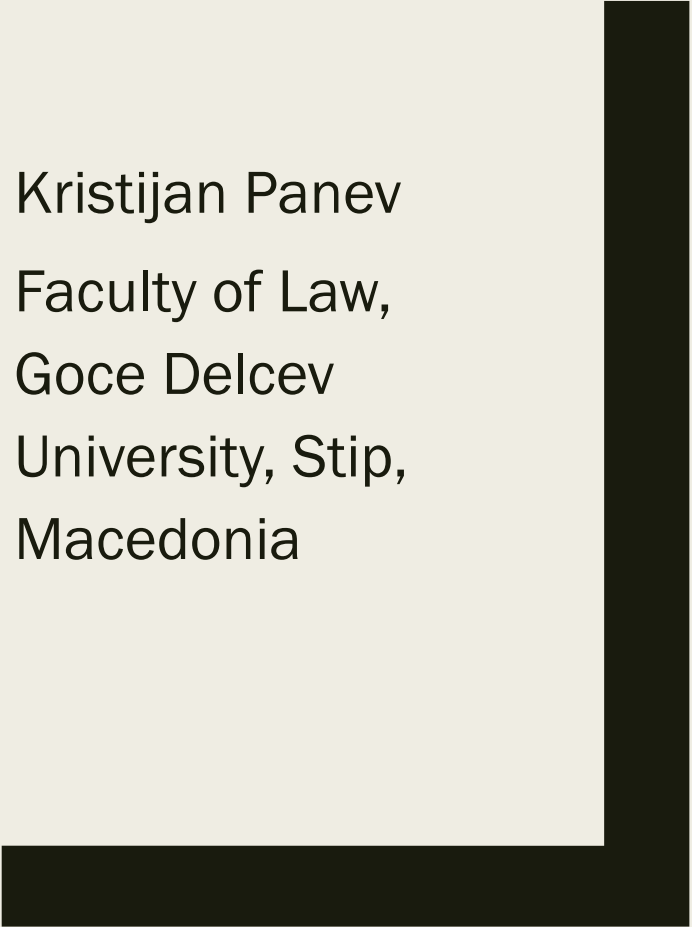


**TOWARDS RESPONSIBLE
BUSINESS CONDUCT:
ANALYZING THE EVOLUTION
OF CORPORATE HUMAN
RIGHTS AND
ENVIRONMENTAL DUE
DILIGENCE IN THE EU**

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Context

- How to make big corporations accountable when their business operations, products, or services are connected with corruption, environmental harm, severe human rights violations, or poor working conditions in their supply chain?

Context

- (2008) UN Framework "Protect, Respect and Remedy"
 - *The State's duty to protect human rights from abuses by third-party*
 - *The corporate responsibility to respect human rights i.e. duty to act with due diligence*
 - *Access to effective remedies to victims of human rights violations*
- (2011) United Nations Guiding Principles on Business and Human Rights (UNGPs) – a reference to legislators, businesses, and communities
- Draft-UN Binding Treaty on Business and Human Rights (?)

The ratio behind: Why regulation is needed?

- "Do no harm" as a social norm
- Corporate Law vs. Human Rights Law
- Expectations from businesses as social norm vs. legally binding obligation to the state to protect and ensure effective enjoyment of human rights
- Environment and human rights abuses are often "externalities" of business operation

The ratio behind: Why regulation is needed?

- Corporations (private entities) - private remedies should apply [...] “what was once a human rights violation becomes a civil wrong, a tort, or a breach of contract” (Clapham A: Non-State Actors)
- Transnational corporations operate from different jurisdictions – it is hard to determine the applicable law and jurisdiction to hold them accountable
- Social expectations to respect human rights by businesses have acquired near-universal recognition (e.g. reflected in soft-law instruments, the ILO Tripartite Declaration, and the OECD Guidelines)

UNGPs

- GP 11: corporate responsibility to respect human rights exists independently of the State's obligation to protect human rights and it goes above compliance with municipal law obligations
- GP 13: two levels of responsibility: 1) to avoid causing or contributing to adverse human rights impacts through their activities (actions or omissions); 2) to strive to prevent or mitigate adverse human rights impacts linked to their operations, products, or services which are made by their business relationships [...]. The requirement is even though they may not have contributed to those adverse human rights impacts.
- GP 14: the responsibility to respect applies fully and equally to all businesses, regardless of size, context, structure, ownership, or industry.
- GP 15: Due diligence is a “process to identify, prevent, mitigate and account for how they address impacts on human rights”.

How to understand due diligence?

