned the lack of a “safe harbour” clause in the Second Revised Draft Treaty in a position paper published on 7 October 2020.⁴

¹ Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed for the European Commission DG Justice and Consumers, *Study on due diligence requirements through the supply chain: Final Report*, 24 February 2020, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (EC study).

² European Working Group on Responsible Business Conduct, "European Commission promises Due Diligence Legislation in 2021" 30 April 2020, available at: <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>.

³ Draft key points of a Federal law on strengthening corporate due diligence to prevent human rights violations in global value chains (Due Diligence Act), July 2020, available at: <https://www.rph1.rw.fau.de/files/2020/06/key-points-german-due-diligence-law.pdf>.

⁴ International Organisation of Employers, "Position on the second revised binding treaty on business and human rights", 7 October 2020, at 4: "The draft treaty explicitly rejects any “safe harbour” for companies that conduct solid due diligence, that may still result in human rights incidents. The elimination of this safe harbour may fail to reward the good faith efforts of companies to conduct due diligence, and thus may eliminate one of the incentives for companies to conduct due diligence.", available at: https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2020-10-07_second_revised_treaty_on_business_and_human_rights_-_joint_paper.pdf.

- During the 2020 UN Forum on Business and Human Rights, the safe harbour concept was mentioned in a panel discussion on the topic of “[Mandatory Human Rights Due Diligence: building out the key components of effective legislation](#)”.⁵

There is accordingly a need to consider what is meant by a “safe harbour” in this context, and how this concept interacts with the concept of mHREDD.

2. The origins of the concept of “safe harbour”

In certain areas of law, the phrase “safe harbour” is used to describe specific conditions which, if met, protects an entity against liability. Two examples are illustrative for our purposes.

In California, the Supply Chain Transparency Act⁶ requires certain companies to disclose which efforts they are taking to eradicate slavery and human trafficking from their direct supply chain. The case of *Barber v Nestlé*⁷ heralded a line of claims based on consumer protection laws⁸ relating to disclosures made in terms of this Act. The cases alleged that the failure to disclose that certain products may have been sourced by forced labour had materially influenced and deceived the plaintiffs in their purchasing choices.

⁵ “Mandatory Human Rights Due Diligence: building out the key components of effective legislation” 2020 UN Forum on Business and Human Rights, 17 November 2020, available at: <http://webtv.un.org/search/mandatory-human-rights-due-diligence-forum-on-business-and-human-rights-2020/6210362214001/?term=&lan=english&cat=Meetings%2FEvents&page=2>.

⁶ California Supply Chain Transparency Act 2010 Cal. Civ.Code § 1714.43.

⁷ *Barber v Nestlé USA Inc* 154 F. Supp. 3d 954, 958 (C.D. Cal. 2015).

⁸ Including the California Business and Professions Code §§ 17200 et seq (the Unfair Competition Law or “UCL”), §§ 17500 et seq (the False Advertising Law or “FAL”) and the California Civil Code §§ 1750 et seq (the Consumers Legal Remedies Act or “CLRA”). See also Lise Smit, Gabrielle Holly, Robert McCorquodale and Stuart Neely “Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard” (2020) *International Journal of Human Rights*.

The Court in *Barber* found that adopting the Supply Chains Transparency Act, the California legislature had:⁹

[C]onsidered the situation of regulating disclosure by companies with possible forced labor in their supply lines and determined that only the limited disclosure mandated by § 1714.43 is required.

It found that the information which the plaintiffs required was additional to the information required by the Act. The Court found in favour of the company that, because the company had complied with the specific requirements of the Act, the plaintiffs' claim was barred by the "safe harbor doctrine". The Court also stated:¹⁰

Plaintiffs may wish—understandably—that the Legislature had required disclosures beyond the minimal ones required by § 1714.43. But that is precisely the sort of legislative second-guessing that the safe harbor doctrine guards against.

The Court in *Barber* referred to the California Supreme Court's finding in the *Cel-Tech Comms* case that "safe harbors exist both if the Legislature has 'permitted certain conduct' and if it has 'considered a situation and concluded that no action should lie.'"¹¹

This *Cel-Tech Comms* description of the two "types" of safe harbour is important for our purposes:

- In the first, the law expressly provides that certain conduct is permitted, or that certain conduct would exempt the actor from liability.

⁹ *Barber* above n 7 at 961.

¹⁰ *Ibid* at 962.

¹¹ *Ibid* at 961, referring to *Cel-Tech Comms., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 182, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999).

- In the second, the law does *not* require the specific conduct, despite requiring other detailed actions. It is assumed that the conduct which is not required was deliberately omitted, and a failure to undertake such conduct would therefore not result in legal liability.

In *Barber*, the Court found that the second scenario applied, insofar as the legislature considered which information should be disclosed, and by complying with these specific requirements of the Act, the company was protected by the “safe harbor”.

An example of the first type of safe harbour described in *Cel-Tech Comms*, namely where the law expressly permits certain conduct (or carves it out from attracting liability), occurred in a European context.

The European Court of Justice in *Schrems v Data Protection Commissioner*¹² found that the European Commission’s decision to create a “safe harbour” exemption was invalid, as it did not adequately protect the fundamental rights and freedoms, particularly the right to privacy, set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Commission’s decision, which was set aside, provided that companies which self-certified as adhering to US Department of Commerce “Safe Harbour Privacy Principles” of 21 July 2000 (and the FAQs relating to their implementation) would be deemed to meet the conditions required for the transfer of personal data from the EU to the US. A company

¹² Case No. C-362/14 *Schrems v Data Protection Commissioner* Judgment of the Court (Grand Chamber) (E.C.J. 6 Oct 2015).

receiving such personal data was considered to have self-certified if it had “unambiguously and publicly disclosed its commitment to comply with the Principles implemented in accordance with the FAQs”.¹³ The judgment, which predated the General Data Protection Regulation (GDPR),¹⁴ is interesting for our purposes insofar as it is an example of an express “safe harbour” provision which was declared invalid for failing to adequately protect human rights. In particular, it has some similarities with the safe harbour clause considered for introduction in the German Draft Key Points, in that it relied on adherence to an industry standard (which in the *Schrems* context was set by the US Department of Commerce), and on the companies’ “commitment to comply” with this standard.

Moreover, the Court held that “legislation not providing for any possibility for an individual to pursue legal remedies” in this context “does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.”¹⁵ It elaborated as follows:¹⁶

The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.

It is possible that a “safe harbour” provision which precludes or limits rights-holders from bringing civil claims against a company may similarly be understood to interfere with the right to an effective remedy.

¹³ Article 2(a) of Decision 2000/520.

¹⁴ General Data Protection Regulation (EU) 2016/679 (GDPR).

¹⁵ *Ibid* n 12 at para 95.

¹⁶ *Ibid*.

