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# The Advancement of Mandatory Human Rights Due Diligence Legal Frameworks in Europe: Switzerland as a Future Taillight?

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## Abstract

The development of mandatory Human Rights Due Diligence (HRDD) legislation has increased in Europe in recent years. More and more States adopt domestic laws in this regard and abandon the idea of relying solely on companies' voluntary compliance with the United Nations Guiding Principles (UNGPs). However, this has led to a fragmented legal landscape and in order to ensure a level playing field the European Union (EU) has reinforced its harmonization efforts. The latter have resulted in the adoption of the Corporate Sustainability Reporting Directive (CSRD) and the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive (CSDDD). This paper will analyse the Swiss domestic HRDD legislation within this changing legal landscape. At the domestic level the French Duty of Vigilance Act, Dutch Child Labour Due Diligence Act, German Supply Chain Act, and Norwegian Transparency Act will be analysed with regards to the protected legal positions, their scope, obligations and enforcement mechanisms, whereas at the regional level the CSRD and CSDDD proposal will be examined. A comparative analysis between the Swiss Federal Ordinance on Conflict Minerals and Child Labour and resulting Code of Obligation provisions (as well as the rejected preceding proposals) and these domestic and regional legislations serves as a basis for the concluding recommendations for Swiss policy-makers.

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## Introduction

Recent years have seen an increase in domestic mandatory human rights due diligence (HRDD) legislation in Europe. These laws have the "aim to turn into 'hard law' the concept of human rights due diligence which was first introduced by the UN Guiding Principles on Business and Human Rights (UNGPs)" (Smit et al., 2020, p. 262). According to the commentary to Principle 3 of the UNGPs, as part of their duty to protect against human rights abuses, States need to "consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights" (OHCHR, 2011). Since the development of the UNGPs, more and more companies have voluntarily incorporated HRDD actions in their operations, due mostly to market pressure "to act sustainably as it helps them avoid unwanted reputational risks vis-à-vis consumers and investors that are becoming increasingly aware of sustainability aspect" (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937 as regards Corporate Sustainability Due Diligence, 2022, p. 2). However, the principle of voluntariness has not led to a satisfactory and cross-cutting implementation to the degree that is required to ensure the effective protection from businesses' adverse human rights impacts (ibid.). In short, it has reached its limit and resulted in increasing mandatory HRDD laws at the domestic level and the proposal for a regional framework at EU-level (ibid.). The national laws in question differ considerably in terms of the legal positions they protect, the obligations they impose, the number of companies falling under their scope and the enforcement measures they establish. The adopted Corporate Sustainability Reporting Directive (CSRD) and the Proposal for a Corporate Sustainability Due Diligence Directive (CSDDD proposal) aim at abolishing the fragmentation and legal uncertainty that has resulted (ibid.).

This thesis will analyse the development and content of mandatory HRDD laws in Europe at the domestic and regional level and pay special attention to the case of Switzerland. The latter serves as a case study for a State where ambitious and far-reaching proposals for mandatory HRDD provisions have undergone political struggle and as a result have been reduced to a much weaker piece of legislation. By analysing the French, Dutch, German and Norwegian due diligence laws as well as the CSRD and CSDDD proposal in detail and comparing them to the Swiss legislation, this thesis has the objective to elaborate main

differences, strengths and weaknesses. Based on these findings, the thesis aims at making recommendations for Switzerland's adaptation to an imminent regional harmonization which sets standards that the Swiss legislation currently does not meet. In chapter one, the French Duty of Vigilance Act, Dutch Child Labour Due Diligence Act, German Supply Chain Act, and Norwegian Transparency Act will be analysed. This normative analysis focuses on four criteria: the protected human rights (to a more limited degree also environmental protection where applicable), the scope, imposed obligations, and enforcement mechanisms. The second part of chapter one analyses the CSRD and CSDDD proposal using the same methodology. At the time of writing, the European Council and the European Parliament have adopted their respective positions on the European Commission's CSDDD proposal and the three institutions have entered trilogue negotiations with the aim to adopt the directive by June 2024 (Business and Human Rights Resource Centre, 29.04.2020). Due to the fluidity of the CSDDD elaboration, this paper will limit its analysis to the proposal submitted by the European Commission in 2022. In chapter two, the Swiss mandatory HRDD developments will be closely analysed. In order to ensure a comprehensive comparative analysis in the subsequent chapter, not only the final legislation (Federal Ordinance on Conflict Minerals and Child Labour and resulting Code of Obligation provisions), but also the Responsible Business Initiative and indirect-counter proposals will be discussed. The comparative analysis in chapter three is divided into two parts. Part one contrasts the Swiss position to the domestic legal frameworks which were analysed in chapter one and part two compares the former to the CSRD and CSDDD proposal. Finally, the comparative analysis will allow the development of some recommendations for Swiss policy makers in the conclusion of this paper. The normative analysis of all legal texts which are analysed in this thesis is based on the same four elements (protected legal positions, scope, obligations, and enforcement mechanisms) and the research method which is used for this purpose is literature review.

## Chapter One: Development of Mandatory Human Rights Due Diligence Legislation in Europe

As discussed in the introduction to this paper, time has shown how the implementation of the UNGP's based on companies' voluntariness was only partially successful. This has led civil society to intervene and demand mandatory HRDD legislation (Deva, 2023, p. 397). This trend of hardening HRDD, in order to implement the UNGP's is the realization of the latter's "regulatory vision of a smart mix" foreseeing the adoption of mandatory measures at the national, regional and international level (ibid.). In accordance with the UNGP's, mandatory HRDD laws should meet four objectives, namely encouraging more companies to comply with HRDD, enabling an international level playing field, increasing market actors' influence on businesses with regards to respecting human rights, and leading to a more balanced division of power between communities and companies (ibid.). Against this background, this chapter will analyse the development of mandatory HRDD legislation in Europe. Part one will focus on selected domestic laws, while part two concentrates on the CSRD and CSDDD proposal.

### 1.1 Domestic Mandatory HRDD Frameworks in Europe

In this section the four most recent European domestic human rights due diligence laws will be subjected to a normative analysis. The French Duty of Vigilance Act, Dutch Child Labour Due Diligence Act, German Supply Chain Act, and Norwegian Transparency Act will be examined along four criteria, namely the human rights they intend to protect, the scope of the human rights due diligence provisions, the resulting obligations, and the enforcement mechanisms. It will be shown how the domestic development has moved towards "comprehensive due diligence requirements, covering all sectors and all impacts on human rights and the environment" (Bueno & Kaufman, 2021, p. 547).

### 1.1.1 The French Duty of Vigilance Act

In 2017, the French Duty of Vigilance Act (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017) has been adopted and entered into force. While the French law can be seen as a cornerstone in national mandatory HRDD legislation, an enormous political struggle preceded its adoption. The political struggle between the two chambers of parliament, the government and civil society lasted four years and finally resulted in a compromise and less far-reaching legislation (Cossart & Beau de Lomenie, 2017, p. 317). The original draft included a new civil corporate liability regime and reversed burden of proof from claimants to companies. It was referred by parliament to the French Constitutional Council, which despite pressure to decide in favour of a more business-friendly legislation, declared the majority of the law to be conform with constitutional principles (Cossart & Beau de Lomenie, 2017, p. 318). When analysing the legislation according to the legal positions which are protected, it becomes apparent that the French law covers human rights and environmental standards in a broad and cross-sectoral manner (Guamán, 2022, p. 31). The HRDD regulations are contained in Article L. 225-102-4 of the French Commercial Code and refer to the protection of human rights when stating the requirements for the so-called vigilance plan:

> Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle. (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017)

While the law requires the prevention of risks and serious violations of human rights, fundamental rights, health, safety of persons and the environment, no reference is made to any internationally recognized standards. By using these categorical terms, the legislator avoided the problematic use of an exhaustive list of human rights norms (Guamán, 2022, p. 7). However, the vague delimitation was one of the examples used by members of parliament to argue for a lack of legal predictability when referring the bill to the Constitutional Council and

led to the adaptation of the enforcement mechanisms as will be shown towards the end of this normative analysis (Cossart & Beau de Lomenie, 2017, p. 321).

In terms of scope, the provisions apply to all large companies which are registered or incorporated in France and, for two consecutive years, employ at least five thousand employees within the French territory or a minimum of ten thousand employees worldwide (including people employed through their direct and indirect subsidiaries) (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017). The HRDD provisions extend beyond companies' own business activities to companies under their control (ibid.). The conditions that determine whether a company is considered as controlling other businesses are listed in Article L.233-16 II (ibid.). The obligations also apply to companies' subcontractors or suppliers if the latter maintain an established commercial relationship, which is defined as "a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last" (Cossart & Beau de Lomenie, 2017, p. 320). The French Duty of Vigilance Act is "the first ever duty established by a law of general application requiring multinational enterprises to monitor the human rights abuses of their supply chains" (Palombo, 2019, p. 276). It has pioneered the application of mandatory HRDD provisions on a wide range of entities, and thus answered the increasing demand by civil society to have companies assess and minimize their adverse impact along international supply chains (Sharma, 2021, par. 2).

Companies that fall under the scope of Art. L. 225-102-4 I must comply with the specific obligations resulting from the duty of vigilance (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017). Companies must establish and implement an effective vigilance plan and draft it in collaboration with its stakeholders (ibid.). While not expressly mentioned, this includes the consultation with trade unions (Guamán, 2022, p. 8). Art. L. 225-102-4 I 1° to 5° also state which specific measures the vigilance plan must include vigilance (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017). Firstly, potential adverse human rights and environmental impacts must be identified, analysed and ranked (ibid.). Secondly, the plan needs to contain procedures to regularly assess

the identified risks with regards to their subsidiaries and suppliers as well as subcontractors with an established business relationship (ibid.). Thirdly, measures to prevent and mitigate risks must be established (ibid.). Moreover, an alert mechanism must be put into place that allows the reporting of existing risks and lastly, the implementation of the plan and its efficiency must be assessed by means of a monitoring mechanism (ibid.). The monitoring mechanism ensures that the vigilance plan can "achieve more than a sophisticated benchmark report" (Sharma, 2021, par. 4). In addition, the vigilance plan and implementation report must be made available to the public (ibid.). Combined, these measures replicate the four steps which the HRDD process entails according to the UNGPs (Deva, 2023, p. 407).

The Duty of Vigilance Act provides two types of enforcement mechanisms. Firstly, following Art. L. 225-102-4 II, any party with a legitimate interest may request that the relevant jurisdiction orders a company to comply with the obligations after a formal notice period of three months and may impose a financial penalty (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017). Originally, the bill authorized relevant jurisdictions to impose a civil fine (at maximum 10 million Euro) (Cossart & Beau de Lomenie, 2017, p. 321). However, as mentioned above, a group of MP's contested the content of the bill and amongst other issues the French Constitutional Council was asked to examine whether the vague use of terms (e.g. broad reference to human rights violations and fundamental rights) lacked legal predictability (ibid.). The Council came to the conclusion that no civil fine could be imposed on a company for committing a breach defined in such insufficiently clear and precise terms and removed the language in question from the bill (Conseil Constitutionnel, 2017, p. 7). While the court order to comply with the duty of vigilance provisions has a preventive role, the second enforcement mechanism is employed after companies' failure to comply with their duties resulted in actual damages (Guamán, 2022, p.8). Article L.225-102-5 establishes a civil liability action based on articles 1240 and 1242 under the French Civil Code (loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017). Companies that breach the duty of vigilance obligations, for example by failing to adopt and implement an adequate vigilance plan according to Art. L. 225-102-4 I, can be held liable for causing preventable harm along their supply chain (ibid.). The burden of proving a company's fault and the causal link to suffered damages lies on the claimant (ibid.). The fact that "the law merely imposes an

obligation of process and not of results" exacerbates the challenge for plaintiffs to prove a legal breach (Deva, 2023, p. 407). A list of specific outcomes that companies must include in their monitoring mechanisms would have increased the enforceability of the law and lightened the burden of proof for claimants (ibid.).

### 1.1.2 The Dutch Child Labour Due Diligence Act

The Dutch Child Labour Due Diligence Act was adopted in 2019 and was supposed to enter into force mid-2022, enabling companies to examine their supply chain in due time (Sharma, 2021, par. 5). However, the law still has not been applied and is unlikely to enter into force, since a broader mandatory due diligence legislation has been developed which is currently being considered by Dutch parliament and repeals the 2019 due diligence act (Business and Human Rights Resource Centre, 26.06.2020). In the following, the Child Labour Due Diligence Act will be examined in terms of the protected human rights, its scope, the obligations it imposes and their enforcement mechanisms. Such an examination is useful despite the fact that the act might never enter into force, as it demonstrates the gradual development of European domestic mandatory due diligence legislation.

When analysing the human rights protected by the Dutch act, the question arises whether human rights are truly the focus of these provisions. According to Guamán, the Dutch regulation clearly introduces duty of care obligations with the main objective to protect consumers' rights (as opposed to the human rights of persons involved in the production of goods) (Guamán, 2022, p. 4). The preamble of the act supports this argument, stating that companies should prevent child labour in their supply chain, in order for consumers to purchase their goods and services with peace of mind (Child Labour Due Diligence Act, 2019). However, even if the protection of consumers' rights were the end goal of the legislation, the Dutch act prohibits the violation of fundamental human rights by prohibiting child labour. Article 2 defines child labour on the basis of the Worst Forms of Child Labour Convention 1999 and the Minimum Age Convention 1973 (ibid.). The fact that only child labour and no other human rights violations are covered leads to a narrow protection from companies' negative human rights impacts. While the human rights coverage of the Dutch child labour due

diligence act is narrow, its scope with regards to duty bearers is very broad. The legislation would have applied to "all companies that sell or supply goods or services to Dutch consumers, regardless of where the company is based or registered, without exemptions for legal form or size" (Sharma, 2021, par. 6). Article 5 defines the scope of the due diligence obligations stating that they affect any company selling goods or services to Dutch end-users regardless of whether or not they are registered in the Netherlands (Child Labour Due Diligence Act, 2019). The application does not include the mere transport of goods as explained in Art. 4 (4) (ibid.). The due diligence obligations contained in Article 5 apply to companies in the event of the existence of a reasonable suspicion of child labour in the supply chain. Thus, a two-step process results from the legislation: first, the internal investigation is conducted to decide whether reasonable grounds for child labour exist and secondly the required HRDD measures need to be implemented in case the investigation has confirmed reasonable suspicion (Guamán, 2022, p.10). No concrete criteria for the assessment of "reasonable suspicion" are given and the only prescribed standard for the internal investigation is that it should rely on sources that can be reasonably known and are accessible to the company (ibid.). These broad conditions may narrow the actual scope of the HRDD provisions contained in the Dutch Child Labour Due Diligence Act.

