GEDIP – subgroup "Corporations and human rights/environmental law – private international law aspects"

Working paper for the 2021 Virtual Meeting

30/06/2021

Draft Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning -

I. Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability], and

II. Amendments to the Brussels I Recast, Rome I, and Rome II Regulations [and to the 2016 GEDIP draft Rules on the law applicable to companies and other bodies]

1. Introduction

1. The GEDIP welcomes the Commission's initiative for a European Union Instrument on the responsibilities of businesses with regard to the adverse impact of their value chains on [human rights, the environment and good governance]. In the light of increasing awareness over the last three decades of human rights violations, environmental degradation, and good governance failures, concern has grown about insufficient accountability of businesses for causing or contributing to harm, and lack of access to justice for victims in particular where businesses' value chains extend into States with weak legal systems.

2. While a wide arrange of instruments in this field have been adopted at the international level[1], they generally do not create binding obligations, neither for States nor for businesses. Although various businesses are voluntarily implementing due diligence as established by these instruments in relation to their activities and those of their business relationships, they remain in a minority, and their commitments diverge from company to company.

3. Recently, several Member States have adopted, or are in the process of adopting, legislation to enforce due diligence. However, these legislations differ in respect of their scope, the legal duty imposed including as regards civil liability, and their provisions on enforcement, monitoring and remedies. We discuss these legislative initiatives and the private international law issues they generate below, **3**.

[1] Including the 2008 United Nations Human Rights Council "Protect, Respect and Remedy" Framework, and its 2011 "Guiding Principles on Business and Human Rights" (UNGPs); the 2012 UN Global Compact; the 2015 UN General Assembly 2030 Agenda with its 17 Sustainable Development Goals; the 2017 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; and the 2018 OECD Due Diligence Guidance for Responsible Business Conduct.

4. The Union itself has already adopted mandatory due diligence frameworks, but only in two specific areas, the Timber Regulation[2], and the Conflict Minerals Regulation[3]. The Timber Regulation applies to both EU based and non-EU based operators; the Conflict Minerals Regulation only (directly) to EU based operators. Moreover, the Non-Financial Reporting Directive[4], following a different approach, imposes on companies with more than 500 employees the obligation to report on the policies they pursue in relation to environmental, social, employee-related, and anti-corruption and bribery matters and respect for human rights, including due diligence. This Directive only applies to companies established in the EU.

5. However, a general binding legal framework for responsible business conduct is still lacking in the Union. This leaves gaps regarding the determination of businesses' responsibility and accountability as well as the protection of (potential) victims. Moreover, this can hamper the freedom of establishment, and contribute to unfair competition. The creation of a level playing field regime, applying to companies, both those based in the Union and those operating in the internal market, is therefore to be welcomed.

6. Whilst sector-specific law instruments such as the Timber and Conflict Minerals Regulations may seek to achieve their aim though a *public* law monitoring and enforcement mechanism, applicable to the territory of each Member State, legislation with a broad, cross-sectoral scope such as the proposed EU Instrument will be more effective if it also creates *civil* law duties for the relevant companies, which may have effect beyond a Member State's territory. This gives rise to issues of private international law, in particular: which EU courts have jurisdiction to deal with claims based on the Instrument? And: what law applies to those civil duties? The future EU Instrument would be incomplete if it did not address these issues.

7. **Therefore, Proposal I. Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability] (pp. 11-14 below), provides suggestions for the private international law aspects of the future EU Instrument.**

Irrespective of the future EU Instrument, Proposal II. Amendments to the Brussels I Recast, Rome I, and Rome II Regulations [and to the 2016 GEDIP draft Rules on the law applicable to companies and other bodies] (pp. 15-17) provides suggestions for amendments of these texts in the light of the ongoing legislative and judicial developments in the Member States.

The Annex (pp. 18-20), which concerns the future EU Instrument only, raises some questions and offers some suggestions relating to the form and certain possible substantive provisions of the Instrument which may have a bearing on Proposal I.

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[2] *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market* (OJ L 295, 12.11.2010, p. 23) subjects operators that place timber and timber products on the internal market to due diligence requirements of information, risk assessment, and risk mitigation, and requires traders in the supply chain to provide basic information on their suppliers and buyers to improve the traceability of timber and timber products

[3] *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 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* (OJ L 130, 19.5.2017, p. 1) establishes a Union system for supply chain due diligence in order to curtail opportunities for armed groups, terrorist groups and/or security forces to trade in tin, tantalum and tungsten, their ores, and gold.