3. The origins of the concept of “safe harbour”

3.1. “Safe harbour” as a “safe space”

The concept of human rights due diligence (“HRDD”) was originally introduced in the UN Guiding Principles on Business and Human Rights (UNGPs)¹⁷ where it is defined as the process through which companies can “identify, prevent, mitigate and account for” the actual and potential adverse human rights impacts that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products or services by their business relationships.¹⁸ The concept was subsequently introduced in various international instruments such as the OECD Guidelines for Multinational Enterprises¹⁹ and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.²⁰

The momentum for mHREDD has been growing over the past few years, as an increasing number of laws and legislative proposals have been put forward in various jurisdictions in Europe and beyond.²¹ This momentum for mHREDD has been supported by

¹⁷ OHCHR, "Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy' Framework", HR/PUB/11/04 (2011).

¹⁸ UNGP 17.

¹⁹ OECD Guidelines for Multinational Enterprises, available at: <http://mneguidelines.oecd.org/guidelines/>.

²⁰ ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration, - 5th Edition (2017), General Policy 10.

²¹ EC study above n 1; Chiara Macchi and Claire Bright, "Hardening Soft Law: the Implementation of the UNGPs in Domestic Legislations", in Martina Buscemi, Nicole Lazzarini, Laura Magi and Deborah Russo (dir.), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill, 2020): 218-247.

NGOs,²² trade unions²³ as well as certain business organizations²⁴ and a growing number of companies.²⁵

However, some companies which have expressed support for mHREDD at the EU level, have also expressed concerns in relation to the increased legal risks that it might pose for them. It is in this context that the concept of “safe harbour” has started to be used in relation to HRDD, and more specifically to refer to the idea of a “safe space” in which companies can avoid liability. In an interview, Virginie Mahin, the Global Social Sustainability and Human Rights Lead at Mondelez International indicated that:²⁶

In cocoa, for example on child labour, we have multistakeholder industry initiatives. We have the International Cocoa Initiative where we work collectively on tackling child labour issues in the West African supply chain. [...] But while there are a lot of good voluntary initiatives, we still think it would be beneficial to have a binding law at EU level to provide a level playing field, and bring along companies upstream in the supply chain, which may not be under the same consumer-facing pressure. And the law should provide that safe harbour we are talking about. That is essential to us.

²² ECCJ, “Over 100 Civil Society Organisations Demand Human Rights and Environmental Due Diligence Legislation”, 2 December 2019, available at: <https://corporatejustice.org/news/16800-over-100-civil-society-organisations-demand-human-rights-and-environmental-due-diligence-legislation>.

²³ ETUC, “ETUC Position for a European Directive on Mandatory Human Rights Due Diligence and Responsible Business Conduct”, (18 December 2019), available at: <https://www.etuc.org/en/document/etuc-position-european-directive-mandatory-human-rights-due-diligence-and-responsible#:~:text=The%20ETUC%20calls%20for%20a,their%20supply%20and%20subcontracting%20chains>.

²⁴ See for instance Amfori, “Human Rights Due Diligence Legislation in Europe: Recommendations for a European approach, taking into account key principles of due diligence”, Position Paper (February 2020), available at: <https://www.amfori.org/sites/default/files/amfori-2020-12-02-Position-Paper-Human-Rights-Due-Diligence.pdf>.

²⁵ Business and Human Rights Resource Centre (BHRRC), “26 Companies, business associations, and initiatives make joint call for EU mandatory human rights & environmental due diligence”, (2 September 2020), available at: <https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence/>; Lise Smit, Claire Bright, Irene Pietropaoli, Juliannes Hughes-Jennett and Peter Hood, “Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies”, *Business and Human Rights Journal* (2020): 1-9.

²⁶ Euractiv, “Upping the Ante on Human Rights Due Diligence”, Event Report (March 2019), available at: <https://en.euractiv.eu/wp-content/uploads/sites/2/special-report/EURACTIV-Event-Report-Upping-the-ante-on-human-rights-due-diligence.pdf>.

Whilst acknowledging that enforcement mechanisms are key to ensure the effectiveness of a law, Mahin also articulated concerns of legal actions being filed on the basis of the information shared by the company. She explained that:

Companies need to have confidence they can be transparent about risks in their supply chains without fearing that they will be exposed to increased risk of litigation. We need to make sure that when we are transparent, we are not exposed.

These references to a “safe harbour” accordingly point to the need expressed for a protected or “safe space” in which companies can be transparent about their risks and how they address these, without thereby subjecting themselves to increased legal risks. This may have been influenced with the understanding of a safe harbour in the *Barber* context, where having reported on certain (specified) steps exempts the company from reporting additional information. The fear that increased transparency would lead to increased legal risk might also have been fueled by case law such as the UK case of *Vedanta*,²⁷ where the company’s own disclosures were relied on to demonstrate that the parent company had assumed a duty of care.

Similarly, in an interview for the EC study, a company interviewee explained the need to allow companies the freedom to recognize their issues in a transparent manner and to try and solve the issues without being immediately found liable for these issues.²⁸ This aligns with the understanding of due diligence as a “safe space”.

It is important to clarify that due diligence as a standard of care would not be aimed at creating a strict liability without a defence, which requires the elimination of all human rights harms, and in terms of which the occurrence of any human rights harm would automatically

²⁷ *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20.

²⁸ EC study above n 21, at 111.

translate into liability (in the German Draft Key Points this is referred to as “*Erfolgspflicht*”, i.e. an obligation requiring *success*).²⁹ Instead, the due diligence standard of care question would focus on how the company has exercised care: whether the company has taken steps to “identify, prevent, mitigate and account for” their actual and potential human rights abuses (“*Bemühungspflicht*” i.e. an obligation requiring *effort*).³⁰ Any duty that is defined with reference to a standard of care would by implication allow any defendant company to show, when challenged in court, that it has in fact met the legally required standard of care. It is the level and quality of the company’s efforts that would determine whether it has met the legal requirement.

Arguably, with a legal standard of care, the company could therefore enter a “safe space” or “safe harbour” by undertaking the due diligence that is appropriate to its actual or potential risks. This can be contrasted with a situation where a strict liability without a defence would automatically ensue for any proven harm, thereby incentivizing the company to “hide” any adverse impacts, and to take efforts to disassociate and deny, rather than create a “safe space” to engage and improve.

This idea of the safe harbour as a “safe space” ties in with the idea embodied in the UNGPs that due diligence should help companies mitigate their legal risks:³¹

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human right abuse. However, business enterprises conducting such due diligence should not

²⁹ German Draft Key Points section 1. b).

³⁰ Ibid. The EC study also indicated at 266: “[A] due diligence standard should not operate to hold companies liable for systemic issues, which cannot be remedied by a single company, if the company has done all it can do prevent harms resulting from its own operations.”

³¹ Commentary to UNGP 17.

assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

Similarly, the EC study describe this risk-based standard of care (as opposed to a strict liability for any harms that occur, with no due diligence defence) as follows:

Due diligence expressly does not automatically expect companies operating in high risk contexts to leave, and does not intend to penalise those companies which operate in certain countries or sectors. Indeed, it has been well-demonstrated that there are no countries or sectors which pose no risks at all to people, the environment or the planet.