The legislation imposes the following obligations on companies. Firstly, companies need to issue a declaration stating that they exercise due diligence as per Art. 4 (Child Labour Due Diligence Act, 2019). Companies that only purchase goods from businesses which have issued declarations are exempt from drafting their own declaratory statements (ibid.). This exemption serves to encourage companies to prioritize suppliers and subcontractors exercising due diligence (Guamán, 2022, p.10). The fact that the declaration only needs to be submitted once, as opposed to on a regular basis, has led to criticism (ibid.). Secondly, Art. 5 requires companies to adopt and implement a plan of action in case the internal investigation showed there is reasonable suspicion for child labour (Child Labour Due Diligence Act, 2019). The law makes no further mention of the content or standards for the investigation and action plan but refers to the ILO-IOE Child Labor Guidance Tool for Business (ibid.). This lack of prescribed concrete measures which the investigation and action plan should contain has been criticized for potentially causing a disparity with regards to the implementation by companies (Guamán, 2022, p.10).

With regards to the enforcement, the law establishes a public regulatory body that oversees the compliance by companies and may impose legally binding orders and fines (ibid.). Article 3 of the Dutch Child Labour Due Diligence Act states that any interested natural or legal person may submit a complaint to the supervisory body indicating a company's non-compliance and must inform the company in question (Child Labour Due Diligence Act, 2019). The supervisor can consider the complaint after it has been addressed by the company or after a delay of six months (ibid.). The supervisory body can issue legally binding orders to the company as well as a fine for not complying with the declaration obligations (maximum 8'200 EUR) or for failing to comply with the due diligence duties (maximum 820'000 EUR or 10 percent of annual turnover). Article 9 refers to the Dutch Economic Offences Act and introduces a criminal liability for directors if a violation is repeated within five years since the last fine was imposed for the same violation under this leadership (ibid.). While the law does "not create a direct civil cause of action permitting third parties to sue a company for the adverse consequences of human rights violations, […] it has strong enforcement mechanisms and is one of the first criminal enforcement instruments in the field of business and human rights" (Sharma, 2021, par. 12). The law might never enter into force as the Bill for Responsible and Sustainable International Business Conduct, that has been submitted to the Dutch parliament in November 2022, contains a Repeal of the Child Labour Due Diligence Act. However, the act was instrumental in "increasing momentum for broad cross-issue mandatory due diligence legislation in the Netherlands" (Business and Human Rights Resource Centre, 2019).

### 1.1.3 The German Supply Chain Due Diligence Act

The German Supply Chain Due Diligence Act was adopted in 2021 and entered into force on 1 January 2023. The necessity for mandatory HRDD legislation has been debated in Germany since 2010 and gained support with the French developments (Krajewski et al., 2021, p. 552). In the two years leading up to the adoption of the law, a government report found that only 13 to 17 percent of companies employing more than 500 persons voluntarily applied HRDD (ibid.). These findings increased the pressure on the legislator. While the drafting process was accompanied by intense political struggles and lobbying, the final proposal was

adopted by parliament by a vast majority (ibid.). Article 2 (2) the German Supply Chain Due Diligence Act contains a non-exhaustive list of internationally recognized human rights which are covered by the regulation (Lieferkettensorgfaltspflichtengesetz, 2021). The human rights violations listed include child and forced labour, violations of occupational safety and health standards, violations of the freedom of association, discrimination and withholding adequate renumeration (ibid.). The list is complemented by fourteen international treaties enumerated in the Annex of the law (such as the fundamental ILO Conventions and the two International Covenants), which leads to a broad ambit in terms of the protection of human rights (ibid.). In addition to human and labour rights, the law also refers to violations amounting to environmentally related risks in Article 2 (3) (ibid.). However, the protection from adverse environmental impacts is narrow in comparison and only covers violations of the Minamata Convention on Mercury 2013, the Stockholm Convention on Persistent Organic Pollutants 2001 or the Basel Convention on Hazardous Wastes 1989 and more generally the violations pertaining to the rights to food, sanitation and health (Krajewski et al., 2021, p. 554).

With regards to the scope, the German Supply Chain Due Diligence Act applies to companies that have their head office in Germany and employ over 3'000 persons worldwide (Lieferkettensorgfaltspflichtengesetz, 2021, Art. 1). The number of employees includes temporary workers and persons employed by subsidiaries (ibid.). In addition, it covers foreign companies which have a branch office in Germany and 3'000 employees on German territory (ibid.). The law states that for both cases, the threshold number of employees will be reduced from 3'000 to 1'000 from 1 January 2024 (ibid). This would increase the estimated number of affected companies by over five times (from 900 to 4'800 companies) (Krajewski et al., 2021, p. 553). The general human rights and environmental due diligence obligations that companies are required to observe in an appropriate manner throughout the supply chain are contained in Article 3 (Lieferkettensorgfaltspflichtengesetz, 2021). Nine different types of obligations are listed, namely establishing a risk management system; designating internal responsibility; conducting regular risk analysis; issuing a policy statement; the establishment of preventive measures; putting into place remedial measures; establishing internal complaint procedures; implementing risk due diligence mechanisms in relation to indirect suppliers; and documenting and reporting (ibid.). Article 3 (2) determines the appropriateness of companies' actions when fulfilling the due diligence requirements (ibid.). In sum, "'appropriateness' relates to the nature

and extent of the business activity, the leverage of the company over the entity which immediately caused the human rights or environmental risk, the severity, reversibility and probability of the violation, and the nature of the company's causal contribution to the violation" (Krajewski et al., 2021, p. 555). The concretization of what is understood by appropriateness and the distinctive obligations for parent companies and direct or indirect suppliers ensure legal certainty and impedes disparity in implementation.

All nine types of obligations mentioned in Art. 3 (1) are further specified in subsequent articles. With regard to the risk management system, companies are required to introduce efficient measures to identify, assess, prevent and minimize adverse human rights and environmental risks (Lieferkettensorgfaltspflichtengesetz, 2021). A responsible monitoring body must be determined which reports back to senior management at least once a year (ibid.). According to Art. 4 (4) companies need to consider the interests of employees and any other interested parties whose rights are affected by the former's business activities when establishing and implementing the risk management system (ibid.). However, the law remains vague on this requirement and since "consultations with persons that are actually or potentially affected are not mandatory, the German Law neglects the importance of stakeholder participation" (Krajewski et al., 2021, p. 555). As part of the risk management system, companies must conduct risk analyses on a yearly basis and identify risks in their own sphere and that of direct suppliers (Lieferkettensorgfaltspflichtengesetz, 2021, Art. 5 (1-4)). In a next step, companies are to undertake preventative measures without delay once risks have been identified (Art.6 (1). These measures include a policy statement on their human rights strategy, the mandatory elements of which are listed in Art. 6 (2) (1-3). In addition, companies must anchor preventive mechanisms in their own sphere aiming at the implementation of the human rights strategy policy, implementing an appropriate procurement strategy, conducting trainings and control measures (Art. 6 (3)). With regards to direct suppliers, companies must take into account human rights and environmental expectation during the selection process, demand contractual assurances as well as trainings aimed at their implementation, and include risk-based control measures (Art. 6 (4)). In order to ensure the effectiveness of these preventive measures they must be assessed once a year and when the company underwent a change (for example by starting a new project or entering a new business area) (Art. 6 (5)). Article 7 formulates the obligations that must be met once the violation of human rights or environmental

standards has already occurred or is imminent. Companies are tasked to prevent, end or minimize the violation. If the violation was caused by a direct supplier of a company and cannot be ended immediately by the latter, a solution plan needs to be jointly developed might entail a temporary suspension of the business relationship. The recommendations for the plan are found in Art. 7 (2) (1-3). The permanent termination of a business relationship is required as a last resort when the violation is considered as very grave, the solution plan has not succeeded in putting an end to the violation within a set deadline or a company does not have any less severe measures at its disposal (Art. 7 (3)). "Both the duty to analyse risks and the duty to undertake follow-up measures are not intended as a duty to succeed, but as a duty to use one's best efforts", which means the law does not require the actual prevention or complete mitigation of all violations but actions that are proportionate and reasonable for the company in question (Sharma, 2021, par. 19). In addition to the preventive and mitigating measures, the law includes reporting obligations for companies. Companies are required to continuously document the implementation of due diligence obligations and to issue a public report once per year. The report needs to include information on whether and which human rights and environmental risks have been identified. In case a risk or violation has been identified, companies need to illustrate which measures have been taken to fulfil their due diligence duties, how they assess the implementation and effectiveness of those measures and what the conclusions are regarding future measures (Art. 10 (2) (1-4)).

Lastly, the German Supply Chain Due Diligence Act is analysed in terms of its enforcement mechanisms and offered access to remedies. As per Article 8, an appropriate internal complaints procedure must be established by companies. Complainants thus have the opportunity to report risks and violations of human rights and environmental standards committed by parent companies or their direct suppliers to the respective body. The complaints procedure must fulfil the minimum requirements listed in Art. 8 (2-5), for example in terms of access and transparency as well as the annual assessment of the process. In addition, section four of the law defines the monitoring and enforcement competences of public authorities. The Federal Office for Economic Affairs and Export Control (BAFA) may intervene ex officio or upon request by persons who made a substantiated claim (Art. 14 (1-2)). In sum, BAFA will receive and assess company reports, has the power to adopt necessary measures to detect, end and prevent violations of the law and may summon people, request information and enter the

premises of companies" and can impose penalty payments or administrative fines which also may impede companies from entering public procurement contracts for the period of three years (Krajewski et al., 2021, p. 557). The law also refers to civil liability and excludes its exercise on the grounds of a violation of obligations arising from this act in Article 3 (3). This explicit exclusion was criticized heavily by civil society representatives (Guamán, 2022, p.13). However, liability may still be evoked under civil law independently of the act. Additionally, Article 11 grants rightsholders with an important protected legal position the chance to transfer their standing before the courts onto domestic trade unions or non-governmental organizations. This provision "provides an important tool to bridge asymmetry of power between large German corporations and the victims of human rights abuses in seeking access to remedy" (Deva, 2023, p. 411). The analysis of the human rights protection, scope, obligations and enforcement mechanisms contained in the German Supply Chain Due Diligence Act has illustrated that the legislator specified the due diligence provisions in great detail. Coupled with the established complaint and monitoring procedures this contributes to an effective HRDD legislation.

### 1.1.4 The Norwegian Transparency Act

The Norwegian Transparency Act is the last domestic European HRDD legislation that will be analysed in this paper before examining the regional developments at the EU level and Swiss national legislation. In the aftermath of the 2013 Rana Plaza collapse, civil society and politicians in Norway increasingly debated on the right of consumers to information on working conditions in the supply chain (especially in high risk sectors such as the apparel industry) (Krajewski et al., 2021, p. 551). In 2018 the government mandated an Ethics Information Committee to analyse whether legislation regulating responsible business conduct in supply chains and consumers' right to information is recommended (ibid.). Based on the Committee's draft, the Government submitted a proposal to Parliament which was adopted without amendments in June 2021 (ibid.). The law entered into force in July 2022.

The Norwegian Transparency Act is another example besides the Dutch law, which puts consumers' rights at the centre of its regulation (Guamán, 2022, p.4). The purpose of the

Norwegian Act is to promote companies' respect for fundamental human rights and decent working conditions and ensuring public access to information (Transparency Act, 2021, Art. 1). As the name of the law suggests, transparency about business activities which enables consumers to take more informed decisions was at the forefront when developing the legislation. The consumer-oriented approach led to a broad coverage of human rights and affected businesses (Krajewski et al., 2021, p. 558). The definition of fundamental rights as understood by the law is found in Art. 3 (b) and refers to internationally recognized human rights as enshrined in international treaties such as the two International Covenants and the ILO's core conventions (Transparency Act, 2021). The definition of fundamental human rights concurs with the UNGPs and the OECD Guidelines for Multinational Enterprises. Decent working conditions on the other hand are defined as respecting fundamental human rights, protecting health, safety, environment at the workplace and guaranteeing a living wage (Art. 3 (c)). In terms of the scope of the act, Article two states that the law covers larger enterprises domiciled in Norway that offer goods and services inside or outside the country as well as larger foreign enterprises offering goods and services in Norway, which are subject to the Norwegian tax system (Transparency Act, 2021). The term 'larger enterprises' is defined in the Norwegian Accounting Act and Art. 3 (a) of the Norwegian Transparency Act additionally includes companies that meet two of the following conditions: exhibit sales revenues of 70 million NOK, a balance sheet total of 35 million NOK, or an average of 50 full-time employees (Transparency Act, 2021). Moreover, the law states that "parent companies shall be considered larger enterprises if the conditions are met for the parent company and subsidiaries as a whole", which means the thresholds are met more easily (Transparency Act, 2021, Art. 3(a)). The act applies to "the operations of the enterprise, supply chains and business partners" and the former include the parent company's business activity as well as that of its subsidiaries regardless of where they are registered (Krajewski et al., 2021, p. 556). Supply chains and business partners are defined in the act and the commentary subsumes them under the OECD Guidelines' use of the term 'business relationships' thus ensuring application to all tiers (ibid.). The scope of the Norwegian Transparency Act is considered to be broad and affect an estimated 8'800 enterprises (Guamán, 2022, p.14).

With regards to the human rights and decent working conditions due diligence obligations which are covered, the law explicitly refers to the OECD Guidelines in the

introduction of Article 4 and lists the six steps which are also found in the guidelines (Transparency Act, 2021). In sum, the six steps are for companies to embed responsible business conduct in their policies, identify and assess risks, take measures to cease, prevent or mitigate risks or violations, monitor the implementation, communicate how risks are addressed and provide or cooperate in remediation. While no further specifications are made in the law, the reference to the OECD Guidelines in the law and especially the legal commentary serve to concretize companies' duties (Krajewski et al., 2021, p. 554). Moreover, the Ministry has the competence to further specify the provisions (Transparency Act, 2021). Art. 4 (2) addresses the principle of proportionality and states that due diligence must be carried out regularly and in proportion to the size and nature of the enterprise, the context, and the severity and probability of adverse impacts on fundamental human rights and decent working conditions.

A unique element of the Norwegian Act is the double duty regarding access to information (Guamán, 2022, p.14). Firstly, Article 5 regulates companies' reporting obligations and lists the minimum requirements for reports that must be made easily accessible on the website (Transparency Act, 2021). These requirements include information on a company's structure, operations, due diligence guidelines, identified risks and impacts, measures taken to cease or mitigate them and finally their (expected) results. Secondly, Article 6 grants persons a specific right to request information from enterprises on actual or potential impacts. The request may relate to general business operations or specific goods and services and may only be denied on the grounds of the criteria listed in Art. 6 (a-d). The resulting obligations for companies are elaborated in Article 7. The information must be provided in written and understandable form and depending on companies' capacity the request needs to be addressed within a period of three weeks to two months. The fact that companies' obligations when it comes to providing information is two-fold decreases "the informational asymmetry that exits between businesses and rightsholders" (Deva, 2023, p. 410). No direct environmental due diligence obligations are contained in the Norwegian Act, as the respective proposals failed to gain parliamentary support (Krajewski et al., 2021, p. 554). The law also contains enforcement mechanisms and charges an existing administrative body, namely the Consumer Authority, with the supervision of the act (Guamán, 2022, p.14). The Consumer Authority provides guidance, monitors the compliance and enforces the law as per Art. 8-14 (Transparency Act, 2021). The supervisory body promotes compliance with the act on its own

accord or upon request by third parties and once a violation is found may issue decisions, enforcement or infringement penalties (Art. 11 (a-c)). The law is limited to these administrative enforcement mechanisms and does not introduce any corporate civil liability provisions (Deva, 2023, p. 410). However, the involvement of different stakeholders in drafting the Norwegian Act resulted in reducing the power imbalance between enterprises and rights-holders and strengthened "the leverage of market actors over business enterprises in integrating respect for human rights as a new normal of doing business" (Deva, 2023, p. 397).