[4] *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups* (OJ L 330, 15.11.2014, p. 1). The Commission has proposed an amendment to this Directive, see *infra* fn. 47

2. Relevance and importance of private international law aspects: recent emblematic cases

8. Recent years have seen a rise in civil litigation before EU courts on issues of corporate social and environmental responsibility. These court cases have also highlighted the jurisdictional and applicable law aspects of civil liability. Emblematic are the UK Supreme court case *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC 20, of 10 April 2019, followed by *Okpabi and others v Royal Dutch Shell Plc and another*, [2021] UKSC 3, of 2 Feb 2021, and the judgments of the Hague Court of Appeal on *Four Nigerian Farmers and Milieudefensie v. Shell* of 29 January 2021[5].

9. With respect to the issue of judicial jurisdiction these cases illustrate the lack of uniformity in the EU regarding interconnected cases where one of the defendants is not domiciled in the EU. In both the UK and the Dutch cases plaintiffs sued the parent company based in the EU and its subsidiary based outside the EU. Whilst the Brussels I Regulation, Article 8 (1), does provide a uniform jurisdictional rule for cases where the co-defendant is based in the EU, it leaves jurisdiction regarding co-defendants based outside the EU to the national law of the Member States. Whereas some Member States, including the Netherlands, have aligned their laws for such cases with Article 8 (1), others, and also the UK, have not. So, there is a need for uniformity, at least at the EU level, and for the inclusion in the future Instrument of a rule extending Brussels I Recast, see **Proposal I. under II.**

10. The issue of applicable law was resolved in both the UK and the Dutch cases in an a-typical way, because in the UK cases the Courts assumed that the applicable Zambian (*Vedanta*) and Nigerian (*Okpabi*) law was the same as English law, and the Dutch Courts (*Four Nigerian farmers*) interpreted Nigerian law in the light of English law. *Vedanta*, in particular, broke new ground: distancing itself from earlier English court rulings, the Court widened the circumstances in which a parent can be said to owe a direct duty of care to persons affected by acts or omissions of a subsidiary[6].

Normally, in the EU the main rule of the Rome II Regulation (Article 4 (1)), provides that the law applicable to non-contractual obligations arising out of tort is "*the law of the country in which the damage occurs irrespective of the country in which the even giving rise to the damage occurs…".* This rule may leave victims based in countries with weak legal systems insufficiently protected.

Recently, in the case *Milieudefensie v. Royal Dutch Shell (RDS)*, the Hague District Court rendered a judgment on corporate responsibility for (the threat of) climate change damage, including its applicable law aspects, that has attracted worldwide attention. The Court decided *"that climate change, whether dangerous or otherwise, due to CO2 emissions constitutes environmental damage in the sense of Article 7 Rome II*". The Court rejected RDS's assertion that the event giving rise to the damage is not the group policy decision by RDS, which according to RDS was a 'mere preparatory act', but the concrete implementation thereof by RDS's companies at the local level, as well as the conduct of the end users across the world. The Court ruled that the corporate policy of the Shell group – despite its ambition *"to be a net-zero emissions energy business by 2050 or sooner, in step with society and its customers"* –

[5] See Shell Nigeria liable for oil spills in Nigeria (rechtspraak.nl), with reference to the judgements (in Dutch only) ECLI:NL:GHDHA:2021:132; ECLI:NL:GHDHA:2021:133; and ECLI:NL:GHDHA:2021:134

[6] "*53. Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, … the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken*." It should be noted that the Court decided this in the context of the jurisdictional issue of whether the plaintiffs had "a real case" against the parent company. By contrast, but relying on Vedanta, the Hague Court of Appeal decided on the merits that a parent company was under a duty of care with regard to the plaintiffs.

"*constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents …*". Therefore, Article 7 Rome II leads to the application of Dutch law.[7].

11. The GEDIP, in response to the current insufficient protection of victims under the Rome II Regulation regarding non-compliance with due diligence for human rights and good governance, proposes the inclusion into the future Instrument of a provision which essentially enlarges the provision of Article 7 (1) Rome II to human rights and good governance, see **Proposal I. under III.**

3. Recent legislative developments in EU Member States and neighbouring States[8]

12. In a number of EU States laws on corporate social and environmental responsibility have been adopted or are being proposed or prepared[9]. Such a statute also applies in the UK, and legislative initiatives are under way in Norway and Switzerland[10]. These laws vary widely regarding their scope, the duties they impose on companies, in particular whether they establish any civil liability (tort) regime, and their applicability in cross-border situations [11].