Due diligence expects companies to assess for themselves their risks, prevent such risks from taking place, and mitigate any damages which have already occurred. The occurrence of a harm suggest that the company would be liable, unless it could show that it has done everything that could have been reasonable expected in the circumstances. In this way, the due diligence standard incentivises effective, high quality and practical due diligence processes which target real risks and priorities.

3.2. “Safe harbour” versus due diligence as a defence

Some have expressed discomfort with the use of the concept of “safe harbour” in this respect. For instance, in the EC study, an interviewee from civil society mentioned that:³²

In this debate, the concept of “safe harbour” is not a very helpful concept, because it is mixing things together. From our perspective, we would want to say to companies: It’s not in your interest *not* to report. Because if something does emerge, if an issue emerges, or an allegation, it’s in your interests to show that you are aware of it, you had identified it, you are dealing with it. And if for whatever reason it had not been resolved, then you have got the information there to say: “Well, we were trying to address it, this is as far as it had gone”, whatever the circumstances were.

³² EC study above n 21.

This aligns with the above-mentioned clarification in the UNGPs that conducting HRDD should help business address the risks of legal claims, by “showing that they took every reasonable step” but that it would not “by itself... automatically and fully absolve them from liability”.³³

Here, it is important to distinguish between the civil procedural definition of a defence which any defendant can rely on in court, and a “safe harbour” exemption which entirely rules out the ability to take action against the company in the first place. All defendants in court, whether civil or criminal, are always able to defend themselves by arguing and proving that they have not breached the law in the way that is alleged. There is a denial of the allegations, with reference to the evidence, and it is up to the judge to decide which side puts forward the most persuasive case. (It is noted that even with strict liability, defendants still have access to civil defences in court, including for example that the alleged harm did not take place as alleged or that the defendant party is not the correct party to sue.)

Where the duty is defined with reference to a due diligence standard of care, the company would therefore be able to demonstrate in court that it has, in fact, met the standard required.

In contrast, with a “safe harbour” exemption, the legislature sets out criteria that, if met, could exclude liability and the corresponding ability of claimants to bring action. For example, the “safe harbour” clause included in the German Draft Key Points excludes a right to civil action, unless intent or gross negligence will be alleged.

³³ Commentary to UNGP 17.

There is accordingly a crucial difference between “due diligence as a defence” and a “safe harbour” exemption. Nevertheless, these two concepts are often used in the same sentence, or even as synonyms, by commentators in ongoing discussions.

This point was emphasized in the EC study by an interviewee:³⁴

In the text of the UNGPs, it is clear that conducting [due diligence] should not be an automatic defence. And I think that it's this issue of automaticity that is the problem. And "safe harbour" implies "I do this, snap, I'm free, whatever happens I'm out". And I think that's the issue that then causes an understandably negative reaction from civil society and others, and a lot of concerns.

What we certainly think is reasonable is that in any consideration of liability, the adequacy, the appropriateness of the due diligence that they conducted would be taken into account. That's integral in actually making decisions under the UNGPs about whether a company contributed or not...The adequacy of their due diligence measures helps place them on a spectrum between contribution and linkage.

3.3 “Safe harbour” and the risk of a “tick-box” approach

Similarly, an approach which automatically exempts companies which undertake “tick-box” approaches were expressly rejected by stakeholders during the EC study.³⁵ It was pointed out that this approach detracts resources away from those issues which are really at risk in the circumstances, towards those which are listed in the standard or instrument.³⁶ Rather, stakeholders preferred a general duty which references a standard of care which

³⁴ EC study above n 21 at 110.

³⁵ Ibid at 107.

³⁶ EC study ibid at 269: “If companies were required to “tick off” such lists regardless of whether these risks even apply to the particular company in question, the law would possibly operate in a prohibitively burdensome way. The OHCHR has warned against the risks of a duty that “overly detailed and proscriptive” as this may lead to “narrow, compliance-orientated, ‘check-box’” processes.”

takes into account the specific circumstances applicable to each companies' operating context.

For our purposes, it is demonstrative to contrast a “tick-box” approach with a legal standard of care (see Table 1).

Table 1: Comparison between “safe harbour”, “tick-box” and due diligence as defence

“Safe harbour” exemption	“Tick-box” approach	Due diligence as defence
Statutory conditions that, if met, rule out or limits the ability to bring civil action against the company in court.	A list of criteria that can be “ticked off” without further or ongoing consideration of the company’s real risks and whether they are being addressed on the facts.	Defence which the defendant company can plead and seek to prove in court
Company has to show that it has met the “safe harbour” criteria set out in the statute	Company has to show that it has met the specified list of criteria.	Company has to demonstrate in court that it has met the standard required, on the specific facts of the case relating to the claimants.
The issues, areas and risks that the company should prioritise in its due diligence are determined	The issues, areas and risks that the company should prioritise are determined by the	The issues, areas and risks that the company should prioritise depends on the severity of the risks

by the legislator (in the statute) or by the external standard linked to the “safe harbour” exemption (such as the MSI standard).	legislator in the listed criteria of the “tick boxes”.	applicable in the context, and should be assessed by the company as part of its HRDD. The prioritization decision will be subject to scrutiny as part of the standard of care enquiry.
Evidence of having met the “safe harbour” criteria can be documentary: Public commitment to MSI standard, certification, audit, reporting requirement etc.	Evidence of having met the specified criteria can be documentary: Public commitment to MSI standard, certification, audit, reporting requirement etc.	Documentation would not suffice, the court look further to what the company did in practice, on the facts of the case, and whether was enough, “adequate” or “reasonable”, given the specific circumstances and risks.
Legislator “considered a situation and concluded that no action should lie.”. ³⁷	Legislator “considered a situation and concluded that no action should lie.”. ³⁸	Due diligence may help companies to “show...that they took every reasonable step” but would not “by itself... automatically and fully absolve them from liability”. ³⁹

³⁷ Ibid at 11.

³⁸ Ibid at 11.

³⁹ Commentary to UNGP 17.

Legislator decides which kind of conduct is excused from liability.	Legislator decides which kind of conduct is excused from liability, with reference to a checklist of factors.	Court decides whether the relevant conduct meets the standard of care, based on the facts of the case. ⁴⁰
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A “tick-box” is understood to refer to a list of criteria that can be “ticked off” superficially, without further or ongoing consideration of the company’s real risks and whether they are being addressed. A “tick-box” approach implies that having undertaken this process is the end of the matter, and there is no substantive enquiry into the quality or appropriateness of the process.

In this way, a “tick-box” approach is similar to a “safe harbour” as defined in *Cel-Tech* where the legislator has “considered a situation and concluded that no action should lie.”⁴¹

Some examples of “tick-box”-centred approaches allow the company to show that it has obtained a report or document (sometimes entitled “due diligence”) from auditors, lawyers or consultants, or a certification or approval from a third party verification scheme, in order to satisfy the legal requirement.