### 1.2 Legal Frameworks at the Regional Level

The EU's efforts in the field of corporate sustainability have intensified in in the last years and recently led to the adoption of the Corporate Sustainability Reporting Directive (CSRD) and the proposal for a Corporate Sustainability Due Diligence Directive (CSDDD). Developments at the EU level illustrate that due diligence is a flexible concept which has found its way into different regulations with different main objectives (Guamán, 2022, p.4). The proposal for the CSDDD is a response to growing demand, not just by civil society but increasingly also by businesses, to clarify mandatory sustainable HRDD obligations, "as the patchwork of national laws and EU level legislation in some areas and sectors is becoming increasingly difficult to navigate" (Directorate-General for External Policies, 2020, p. 2). In this sense, the domestic laws which have been analysed in the previous sections served to "provide further momentum for mandatory measures to promote corporate respect for human rights, including future regulations in the European Union" (Krajewski et al., 2021, p. 550). In some cases, national institutions called for a EU mandatory HRDD directive and proposed concrete recommendations (Guamán, 2022, p.2). In the following section a brief background on corporate sustainability legislation at the EU level will be provided with a focus on the CSRD and proposal for a CSDDD. The latter were chosen for the analysis because of the recency of entry into force and adoption and their relevance in the comparative analysis with the Swiss legislation in chapter three of this paper. After the general overview, the directive and the proposal will be analysed according to the same criteria as the domestic legislations beforehand.

### 1.2.1 Corporate Sustainability Developments at the EU Level

Recognizing its important role in promoting corporate social responsibility (CSR) as well as business and human rights standards to ensure that companies act responsibly by preventing and mitigating adverse impacts on the environment and society, the EU has been adopting pioneering initiatives and policies since the adoption of the UNGPs in 2011 (European Commission *Corporate sustainability reporting*, 2023). The positive and negative impact that companies can have on society "in terms of the products and services they offer or the jobs and opportunities they create, but also in terms of working conditions, human rights, health, the environment, innovation, education and training" has led to the adoption of initiatives in those fields (ibid.). In 2019, the European Commission has published a staff working document on CSR, Responsible Business Conduct, and Business and Human Rights, in order to track the progress made since the renewed EU strategy for CSR was adopted in 2011 (European Commission *Staff Working Document*, 2019). As part of the analysis of the promotion of CSR and the implementation of the UNGPs through the EU, the development in the field of due diligence was examined. Three key actions were identified in this regard: regulations with regards to the sourcing of timber and minerals, measures in the textile sector and due diligence requirements in the Non-Financial Reporting Directive (ibid.). In 2011 the EU Timber Regulation was adopted imposing due diligence measure on the sourcing of timber and in 2017 the Conflict Minerals Regulation followed. Promoting sustainable garment value chains was the main objective of EU measures in the apparel sector and led to the elaboration of risk assessment tools and increased funding for development support (ibid.). The Non-Financial Reporting Directive (Directive 2014/95/EU amending Directive 2013/34/EU, hereafter NFRD) was adopted in 2014 and required companies to "disclose, amongst other things, the due diligence process that they implement with regard to environmental and social issues, human rights, and bribery and corruption" (ibid.). When the European Commission presented the European Green Deal in 2019, the roadmap for a more sustainable EU economy also contained recommendations to review the NFRD (Directive (EU) 2022/2464). These recommendations were based on the findings from studies and consultations conducted by the Commission, which showed room for improvement regarding various aspects in the directive (Baumüller & Grbenic, 2021, p. 370). Two years later the Commission published its proposal for an amending

directive and in January the resulting Corporate Sustainability Reporting Directive (CSRD) entered into force. The CSRD "completely reshaped the European reporting framework on sustainability reporting" and increased the scope of companies obligated to report as well as the range of topics to be included (Baumüller & Grbenic, 2021, p. 371).

The content of the CSRD will be analysed in detail in the subsequent section of this paper. Companies will have to apply the new regulations for the first time in the financial year of 2024 and draft the reports according to the European Sustainability Reporting Standards which the Commission is developing in collaboration with the European Financial Reporting Advisory Group (European Commission *Corporate sustainability reporting*, 2023). One of the objectives of the CSRD is "aligning the European provisions for corporate sustainability reporting with the further requirements put forth by other sustainability-regulated regulations" such as the Sustainable Finance Disclosure Regulation (SFDR) and the Taxonomy Regulation (Baumüller & Grbenic, 2021, p. 371). However, a 2020 study by the Commission has found that "while the introduction of reporting requirements has created positive impact by raising awareness and stimulating internal conversations within companies, its effect on the actual improvement of due diligence seems to be minimal" (Directorate-General for External Policies, 2020, p. 1). While the regulations require companies to report on their due diligence practice, establishing those due diligence mechanisms remains voluntary (ibid.). Civil society as well as governments increasingly demanded a more robust business and human rights framework in the form of mandatory due diligence legislations and businesses struggling with navigating various domestic regulations have requested more legal certainty as well (Smit et al., 2020, p. 268). In a study conducted by the Commission in 2020, 70% of companies replied that they expect to benefit from mandatory HRDD obligations (Smit et al., 2023). Likewise, the European Parliament and Council of the European Union have urged the Commission for a respective proposal (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, as regards Corporate Sustainability Due Diligence, 2022). Finally, in February 2022 the Commission published a draft Corporate Sustainability Due Diligence Directive (ibid.). The aim of the CSDDD proposal is to obligate companies to ensure "the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management

systems and measures in place to this end" (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, as regards Corporate Sustainability Due Diligence, 2022, p. 2). The content of the proposal will be analysed in detail in section 1.2.3 of this paper. The Council has adopted its position on the CSDDD proposal in December 2022 and the Parliament has agreed on its position in June 2023 (Business and Human Rights Resource Centre, 29.04.2020). The positions of these two institutions differ from the Commission's proposal with regards to several elements. "The Council's draft misses the opportunity to set ambitious due diligence" by removing or amending key provisions such as the regulations relating to directors' duty or civil liability (Mangin, 2022, par. 1). The Parliament on the other hand, expanded the scope of the CSDDD proposal in its position. For instance, the position paper adapts the provisions more closely to internationally established obligation standards and facilitates the access of victims to remedies (Patz, 2023). In the run-up to the plenary vote, MEP's had attempted and failed to water-down the parliamentary position by means of modification requests (Keller, 2023). As both institutions have adopted their position, the EU policymakers entered the trilogue negotiations and a final text is expected towards the end of 2023. As explained in the introduction of this thesis, the analysis in this paper with regards to the CSDDD's human rights protection, scope, obligations and enforcement elements is limited to the proposal published by the Commission in February 2022.

### 1.2.2 Corporate Sustainability Reporting Directive

The analysis of the CSRD will start with questioning how the protection of human rights is anchored within the directive. The list of sustainability matters which are covered by the directive include "environmental, social and human rights, and governance factors" (Directive (EU) 2022/2464, Recital 28). The directive emphasizes that "information about forced labour and child labour in their value chains where relevant" must be included when companies are reporting on human rights (Directive (EU) 2022/2464, Recital 49). While reporting duties on child labour and forced labour are highlighted, the directive also requires reporting standards to specify which internationally recognized human rights are further

covered and refers to the International Bill of Human Rights and other core UN human rights conventions, including the UN Convention on the Rights of Persons with Disabilities, the UN Declaration on the Rights of Indigenous Peoples, the UN Convention on the Rights of the Child, the ILO Declaration on Fundamental Principles and Rights at Work, the fundamental conventions of the ILO, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, and the Charter of Fundamental Rights of the European Union (ibid.). Furthermore, European Sustainability Reporting Standards (ESRS) must specify that companies are obliged to report on equality measures, working conditions as well as environmental factors (Directive (EU) 2022/2464, Art. 29b (2)). When drafting the standards the Commission is asked to "pay particular attention to the scale of the risks and impacts related to sustainability matters for each sector, taking account of the fact that risks and impacts are higher for some sectors than for others" (Directive (EU) 2022/2464, Art. 29b (1)). Based on the directive, the coverage of social and human rights matters in reporting is broad, but the concrete priorities will depend on the guiding standards and the transposed national laws.

With regards to the scope, the CSRD brought about an immense change compared to the NFRD (Baumüller & Grbenic, 2021, p. 373). Whereas the latter only affected large undertakings which are public-interest entities and employed at least 500 persons, the scope for the CSRD is extended (ibid.). Firstly, the reporting duties that are set forth in Art. 19a apply to large undertakings and small and medium-sized public interest undertakings (Directive (EU) 2022/2464). According to the EU Accounting Directive, large undertakings are companies that meet two of the following criteria: balance sheet total over 20 million EUR, net turnover of 40 million EUR, or 250 employees (ibid.). SMEs which are public interest undertakings (such as companies listed on the stock market, insurances or credit institutions) are also required to comply with the reporting obligations (Davies et al., p. 2). Secondly, Art. 29a places reporting duties on "Parent undertakings of a large group", which means that parent and subsidiary companies that combined meet two of the criteria mentioned above are also affected by the directive (Directive (EU) 2022/2464). Lastly, "for the first time, also third-country issuers within the EU must prepare sustainability reports based on European law" (Baumüller & Grbenic, 2021, p. 373). According to Art. 40a, enterprises whose parent companies are not registered in the EU but have a net turnover of 150 million EUR within the EU for two

consecutive years and additionally either have a subsidiary within the EU that fulfils the criteria under Art. 19a or has a branch in the EU with a net turnover of 40 million EUR in the preceding year are covered by the directive (Directive (EU) 2022/2464). What has remained unchanged is the exemption for subsidiaries which are already included in consolidated reports of parent companies (ibid.). The expansion in the scope has resulted in an application by almost 50'000 companies (under the NFRD 11'700 companies were covered) (European Commission. *Corporate sustainability reporting*, par. 1).

The CSRD also extends the reporting obligations of covered undertakings. In the following a limited number of obligations are discussed, which are relevant for the comparative analysis in chapter 3. While Art. 19a (1) contains the general obligation to "include in the management report information necessary to understand the undertaking's impacts on sustainability matters", the second paragraph specifies which information the reporting must include (Directive (EU) 2022/2464). Reports must provide information on sustainability matters with regards to the business model and strategy, forward-looking and retrospective information relating to sustainability targets, the role of supervisory bodies, adopted policies, incentive schemes, a description of risks (Directive (EU) 2022/2464, Art. 19a (2) (a-h)). Regarding the reporting of sustainability related risks, the directive demands that information on human rights due diligence implementation be reported (including the identification of actual or potential risks and the prevention, mitigation, remediation measures taken) (Directive (EU) 2022/2464, Art. 19a (2) (f)). Recital 31 states that the due diligence reporting obligation under the NFRD did not sufficiently "ensure consistency with international instruments" and that disclosure duties need to be more concrete to reflect the UNGPs and OECD Guidelines. The recital therefore defines due diligence according to the UNGPs and emphasizes that potential and actual impacts caused by an undertaking's own business activities or along its supply chain are included. Another change introduced by the CSRD is the principle of double materiality, to assess the matters that need to be included in the reporting (Baumüller & Grbenic, 2021, p. 373). Recital 29 clarifies that undertakings need to "report both, on the impacts of the activities of the undertaking on people and the environment, and on how sustainability matters affect the undertaking" (Directive (EU) 2022/2464). The necessity of including both perspectives in their reports and reporting on sustainability matters without financial consequences has proven to be challenging for undertakings in the past (Directive

(EU) 2022/2464, Art.29). The directive also includes specifications on the format of reports and most importantly introduces the single electronic reporting format, which is crucial for the introduction of the European Single Access Point (Baumüller & Grbenic, 2021, p. 376). Moreover, the CSRD requires third-party assurances and external auditing, which supports compliance with the reporting duties (Recital 60). With regards to enforcement mechanisms, the CSRD does not contain very specific provisions. However, Art. 20 requires Member States to "ensure that there are effective systems of investigations and sanctions to detect, correct and prevent inadequate execution of the statutory audit and the assurance of sustainability reporting". These sanctions shall be "effective, proportionate and dissuasive" (Directive (EU) 2022/2464, Art. 20). The decision of policy-makers not to include direct non-compliance sanctions recognizes "the diversity of implementing and enforcement mechanisms for company obligations in EU Member States" and the challenge of imposing universal measures that are effective and appropriate for all national contexts (Directorate-General for External Policies, 2020, p. 13).

### 1.2.3 Proposal for a Corporate Sustainability Due Diligence Directive

In the explanatory memorandum to the proposal for a Directive on Corporate Sustainability Due Diligence, the Commission defines the aim of the CSDDD as follows:

> This Directive will set out a horizontal framework to foster the contribution of businesses operating in the single market to the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end. (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, as regards Corporate Sustainability Due Diligence).

In terms of the human rights which are protected by imposing due diligence obligations on companies, the directive refers to selected international conventions and applies a "cross-cutting" approach (ibid.). Recital 25 specifies that the relevant international conventions are

listed in Annex one, but that the list is not exhaustive and "to ensure a comprehensive coverage of human rights, a violation of a prohibition or right not specifically listed in that Annex which directly impairs a legal interest protected in those conventions should also form part of the adverse human rights impact covered by this Directive" (ibid.). The twenty-two listed conventions include the International Bill of Human Rights, ILO core conventions as well as the Conventions on the Rights of the Child, Persons with Disabilities and the UN Declaration on the Rights of Indigenous People (ibid.). The CSDDD proposal thus covers a broad range of human rights and according to Art. 1 (2) the directive explicitly denies that the protection level of human rights and the environment in national legislations is lowered on the grounds of the CSDDD proposal (ibid.). With regards to environmental protection, the Annex contains a separate list of conventions in Part two.