13. The Dutch 2019 *Child Labour Due Diligence Act*[12] focusses on a specific sector of the economy, is monitored through a public law sanctions system that is mandatorily applicable on the territory of the Netherlands, and does not establish any civil liability[13]. The 2015 UK Modern Slavery Act focuses on one specific risk: the Act aims to achieve increased transparency by requiring companies to set out what measures they have taken to ensure that no human rights violations occur throughout their global supply chain[14]. Again, this Act applies as a mandatorily applicable rule that is applicable to UK territory only, and does not establish a civil liability regime.

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[7] Hague District Court, 26 May 2021, ECLI:NL:RBDHA:2021:5337, English translation, ECLI:NL:RBDHA:2021:5339. "Superfluously", the Court ruled that because it considered that Milieudefensie represented Dutch residents, the (threat of) damage was localized in the Netherlands, so that Article 4 (1) Rome II also led to the application of Dutch law. The Court did not address RDS's argument that, if Article 4 (1) were applicable, Article 17 Rome II should be applied.

[8] For a comprehensive overview of global legislative and judicial developments for twenty States and a general report, see C. Kessedjian et H. Cantú Rivera (eds.), *Private International Law Aspects of Corporate Social Responsibility*, Springer (2020).

[9] See, in addition to the (draft) laws below: https://www.business-humanrights.org/en/latest-news/finland-govt-publishes-study-on-possible-regulatory-options-for-proposed-due-diligence-legislation/(Finland).

[10] See https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/mandatory-human-rights--taylor.html (Norway), and https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/. In both cases no civil liability regime is foreseen.

[11] (Draft) legislations outside the EU include the 2010 *Dodd Frank* Act (on conflict minerals, forerunner of the EU Conflict Minerals Regulation), the 2010 *California Transparency in Supply Chains Act*, the 2018 *Australian Modern Slavery Act*, and the 2020 Canadian Bill S-216, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*.

[12] *Wet Zorgplicht Kinderarbeid*, entry into force expected by 2022. The law requires companies to submit a statement to regulatory authorities declaring that they have carried out due diligence related to child labour in their global supply chains. If there are indications that a company's products or services were produced with child labour, individuals and organizations can file a complaint with the regulator. The law provides for substantial enforcement measures including fines and even imprisonment of company directors. See https://www.business-humanrights.org/en/going-dutch-four-things-you-should-know-about-the-netherlands%E2%80%99-new-law-to-eliminate-child-labour

[13] A legislative initiative has been taken by the Dutch parliament for a law covering the whole economy, incorporating the Child Labour Due Diligence Act, that *would* establish civil law responsibility for companies.

[14] The Act only applies to England and Wales. In Scotland there is the *Human Trafficking and Exploitation (Scotland)* Act 2015. In Northern Ireland there is *the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland)* 2015

14. By contrast, the 2017 French *Loi sur le devoir de vigilance* covers has a cross-sectoral scope. France thereby became the first country to adopt binding legislation on the respect of human rights and the environment by multinationals (i.e. companies with more than 5000 employees in France or 10 000 worldwide). Such multinationals have a legal obligation to identify and prevent human rights and environmental abuses that result not only from their own activities, but also from those of their subsidiaries, subcontractors and suppliers with whom they have an established commercial relationship in France and around the world[15]. The *Loi sur le devoir de vigilance* was the principal inspiration for the European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability discussed below, **4.**

15. Having a broad cross-sectoral scope, the French Law does not only depend on a public monitoring and enforcement mechanism, but also provides for civil liability under tort law where the company breaches *its own* vigilance obligations (there is no separate civil liability for the parent company based on the fault of other entities in their supply chains). But can a victim of a breach of vigilance obligations by the company occurring outside the EU invoke the Law? Whilst the prevailing view would seem to be that the Law applies as an overriding mandatory rule, therefore irrespective of the otherwise applicable law, this viewpoint is contested, and it is being argued that it could be characterized as a matter belonging to the law applicable to companies and/or to the law applicable to non-contractual obligations[16].