In contrast, with a legal duty which comprises a standard of care, a document or certificate would not in itself suffice to end the enquiry. The court may take the “checked boxes” into account as counting in the company’s favour, but the court’s enquiry would go further and ask what the company did in practice, on the facts of the case, and whether was enough, “adequate” or “reasonable”, given the specific circumstances and risks.

⁴⁰ EC study above n 21 at 264-265.

⁴¹ Ibid at 11.

With a “tick-box” (or, arguably for our purposes, a “safe harbour” approach) it is accordingly the legislator who decides which kind of conduct is excused from liability, with reference to a checked list of factors (which may or may not be circumscribed in the statute or outsourced to recognised verifiers). With a duty to exercise a standard of care, especially where a statutory or civil remedy is ensured to accompany it, it would be the court (or the regulator) which decides whether the relevant conduct meets the statutory duty of care. This enquiry would be based on the specific facts of the case, including the risks, the knowledge that the company had or ought to have had, and what would have been expected of the reasonable company under those circumstances.⁴²

With a “tick-box” requirement (or “safe harbour” exemption) the statute itself determines whether affected parties may bring a claim at all, or whether such a claim is excluded by the company having obtained the documentation to show the process or entered the “safe harbour” through its conduct. With a duty which requires a context-specific standard of care, the statute does not rule out liability. Instead it allows the court (or regulator) to do so - or to decide on mitigating arguments - if the company has persuasive evidence that it has met the required standard.

This standard of care approach aligns with the concept of HRDD in the UNGPs, which survey respondents and interviewees in the EC study stressed should not be abandoned. In this respect, the UN Office of the High Commissioner for Human Rights (OHCHR)

⁴² EC study above n 21 at 264-265.

Interpretive Guide to the corporate responsibility to respect human rights defines human rights due diligence as:⁴³

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] *under the particular circumstances*; not measured by any absolute standard, but *depending on the relative facts of the special case*. [Emphasis added].

In other areas of law, due diligence is also often applied as a standard of care rather than a “tick-box” test. Indeed, this is the kind of exercise which courts make on a daily basis in civil litigation claims. The EC study found:⁴⁴

This understanding of due diligence aligns with other examples of how due diligence as a legal standard of care is applied in the case law. Such due diligence enquiries typically ask not only about the formalities of the process but whether it was adequate in the circumstances, and whether it was followed in reality. The simple fact of having a so-called “due diligence” process in place does not automatically show that the standard of care was met.

...
Similarly, in other cases where due diligence is required, the courts consider whether there was a process in place, whether the process was implemented, and whether it was adequate. In English case law relating to statutory due diligence defences, courts and regulatory bodies have considered management’s telephonic availability, whether incidents were recorded in logbooks, whether advice from external experts were sought, whether training programmes effectively imparted sufficient knowledge and understanding to prevent the incident from taking place, as well as the expertise of the trainers. It has also been held that having an audit system in itself does not constitute adequate due diligence as it was not constructed to “pick up [the] failure” and did not in fact prevent or address the impacts in question.

⁴³ UN Office of the High Commissioner for Human Rights (OHCHR) *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), HR/PUB/12/02 available at: https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf at 6.

⁴⁴ EC study above n 21 at 264-265.

Again noting the dangers of the “tick-box” approach, the OHCHR Report on the relevance of HRDD to determinations of corporate liability notes in this respect that:⁴⁵

Permitting a defence to liability based upon human rights due diligence activities could incentivize companies to meaningfully engage in such activities and have important preventative effects; however, there are serious concerns with the appropriateness of a human rights due diligence defence in some cases. Participants in the Geneva meeting expressed concern that such a defence might not be fair to victims in some cases. In particular, the participants drew attention to the inappropriateness and unfairness of business enterprises seeking to raise due diligence defences in cases where superficial “check box” approaches to human rights due diligence might be used as a reference point instead of genuine attempts to identify, mitigate, and address human rights risks as contemplated in the UNGPs. The discussion highlighted the importance of ensuring that judges are familiar with the content of the UNGPs as it relates to human rights due diligence so they can distinguish genuine efforts by business enterprises to identify and address risks from superficial efforts, and make their decisions accordingly.

A recent study which considered whether the duty to prevent bribery set out in the UK Bribery Act could be used as a model for a HRDD regulation, found:⁴⁶

It is accordingly clear that a pure procedural “check box” or “safe harbour” provision that would shield a company completely from liability if any kind of human rights due diligence was performed, would not be aligned with the concept of due diligence contained in the UNGPs. Moreover, as is evidenced from the Guidance on the Bribery Act and the *Skansen* case,⁴⁷ such a “safe harbour”

⁴⁵ OHCHR, “Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability”, (1 June 2019), A/HRC/38/20/Ass.2.

⁴⁶ Irene Pietropaoli, Lise Smit, Julianne Hughes-Jennett and Peter Hood ‘A UK Failure to Prevent Mechanism for Corporate Human Rights Harms’, (11 February 2020), available at: https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf at 52.

⁴⁷ *R v Skansen Interiors Limited*, Southwark Crown Court, Case Number: T20170224, (21 February 2018), unreported judgement.

approach is clearly not the way in which a due diligence defence is interpreted by the English courts in the context of the Bribery Act.

Instead, it argued that:⁴⁸

If the UNGPs concept of human rights due diligence were to be introduced as a defence to a failure to prevent mechanism, it would allow a company to avoid liability where it can show that it had in place a robust system of human rights due diligence. In accordance with the UNGPs, the level of due diligence expected would depend on the specific circumstances. Whether a company has met its due diligence expectations would need to be determined by the court, with reference to the company's particular size, sector, operations, risk, and the relevant industry standards, as well as other any other relevant factors.

It is clear from the above that a blanket exemption from due diligence which does not take into account the specificities of each case would not be in accordance with the context-specific standard of the UNGPs. Instead, understanding “safe harbour” as synonymous with “safe space” potentially aligns with the understanding of due diligence as a (civil) defence, namely the ability of the company to defend itself against liability by undertaking the due diligence appropriate in the circumstances.

4. The limitations of reliance on external or industry standards

“Safe harbour” exemptions are often defined with reference to a list of criteria or an external standard of verification. The *Schrems* case provided one example of this. Another example which is informative for our purposes is the “safe harbour” clause contained proposed in the German Draft Key Points. This provision proposes to limit the civil liability

⁴⁸ Ibid.

of companies which “join and implement an officially recognised (industry) standard” to liability for intent and gross negligence. The criteria for a “recognised (industry) standard” would be listed in the legislation, and would include that:⁴⁹

The standard must:

- 1) cover the entire supply chain;
- 2) take into account all the core elements of due diligence;
- 3) have been developed in the framework of a multi-stakeholder process.