The scope of the established HRDD obligations covers companies' own operations, the activities of their subsidiaries and indirect or direct established business relationships throughout the entire value chain (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, as regards Corporate Sustainability Due Diligence , Recital 15). According to Art. 2 (1) (a-b) companies are required to fulfil the obligations if they either employ an average of 500 persons and have a net turnover of over 150 million EUR or if they operate in a high risk sector and have over 250 employees as well as a net turnover of 40 million EUR (at least half of which was made in high risk sectors). The respective sectors are the textile industry, agriculture (including forestry and fisheries) and production with mineral or metal resources and the designation is based on the OECD guidelines (Recital 22). Smaller companies meeting the threshold under Art. (2) (b) "should only be obliged to identify those actual or potential severe adverse impacts that are relevant to the respective sector" (Recital 31). While SMEs are not covered in the scope of the CSDD proposal, they are indirectly affected as sub-/contractors of companies that fall under Art. 2 (a) (Recital 47). Third country companies fall under the scope of the CSDDD proposal if they either generated a net turnover of over 150 million EUR in the EU market or made a net turnover of 40 million EUR in the EU (at least 50% of which was acquired in one of the high risk sectors (Art. 2 (2)). During the consultation phase, the Commission found that the majority of companies "indicated that they feared the risk of competitive disadvantages vis-à-vis third-country companies that do not have the same duties" (Proposal for a Directive of the European

Parliament and of the Council amending Directive (EU) 2019/1937, as regards Corporate Sustainability Due Diligence, p. 11). Thus, they agreed that third country companies passing certain thresholds should be covered by the CSDDD proposal. When analysing the obligations which are imposed by the directive proposal, Recital 15 needs to be consulted. It states that "the main obligations in this Directive should be obligations of means". This means that companies are not required to ensure that the violation of human rights or environmental standards never occur, but that "appropriate measures which can reasonably be expected to result in prevention or minimisation of the adverse impact" have been taken (Recital 15). Thus, the CSDDD proposal is in line with the UNGPs (Smit et al., 2023, p. 8). Art. 4 (a-f) defines the six steps which are comprised in the due diligence duty: the integration of due diligence in a company's policies: identifying actual or potential risks; preventing, mitigating and ending adverse impacts; establishing and implementing a complaints procedure; monitoring the effectiveness of due diligence measures; communicating on due diligence. Hereby the directive proposal follows the due diligence steps as defined in the OECD guidelines (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, as regards Corporate Sustainability Due Diligence, Recital 16).

In the subsequent articles the proposal defines the specific measures for each required due diligence action. Critics argue that in the proposed directive, "the dynamic process of due diligence foreseen in the international standards has been distilled to an exhaustive subset of specific actions to be taken by the company" (Patz, 2022, p. 293). However, mandatory due diligence legislation benefits from specifications and as shown in various studies, companies wish for more legal certainty, which can be ensured by prescribing concrete measures to be taken by companies (Smit et al., 2020, p. 264). With regards to the obligation of integrating a due diligence policy, companies are asked to include a description of their approach, a code of conduct and implementation measures (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, Art. 5). When taking appropriate measures to identify potential or actual adverse human rights or environmental impacts, the operations of a company, its subsidiaries and the established business relationship within the value chain need to be considered by companies (Art. 6). The term 'established business relationship' is defined as "a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and

which does not represent a negligible or merely ancillary part of the value chain" (Art. 3 (f)). The definition has been criticized for being too "static" and not recognizing a company's ability to influence, but only the actual influence that results from a lasting relationship (Patz, 2022, p. 294). The term 'appropriate measures' is also defined in the CSDDD proposal: "Appropriate measure means a measure that is capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritisation of action" (Art. 3 (q)).These criteria of severity, likelihood, influence and prioritisation of action are based on the UNGPs (Patz, 2022, p. 294). Article 7 (2) lists the steps which companies need to follow in order to comply with their obligation to take appropriate measures to prevent or mitigate adverse impacts. They include the development and implementation of a prevention action plan, demanding contractual assurances or entering a contract to ensure the compliance with the code of conduct and monitoring the implementation. In the case of severe potential impacts, companies shall "terminate the business relationship" (Art. 7 (5) (b))). To a large degree, the steps companies need to follow when taking appropriate action to end an actual adverse impact contain the same elements. Instead of a prevention action plan, once the adverse impact has occurred, companies must develop and implement a corrective action plan (Art. 8 (3) (b)))). In addition, companies must "neutralise the adverse impact or minimise its extent, including by the payment of damages to the affected persons and of financial compensation to the affected communities" (Art. 8 (3) (a))). The amount of the payment is proportional to the severity of the damage (ibid.). These obligations of preventing, mitigating and ending adverse human rights and environmental impacts provide for "proactive stakeholder consultation" (Patz, 2022, p. 294). When identifying risks and developing the prevention or corrective action plans, consultations with affected stakeholders are "discretionary", but engaging with stakeholders in the complaints procedure is obligatory (ibid.). Pursuant to Article 9, companies are obliged to establish the latter and thus give affected persons and when related to the value chain trade unions and civil society the possibility to file a complaint to share their concern about actual or potential impacts. The latter also have the right to demand a follow-up and meet with representatives of the company (Art. 9 (4)). Lastly, Articles 10 and 11 specify companies'

monitoring and communicating obligations. With regards to monitoring, companies must assess the effectiveness of their due diligence measures at least once a year and additionally when a new risk has arisen (Art. 10). In terms of reporting obligations, the proposal refers to the 2013 Accounting Directive and states that companies that are not covered the reporting requirements of the latter must publish an annual report under the CSDDD (Art. 11). The explanatory memorandum also refers to the CSRD which had not yet been adopted when the text was drafted (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, p. 3). Article 25 in the CSDDD proposal regulates director's duty of care and requires that "Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties apply also to the provisions of this Article" (ibid.). Directors are required to oversee the due diligence measures and specifically are responsible for supervising the adoption of "the company's due diligence policy, taking into account the input of stakeholders and civil society organisations and integrating due diligence into corporate management systems" (Recital 64).

While the due diligence obligations introduced by the CSDDD proposal form a robust protection from adverse human rights and environmental impacts, "enforcement mechanisms are key to ensuring the effectiveness of a law" (Smit et al., 2023, p. 9). The proposal contains public and private enforcement mechanisms. Regarding the latter, the CSDDD proposal obligates Member States to regulate the civil liability for companies in the case of non-compliance with their due diligence obligations (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, Recital 52). While "the company should be liable for damages if they failed to comply with the obligations to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and minimise their extent, and as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures occurred and led to damage", civil liability does not apply to the same degree in all situations (ibid.). According to Art. 22 (2), companies are not held liable for the operations of indirect partners even if they have an established business relationship except if it was unreasonable to expect that the taken preventive, mitigating and ending measures were sufficient (ibid.). Furthermore, companies' liability is assessed taking into account their efforts to address the adverse impact and compliance with the supervisory authority's orders (ibid.).

As part of the public enforcement mechanisms, authorities which identified a case of non-compliance with the due diligence provisions must offer companies "an appropriate period of time to take remedial action" before considering imposing proportionate sanctions (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, p. 9). In order to ensure enforcement, Member States are asked to designate specific national supervisory authorities, which can conduct investigations and impose administrative or pecuniary sanctions (Recital 54). A full list of the expected powers of the supervisory authority is contained in Article 18 of the CSDDD proposal. The CSDDD proposal also ensures the liability of directors in cases where Member States' laws regulate breaches to directors' duty accordingly (Art. 25). While the directive requires Member States to ensure that a sanction regime is established in Article 20, the CSDDD proposal "leaves it to the Member States to ensure a proportionate enforcement process, in line with their national law" (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, p. 9). Thus, as is the case in the CSRD the Commission recognized that the diversity in national enforcement mechanisms necessitates a certain degree of flexibility for Member States.

In this chapter recent mandatory HRDD legislations and proposals have been examined. At the domestic level, the French Duty of Vigilance Act, Dutch Child Labour Due Diligence Act, German Supply Chain Act, and Norwegian Transparency Act underwent a detailed normative analysis taking into consideration four main elements (human rights concerned, scope, obligations and enforcement mechanisms). The level of detail ensures that a comprehensive comparative analysis can be conducted between these acts and the Swiss counterpart in Chapter three. While the national laws show some similarities, their differences with regards to the four crucial elements which were examined lead to a fragmented legal landscape and legal uncertainty for companies operating in the EU market. Union legislation on the other hand would "advance respect for human rights and environmental protection [and] create a level playing field for companies within the Union" (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, p. 2). In the second part of this chapter the Corporate Sustainability Reporting Directive and the European Commission proposal for a Corporate Sustainability Due Diligence Directive were therefore analysed according to the same criteria as the four domestic acts. While the analysis has illustrated that the CSRD and CSDD proposal have both been objects of criticism, the

introduction of mandatory HRDD at the EU-level is a crucial step in hardening soft law and promoting the cross-cutting respect for human rights in the Union and beyond thanks to the provisions applying to third country companies. The impact on third countries will be discussed in more detail when contrasting the EU legislation with the Swiss law and examining the impact on companies.

## Chapter Two: Human Rights Due Diligence Legislation in the Case of Switzerland

This chapter will outline the Swiss HRDD legislation developments in recent years and pay special attention to the Swiss Responsible Business Initiative, the indirect counter-proposal and resulting Federal Ordinance on Conflict Minerals and Child Labour and respective Code of Obligation provisions. A brief background on the developments leading up to the popular initiative and the general procedure for the latter will be provided in the introductory part of this section. Subsequently, the initiative proposal and final legislation will be analysed according to the same criteria that were applied to domestic and regional legislations in the previous chapter, namely the Human Rights concerned, the scope, obligation and the enforcement mechanisms foreseen by the proposals and final ordinance. While the Responsible Business Initiative has been defeated in the vote on the 29th of November 2020, its analysis is still relevant for the present thesis. It will be shown how the proposal influenced the adopted Swiss legislation and in the next chapter elements of the initiative text will also be discussed in the comparative analysis with other domestic and regional human rights due diligence legislations.

### 2.1 Background

In 2012, one year after the endorsement by the Human Rights Council of the United Nations Guiding Principles on Business and Human Rights, the Swiss Foreign Affairs Committee of the National Council submitted a postulate asking the Federal Council to have a comparative law report elaborated regarding the obligation of boards of directors to implement due diligence mechanisms concerning business activities abroad in the area of human rights and the environment (Commission des affaires extérieures du Conseil national, 2012). The

comparative report was presented in 2014 and contained recommendations to increase the corporate responsibility to protect human rights by suggesting accountability measures and imposing specific obligations on boards of directors of Swiss parent companies (Palombo, 2019, p. 276). However, in March 2015 the National Council narrowly rejected a motion to advance the comparative law report (ibid.). In the same year, a position paper on CSR was adopted by the Swiss Federal Council (ibid.). One of the suggestions in the position paper was the elaboration of a definition of CSR in the framework of the UN and OECD and it was complemented in 2016 by the Swiss National Action Plan (NAP) (Bueno, 2019). Neither the Position Paper, nor the NAP recommended adopting mandatory human rights due diligence provisions in national law or contained suggestions with regards to establishing liability regimes (ibid.). In the NAP the Federal Council made the following statement regarding mandatory human rights due diligence:

> Toute réglementation dans ce domaine devrait bénéficier d'un large soutien au niveau international, afin d'éviter que la place économique suisse ne soit pénalisée. Le Conseil fédéral recommande en revanche une procédure de diligence sur une base volontaire. (Conseil Fédéral, 2016, p .15)

While the government thus emphasized that it supports a human rights due diligence process based on voluntariness, in order not to penalize Swiss businesses by disadvantaging them in the international market, it also acknowledged the almost concurrent submission of a popular initiative demanding precisely a mandatory piece of legislation in that regard (ibid.). As a reaction to the conservative stance of the Swiss government and parliament, the public had intervened (Palombo, 2019, p. 276).

### 2.2 Responsible Business Initiative

The popular initiative 'For responsible businesses – protecting human rights and the environment' was submitted in October 2016. The Responsible Business Initiative and its draft article were launched by the Swiss Coalition for Corporate Justice in 2015 and since then the coalition's number of supporting civil society organizations has risen from 66 to 99 (SCCJ Website). The federal popular initiative, a cornerstone of Swiss direct democracy, allows the

population to suggest constitutional amendments. The provisions related to federal popular initiatives are found in Art. 139 of the federal constitution. Its submission is valid if 100'000 signatures have been collected within 18 months since the publication date and if it does not violate jus cogens (Federal Constitution of the Swiss Confederation, 1999). The initiative can be submitted as a general proposal or more commonly, like in the case of the Responsible Business Initiative, as a specific draft article. The draft, accompanied by a recommendation of the Federal Assembly whether to accept the initiative or not, is then submitted to the people and the cantons for a popular vote and requires a double majority. The Federal Assembly may include a counter-proposal in the same vote. This counter-proposal is either a direct one, which means that Parliament suggests an alternative amendment to the constitution, or an indirect one that proposes not a constitutional change but a change or addition of ordinances. The initiative committee that launched the initiative may retract its submission after these counter-proposals have been made. Whereas a direct counter-proposal needs to be explicitly accepted by the people and the cantons in the same vote, an indirect-counter proposal is automatically triggered when an initiative is defeated. In the case of the Responsible Business Initiative, an indirect-counter proposal was elaborated. So far 228 federal popular initiatives have been submitted to a vote, only 25 of which have been accepted by the people and the cantons (Bundeskanzlei, 2023). However, even defeated initiatives can have a strong political impact and promote legal modifications, for example by prompting Parliament to suggest counter-proposals (Moeckli, 2018, p. 82).

In the following paragraphs the text of the initiative and its proposed constitutional Art. 101a will be analysed (Bundesrat *Erläuterungen des Bundesrates – Volksabstimmung vom 29.11.2020, 2020*). The draft article is structured as follows: paragraph one states the general objective of the amendment, paragraph two refers to the human rights in question (101a (2) (a)), the scope (101a (2) (a-b)), obligations (101a (2) (a-b)), liability (101a (2) (c)) and applicable law (101a (2) (d)). The general aim of the proposed Article was for the Confederation to "take measures to strengthen respect for human rights and the environment through business" (Bundesrat *Erläuterungen des Bundesrates – Volksabstimmung vom 29.11.2020, 2020*). Paragraph two defines the steps needed to achieve this goal and firstly refers to the human rights that are to be protected by the amendment (ibid.). However, the draft article remains vague and leaves room for interpretation. Paragraph (2) (a) refers to "internationally

recognized human rights and international environmental standards", but does not further specify. However, the explanations to the text state that the UNGPs constitute the primary basis for the draft, which is why they should be consulted when interpreting the text (Swiss Coalition for Corporate Justice, 2021, p .1). The initiative therefore covers the internationally recognized human rights which Principle 12 identifies at a minimum as the Bill of Human Rights and the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work (ibid.). For the definition of international environmental standards, the coalition refers to standards that were adopted in international public law, by international organizations and non-governmental standards and lists some examples (ibid.). The initiative text made no reference to specific sectors and demanded a broad cross-sectoral protection of human rights and environmental standards.

Secondly the scope of the amendment is explained. The proposal was to impact "companies that have their registered office, central administration, or principal place of business in Switzerland" and their business activities abroad. No further limitations regarding the size, number of employees or net turnover are mentioned, which means that the draft amendment would apply to all companies registered in Switzerland including small and medium-sized enterprises (SMEs). The defenders of the initiative refuted this claim and clarified in the explanatory report that in practice Swiss SMEs would not be affected (Swiss Coalition for Corporate Justice, 2021, p .15). Firstly, paragraph (2) (b) leaves the legislator some leeway in the regulation concerning SMEs: "In the process of regulating mandatory due diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind". Thus, except in high-risk sectors, SMEs could be excluded in the legislation. Secondly, as per (2)(b) the scope of the human rights due diligence obligations extends to enterprises' controlled companies abroad. In practice, supporters argue, this means SMEs are not included in the scope, as they hardly possess subsidiaries or control companies abroad (ibid.). The terms used to define the scope of the law, namely "controlled companies" and "business relationship" raised additional questions in the discussion surrounding the proposal. The proposed Art. 101a(2)(a) states:

> Companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and

> environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.