16. The recent (2021) German legislative proposal *Sorgfaltsplichtengesetz*, like the French law, has a broad scope. Moreover, it also covers environmental risks. But, contrary to the French Law, it does not purport to establish civil liability. That means that, under Article 4 (1) of the Rome II Regulation, it will in principle be the law of the country where the damage occurred which applies. Victims would then have to rely on that law, which may offer less protection than German tort law. And if, contrary to *Vedanta* and *Okpabi*, German courts would not hold African or Asian laws to be identical to English law, these laws would risk to offer less protection in Germany than in the UK[17].

17. Article 4 (1) Rome II would, in principle, also determine the applicable law to tortious conduct – other than environmental damage covered by Article 7 Rome II – occurring outside the EU under the legislations or legislative initiatives mentioned here. That is not satisfactory, hence **Proposal II. under C.1.**

18. The recent legislative developments do not address jurisdictional issues. However, as pointed out above, **2.**, the Brussels I Recast Regulation leaves jurisdiction regarding co-defendants based outside the EU to the national laws of the Member States, which are not uniform. Therefore, the GEDIP also proposes an amendment to the Brussels I Recast Regulation, see **Proposal II. under A.**

19. **The GEDIP is of the view that the amendments of Proposal II., concerning the Brussels I Recast, Rome I and Rome II Regulations, as well as the GEDIP draft Rules of 18 September 2016**

[15] A first case based on the *Loi sur le devoir de vigilance* was launched by the French NGO *Les Amis de la Terre France et Survie* and others against the French multinational company *Total* concerning its oil fields in Uganda. The *Tribunal de grande instance* de Nanterre declared, on 30 January 2020, that is was not competent to hear the claim because it should have been instituted before the Tribunal de commerce. The decision was appealed to the *Cour d'appel* de Versailles, which, however, referred the case to the commercial courts: https://www.amisdelaterre.org/communique-presse/affaire-total-ouganda-la-cour-dappel-de-versailles-renvoie-au-tribunal-de-commerce/ www.totalautribunal.org.

[16] Valérie Pironon, « Le devoir de vigilance et le droit international privé – influences croisées «, *Travaux du Comité français de droit International privé* 2018-2020….

[17] E.M. Kieninger, UK Supreme Court in *Okpabi v Royal Dutch Shell (2021 UKSC 3): Jurisdiction, duty of care, and the new German "Lieferkettengesetz" – Conflict of Laws* 15 February 2021.

on the law applicable to companies and other bodies, are needed irrespective of amendments of these Regulations following from the future EU Instrument.

4. Recent Developments in the European Union

20. In January 2020 the Commission published the extensive *Study on due diligence requirements throughout the supply chain*, carried out by the British Institute of International and Comparative Law (BIICL) and partners[18]. The BIICL Study presented 4 options for action to be taken by the EU: no change (Option 1), new voluntary guidelines (Option 2), new reporting requirements (Option 3) and mandatory due diligence as a legal standard of care (Option 4). Option 4 would "*entail a new mandatory due diligence requirement at EU level which would require companies to carry out due diligence to identify, prevent, mitigate and account for actual or potential human rights and environmental impacts in their own operations and supply or value chain, as a legal duty or standard of care. It would allow for a company to demonstrate, in its defence, that it has met this standard by undertaking the level of due diligence required in the particular circumstances, i.e. this would be a context-specific risk-based approach*"[19]. Option 4 includes sub-options limited to sector and company size, and enforcement through state-based oversight or judicial /non-judicial remedies.

20. In line with option 4 of the BIICL Study, EU Commissioner for Justice, Didier Reynders, on 19 April 2019 committed to a legislative initiative on mandatory human rights and environmental due diligence obligations for EU companies in early 2021, which will include liability and enforcement mechanisms and access to remedy provisions for victims of corporate abuse[20]. The EP had insisted on this, and the EP's Due Diligence working group proposes that the scheme applies to all companies, small and large, with a due diligence obligation throughout the value chain, to prevent human rights violations and environmental degradation, with remedies and sanctions[21].

21. Meanwhile the European Parliament had commissioned studies both on environmental liability of companies[22] and on corporate due diligence and corporate accountability[23]. On 11 September 2020, the EP's JURI Committee presented a "Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability"[24]. The Report includes a proposal for a draft Directive, and for amendments to the Brussels I Recast and Rome II Regulations. On 27 January 2021, the JURI Committee approved this draft legislative initiative, with a number of amendments[25].

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[18] See https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[19] *Ibid.* p. 20.