Insofar as this model is currently being referenced also in other legislative contexts, including the discussions around the Draft Treaty,⁵⁰ it is important to consider the implications of such a “safe harbour” exemption which is linked to an external industry standard.

A multitude of multi-stakeholder (industry) standards have developed over the past few decades around corporate sustainability, respecting human rights and protecting the environment. Industry standards are often used to inform the due diligence process. Stakeholders in the EC study highlighted the importance of using the UNGPs’ context-specific approach, which should be interpreted with reference to the specific context – including sector, size and nature of operations.⁵¹ The study also confirmed the important role of industry standards in determining what would be expected of the reasonable company in each specific context.⁵² Some of the other benefits of using industry standards in the due diligence process include collective power that they offer, which has been

⁴⁹ The clause also provides that compliance with the standard would be “externally audited”, and adds that “[t]he Safe Harbour option provides positive incentives for exemplary conduct”.

⁵⁰ IOE position paper above n 4.

⁵¹ EC study above n 21.

⁵² Ibid at 272-273.

highlighted as critical in addressing those systemic issues that one company is unable to solve on its own.⁵³

The Corporate Human Rights Benchmark (CHRB) observes that:⁵⁴

[C]ompanies actively engaged with CHRB score three times as much as non-engaged companies and that, on average, engaged companies' scores improve at triple the rate of non-engaged companies. This suggests that the companies that engage with CHRB do so because they are interested in understanding how to improve their scores - and also hopefully their approach to human rights. While CHRB would discourage engaging "for the sake of engaging", it has proven beneficial to help companies understand the detail of the assessment criteria and learn from other companies that demonstrate good practices.

Although the CHRB is not a multi-stakeholder industry standard itself, the observation could similarly apply to engagement with industry standards. Indeed, it could potentially be assumed that companies which engage in industry standards are seeking to learn more about their human rights risks and how to address them. This would presumably reflect favourably on the company if a judge or regulator has to determine whether the company has undertaken the due diligence required of the reasonable company in the circumstances. Involvement in industry standards are potentially extremely significant for the application of the legal test for mHREDD.

⁵³ Ibid at 28. See also Arianne Griffith, Lise Smit and Robert McCorquodale "When national law conflicts with international human rights standards: Recommendations for Business", British Institute of International and Comparative Law (May 2018), available at: https://www.biiicl.org/documents/3_1930_biiicl_bn_report_web.pdf.

⁵⁴ Corporate Human Rights Benchmark "2019 Key Findings", at 7, available at: <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>

The positive role that multi-stakeholder initiatives have played has also been emphasized in a recent study evaluating the Dutch Responsible Business Conduct (RBC) agreements commissioned by the Dutch Ministry of Foreign Affairs, which noted that:⁵⁵

While results of RBC agreements on due diligence are only (slowly) starting to manifest, RBC agreements effectively contribute to the following: they raise awareness about due diligence, support learning and facilitate company compliance through a support infrastructure, monitoring and assessment, and continuous interaction with civil society organisations (CSOs), i.e. NGOs and unions. This is particularly important as due diligence in line with the OECD Guidelines and UNGPs has been a new process for most companies participating in RBC agreements and smaller companies, in particular, face difficulties, such as capacity constraints, in conducting due diligence.

A July 2020 report by MSI Integrity entitled *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* summarises evidence gathered about 40 international standard-setting multi-stakeholder initiatives (MSIs) over the past decade, and explains:⁵⁶

Although the MSI is far from a household concept, many people around the world now rely on or interact with them in their daily lives: from factory workers and local communities negatively affected by corporate behavior, to consumers looking at labels on chocolate bars, bags of coffee, and tins of tuna that claim the products are made “sustainably,” “fairly,” or “ethically.” Governments or consumers often equate membership in or certification by MSIs with good practice or evidence that a company is taking reasonable steps to safeguard rights holders.

⁵⁵ KIT Royal Tropical Institute, “Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?”, (8 July 2020), at 8.

⁵⁶ MSI Integrity “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance” (July 2020), available at: https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf at 11.

The report concludes that “MSIs have been influential as human rights tools, but that influence, along with their credibility, is waning.”⁵⁷

Nevertheless, a “safe harbour” provision which relies exclusively on industry standards poses some contradictions to the concept of HRDD, particularly if it leads to a blanket exemption rather than a context-specific standard of care. Even leading companies, which are often instrumental in producing and advancing such industry standards, acknowledge that industry standards are only one part – albeit an important and helpful part - of the company’s “human rights journey”.⁵⁸

4.1 Industry standards providing content to the standard of care

In the context of due diligence in other areas of law, industry standards complement and give content to due diligence as a context-specific standard of care. A company’s adherence and involvement with an industry standard could help it to demonstrate its due diligence, and, in contrast, a failure to participate in established industry standards could signal that the company has not acted reasonably in the circumstances.

The EC study also envisioned an important role for industry standards in the interpretation of the standard of care.⁵⁹

One legal expert interviewee explained how this approach would be applied in terms of a legal test for due diligence as a standard of care. They indicated that if a general cross-sectoral due diligence requirement is “applied correctly by a

⁵⁷ Ibid at 29.

⁵⁸ Griffith et al above n 53 at 34.

⁵⁹ EC study above n 21 at 126.

judge”, they would expect sectoral guidance to provide content to the whether the due diligence expectation was met by the specific business in the circumstances

...

In this way, companies which adhere to industry standards would be more likely to show that they had undertaken the requisite due diligence even if adverse impacts should take place.

However, the EC study does not foresee that industry standards would be linked to any “safe harbour” type exemptions, which would effectively turn private and voluntary industry standards into “hard law”. Instead, the EC study suggests that non-binding guidance could stipulate that industry standards should be used to inform the content of the relevant standard of care required in each specific case before the courts. The study also provides a non-exhaustive list of some industry standards which could be mentioned in the non-binding examples of such existing industry standards.⁶⁰

4.2 Multi-stakeholder and individual company stakeholder engagement

Despite being a central element of the HRDD process as set out in the UNGPs, meaningful engagement with stakeholders, and especially rights-holders, often lacks from current corporate practices. Even in France, where the Duty of Vigilance law *encourages* (but does not require) the cooperation of relevant stakeholders for the elaboration of the vigilance plan,⁶¹ empirical evidence has shown that consultation with relevant stakeholders have been lacking in both stages of the HRDD process.⁶² A recent report for the French

⁶⁰ EC study *ibid* at 272-273.

⁶¹ It only *requires* the involvement of trade unions in relation to the alert mechanism.

⁶² Juan Ignacio Ibañez, Chris Bayer, Jiahua Xu and Anthony Cooper, 'Devoir de Vigilance: Reforming Corporate Risk Engagement', Development International e.V., 2020. They note at 56 and at 100 that only 5% of companies studied had conducted stakeholder consultations in designing their vigilance plan; and only 10% of companies reported that their alert system was managed by an independent third party.