The text above does not contain a definition of the term "control" other than stating its determination depends on factual circumstances and may also derive from the exercise of power in a business relationship. This broad description means any form of control falls under the scope of the proposal, be it based on "ownership (holding shares in a subsidiary) or economic relationship (such as the control that accompany exercises across its value chain)" (Palombo, 2019, p. 277). The initiative committee's initial objective was to target parent companies in control of their subsidiaries while leaving room for other possible forms of control, such as a relationship of dependence between a sole purchaser and its supplier (Bueno, 2019). Ultimately, by including such broad language in the text, the interpretation of control and whether or not to allow considerations regarding the level of influence was left to the legislator and the courts.

The third element in the initiative text to be considered are the obligations it contains. The text demands that companies respect internationally recognized human rights and environmental standards not just in Switzerland but also abroad. To this end a mandatory due diligence obligation was included in paragraph (2)(b) which requires businesses to identify adverse human rights and environmental impacts, take appropriate measure to prevent them and cease existing violations, and account for the actions that were taken. The mandatory due diligence is the "heart" of the initiative and based on the human rights due diligence definition of Principle 17 in the UNGPs and the OECD Guidelines for Multinational Enterprises (Swiss Coalition for Corporate Justice, 2021, p .2). The initiative goes beyond the UNGPs by extending the due diligence obligation to international environmental standards and in the explanation text the coalition refers to the OECD Guidelines for Multinational Enterprises recommendations (ibid.).

The initiative text also contains enforcement measures and specifies the legal consequences for enterprises that violate their mandatory due diligence. This corporate civil liability is contained in paragraph (2) (c) and, in line with the due diligence scope, it states that companies are not only liable for the human rights and environmental damages caused by

themselves, but also for the damage that companies under their control have caused abroad. The draft amendment is based on the principal liability provisions of Art. 55 of the Swiss Code of Obligations, which limit the liability of parent companies to subsidiaries in their effective control (Werro, 2019, p. 166). Enterprises are exempt from corporate civil liability under the proposed constitutional amendment "if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken". Victims could enforce due diligence by providing evidence for the unlawful damage they suffered and proving a causal link to the in-/action of the enterprise (Swiss Coalition for Corporate Justice, 2021). The draft took into consideration the practical barriers to accessing remedies that victims encounter by having to prove that enterprises violated their due diligence and reverses this burden of proof (Bueno, 2019). This reversal relieves the claimant and requires the enterprise to provide evidence for respecting due diligence, thus dividing the burden of proof. Some experts have considered this element of the Swiss business initiative as revolutionary, since it took the practical difficulties such as lack of access to information and as well as the power imbalance between multinational enterprises and plaintiffs into account. The innovation lies in giving companies the opportunity "to defend themselves against nuisance lawsuits, while at the same time, not overburn human rights victims with a high standard of proof that they are unlikely to meet" (Palombo, 2019, p. 284). While the coalition elaborated in the explanatory paper to the initiative text that the scope as per paragraph (2) (a) covers controlled companies such as subsidiaries but also suppliers that do not fall under that category if certain criteria are fulfilled, no such mention is made for the draft's liability provisions. Lastly, paragraph (2) (d) determines the applicable law for paragraphs (2) (a-c). The drafting committee had considered that transnational civil liability cases are generally judged by Swiss courts by applying the law of the foreign state where the damage was caused (Swiss Coalition for Corporate Justice, 2021). In order to ensure the enforcement of the draft's mandatory due diligence and liability provisions, the text therefore foresees that they "apply irrespective of the law applicable under private international law". While the Responsible Business Initiative did not succeed in being accepted by the population and the cantons thus failing to acquire the double majority needed for a constitutional amendment, it did gather the necessary popular votes. 50.7 percent of the population approved the initiative, which led to a rare occurrence in the chapter of Swiss democracy – only once

before, in 1955, was an initiative rejected due to a missing cantonal majority (Leutenegger, 2020). This narrow defeat of the popular initiative was the culmination of a heated campaign and complex negotiations between the two chambers of Swiss parliament when drafting its indirect counter-proposal. In the next section the development of the indirect-counter proposal (and resulting legislation) will be outlined and its content will be analysed and compared to the popular initiative.

### 2.3 Indirect Counter-Proposal and Resulting Legislation

As previously mentioned, an indirect counter-proposal was elaborated by the Swiss Parliament in response to the submitted Responsible Business Initiative. As opposed to a direct counter-proposal, indirect proposals suggest an amended or new act with the advantage of avoiding a long legislative process following the constitutional amendment of an initiative or direct proposal (Swiss Parliament, 2023). In addition, indirect counter-proposals have an important political significance and allow Parliament to react to the demands of initiatives and its supporters by suggesting an alternative. The motivation of the Federal Assembly is to "show that it regards the popular initiative as going too far, but that it still wants to take up the matter, if only in part, and bring in new legislation below the level of the Constitution" (ibid). In the case of the Responsible Business Initiative, the Swiss executive branch as well as parliament regarded the content as too far-reaching. In January 2017 the Federal Council published its recommendation for cantons and the population to reject the initiative and in June 2017 the National Assembly approved the indirect counter-proposal drafted by its Law Commission (Werro, 2019, p. 167). Subsequently, a "legislative ping-pong" ensued between the two chambers of parliament regarding the counter-proposal (which needs to be approved by the Federal Assembly as a whole) (Palombo, 2019, p. 276).

The first draft counter proposal weakened the initiative's demands especially with regards to two elements, namely the scope and liability criteria (Bueno & Kaufman, 2021, p. 544). Whereas the constitutional amendment would have applied to all companies registered in Switzerland (with an exception for SMEs in low-risk sectors) and their activities abroad, the first counter-proposal limited the scope to large enterprises with over 500 employees, a

turnover of 40 million francs or a balance sheet total of 80 million francs (Bundesamt für Justiz *Gegenüberstellung der beiden KVI-Gegenvorschläge durch das BJ, 2020*). In terms of corporate civil liability, the National Council's draft maintained parent companies' liability for subsidiaries abroad and the reversed burden of proof demanding parent companies to provide evidence that they have not acted negligently (ibid.). However, it excluded legal liability for damages caused by third parties such as suppliers (ibid). Thus, unlike the initiative, the proposal did not apply the liability provisions across the entire supply chain of a Swiss parent company. Although the Council of States had been included in elaborating the first draft, it refused to deliberate the National Assembly's proposal (Werro, 2019, p. 167). Also the government and Swiss business associations criticised the proposal for being too drastic (Bueno & Kaufman, 2021, p. 544). The former therefore instructed the Federal Office of Justice to draft an alternative that focused on conflict minerals and child labour and excluded any liability provisions (ibid.). This draft for the indirect counter-proposal was approved by both chambers and was then triggered when the initiative was defeated in November 2020. When the required consultation procedure for the resulting Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour ended, the Federal Council decided to bring the new provisions in the Code of Obligations (CO) and the implementing ordinance into force.

The respective provisions are contained in articles 964j-964l CO and while they entered into force on 1 January 2022, the law granted companies one year to adapt to the new obligations so the provisions were applied from 1 January 2023 onwards (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). The articles are divided into three sections, namely general principles, due diligence and reporting and the implementing ordinance by the Federal Council regulates the resulting obligations. When analysing the CO provisions and complementary ordinance according to the four criteria applied in the previous analyses (human rights concerned, scope, obligations and enforcement mechanisms) it becomes apparent how they differ from the more far-reaching initiative text. The CO provisions cover the prevention of human rights abuses in two situations: the import or processing of conflict minerals and the occurrence of child labour in the supply chain. According to Art. 964j (4) the Federal Council may refer to internationally recognized regulations the adherence to which exempts companies from obligations under

964j-964l CO. In the case of conflict minerals the relevant regulations are: the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas and Regulation (EU) 2017/8218 (ibid.). Regarding the prevention of child labour, the Federal Council refers to: ILO Conventions Nos 1389 and 18210 and the ILO-IOE Child Labour Guidance Tool for Business, the OECD Due Diligence Guidance for Responsible Business and the UN Guiding Principles on Business and Human Rights (ibid.). By focusing on companies' irresponsible sourcing of minerals originating from conflict areas, negative human rights impacts such as forced labour, forced resettlement, environmental damages, the financing of military groups etc. can be reduced (Regulation of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, 2017). The prevention of child labour impacts human rights of children such as the right to health and education or the prohibition of slavery and sexual exploitation. While the initiative demanded a broad environmental and human rights protection across all sectors, the CO provisions are limited to areas which were identified as the most crucial and sensitive ones according to the legislator (Bundesrat *Bestimmungen für besseren Schutz von Mensch und Umwelt gelten ab 1. Januar 2022*, 2021.).

The provisions apply to companies that have their main office in Switzerland and the scope extends to their supply chain. The supply chain is defined as a company's "own business activity and that of all upstream economic operators" (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). Critics, including the Initiative Coalition, argued that the definition is too narrow and that it should include all business relationships not only upstream but also downstream the supply chain (Bundesamt für Justiz *Verordnung über Sorgfaltspflichten und Transparenz in den Bereichen Mineralien und Metalle aus Konfliktgebieten sowie Kinderarbeit (VSoTr) Bericht über das Ergebnis des Vernehmlassungsverfahrens*, 2021). With regards to the due diligence duties related to conflict minerals, companies are affected if they import or process tin, tantalum, tungsten or gold from conflict and high-risk areas above a yearly threshold amount which is set by the Federal Council (Art. 964j (1) (1) and (2)). The import and processing quantities which require companies to comply with the due diligence obligations are contained in Annex 1 of the ordinance. During the consultation process the

Federal Council was criticized for not lowering the quantities and ensuring that at least 95% of minerals and metals in Switzerland are covered by the due diligence provisions (Bundesamt für Justiz *Verordnung über Sorgfaltspflichten und Transparenz in den Bereichen Mineralien und Metalle aus Konfliktgebieten sowie Kinderarbeit (VSoTr) Bericht über das Ergebnis des Vernehmlassungsverfahrens*, 2021, p. 5). The due diligence obligations aimed at the prevention of child labour require companies to check whether there is reasonable grounds to suspect the production of goods or services involved child labour (Art. 964j (1) (2)). For SMEs and companies at low risk, the Federal Council has the competence to regulate to which degree they might be released from the obligations under this article. In the complementary ordinance, the Federal Council excluded SMEs that fall under two of the falling criteria in two consecutive years: a balance sheet total of under 20 million Swiss Francs, a sales revenue below 40 million Swiss Francs, or less than 250 employees (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). Low risk for child labour is assumed by the Council on the basis of the UNICEF Children's Rights in the Workplace Index when the respective countries of the business activities are categorized as basic (ibid.). The scope of the due diligence duties related to child labour has led to controversial stakeholder feedback (Bundesamt für Justiz *Verordnung über Sorgfaltspflichten und Transparenz in den Bereichen Mineralien und Metalle aus Konfliktgebieten sowie Kinderarbeit (VSoTr) Bericht über das Ergebnis des Vernehmlassungsverfahrens*, 2021, p. 4). Firstly, the term 'reasonable grounds to suspect' is not defined in the ordinance and leaves room for interpretation (ibid.). Secondly, it is argued that the revision which companies conduct in order to verify whether there exists a reasonable suspicion for child labour or whether they are exempt from the due diligence obligations should in fact be a part of the due diligence examination and reporting instead of a preliminary, separate check (ibid.). The exemption for SMEs in the CO and regulating ordinance goes further than the original suggested limitation for SMEs in the initiative and first counter proposal of the National Council. Whereas the initiative would have excluded low-risk SMEs and the first counter proposal would have applied to high-risk SMEs, the CO provisions exclude all SMEs that are below the threshold criteria mentioned above. This led to the demand by some consulted stakeholder to increase the threshold, in order to cover more SMEs under the scope, or include high-risk SMEs without exceptions was not implemented (ibid.).

The scope of the final legislation is not just reduced with respect to SMEs when compared to the initiative and first counter proposal, but is less far-reaching in general. Neither of the latter limited the due diligence obligations to specific areas, as opposed to the CO provisions on conflict minerals and child labour. The due diligence and reporting obligations introduced through the legislation are found in Art. 964k and Art. 964l respectively (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). According to Art. 964k, companies must establish a supply chain policy for conflict minerals and metals and products where child labour is suspected in the supply chain (ibid.). These policies must contain a traceability system and risk assessment plan with measures to minimize the identified risks. In the case of conflict minerals and metals, additionally, a due diligence audit by an independent expert is mandatory (ibid.). The ordinance regulates the due diligence obligations in more detail. The Federal Council demands that companies comply with due diligence obligations throughout the supply chain, ensure that the policy is known to suppliers and contained in contracts, allow for concerns to be reported, and identify, mitigate, assess and communicate risks (ibid.). The Council also lists specific instruments that serve to identify, assess, eliminate or mitigate, adverse impacts (ibid.). For both cases, conflict minerals and metals or suspected child labour, appropriate instruments include factory checks, consultations with experts and organizations, certification systems and assurances from business partners. In general, the policy must be based on the internationally recognised regulations that have been mentioned above when discussing possible exemption from the CO provisions. In the consultation process, stakeholders have commented that the CO provisions and ordinance fail to explicitly mention access to effective remedy with regards to risk management plans and demanded unsuccessfully that they are included based on international standards (Bundesamt für Justiz *Verordnung über Sorgfaltspflichten und Transparenz in den Bereichen Mineralien und Metalle aus Konfliktgebieten sowie Kinderarbeit (VSoTr) Bericht über das Ergebnis des Vernehmlassungsverfahrens,* 2021, p. 8). The traceability system that companies incorporate in their policy must meet the criteria listed in Art. 12 and 13 of the ordinance.