[20] See https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/. On the possible legal basis for such an initiative, ibid. pp. 231,232

[21] See https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021

[22] See https://www.europarl.europa.eu/cmsdata/214267/IPOL_STU(2020)651698_EN.pdf

[23] See https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf

[24] See https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/PR/2021/01-27/1212406EN.pdf

[25]See https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2021/01-27/Votinglist_Corporateduediligence_amendments_EN.pdf, texts of the compromise amendments at the end.

22. The initiative was welcomed in circles of private international law scholars[26], but also raised criticisms. In part, this critique concerns the draft Directive itself, in part the proposed amendment to the Rome II Regulation. Criticisms of the draft itself were made on:

- Its scope and objective (extension to risks to "governance" (Art. 3))
- Its definition of due diligence (Art 3[27]) for going beyond UNGP obligations
- Its broad definition of "human rights" (Art. 3).
- Its use of the term "undertaking"
- The lack of any limitation to the size of the "undertakings" covered.

No criticisms were made regarding the extension of due diligence to all the tiers of the value chain (Art. 1 (2)), and its application to both EU based and foreign based companies (Art. 2).

23. Regarding civil liability, the original draft simply proposed a safe-harbour provision (Art. 20 - Civil Liability):

"*The fact that an undertaking has carried out due diligence in compliance with the requirements set out in this Directive shall not absolve the undertaking of any civil liability which it may incur pursuant to national law*."

The JURI Committee apparently felt that a stronger rule on civil liability was needed, and added the following three paragraphs to Art. 20:

1. The fact that an undertaking respects its due diligence obligations shall not absolve the undertaking of any liability which it may incur pursuant to national law.

2. Member States shall ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environmental or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions.

3. Member States shall ensure that their liability regime as referred to in paragraph 2 is such that undertakings that prove that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, are not held liable for that harm

4. Member States shall ensure that the limitation period for bringing civil liability claims concerning harm arising out of adverse impacts on human rights and the environment is reasonable

24. Paragraph 2 makes it clear that the Directive, with its wide cross-sectoral scope, for its effectiveness needs a civil liability regime for the businesses covered. Paragraphs 3 and 4 provide some guidance, but only regarding the burden of proof and the limitation period for bringing civil liability claims. The Article does not establish a harmonized civil liability system for the EU, and, except for paragraphs 3 and 4, not even minimum requirements for civil liability[28].

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[26] See in particular, at Conflict of Laws.net, the contributions by Geert van Calster, Giesela Rühl, Jan von Hein, Bastian Brunk, Chris Thomale, and Eduardo Álvarez-Armas.

[27] *'due diligence' means the process put in place by an undertaking aimed at identifying, ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating the risks posed to human rights, including social and labour rights, the environment, including through climate change, and to governance, both by its own operations and by those of its business relationships*.

[28] See Bastian Brunk, https://conflictoflaws.net/2020/a-step-in-the-right-direction-but-nothing-more-a-critical-note-on-the-draft-directive-on-mandatory-human-rights-due-diligence/

25. Instead, the JURI Committee proposed that Member States should ensure that "relevant" rules of Directive will work as overriding mandatory provisions in the sense of Article 16 of the Rome II Regulation:

Article 20a Private international law

Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of [Rome II].

Annex 1 - part 2 (proposed amendments to Brussels I Recast): deleted; Annex 1 - part 3 (proposed amendments to Rome I): deleted

Note that this proposal does not refer to the immediately preceding Art 20 on civil liability[29] but rather to any "relevant provisions", without defining those. Nor does the proposal define any connecting factor linking the rule to the businesses to which it purports to apply. Apparently, no amendments of the Brussels I Recast and Rome II Regulations were deemed necessary.

26. On 10 March 2021 the European Parliament adopted its *Resolution with recommendations to the Commission on corporate due diligence and corporate accountability*[30]. The text of the draft Directive proposed by the JURI Committee was largely adopted, including Article 20 (renumbered 19) and Article 20a (renumbered 20), and without any proposals to amend the Brussels I Recast and Rome II Regulations.

5. Reflections on the EP Resolution of 10 March 2021

27. The history of Articles 19 and 20 of the EP Resolution related above (paras. 23-26) shows that the Parliament – starting from the premise that the future EU instrument will take the form of a Directive and not of a Regulation – has struggled with the question of how to ensure that Member States will offer an effective civil liability regime to (potential) victims of non-compliance with due diligence, including an effective private international law regime that comes with it. **Proposal I**. below concerns the latter, private international law, aspect only. The **Annex** offers a suggestion regarding the substantive civil liability regime.