Government highlighted that low levels of stakeholder engagement constituted one of the main pitfalls of the implementation of the law.⁶³

Similarly, at the European level, it has been argued that the proposed EU legislation on mandatory HREDD should include “a requirement that companies consult stakeholders at each of the steps it takes, and that gender dimensions and vulnerable groups' differences should be taken into account in such consultations [...]”.⁶⁴ In this respect, scholars have suggested that because “human rights challenges vary widely, depending on state, industry, (severity of the) human rights issue at hand or type of supply chain”, the EU might wish to incentivize the development of industry and sectoral standards supporting the legislation.⁶⁵

The recognition criteria in the German Draft Key Points include that the standard must have been developed in the framework of a multi-stakeholder process, although stakeholder engagement is not expressly mentioned in that example.

However, there is evidence that existing MSIs do not yet achieve the required level of stakeholder engagement. A recent position paper by German NGO Network CorA, Venro and Forum Menschenrechte found that stakeholders along the supply chain are not currently being involved sufficiently in existing MSIs.⁶⁶ It added that the “representation” which NGOs

⁶³ Anne Duthilleul and Matthias de Jouvenel, “Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre”, (January 2020), available at: <https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises> at 7.

⁶⁴ Robert McCorquodale and Martijn Scheltema, “Exploring core elements of an EU regulation on mandatory human rights and environmental due diligence” *Business and Human Rights Resource Centre*, August 2020, available at: <https://www.business-humanrights.org/en/exploring-core-elements-of-an-eu-regulation-on-mandatory-human-rights-and-environmental-due-diligence>.

⁶⁵ Ibid.

⁶⁶ CorA, Venro and Forum Menschenrechte, “Anforderungen an wirkungsvolle Multi-Stakeholder-Initiativen zur Stärkung unternehmerischer Sorgfaltspflichten Empfehlungen aus Sicht der Zivilgesellschaft”, (17 July 2020), available at: https://www.cora-netz.de/wp-content/uploads/2020/07/2020-07-17_MSI-Positionspapier_CorA-ForumMR-VENRO.pdf at 9.

in the global North are able to offer is limited and cannot replace the continuous involvement of the perspective of those affected.⁶⁷

Stakeholder engagement is a core part of the HRDD in that it allows companies to identify their particular risks and monitor whether actions taken to address them are effective. Separate companies have, by definition, different stakeholders from their peers and competitors. In the EC study, company respondents indicated that they have collectively “over 3 million first tier suppliers, and over 1 billion suppliers in the upstream supply chain.”⁶⁸ These numbers reflect only the suppliers as business entities, and not the individual workers within each such entity, nor the stakeholders beyond the workplace such as affected communities or end users of products. It would not be feasible or appropriate for an industry initiative to attempt to engage collectively with all relevant stakeholders of all its member companies. The stakeholder component of a multi-*stakeholder* initiative cannot replace the individual company’s engagement with its own stakeholders.

4.3 Industry standard no guarantee of adequate due diligence

An important argument against a “safe harbour” exemption which relies on external or MSI standards, is that involvement in a MSI standard does not guarantee an adequate HRDD process.

Recent surveys have shown low levels of corporate human rights and environmental due diligence practices. In the EC study, just over one-third of business respondents indicated

⁶⁷ Ibid at 8: “Anspruchsgruppen entlang der Lieferkette, d. h. Produzent*innen, Gewerkschaftsvertreter*innen und NRO aus den Produktionsländern werden in MSI in der Regel nicht ausreichend eingebunden. Eine „Vertretung“ durch NRO aus dem globalen Norden ist nur in Ansätzen möglich und kann nicht die kontinuierliche Einbindung der Perspektive der Betroffenen ersetzen.”

⁶⁸ EC study above n 21 at 45.

that their companies undertake due diligence which takes into account all human rights and environmental impacts, and a further one-third undertake due diligence limited to certain areas.⁶⁹ In Germany, the results of the 2020 monitoring process revealed that only 13-17% of the 455 companies surveyed⁷⁰ could show that they adequately meet their due diligence obligations as contained in the German National Action Plan for Business and Human Rights.⁷¹ In Portugal, the first National Enquiry on Responsible Business Conduct reached similar findings with less than 50% of the companies surveyed being aware of applicable international norms and less than one in five companies having due diligence processes in place.⁷²

The MSI Integrity report concludes, after having researched 40 international standard-setting MSIs over the past decade, that “MSIs have not lived up to their promise of advancing rights holder protection against business-related abuses” and that “MSIs are unlikely to ever be reliable tools to protect human rights”.⁷³

The position paper by CorA et al describes the strengths of multi-stakeholder standards in this context, including by complementing and concretizing the content of legislative standards.⁷⁴ However, the position paper also sets out various limitations of multi-

⁶⁹ EC study *ibid* at 16.

⁷⁰ German-based companies with over 500 employees.

⁷¹ German Federal Foreign Office, "Monitoring the National Action Plan for Business and Human Rights (NAP)" 13 October 2020, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2131054>.

⁷² Ana Lúcia Romão, Ana Paula Ferreira, Isabel Cabrita, Liliana Soarez and Miguel Vaz, "Resultados do 1º Inquérito Nacional sobre Conduta Empresarial Responsável e Direitos Humanos", available at: <https://www.dgae.gov.pt/servicos/sustentabilidade-empresarial/responsabilidade-social-das-empresas.aspx>. See also Claire Bright, "Some Concluding Remarks on Business and Human Rights in Portugal", *Nova Centre on Business Human Rights and the Environment*, November 2020, available at: <https://ncbhre.novalaw.unl.pt/concluding-remarks-business-human-rights-portugal/>.

⁷³ MSI Integrity above n 56 at 218.

⁷⁴ CorA, Venro and Forum Menschenrechte, "Anforderungen an wirkungsvolle Multi-Stakeholder-Initiativen zur Stärkung unternehmerischer Sorgfaltspflichten Empfehlungen aus Sicht der Zivilgesellschaft", (17 July 2020), available at:

stakeholder initiatives, such as the limited involvement of stakeholders in reality, and the inability of a certification process to replace the company's own internal due diligence process.⁷⁵ It concludes that participation in multi-stakeholder initiatives cannot in itself serve as “blanket proof” of human rights and environmental due diligence.⁷⁶

MSIs also have the potential to provide mechanisms through which affected parties can raise grievances. Guiding Principle 30 provides in this respect that:

Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

However, in practice, the MSI Integrity report notes that many MSIs do not have a grievance mechanism, and for the ones that do, they “have not developed procedures that meet internationally accepted minimum practices or engender trust among rights holders”.⁷⁷

There is also a concern from business that states prefer to outsource their human rights obligations to the private sector, relying disproportionately on self-regulatory schemes such as MSIs, industry standards and non-judicial industry-level grievance mechanisms. For example, in describing their collective engagements activities through industry associations, one company interviewee has stated that “all of these things are substitutes for Pillar I [of the UNGPs]”⁷⁸ (namely the State duty to protect human rights). In relation to the MSI Integrity

https://www.cora-netz.de/wp-content/uploads/2020/07/2020-07-17_MSI-Positionspapier_CorA-ForumMR-VENRO.pdf at 9.