With regards to the reporting obligations, Art. 964 (l) requires the management of companies to publish annual reports on the fulfilment of their due diligence duties (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected

Areas and Child Labour, 2021). They must be made available online and be accessible for the public for ten years. Art. 964 (l) (5) exempts companies that sell products or services from other businesses for which the latter have already published an equivalent report (ibid.). However, the Council elaborates in the ordinance that companies must include this information in their annual financial statements and publish the report that covers them. While Art. 964 (l) introduced new reporting obligations resulting from the introduced due diligence provisions, they complement the already previously existing reporting duties of companies contained in Art. 964 (a-c) CO which used the NFRD as a point of reference. The latter will briefly be discussed here, as the complete overview of Swiss reporting regulations is relevant for the comparative analysis in chapter three (especially when contrasting them with the CSRD). Companies are required to report on non-financial matters if they are public interest entities, employed an average of 500 employees for two consecutive years and either display a balance sheet total of 20 million francs or sales revenues of 40 million francs (Art. 964a (1)). Companies are exempt from reporting duties if they are controlled by an entity which conducts the respective reporting (Art. 964a (2)). The report on non-financial matters must include information on environmental matters, in particular CO2 targets, social matters, employee matters, respect for human rights and the fight against corruption with regards to the companies' operations and impact (Art. 964b (1)). Moreover, the report must contain the following elements; a description of the business model, the approach followed concerning the previously mentioned matters, including the respect for human rights, and the applied due diligence, a description of taken measures and their effectiveness, the identified risks (arising from their own activities and where relevant those of business relationships) and how they were managed, and performance indicators (Art. 964b (2)). In the event of a breach of the reporting obligations, the sanction is a fine of up to 100'000 Swiss Francs (Schweizerisches Strafgesetzbuch, 1937, Art. 325ter). This applies to general non-financial reporting as well as the reporting obligations resulting from the transparency on child labour and conflict minerals or metals. Thus, in addition to the new reporting duties with regards to child labour and conflict minerals and metals, the Swiss law already contained cross-sectoral provisions on reporting sustainability matters. However, while these provisions require companies to report on respecting human rights and due diligence, companies are not required to establish due diligence measures for these matters.

Lastly, the CO provisions need to be analysed with regards to enforcement mechanisms. Unlike the Swiss Business Initiative or the first draft of the counter proposal, Art. 964 (j-l) CO and the accompanying ordinance do not introduce any corporate liability. The initiative coalition and National Council had based the corporate civil liability on Art. 55 CO and argued that the liability of principals, which regulates the legal relationship between a business owner and an employee (a natural person), can be applied to the relationship between a parent company and a subsidiary (Beschluss des Nationalrates, 2018). In this sense, Swiss companies would have been held liable before Swiss courts by people negatively impacted by a company even in the event of misconduct by subsidiaries and economically dependent suppliers abroad. However, this application is not supported in Art. 964 (j-l) CO and the legislator maintained the previously existing regulation. The liability of a Swiss parent company for damages caused by a subsidiary abroad continues to be governed by the law of the foreign place of tort (according to Art. 133 of the Swiss Federal Law on Private International Law). The violation of due diligence and reporting obligations is assessed in accordance with the general provisions on liability for administration, management and liquidation (Art. 754 CO). In conclusion, this analysis has illustrated that in terms of enforcement through corporate liability, the human rights protected and the scope, the final legislation significantly reduced the objectives of the initiative and first draft of the indirect counter proposal.

This chapter has provided an overview of the Swiss HRDD legislation developments with the Swiss Responsible Business Initiative as a starting point. The initiative text, indirect counter-proposal and resulting Federal Ordinance on Conflict Minerals and Child Labour and Code of Obligation provisions have been analysed with regards to their scope, the protected rights, resulting obligations and enforcement. The initiative had suggested far-reaching changes with encompassing human rights and environmental due diligence application on all companies registered in Switzerland (except that in practice low-risk SMEs were excluded) and with the introduction of corporate civil liability which would have included a reversal of the burden of proof requiring companies to provide evidence for respecting due diligence. Especially when analysing the development of the indirect counter-proposal, the political struggle that accompanied the process of adopting mandatory HRDD legislation in Switzerland became apparent. The National Council's first proposal was seen as too similar to

the initiative's demands according to the second chamber of parliament as well as the Federal Council. The incorporation of a crucial element of the initiative in the first draft of the proposal, namely a new corporate civil liability, led the Council of States to demand a more business-friendly alternative. Such an alternative was then provided by the Federal Office of Justice which was instructed by the Federal Council to focus on conflict minerals and child labour and exclude any liability provisions. The resulting Articles 964j-964l CO and regulating ordinance require companies to respect due diligence and reporting obligations along the supply chain for goods produced with conflict minerals or metals or reasonable suspicion of child labour. The limitation to these two highly sensitive cases and the exclusion of any corporate liability illustrate to which degree the initial demands of the initiative and even the suggestions made by the National Council have been weakened. In the following chapter, a comparative analysis will be conducted between the Swiss legislation and the previously examined European domestic frameworks and recent developments at the EU level.

## Chapter Three: Comparative Analysis Between European Human Rights Due Diligence Regulatory Frameworks and the Swiss Situation

In this chapter, the domestic and regional mandatory HRDD legislations which were analysed in chapter one will be compared to the Swiss law. The chapter is divided into two parts. Part one contrasts the Swiss position to the domestic legal frameworks which were analysed in chapter one and part two compares the Swiss law to the CSRD and CSDDD proposal. While the comparative analysis with other domestic legislations is relevant for the sake of the recommendations which are included in the conclusions to this paper, the comparison with the CSRD and CSDDD proposal is conducted to a more detailed extent, since they contain regulations that directly impact third country companies (including Swiss businesses).

### 3.1 Switzerland's Position in the Landscape of Advancing Domestic HRDD Legal Frameworks

In this section the five domestic laws which have been analysed in this paper will be briefly compared. In terms of the human rights which are covered under the various acts, differences can be found regarding the ambit and specificity. The French Duty of Vigilance Act applied a broad and cross-sectoral approach by creating due diligence obligations for companies with regards to human rights in general. Likewise, the German Supply Chain Due Diligence Act and the Norwegian Transparency Act apply to all internationally recognized human rights. The difference is that the French law does not refer to any international conventions, whereas the German and Norwegian acts include a non-exhaustive list of international treaties. The vague French delimitation of protected human rights (and other non-defined terms) has caused the legislator to reduce the enforcement measures, due to a lack of legal predictability (Cossart & Beau de Lomenie, 2017, p. 321). The Dutch Child Labour Due Diligence Act on the other hand limited the coverage to the prohibition of child labour. To a certain degree, the Swiss law was based on the Dutch law as well as the EU Conflict Minerals Regulation and thus also prioritised certain areas of human rights protection (Bundesamt für Justiz, 2022, p. 6). The Swiss Business Initiative and first draft for the indirect counterproposal, which were not adopted, had envisaged due diligence obligations for all human rights. "The Swiss sectoral approach [was] based on assumptions that are partially already outdated" (Bueno & Kaufman, 2021, p. 547). This becomes apparent when observing the developments in the Netherlands and the EU. The Dutch act never entered into force, since a broader mandatory due diligence law is currently being considered by Dutch parliament which covers all human rights (Business and Human Rights Resource Centre, 2020). Moreover the CSDDD proposal would impose cross-sectoral HRDD obligations on Member States. Thus, domestic and EU HRDD legal frameworks move towards the promotion of businesses' respect towards human rights according to UNGP 12 while the current Swiss law reflects an outdated approach. Another element which can be observed in the Dutch law, as well as the Norwegian act, is the focus on consumers and their rights, which led to a broad scope of the legislation as will be discussed in the next paragraph.

The five normative analyses have identified differences between the mandatory HRDD domestic legislation with respect to the threshold criteria, consideration of risk factors and the inclusion of business relationships along the supply chain. In Norway and the Netherlands a consumer-oriented approach determined the broad scope of the acts (Krajewski et al., 2021, p. 551). The former covers all large domiciled companies in Norway which offer goods and services within the country or abroad, as well as large companies selling goods and paying taxes in Norway (Transparency Act, 2021, Art. 3 (a)). The Dutch law goes even further, including all companies that sell or supply goods or services to Dutch consumers without setting a threshold in terms of size, net turnover or number of employees (Sharma, 2021, par. 6). In contrast, the Swiss law, while partly based on the Dutch act, does not apply to foreign companies and sets threshold conditions which can exclude SMEs (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). The conditions deciding whether businesses need to examine whether there is reasonable suspicion of child labour do not just consider the size, net turnover and balance sheet total of companies but also whether or not they are at high or low risk (ibid.). The scope of the Swiss provisions on conflict minerals and metals will be discussed in the next two sections of this paper. Likewise, the French Vigilance Act only applies to French companies meeting the threshold requirements (Article L.233-16 II). In Germany, thresholds were set for companies with a head office in the country but also for foreign companies with a branch in Germany, which will be lowered in 2024 and will quintuple the number of affected companies (Krajewski et al., 2021, p. 553). However, while the Swiss and French law only directly apply to domestic companies, the question to which degree legislators have included business relationships along the supply chain influences the indirect impact of the legislation. The French law requires enterprises to monitor the adverse human rights impacts of their established commercial relationships within supply chains (Article L.233-16 II). Likewise, the Swiss law expands companies' due diligence duty to all their upstream economic operators (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). The Dutch act also requires companies to examine whether child labour exists in the supply chain and encourages companies to do business with suppliers that issue due diligence statements (Guamán, 2022, p.10). The Norwegian act also aims at ensuring that not only companies' own operations but also their

supply chains and business partners are affected by the due diligence obligations (Krajewski et al., 2021, p. 556). Finally, as the name suggests the German Supply Chain Due Diligence Act also impacts companies and their related actors. As part of their obligations, companies must for instance take into account human rights and environmental expectation when selecting direct suppliers (Lieferkettensorgfaltspflichtengesetz, 2021, Art. 6 (4)). While the five laws cover the supply chain actors to different degrees, with regards to the included tiers and upstream or downstream procurement, a certain coverage has been ensured by them all.

In terms of obligations, the domestic laws which have been analysed are based on the second pillar of the UNGPs and the HRDD definition contained in Principle 17, by requiring businesses to identify adverse human rights impacts, take appropriate measure to prevent them and cease existing violations. While the HRDD obligations are similar in all five laws and the prescribed measures have been inspired by the OECD Guidelines, the main difference concerns their specificity and the development of standards that contribute to an effective implementation by companies. The national laws follow the six stages of the due diligence process described in the OECD guidelines. As part of the first step, the French law requires the development of a vigilance plan, the Dutch law calls it an action plan, the German law demands the adoption and implementation of a risk management plan, the Norwegian law refers to the OESC guidelines and the Swiss law requires the adoption of a supply chain policy including a traceability system and risk assessment plan. Whereas the Dutch and Swiss law include some minimum instruments which these plans need to contain, the Norwegian law makes no specifications at all and the German law provides very detailed provisions. This difference in terms of specificity can also be observed with regards to the other obligations which the laws regulate. The German law defines nine types of due diligence obligations and concretizes each type in a separate article (Lieferkettensorgfaltspflichtengesetz, 2021, Art. 3 (1)). None of the remaining domestic laws which were analysed in this paper come close to this level of detail.

While including a list of specific exhaustive measures can be regarded as too static, a lack of concreteness can potentially cause a disparity with regards to the implementation by companies (Guamán, 2022, p. 10). What all laws (except for the general provisions of the Norwegian law) have in common is the opportunity for stakeholder engagement when

developing the respective action plans. The obligations of the Norwegian Transparency Act have a stronger emphasis on reporting duties than the other analysed national acts. It contains a double duty regarding access to information and describes companies' obligation to report to the public and the right of interested persons to request information in detail. In the case of the Dutch and Swiss law, a two-step process has been decided for obligations related to child labour. IN both laws companies falling under the scope must first investigate whether a reasonable suspicion of child labour exists in the supply chain and only if the answer is yes the additional due diligence obligations apply. Another common feature of all analysed national laws is that they consider "duties of care as obligations of means/best efforts: if the defendant proves that they were diligent enough, they cannot be found responsible despite the fact that a tortious act has indeed taken place" (Kotzamani, 2023, par. 8). Some of the acts also define what appropriate diligence entails and thereby apply the principle of proportionality (for example the Norwegian act in Art. 4 (2)).

With regards to the enforcement mechanisms which the domestic laws introduced the biggest difference concerns the question of whether or not they provide for civil liability. This is the case for the French law, which ensures that civil liability action can be taken for damages arising from the described due diligence obligations (Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Art. L.225-102-5 referring to French tort law contained in articles 1240 and 1242 of the French Civil Code). In addition, public enforcement mechanisms under the law allow courts to issue orders in case of non-compliance and financial penalties (Art. L. 225-102-4 II). The Dutch law on the other hand, does not provide a direct civil cause of action, but plans for the designation of public supervisory bodies which can impose legally binding orders as well fines in cases of non-compliance (Child Labour Due Diligence Act, 2019, Art. 3). Moreover, directors can be held criminally liable for repeated violations under the same leadership (Art. 9). The German and Norwegian law also regulate that a public authority monitors compliance and may issue orders and impose fines. The German and Norwegian law also do not provide civil liability provisions for violations of due diligence obligations. Moreover, civil liability arising from breaches of the obligations is even explicitly denied in the German act (Art. 3 (3)). Similarly, the Swiss law does not introduce any new corporate civil liability, but refers to general provisions on due diligence violations regarding administration, management and liquidation (Bundesgesetz

betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, 1911, Art. 754 CO).Similarly, the Swiss law also refers to criminal sanctions, which do not result specifically from violations of the HRDD obligations it introduced (Schweizerisches Strafgesetzbuch, 1937, Art. 102). Unlike the three previously mentioned laws, it does not establish or designate a supervisory body for the monitoring of compliance. The analysis of domestic laws in chapter one and three has illustrated that in several cases, lobbying, political dissent and differing legislative positions have led to watered-down mandatory HRDD legislation. The Swiss developments are an example that has been described in some detail and has shown how the suggestion for a new corporate civil liability by the drafters of the Swiss Business Initiative and the National Council were rejected (Bueno & Kaufman, 2021, p. 544). However, civil liability is a "critical design feature" for mandatory HRDD legislation, as it serves as a deterrent for companies and provides access to remediation (Holly, G., 2021, par. 8). EU Member States might be forced to adapt their laws should the CSDDD proposal, which introduces corporate civil liability, be adopted but given the political struggles mentioned in this paper states might opt for a weak transposition in this regard.

### 3.2 Analysis Between the EU Directive on Corporate Sustainability Reporting and Swiss Law

In this section the Swiss legislation regarding companies' due diligence reporting and reporting on non-financial matters will be compared to the CSRD with the goal of identifying potential incongruences. A first difference than can be identified between the two regulatory frameworks concerns the terminology. The CSRD replaced the term 'non-financial' with 'sustainability' matters when amending the NFRD, due to the fact that sustainability information is increasingly financially relevant (Directive (EU) 2022/2464, 2022, Recital 8). Such a change in terminology is not intended in Swiss law (Bundesamt für Justiz, 2022, p. 14). Furthermore, the normative analysis of the EU reporting directive in section 1.2.2. has shown that reporting duties cover a broad range of human rights. The CSRD requires companies to report on social and human rights and lists the core international human rights treaties as a reference (Directive (EU) 2022/2464, 2022, Recital 49). Moreover, Recital 49 stresses the

importance of including information on child labour and forced labour in the reporting. The reporting on non-financial matters in Swiss law is found in Articles 964a-c OR. While the article requires companies to include information on the respect for human rights and due diligence in the reporting, no references are made to international conventions and a minimum coverage of human rights. However, as a result of the due diligence obligations introduced in the code of obligations regarding Minerals and Metals from Conflict-Affected Areas and Child Labour, Art. 964l regulates the reporting duties with regards to these two substantive matters. Unlike Swiss Law, the CSRD authorizes the legislator, the Commission, to adopt European Sustainability Reporting Standards. The ESRS may further specify the human rights information companies are obligated to report on and the Commission will adapt the content of required sustainability information according to the risks predominant in a specific sector (Directive (EU) 2022/2464, 2022, Art. 29b (1)). These European standards will also affect Swiss companies, as will be discussed in more detail in section 3.4.