- Due diligence as a standard of care (human rights context) and due diligence as a process to prepare business transactions (business context)
- Negligence (could have been avoided if the person has exercised due care)
- Due diligence is a “process to identify, prevent, mitigate and account for how they address impacts on human rights”. (GP 15)

Subject matter

Actual and Potential Adverse Impacts on Human Rights

- UNGPs: Actual (occurred or currently occurring) and potential (may occur, but has not occurred yet) human rights impacts.
- German Supply Chain Act – does not specifically use a formal designation as “actual or potential” but it is clearly intended to include both.
- French Law on Corporate Duty of Vigilance – refers to risk in general
- EU CSDDD - Actual and potential human rights adverse impacts and environmental adverse impacts

Risk assessment

Risk assessment in the business context is primarily associated with the company's risks, HRDD goes beyond those risks and put the focus on risks to rights-holders.

- addresses consequences (how severe is the impact on human rights) and probability (how likely is the event to occur)

Elements of DD obligation

UNGPs:

- Identifying and assessing actual and potential human rights risks
- Integrating and acting upon the findings
- Tracking responses
- Communicating how impacts are addressed

EU CSDDD:

- integrating due diligence into their policies
- identifying actual or potential adverse impacts
- preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent
- establishing and maintaining a complaints procedure
- monitoring the effectiveness of their due diligence policy and measures
- publicly communicating on due diligence

Identifying and assessing actual and potential human rights risks

- **Duty to know** – comprehensive and proactive attempt to uncover human rights risk
- To understand ‘the specific impact on specific people, given a specific context of operation’
- The procedural aspect of the obligation focuses on collecting data and information as a precondition for taking action to prevent, mitigate, and/or account for human rights impacts
- Taking variables into consideration i.e. some business operations may affect different groups differently e.g. women, minorities, etc.
- Not a single prescriptive formula – a tailor-made process adjusted to the context
- A non-exhaustive list of tools or methods for identifying and assessing risks
- On-going and continuous process (In the contrary, the EU CSDDD limits the obligation **for financial undertakings** when they provide credit, loan, or other financial services, to carry out risk assessment only before providing that service)

Integrating and acting upon findings

- Duty to act based on knowledge
- Positive obligation to act, to not remain a passive observer
- Three stages at which a diligent business enterprise should act:
 - prevention phase (potential risks)
 - mitigation phase (occurring risks)
 - remediation (when risks are not prevented on time) – *restitutio in integrum* or fair compensation
- What is an appropriate measure? – It varies on the circumstances of the case and the nature of the contribution or linkage with adverse human rights impact.
- Possible directions to assess:
 - What kind of leverage can it use over the business partner that has caused the adverse human rights impact?
 - Contribution to the adverse human rights impact may be linked to the concept of complicity (?)
 - Lack of contribution – exercising leverage as an obligation of diligent business enterprise (?)

Tracking responses

- Step to find out **if** the company is addressing the adverse human rights impacts and **how effective** it is in doing that.
- Reference for improvement.
- UNGPs: It should be based on "**appropriate** quantitative and qualitative indicators" and make use of "internal and external sources, including affected stakeholders"
- Meaningful indicators and verification systems as part of the tracking response policies

Communicating how impacts are addressed

- A concept of accountability – it is not an unknown concept for businesses, as they often have internal accountability systems for evaluation of business transactions, decisions, and performance.
- An act of transparency – to show different stakeholders e.g. affected right-holders, investors, etc. how the company is dealing with its human rights impacts.

Scope and Extent of HRDD

- How far a company should go to discover and then prevent and/or mitigate adverse human rights risks?

Personal Scope

- Who bears the obligation?
- UNGPs: broad approach i.e. the responsibility to respect applies fully and equally to all business enterprises, regardless of size, context, structure, ownership, or industry.

The principle of proportionality as a standard to determine the scope of HRDD's obligation applies to each business enterprise.

- German Supply Chain Act: Businesses with 3.000+ employees (from 01.01.2024 -is reduced to 1000+ employees)
- French Law on the Corporate Duty of Vigilance: Businesses with 5.000+ employees in France or alternatively, 10.000+ employees including direct or indirect subsidiaries located in France and/or elsewhere.
- EU CSDD: 1.000+ employees **and** a net worldwide turnover of EUR 450+ million (in practice will apply to +/- 6.000 EU companies and +/- 900 Non-EU companies)

Material Scope

- It defines the range of human rights that are subject to protection
- UNGPs: Internationally recognized human rights expressed in the Universal Declaration of Human Rights codified through the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights) and the principles concerning fundamental rights in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.
- EU CSDDD: Besides the minimum set out in the UNGPs, it extends to more conventions and covers environmental conventions too.

Extent of Due Diligence Obligation

- How far the due diligence obligation goes?
- Three possible scenarios:
 - 1) When it caused or contributed to adverse human rights impacts with its own activities
 - 2) When it does not directly cause, but the impact is directly connected with its operations, products, or services, by a business relationship (in some cases it may find some foundations in the concept of complicity (assistance (actus reus) – knowledge (mens rea) – damage) (?))
 - 3) “Reach out and help” principle