⁷⁵ Ibid at 8.

⁷⁶ Ibid at 9: “Eine pauschale Erfüllung der Sorgfaltspflichten von Unternehmen kann die Teilnahme an MSI aufgrund der bereits beschriebenen Herausforderungen jedoch keinesfalls bedeuten.”; and at 3: Die Teilnahme an MSI kann dabei nicht ohne Weiteres als Nachweis der Erfüllung menschenrechtlicher und umweltbezogener Sorgfaltspflichten gewertet werden.

⁷⁷ MSI Integrity above n 56 at 159.

⁷⁸ Griffith et al above n 53 at 33.

report discussed above, *The Guardian* quotes Amelia Evans, Executive Director of MSI Integrity, as follows:⁷⁹

According to Evans, multi-stakeholder initiatives have a “tricky relationship” with governments, which frequently interpret their existence as evidence that abuses are being “taken care of”.

“In truth, the exact opposite needs to happen. Governments must recognise that because there’s an initiative in place, then underlying human rights abuses are occurring and they are obligated to take action,” says Evans.

The recent trend of corporate calls for mHREDD laws also demonstrates that industry standards cannot be equated with due diligence. Some of the same companies that are calling for mandatory due diligence regulation at European level have themselves been leading and participating in sophisticated multi-stakeholder industry standards.⁸⁰ Their call for regulatory intervention imply that these MSI standards, however advanced, are not by themselves capable of addressing the issues.

Accordingly, due to the nature of MSI standards, they are not capable of being used as “safe harbour” type substitutes for the individual, ongoing HRDD required of each company in terms of the UNGPs.

4.4 Industry standards not required for adequate due diligence

The previous subsection highlighted that participation in an industry standard does not guarantee adequate due diligence. However, the opposite is also true: the *absence* of

⁷⁹ Oliver Balch, “Ethical labels not fit for purpose, report warns consumers” *The Guardian*, (16 July 2020).

⁸⁰ BHRRC above n 25.

participation in an industry standard does not imply that the company *did not* undertake adequate due diligence.

Whilst industry standards are in practice informative, persuasive and important for the interpretation of the context-specific standard, the UNGPs envision that each company would undertake due diligence for itself, based on its own risks. Indeed, some of the most innovative and pioneering HRDD systems have been developed by leading companies outside of industry-collaborative contexts. Examples include Ikea's supply chain codes of conduct,⁸¹ Nestlé's in-depth field work with the Danish Institute of Human Rights,⁸² and Fairphone's innovative approach to covering the entire supply chain.⁸³ "Safe harbour" exemptions based on industry standards might discourage or counter-incentivise this kind of individual company HRDD.

4.5 Issue-specific scope, piecemeal coverage and fragmentation

Industry standards often focus exclusively on specific human rights or on specific sectors, commodities or countries. Examples include the International Cocoa Initiative, which applies only to issues of *child labour* in cocoa-growing communities;⁸⁴ the Voluntary

⁸¹ Ikea "Building a Better Business with IWA", available at: <https://about.ikea.com/en/sustainability/fair-and-equal/building-a-better-business-with-iway>. See also Lara Blecher "Codes of Conduct: The Trojan Horse of International Human Rights Law?" *Comparative Labor Law and Policy Journal* 38, 449-551; Smit et al above n 8.

⁸² Danish Institute for Human Rights ("DIHR") "Nestlé Partnership", available at: <https://www.humanrights.dk/projects/nestle-partnership>; DIHR and Nestlé, "Talking the Human Rights Walk" Nestlé's Experience Assessing Human Rights Impacts in Its Business Activities" (2013), available at: http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf; EC study above n 21 at 79.

⁸³ Fairphone, "Fairphone 2 Supply Chain" *Sourcemap*, available at: <https://open.sourcemap.com/maps/57d016b346a1127f1ceff50c>; Fairphone, "Smartphone Material Profiles" (2017), available at: https://www.fairphone.com/wp-content/uploads/2017/05/SmartphoneMaterialProfiles_May2017.pdf; EC study *ibid* at 77.

⁸⁴ International Cocoa Initiative, available at: <https://cocoainitiative.org/about-ici/about-us/>.

Principles on Security and Human Rights in the extractives sector, which applies only to risks arising in *security operations*;⁸⁵ the Bangladesh Accord on Fire and Building Safety, which covers *only the Bangladeshi ready-made garment industry*;⁸⁶ the Tech Against Trafficking initiative focuses on *trafficking* within the technology sector.⁸⁷ Participation in narrowly-focused standards would only cover a small portion of any participating company's actual or potential human rights or environmental risks, leaving the remaining issues unaccounted for.

These kind of (narrowly focused) industry standards would therefore not be capable of providing a “safe harbour” from a legal due diligence standard which would otherwise apply to all human rights and environmental harms across issues and across sectors.

Many companies source across multiple sectors, but even companies which operate squarely within one sector have noted concerns about fragmentation. A study on due diligence practices quoted an extractives company interviewee as explaining that “even though they are ‘at the top end of the stream [as they] dig rocks out of the ground and sell it to people’, they still have a supply chain of over 14,000 suppliers” which range from equipment and construction services, “coffee and janitorial services to clothing and boots for their workers”.⁸⁸ A statutory exemption based on the industry standard in one sector, may not apply to the same company's supply chains relating to other sectors.

Moreover, evidence has shown that companies which use piecemeal processes which focus on specific (often regulated) human rights such as health and safety, are significantly

⁸⁵ Voluntary Principles on Security and Human Rights, available at: <https://www.voluntaryprinciples.org/>.

⁸⁶ The Bangladesh Accord on Fire and Building Safety, available at: <https://bangladeshaccord.org>.

⁸⁷ Available at: <https://techagainstrafficking.org/>.

⁸⁸ Smit et al above n 8 at 5.

less likely to identify real risks than those which use a wider human rights-dedicated framework.⁸⁹ By incentivizing companies to prioritise those issues which are the focus of an officially recognized standard, a “safe harbour” exemption could have the counter-productive effect of drawing the company’s attention away from other human rights and environmental issues which might be more severely at risk within their actual operations or supply chains. Companies which prioritise recognized industry standards may inadvertently expose themselves to liability in relation to those human rights risks they have overlooked as a result of pursuing the official recognised industry standard. Similar concerns about issue-specific legislative standards were also raised by stakeholders in the EC study.

4.6 Criteria for official recognition of standards

Scholars have highlighted the diversity and significant variation which exists in relation to industry standards. Axel Marx and Jan Wouters note in this respect that:⁹⁰

[Such] diversity generates a clear credibility gap and several references can be found that [Voluntary sustainability standards] VSS are pure 'green-washing'.