As illustrated in section 1.2.2, the scope of sustainability reporting obligations was extended considerably by the CSRD compared to the NFRD. The CSRD threshold balance sheet total and net turnover corresponds to the thresholds prescribed by Swiss law under Art. 964a (1) (3) CO. However, while the directive lowered the threshold of the average number of employees to 250, the Swiss law sets the threshold at 500 employees. The directive also newly applies to listed SMEs, which are not included under Art. 964a. Additionally, third country companies are required to comply with the directive if they meet the thresholds set in Art. 40a of the CSRD regarding the minimum net turnover generated in the EU, which results in companies being obligated to comply with reporting duties under EU law in addition to the Swiss obligations (Bundesamt für Justiz, 2022, p. 20). The Swiss provisions on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour complements Art. 964a and extends the reporting scope. In principle, all companies with a head office in Switzerland need to check whether there is reasonable grounds to suspect the production of goods or services involved child labour (Art. 964j (1) (2) OR), but the Federal Council defined the conditions under which SMEs and low-risk companies may be exempted (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). Moreover, the Federal Department of Justice and Police estimates that that the majority of companies within the scope of the CSRD already

fell under the scope of the new Swiss legal provision concerning transparency on non-financial matters (Art. 964a - 964c CO) and the previous existing EU provisions on sustainability reporting (Bundesamt für Justiz, 2022, p. 20). However, had the Swiss Business Initiative been accepted, the Swiss HRDD reporting obligations would have had a wider scope than the CSRD, as not only large companies and listed SMEs would have been affected, but all companies across sectors with the exception of low-risk SME. The impact on Swiss companies will be analysed in more detail in section 3.4.

The CSRD did not only increase the scope of sustainability reporting, but also expanded the obligations of companies. Firstly, it defined which information is necessary to understand the undertaking's impacts on sustainability matter and therefore must be included in the reporting (Directive (EU) 2022/2464, 2022, Art. 19a (2) (a-h))). The article requiring Swiss companies to report on their due diligence to increase the transparency on conflict minerals and metals or child labour do not specify the type of information to be included (Art. 964l CO). However, the general stipulations on non-financial reporting contained in Art. 964b CO do provide guidance on what the reporting should entail. Some of the informative elements coincide, such as the necessity to report on the business model, identified risks, taken measures and their effectiveness. Unlike the Swiss law, the CSRD makes additional requirements such as the disclosure of companies' sustainability strategy, information on objectives, the role of the board of directors and management, a description of the potential or actual adverse impacts (Art. 19a (2) (a-h))). This disparity between the level of specificity on the required reporting content will increase once the aforementioned ESRS are adopted, as they will further concretize the reporting obligations at EU-level. Another difference between the CSRD and Swiss law relates to the concept of double materiality which the former introduced. As mentioned in section 1.2.2. of this paper, based on this principle the directive requires companies to report separately on both, how sustainability aspects affect their business, as well as on the impact of these aspects on people and the environment. The Swiss law does not mention the double materiality principle (Bundesamt für Justiz, 2022, p. 15). In terms of enforcement, the CSRD requires Member States to ensure an effective system of investigation and a proportionate, dissuasive sanction regime (Directive (EU) 2022/2464, 2022, Art.20). The original Commission proposal for the directive had included an Article 51 on penalties, prescribing minimum administrative measures and sanctions which were not adopted in the final directive

(Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022). However, the proposal's stipulation on mandatory reviews on the reporting by external auditors has been included in the CSRD, which is not the case in Swiss law (Art. 964c OR). Under Swiss law, in the case of a breach of reporting obligations, the general provisions on the liability of corporate bodies in administration, management and liquidation apply (Art. 754 CO). For both cases, the non-compliance with reporting duties on general non-financial matters and on child labour or conflict minerals and metals, the Swiss law foresees a fine of up to 100'000 Swiss Francs (Art. 325ter Swiss Criminal Code). The question to which degree the enforcement of CSRD obligations differs from Swiss provisions will depend largely on how the Member States transpose the directive by July 2024.

### 3.3 Analysis between the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive and Swiss law

Following the comparison between the Swiss legislation and the CSRD, this section contrasts the HRDD duties found in the Swiss Code of Obligations and complementing Ordinance (as well as elements of the Swiss Business Initiative and first draft counter-proposal) to the European Commission Proposal for a Corporate Sustainability Due Diligence Directive. As was shown in the normative analysis in section 1.2.3 of this paper, the CSDDD proposal covers a broad range of human rights. To promote the respect of human rights by businesses in the Union market, the directive proposal includes a list of twenty-two international conventions in its Annex whose violation constitute adverse human rights impacts and clarifies it is not exhaustive (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Recital 25). A separate list of conventions relating to environmental standards is also included. The only explicit HRDD obligations in Swiss law relate to child labour and conflict minerals or metals and thus are significantly more limited in coverage (Bundesamt für Justiz, 2022, p. 10).

With regards to the scope, the CSDDD proposal factors in large companies (500 employees and a net turnover of over 150 million EUR) and companies operating in high risk sectors (250 employees with a net turnover of 40 million EUR of which 50% was generated in

a high risk sector) (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Art. 2 (1) (a-b)). The Swiss law requires all companies to comply with the obligation to check if reasonable suspicion of child labour exists with an exemption for SMEs or companies of any size at low risk (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021, Art. 6 and 7). No such exemption for large companies meeting the thresholds of the first category mentioned above exists in the CSDDD proposal. However, the consideration of 'risk' as an additional criterion besides size and turnover appears in both frameworks. In terms of assessing this risk the provisions of the CSDDD proposal are based on established risk sectors, whereas the Swiss law identifies risk countries for child labour (according to UNICEF Children's Rights in the Workplace Index) (Bundesamt für Justiz, 2022, p. 9). As mentioned in the previous section, in terms of the scope of the Swiss provisions on conflict minerals and metals, the thresholds correspond to the ones listed in the EU Conflict Minerals Regulation. Thus, the scope of the CSDDD proposal is more far reaching, as it applies to all companies above the threshold criteria, while the Swiss due diligence provisions only apply to the areas of child labour and conflict minerals and metals. In the case of child labour, the current Swiss provisions also fall short of the EU-level scope. In addition, the CSDDD proposal also extends the scope to third country companies and in practice has an indirect impact on SMEs not meeting the set thresholds, which further distinguishes the regulated application from the Swiss law. Third country companies fall under the scope of the CSDDD proposal if they generate a net turnover of over 150 million EUR in the EU market or made a net turnover of 40 million EUR in the EU (at least 50% of which was acquired in one of the high risk sectors) (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Art. 2 (2)). Thus Swiss companies meeting these criteria will be obliged to comply with the due diligence obligations according to the standards set by the ESRS. In contrast to the CSDDD proposal, the Swiss due diligence obligations are only applied to companies whose registered office, head office or principal place of business is in Switzerland, therefore foreign companies providing goods or services to Swiss end users are not included. While the scope of the final legislation and complementing ordinance has shown to be much more narrow than the ambit of the CSDDD proposal, the Swiss Responsible Business Initiative and first draft of the indirect counter proposal shared more parallels. Both

Swiss alternatives would have applied to recognized international conventions on human rights and the environment (Bundesamt für Justiz *Gegenüberstellung der beiden KVI-Gegenvorschläge durch das BJ,* 2020). The Initiative would have been far reaching in terms of direct impact, as it demanded an application to all companies registered in Switzerland regardless of their size. The only exemption would have been made for low-risk SMEs (Bundesamt für Justiz *Gegenüberstellung der KVI und Gegenvorschlag zur KVI. 2020*). The draft indirect counter-proposal set thresholds regulating the scope for large companies (thus excluding SMEs) and allowed for an exemption for large companies at low-risk (Bundesamt für Justiz *Gegenüberstellung der beiden KVI-Gegenvorschläge durch das BJ,* 2020). Thus, whereas the discrepancy regarding ambit is substantial between the current Swiss law and the CSDDD proposal, the same could not have been said for the previously rejected Swiss proposals. The potentially necessary adaptations to Swiss law (also in terms of HRDD scope) will be further discussed in the conclusion of this chapter.

The HRDD obligations resulting from the directive proposal have been analysed in detail in section 1.2.3. of this paper. Overall, the CSDDD proposal is in line with the UNGPs, stating that the duties for companies are obligations of means, and with the OECD Guidelines (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Recital 16). The latter have served to define the six due diligence steps contained in Art. 4 (a-f) of the directive, namely integration of due diligence in a company's policies; identifying actual or potential risks; preventing, mitigating and ending adverse impacts; establishing and implementing a complaints procedure; monitoring the effectiveness of due diligence measures; communicating on due diligence. With regards to the last step, the proposal refers to the existing union regulation (including the CSRD which had not been adopted at that point). The reporting obligations and their juxtaposition to the Swiss law (Art. 964l and 964 (a-c)) have been closely analysed in the previous section of this paper and will therefore not be repeated here. According to the Federal Department of Justice and Police, the obligations are very similar to the ones contained in the Swiss provisions on child labour and conflict minerals and metals (Bundesamt für Justiz, 2022, p. 11). However, the biggest difference with regards to the obligations does not relate to the content but the level of concretisation (ibid.). For each of the six steps, the directive proposal includes a separate article explaining the specific measures companies are required to take. The Swiss due diligence

obligations resulting from Art. 964k are also specified to a certain degree by the Federal Council. In the complementary ordinance, the Council lists some specific appropriate instruments that serve to identify, assess, eliminate or mitigate, adverse impacts for both cases, conflict minerals and metals or suspected child labour (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021). Especially the traceability system which companies need to adopt as part of their due diligence policies is described in some detail (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021, Articles 12 and 13). However, in general the explanations made by the Council do not reach the same level of concreteness as their EU counterpart. What this disparity means in terms of impact on duty bearers will be analysed briefly in the next section. The first indirect counter proposal by the Swiss National Council contained the same general due diligence obligations as the final law and the Swiss Business Initiative merely referred to due diligence in terms of the definition contained in UNGP 17 (however, the general wording of the latter was due to the fact that the initiative was a constitutional amendment proposal) (Swiss Coalition for Corporate Justice, 2021, p. .2). Another significant difference that can be observed besides specificity level is the obligation to consult with stakeholders when taking due diligence action. As discussed in section 1.2.3., the CSDDD obligations provide for "proactive stakeholder consultation" (Patz, 2022, p. 294). Companies may consult stakeholders when developing preventive and corrective action plans and must engage with them during the complaints procedure (ibid.). The Swiss due diligence provisions in the Swiss CO contain no reference to stakeholder consultation and the Council merely mentions that the instruments listed in the due diligence policy must include consulting experts and specialist literature (Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, 2021, Art. 10 (2) (c)). Critics argue that the stakeholder consultation duties contained in the CSDDD proposal leave too much room to companies (Patz, 2022, p. 294). The fact that it is almost completely missing in Swiss law is even more detrimental, as companies would benefit immensely from proactive stakeholder consultation, in order to identify and prevent risks and respond to adverse impacts in an effective manner (ibid.).

Another mechanism to ensure the effectiveness of due diligence regulations is enforcement. The CSDDD proposal contains public and private enforcement mechanisms. Member States are required to appoint national supervisory authorities which investigate potential breaches with the regulations and may impose administrative or pecuniary sanctions (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Recital 54). The sanction regime is to be specified by Member States in accordance with their national law and must ensure a proportionate enforcement (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Article 20). Also third country companies, including Swiss companies, are subject to the member states' representative supervisory authority if they fall under the scope of the CSDDD (Art. 17). The Swiss law does not include any such administrative sanctions or supervisory authority for Swiss or foreign companies, but provides for criminal sanctions for companies according to Article 102 of the Swiss Criminal Code. The criminal sanctions are limited to certain criminal offenses: Support of a criminal organization, financing of terrorism, money laundering, bribery and corruption of Swiss public officials, bribery of foreign public officials, and bribery of private persons (Schweizerisches Strafgesetzbuch, 1937, Art. 102). In terms of private enforcement mechanisms, the CSDDD proposal introduces a new corporate civil liability for the case where a company has violated due diligence obligations which led to adverse impacts that resulted in damages (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Recital 52). Civil liability also applies to subsidiaries and business partners under certain circumstances and thus indirectly also impacts Swiss companies (indirect established business-relationships are excluded unless the preventive measures were not appropriate) (Bundesamt für Justiz, 2022, p. 12). In addition, the CSDDD proposal also stipulates liability of directors in cases where Member States' laws regulate breaches to directors' duty accordingly (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Art. 25). Overall, the directive proposal does not specify the required private or public enforcement mechanisms in detail but leaves it in the hands of Member States to adopt proportionate national enforcement provisions (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, p. 9). In the Swiss context, no corporate civil liability exists for violations of due diligence obligations (neither for human rights and

environmental matters as a whole, nor for the areas of conflict minerals and metals or child labour). The supporters of the Swiss Business Initiative and the first draft of the indirect counter proposal wanted to introduce the concept based on Art. 55 CO (which regulates principals' liability for damages caused by an employee if the former neglected to act diligently and could be interpreted as regulating the liability of a parent company towards its subsidiaries) (Bundesamt für Justiz, 2022, p. 12). As discussed in section 2.3 a political tug of war ensued between the National Council, the Council of States and Federal Council as a result of the far-reaching proposal for corporate civil liability, which ended in maintaining the status quo. Cases where subsidiaries of Swiss parent companies cause damages abroad continue to be governed by the law of the foreign place of tort (Art. 133 of the Swiss Federal Law on Private International Law). Moreover, the Swiss law does not specifically regulate a liability for managing directors for damages resulting from due diligence breaches, but the general provisions on liability for administration, management and liquidation apply (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, 1911, Art. 754).

### 3.4 Impact on Swiss Companies

In this section the above mentioned contrast between the Swiss law and EU-level legislation (and to a certain regard also to other domestic frameworks) on HRDD will be discussed in terms of its impact on companies registered in Switzerland. As has been discussed in the previous section, both the CSRD and the CSDDD proposal contain third country regulations and thus have a direct impact on Swiss businesses. Additionally, an indirect impact on Swiss companies can be observed. The direct impact is largely motivated by the goal to create a level playing field and respond to feared competitive disadvantages for companies registered in the EU vis-à-vis third countries (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, p. 11). The indirect impact of the EU legislation and proposal results from the fact that "many companies are operating EU-wide or globally; value chains expand to other Union Member States and increasingly to third countries" and as EU based companies must observe due diligence obligations along the value chain, subsidiaries worldwide are indirectly required to comply

with the regulations (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, p. 13). Extending the scope of due diligence to global value chains therefore is an effective way to promote companies' respect of human rights. However, the EU legislation leads to additional efforts, costs and risks for companies registered in Switzerland (Bundesamt für Justiz, 2022, p. 18).

