Alignment with the Spirit of the UN Guiding Principles on Business and Human Rights (blog series Towards New HREDD Laws)

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Last week, we published a study about changes in corporate practice resulting from the implementation of HREDD laws, namely the French DVL and German LkSG. This blog provides some reflections on the need of harmonisation of regulation and alignment with the UN Guiding Principles on Business and Human Rights (UNGPs), on companies adopting more mature risk-based HREDD process over time, and on the balance between flexibility in the implementation of HREDD processes and legal specificity.

While the French and German HREDD laws mandate processes that are based on international standards they are not fully aligned with the UNGPs, they use different legal models and impose different requirements. The adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) is an important step forward in developing harmonised HREDD requirements in line with the UNGPs - although the CSDDD has some shortcomings in relation to the limited personal and material scope, the value chain not including all downstream activities, and some loopholes in stakeholder engagement provision. We find that companies with more mature programmes use international standards - the UNGPs and the OECD Guidelines - to develop their HREDD.

The adoption of HREDD laws has accelerate the implementation of risk-based HREDD processes, which many large companies were already implementing based on UNGPs expectations. We find positive changes at the level of policy, integration and management. This is evident especially when changes are assessed over time, for example comparing company processes the first year the French DVL was in place with current practice. Legislation is also having a positive impact on companies that are not directly covered by the French and German laws. Many are already anticipating CSDDD requirements. And in general, we find that large multinational companies are not able to ignore the stream of various HREDD legal requirements in Europe, even if technically they are not in-scope. As more competitor companies become in-scope and more countries adopt HREDD laws, some companies are trying to foresee future HREDD developments and take a highest standards approach when developing internal compliance frameworks. Gaps still existing, however, especially in relation to measures for the identification, assessment and prioritisation of risks, tracking performance and measuring effectiveness, as well as in relation to meaningful stakeholder engagement and grievance mechanisms. Some companies still approach HREDD as another risk management process. As the CSDDD embraces a risk-based approach it is anticipated that the Directive will push for a more integrated approach to human rights and the environment and more holistic HREDD process.

There is a tension between an open flexible approach to HREDD - i.e. UNGPs and OECD Guidelines 'soft law' standards - and the prescriptive approach in hard laws. A flexible risk-based approach can be more adaptable and commensurate but may give too much discretion to companies and do not provide enough legal certainty. Yet HREDD obligations mandated in hard laws risk a 'tick-box compliance' approach replacing more innovative processes. There is a balance to be struck between the prescriptive elements of HREDD laws and their flexibility to allow companies to approach HREDD in a way that is reflective of their own risk areas and processes. Hard laws, enforced by national authorities (as opposed to 'voluntary' international standards) are needed but not too overly prescriptive closed list of actions allow companies to still be flexible as to how implement HREDD and adapt it to their own businesses.

The CSDDD made the right level of compromise by listing mandatory 'appropriate measures' companies 'shall' take, supplemented by additional measures they 'may' take. With proper guidance this should provide a balance between legal clarity and certainty about corporate obligations with the possibility of a flexible risk-based approach based on appropriate measures, which include transformative business strategies and purchasing practice changes. As such, there is the recognition that companies have agency in the implementation of HREDD requirements. The guidance to be developed by the European Commission - in consultation with CSOs, trade unions and national human rights institutions-, as well as the accompanying measures by Member States, are going to be crucial especially as company measures are relevant not only for companies in scope but also for suppliers and SMEs affected

as a part of the value chain.

Alignment with the UNGPs should be at the heart of HERDD regulation. Policy makers should see the UNGPs as the standard reference to follow to ensure policy coherence, avoid fragmentation and design an effective 'smart mix' of policy and regulation. They should consider broadening the personal - by lowering the thresholds and including all corporate forms - and material scope of HREDD laws - by including all human and environmental rights - and include downstream value chain in the definition of 'chain of activities'. Policy makers should also clarify the definition of 'appropriate measures' and the concept of 'effectiveness', which should be always part of business measures to address actual and potential impacts, and require an expansive holistic, risk-based approach to HREDD in line with the expectations of the UNGPs. Minimum 'tick-box' compliance is not embedded in HREDD laws - while companies are required to comply with appropriate measures, they should be encouraged to develop transformative internal and commercial business strategies following a risk-based and shared responsibility approach.

This blog is part of a series of reflections based on our study, published on 15th October 2024 during a launch event at BIICL. You can read the full report here.

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