In addition, some industry standards are not about due diligence processes but focus on more specific measurable and technical goals within the industry or individual company, as indeed they are encouraged to do in the position paper by CorA et al.⁹¹ The vast majority of sustainability verification schemes relate to product standards in the supply chain, and integration of lead firm management systems is at a very early stage. In addition, many

⁸⁹ GBI and Clifford Chance, "Business and Human Rights: Navigating the Changing Legal Landscape", 2019, at 7, available at: <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/03/business-and-human-rights-navigating-a-changing-legal-landscape.pdf>; EC study above n 21 at 254.

⁹⁰ Axel Marx and Jan Wouters, "Competition and Cooperation in the Market of Voluntary Sustainability Standards", Working Paper No 135, KU Leuven, (April 2014).

⁹¹ CorA et al above n 74 at 4.

issues remain around the effectiveness of a number of verification schemes. For instance, a study carried out by Danwatch found child labor in 4 out of 6 Fairtrade certified plantations supplying European consumers.⁹²

Accordingly, where a “safe harbour” provision sets out criteria for official recognition of an external or industry standard, such as in the example of the German Draft Key Points, it is likely that, initially at least, there may only be a short list of existing industry standards that meet the recognition criteria. Officially recognized standards may only cover a small number of industries, commodities, issues or regions, and this might lead to a patchwork as well as large gaps. Even within the supply chain of a single company, some products or materials might be covered by one officially recognized standard, some by another, and some might not be subject to a recognized standard at all. Fragmentation of standards was mentioned by stakeholders in the EC study as one of the key reasons for supporting a general mandatory due diligence regulation.⁹³

It should also be considered whether exemptions based on official recognition would discourage other types of “softer” multi-stakeholder initiatives which would not meet the recognition criteria but have also been described as valuable. Some examples include those industry initiatives that are aimed at being knowledge exchange platforms only, or stakeholder participation fora without strict monitoring or implementation criteria.⁹⁴ There is a risk that official recognition could draw superficial distinctions between these various

⁹² Louise Voller, “Child labour found in Fairtrade cocoa plantations”, (30 July 2020), available at: <https://danwatch.dk/en/undersogelse/child-labour-found-in-fairtrade-cocoa-plantations/>.

⁹³ EC study above n 21 at 96.

⁹⁴ Examples include the initiatives Drive Sustainability in the automotive industry, available at: <https://www.drivesustainability.org/>; Tech Against Trafficking, available at: <https://www.bsr.org/en/collaboration/groups/tech-against-trafficking>; and the Global Network Initiative in the ICT sector, available at: <https://globalnetworkinitiative.org/>.

initiatives, and valuable established standards that are not aimed at achieving these objectives may be seen as lesser or “downgraded” in the view of participating companies.

5. Removal or privatization of remedy

Access to remedy forms the third pillar of the UN Guiding Principles on Business and Human Rights. Stakeholders in the EC study have also emphasized the need for any mHREDD duty to manifest itself as a civil remedy for victims.

The evidence regarding practical, legal and financial barriers to remedy for corporate human rights abuses are well documented.⁹⁵ Yet, at the moment, in many of the national or Member State jurisdictions under consideration, claimants have, at least in theory, the availability of civil remedies in tort law.

As mentioned above, “safe harbour” exemptions can operate in a way that excludes a right to action where the statutory criteria have been met. (This is contrasted with the legal standard of care where the appropriateness of the company’s due diligence process is evaluated as part of the court enquiry.)

For example, the “safe harbour” clause in the German Draft Key Points provides that companies adhering to recognised MSIs will be excluded from civil liability apart from case of alleged intent or gross negligence.⁹⁶ These kinds of “safe harbour” provisions would

⁹⁵ See for instance Axel Marx, Claire Bright and Jan Wouters, “Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries”, Study requested by the European Parliament, March 2019, available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2019\)603475](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2019)603475).

⁹⁶ It is worth noting that *corporate* intent and gross negligence are both notoriously difficult to prove, insofar as the state of mind of the company is not easily ascertainable. See for example Jennifer Zerk, “Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies – A report prepared for the Office of the UN

actually remove access to those civil remedies which currently exist. Rights-holders wishing to access remedy would be in a worse position than they are now.

In the *Schrems* case, the relevant Directive provided for independent, state-based supervisory authorities with “a wide range of powers” including “investigative powers”, “effective powers of intervention, such as that of imposing a temporary or definitive ban on processing of data” as well as “the power to engage in legal proceedings”. In addition to these powerful state-based bodies, the Court found in referring to Article 47 of the EU Charter of Fundamental Rights⁹⁷ that:⁹⁸

In a situation where the national supervisory authority comes to a conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must...have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts.”

The Court also held that in the “converse situation” where the supervisory authority agrees that the claimants’ rights may have been harmed, “it is incumbent on the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts”.⁹⁹

High Commissioner for Human Rights”, available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> at 44.

⁹⁷ Art 47 of the EU Charter of Fundamental Rights provides: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

⁹⁸ *Schrems* above n 12 at para 64.

⁹⁹ *Ibid* at para 65.

It is clear from this dictum that even where a “safe harbour” provision provides for a strong independent state-based complaints mechanism, claimants should still have access to judicial remedies before national courts.

It is also important to note the important difference between state-based or judicial remedies, and private operational-level grievance mechanisms at company or industry level. Even the most sophisticated and ambitious MSI grievance mechanisms cannot substitute judicial remedies. From a public law perspective, private MSIs simply do not have the legitimacy, resources or the enforcement powers of courts. Practically speaking, there are currently very few examples of industry standards which have succeed in providing adequate grievance mechanisms. The MSI Integrity report found that many MSIs do not have a grievance mechanism, and for the ones that do, they “have not developed procedures that meet internationally accepted minimum practices or engender trust among rights holders”.¹⁰⁰ Such grievance mechanisms still need to be much improved, and even so will only be able to supplement rather than replace state-based judicial remedies.

6. Conclusions

The concept of a “safe harbour” has surfaced in several ongoing conversations around mHREDD regulations, with different connotations. When understood as a “safe space” in which to “know and show” the steps that the company is taking towards HRDD, it could potentially be understood as compatible with the UNGPs. However, there are also concerning similarities between “safe harbour” exemptions and the “tick-box” approach which was rejected by the wide range of stakeholders in the EC study. The interchangeable use of “safe harbour” as synonymous with a due diligence defence is also potentially

¹⁰⁰ MSI Integrity report above n 56 at 159.

misleading. Some manifestations of the former exclude access to court remedies, whereas the latter refers to the defence that the company would have to mount in court. The language of “safe harbour” calls up a variety of meanings, often contradictory, amongst stakeholders. In order to feed coherently into the design of legislation, the terminology of “safe harbour” may need to be carefully considered, in light of alternative phrases which more clearly communicate the envisioned legal implications.