With regards to the CSRD, it can be assumed that the majority of affected Swiss companies already falls under the scope of the Swiss reporting regulations (Bundesamt für Justiz, 2022, p. 20). More specifically, the directive is applied to third country companies which have a net turnover of 150 million EUR within the EU for two consecutive years and additionally either have a subsidiary within the EU that fulfils the criteria under Art. 19a or has a branch in the EU with a net turnover of 40 million EUR in the preceding year (CSDDD). Currently, there is no official statistic available on the net turnover of Swiss companies in the EU, therefore no clear prediction can be made as to how many companies are affected (Bundesamt für Justiz, 2022, p. 18). Although large Swiss companies already comply with certain reporting obligations, it has been shown that the CSRD obligations are more far reaching in terms of content. Swiss companies falling under this scope will have to adapt their reporting and include additional elements in their reports (the ESRS will further increase the required level of specificity) and respect the principle of double materiality, which results in increased efforts and costs (Bundesamt für Justiz, 2022, p. 20). More specifically, Swiss companies would need to provide more comprehensive reports, adapt the format of reports to EU standards, undergo external audits and might be subject to administrative measures and sanctions (Bundesamt für Justiz, 2022, p. 20). Swiss SMEs are unlikely to meet the threshold criteria that require them to report based on the directive, but they might be impacted indirectly as suppliers which are asked to submit sustainability information by companies falling under the scope of the CSRD (Bundesamt für Justiz, 2022, p. 20). SMEs of EU Member States are likely to benefit from supportive measures to implement reporting actions and Swiss SMEs would suffer from a competitive disadvantage in this case if no such measures are made available to them (Bundesamt für Justiz, 2022, p. 21).

Regarding the CSDDD proposal, the scope includes third country companies which generate a net turnover of over 150 million EUR in the EU market or made a net turnover of

40 million EUR in the EU (at least 50% of which was acquired in one of the high risk sectors) (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Art. 2 (2)). As mentioned above there is no statistic available on Swiss companies' net turnover in the EU, but the European Commission estimates that 4'000 third country companies will be affected (including Switzerland) (Bundesamt für Justiz, 2022, p. 18). The Federal Department of Justice and Police estimates that most of the Swiss companies meeting the CSDDD proposal criteria are already required to observe due diligence based on the Swiss regulation regarding child labour and conflict minerals and metals (ibid.). However, the due diligence obligations of these companies would no longer be restricted to those two areas under the CSDDD proposal, but to a broad range of human rights and environmental standards. In addition, companies would be affected by the new liability provisions and the establishment of national supervisory authorities (third-country companies need to designate a contact person for the supervisory authority and are subject to its investigations and sanctions) (ibid). While the additional effort and cost to monitor compliance with the future EU directive is apparent, the potential competitive disadvantages are less certain. If the enforcement of the CSDDD proposal is strict, no competitive disadvantages should occur for Swiss companies, but in case the enforcement is lax Swiss companies would be economically disadvantaged when competing with companies from countries with weak sustainability legislation (Bundesamt für Justiz, 2022, p. 19). As is the case under the CSRD, SMEs would indirectly be covered by the CSDDD proposal as suppliers to EU companies which are covered by the directive. Similarly, the directive proposal also envisages measures to support EU SMEs with the implementation. This means that Swiss SMEs which don't benefit from the same support would be at a competitive disadvantage compare to EU based SEMs (ibid.).

As has been illustrated in the above comparative analysis, the two discussed pieces of EU legislation surpass the Swiss regulations in terms of covered human rights, scope, content of the obligations as well as enforcement mechanisms. When Switzerland adopted its first NAP in 2016, the Federal Council communicated that any regulation in this area would need to be broadly supported at international level, to avoid penalizing Switzerland as a business hub (Conseil Fédéral, 2016, p. 15). The priority of coordinating the regulation in the area of sustainable corporate governance for the protection of people and the environment internationally and monitoring EU developments is also prominently stated on the main portal

on the subject on the Federal Department of Justice and Police website (Bundesamt für Justiz, 02.12.2022). The above analysis has shown that currently, Swiss companies face risks and legal uncertainty due to the significant differences between the EU regulations (especially the CSDDD proposal). While the legislator and Federal Council strove to ensure that Swiss businesses and the Swiss business hub is not penalized by imposing strict economic sustainability regulations, the decision to act conservatively might have led to the opposite result. The analysis above has shown that the Swiss Business Initiative and even the more moderate first draft for an indirect counter proposal anticipated many of the elements which the EU CSRD and CSDDD proposal are imposing. If they had been adopted, the Swiss HRDD legislation could have been "the most advanced framework to hold multinational enterprises to account for extraterritorial human rights abuses" (Palombo, 2019, p. 266). Instead, the Swiss examination of a potential need for adaptation based on the developments at EU level mentions the time factor and leeway regarding their implementation by Member States during the transposition process (Bundesamt für Justiz, 2022, p. 7). It also stresses that Switzerland is not required to adapt the law by incorporating the standards set by the EU and that the CSDDD is a "moving target" as it has not been finalized yet (Bundesamt für Justiz, 2022, p. 22). The Swiss legislator has missed an important turning point for mandatory HRDD regulation. Its legislation came "at a time when the international debate [was] moving towards comprehensive due diligence requirements, covering all sectors and all impacts on human rights and the environment", as has been illustrated by the analysis of EU developments and domestic laws (Bueno & Kaufman, 2021, p. 548). Based on these observations the question is what measures the Swiss legislator should take moving forward in order to avoid being seen as the European taillight in mandatory HRDD legislation. In the conclusion of this paper a few recommendations will be presented.

## Chapter Four: Final Considerations and Recommendations

The comparative analysis above has shown that Switzerland's Federal Ordinance on Conflict Minerals and Child Labour and resulting Code of Obligation provisions are outdated when compared to European domestic and regional developments. In terms of the

protection of legal positions the CSRD, CSDDD proposal and all analysed domestic laws with the exception of the Dutch Child Labour Act, protect a broad range of human rights. While the latter chose to limit the protection to child labour, similarly as the Swiss law which covers the protection against child labour and conflict minerals and metals in supply chains of goods and services, the new Dutch HRDD legislation proposal which is pending rectifies and expands the ambit of the act that has never entered into force (Business and Human Rights Resource Centre, 2020). With regard to the scope, the analysed domestic and regional legislations set different thresholds. However, the Norwegian, Dutch and German law all contain conditions which directly impact foreign companies should they meet the defined criteria and the CSRD as well as the CSDDD proposal both contain provisions regarding third country companies. The Swiss law on the other hand contains no such provisions.

When comparing the HRDD obligations resulting from the respective legislations and proposals, it became apparent that they are similar in all five laws as well as the EU regulations, as the prescribed measures have been inspired by the OECD Guidelines. The level of specificity and prescribed instruments however is much higher in the German Supply Chain Act, the CSRD and the CSDDD proposal. With regards to enforcement mechanisms, the French Duty of Vigilance Act established a corporate civil liability for companies despite political pressure on the Constitutional Council (Cossart et al., 2017, p. 322). A feat which the Swiss Responsible Business Initiative and the National Council's drafted indirect counter proposal unsuccessfully tried to accomplish and which is also an important corner stone of the CSDDD proposal (Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1937, 2022, Recital 52). As mentioned in the conclusion to the last chapter, a repeated argument by the Swiss government that determines Switzerland's HRDD legislation is the goal to tailor the latter according to international and specifically EU developments. In its comparative report, the Federal Department of Justice and Police stated that while considerable differences exist, more so with regards to the CSDDD proposal than the CSRD, a legal adaptation in Switzerland is not mandatory and remains a political decision (Bundesamt für Justiz, 2022, p. 23). If the Swiss government wants to stay true to its argument of tailoring its legislation to international and EU regulation a legal adaptation is inevitable. This paper has shown how domestic and regional European legislation has moved towards

comprehensive mandatory HRDD legislation and on this basis the following recommendations can be made.

### 4.1 Recommendations for Future Legal Adaptations by Swiss Policymakers

In the following, some recommendations will be made for adjustments to the Swiss law with a focus on the four criteria which have been examined throughout the analyses of this paper. As previously discussed, the legal positions which are protected by the Swiss due diligence legislation are restricted to cases of reasonable suspicion of child labour or the use of conflict minerals and metals in the supply chain. While this prioritisation of sensitive areas might facilitate the effective implementation of due diligence obligations in the sense that overloading companies with the difficult task of monitoring its complex supply chains across sectors is avoided, the approach is "outdated" and does not comply with Switzerland's general duty to protect against human rights abuses from companies based on pillar one of the UNGPs (Bueno & Kaufman, 2021, p. 548). In order to ensure a level of protection which is in line with EU standards, the Swiss Code of Obligation should be amended and its thirty-first title regarding business companies should be expanded by adding an additional section establishing overarching due diligence obligations across sectors which compliments Art. 964 (j-l) (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches Fünfter Teil: Obligationenrecht, 1911).

In terms of the scope, it has been shown that all of the analysed domestic an regional legal frameworks use different thresholds to determine which companies are affected by their due diligence obligations. Companies' size, net turn over, balance sheet total and number of employees are the common criteria to determine which businesses fall within the ambit of the analysed legislations. The Dutch Child Labour Act is an exception and would have applied to all companies offering goods to the Dutch end users, irrespective of size or legal form. An additional criteria to determine the scope which is contained in the CSDDD proposal and the Swiss law pertains to risk factors. As highlighted in the introduction paragraph to this section, the Swiss law does currently not directly apply to foreign companies and thus only has an indirect effect on foreign companies as part of Swiss companies' supply chain. In its

comparative report, the Federal Department of Justice and Police leaves the question on whether or not Switzerland should expand the due diligence duties not only for Swiss companies according to the CSDDD proposal, but also issue provisions with a direct impact on foreign companies operating in the Swiss market unanswered (ibid.). In line with the government's target to tailor its legislation to international and EU developments, the question to this answer should be positive. Three out of the four domestic laws analysed in this paper besides Switzerland contain provisions with a direct impact on foreign companies and so do the analysed EU legislations in the case of third country companies. While choosing not to impose obligations on foreign companies operating in Switzerland might benefit the country's interest in maintaining an attractive business hub, it contradicts the European trends and furthermore could incentivise foreign companies to abuse this legal loophole (Conseil Fédéral, 2016, p. 15). Concerning the expansion of the scope to Swiss companies which are currently not covered by domestic legislation but would be affected in the future when the CSDDD proposal is accepted, an according adaptation of Swiss law is recommendable, in order to enhance the legal certainty for Swiss businesses operating in the Union market and avoiding legal fragmentation. Furthermore, similarly to the exemption which is currently made in Art. 964 (j) (4) CO in the case of the due diligence obligations related to child labour and conflict minerals and metals when companies already comply with equivalent internationally recognized regulations, an exemption could be made for companies which are affected by and comply with the future CSDDD.

With regards to the obligations which the Swiss law imposes on affected companies, it has been shown that the CO provisions as well as the Federal Council's complementing Ordinance are not very specific, contrary to the German law, the CSRD and the CSDDD proposal. The inclusion of concrete measures leads to more clarity for companies and reduces the potential disparity with regards to the implementation of the HRDD obligations (Guamán, 2022, p.10). Therefore, the Swiss law should be adapted and provide more guidance for companies. Moreover, as the CSRD and CSDDD proposal both envisage measures to support EU SMEs regarding their compliance with obligations, the Swiss law should establish similar supportive options for Swiss SMEs (which are unlikely to meet the thresholds for a direct impact of the CSRD and future CSDDD, but might be impacted indirectly), in order to minimize their competitive disadvantage.

Finally, in the previous chapter it has been shown that the enforcement mechanisms of the analysed domestic laws differ and the CSRD and CSDDD proposal both acknowledge the necessity to respect Member States' individual domestic mechanisms, which requires some leeway with regards to the transposition of the directives (Directorate-General for External Policies, 2020, p. 13). In a study conducted by the European Commission, companies and civil society representatives were asked what the main incentive was to undertake HRDD and while company representatives selected provisions establishing the grounds for liability as the least important incentive, CSOs ranked it as the highest incentive (Smit et al., 2020, 265). Businesses understandably fear litigation which could ensue from mandatory HRDD legislation with specific enforcement mechanisms and are unlikely to admit its high incentivising effect (Holly, G., 2021, par. 8.). The civil liability regime which the CSDDD proposal envisions would allow victims of businesses' adverse human rights impacts to hold companies accountable before a court, but practical barriers to access would persist and the scope is limited to large companies (Business and Human Rights Resource Centre, 22.02.2022). It would be advisable for the Swiss law to guarantee the same minimum standard for civil liability and base it on Art. 55 CO (as the liability of principals and could be interpreted so that it applies to the relationship between a parent company and a subsidiary) (Beschluss des Nationalrates, 2018). With this adaptation the Swiss law would reflect the EU legislation, follow the recommendation of CSOs, provide access to remedy as required by the UNGPs and create an additional compliance incentive for companies.

## 4.2 Conclusions

The above mentioned recommendations for adaptations to the Swiss HRDD legislation regarding its expansion to all human rights and sectors, an increased scope and establishment of a civil liability regime are elements which were already contained in the Swiss Responsible Business Initiative and the National Council's drafted indirect counter proposal. The Swiss legislator and Federal Council have missed the chance to anticipate European developments and are now faced with the decision of whether or not to adapt to current and developing standards or risk a comparably lax protection from companies' adverse human

rights impacts. The latter would not only be ethically questionable but also lead to additional efforts and costs for Swiss companies that will fall under the future CSDDD and will need to navigate two separate regulatory frameworks. The Federal Department of Justice and Police rightly concluded that adapting the legislation, in order to comply with the future CSDDD is problematic, as it is still being developed (Bundesamt für Justiz, 2022, p. 22). However, once the final text is adopted, the Swiss government and Parliament will be under pressure to deliver on their argument of prioritizing the adaptation of the domestic HRDD legislation to international and especially EU standards. An adaptation, in order to include the CSRD provisions in the Swiss CO would be less problematic than the adjustment to the not yet finalised CSDDD, as the CSRD is already adopted and does not differ from current Swiss reporting obligations to the same degree (ibid.). In conclusion, this paper has provided a detailed overview of the recent developments regarding the selected domestic mandatory HRDD laws in Europe and at EU level. The normative analysis of four domestic laws, the CSRD and the CSDDD proposal has served as a basis for the comparative analysis between the former and the Swiss legislation with the aim of identifying potential shortcomings of the latter. The resulting recommendations to Swiss policy-makers that have been elaborated urge the Federal Council and Parliament to adapt Switzerland's legislation and deliver on their duty to foster business respect for human rights according to Principle 3 of the UNGPs. While Switzerland could have assumed a pioneering role in the promotion of mandatory HRDD legislation, similarly as France and Germany, had the Swiss Business Initiative or the National Council's first draft for an indirect counter proposal been adopted, it is now tasked with the challenge of not ending up as Europe's taillight.

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