28. Regarding the Resolution's Article 20 "*Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of [Rome II]* ", the EP takes an approach that is known from earlier Directives. Article 3 of the 2018 Postings Directive[31] provides:

"Terms and conditions of employment
1. Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out:
– by law, regulation or administrative provision, and/or
– by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8:
(a) maximum work periods and minimum rest periods…; " etc.

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[29] This would have required a different formulation: Member States shall ensure that the liability rules established under Art. 20 (2) will be in the nature of overriding mandatory provisions in line with Article 16 of Rome II.
[30] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
[31] *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services amended by Directive (EU) 2018/957of the European parliament and of the Council of 28 June 2018*

29. The rules referred to in Article 3 of the Postings Directive will overrule the provisions on employment contracts, including those of Article 8 of the Rome I Regulation, via its Article 9[32]. Likewise, the Resolution's Article 20 probably seeks to ensure that the provisions of the proposed Directive will, via Article 16 of the Rome II Regulation, apply to businesses established in the EU and those established in a third State when operating in the internal market, irrespective of the law applying to civil liability under Rome II. The liability of the business and the protection of the (potential) victim will, in each Member State, be determined by the law designated by Rome II, subject to the overriding mandatory rules of the Directive, as implemented by that Member State. The difference with Article 3 of the Postings Directive is, that the latter gives overriding mandatory effect to rules which are essentially of national origin, while Article 20 does so in respect of rules which are not necessarily "regarded as crucial by *a country* for safeguarding *its* public interests etc." within the meaning of Article 9 of the Rome I Regulation, but *as defined by the Directive*, as implemented by the Member States.

30. The adjective "relevant", would seem to serve no purpose. Certainly, a plaintiff in a civil liability suit will invoke only those implemented provisions of the Directive which, depending on the circumstances of the case and the applicable civil liability law, are relevant to the case. But that is different from requiring Member States to ensure that "relevant" provisions of the Directive etc.[33].

31. **Article 20 is entitled 'Private international law'. However, the Directive's provisions, if implemented, would not only interact with the law applicable to civil liability, *but also with the law applicable to contractual obligations and with the law applicable to companies*. Indeed, in order to be effective, the Directive's provisions should also override the otherwise appliable laws to contracts and companies.** If not, in respect of companies, the application of the *lex societatis* according to the conflict rules of each Member State could lead to outcomes different from those required by the Directive's provisions. Likewise, in respect of contracts, although multinational businesses, in particular, continue to include in their transnational agreements linkages to corporate social responsibility, such clauses are not uniform, and there is no guarantee that, under the otherwise applicable rules of the Rome I Regulation, their application (fully) meets the Directive's due diligence provisions.

32. Article 20, therefore, should be broadened, see **Proposal I**, **I. Overriding mandatory effect of the Instrument's provisions**

33. However, in order for the future instrument to fully reach its objective, additional consequential, measures are needed. First, the Brussels I Recast Regulation should be amended (i) to extend Article 8 (1) on connected claims to defendants domiciled outside of the EU, and (ii) to establish a *forum necessitatis*, see **Proposal I. II Jurisdiction.** Second, the Rome II Regulation should be amended to provide, in addition to the special rule of Article 7, which will be applicable in the case of damage resulting from non-compliance with the Instrument's due care obligations in respect of the environment, a special rule for non-compliance with the Instrument's due diligence provisions regarding human rights

[32] See A.A.H. van Hoek, Private International Law: "An Appropriate Means to Regulate Transnational Employment in the European Union?" *Erasmus Law Review*, 2014 http://www.erasmuslawreview.nl/tijdschrift/ELR/2014/3/ELR_2210-2671_2014_007_003_006

[33] See discussion between Marta Requejo Isidro and Thalia Kruger European Parliament Resolution on corporate due diligence and corporate accountability – Conflict of Laws

and good governance, see **Proposal I. III Law applicable to non-contractual obligations arising out of damage resulting from non-compliance with due diligence obligations**

PROPOSAL I. Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability]

I. Overriding mandatory effect of the Instrument's provisions

[*Member States shall ensure that*[34]] ***the provisions of this Instrument shall apply to [undertakings] established in the European Union and those established in a third State when operating in the internal market, irrespective of the law otherwise applicable to companies, to contractual obligations [as provided for under Article 9 of the Rome I Regulation,] and to non-contractual obligations [as provided for under Article 16 of the Rome II Regulation]***[35]***.***

II. Jurisdiction

1. Connected claims

A person not domiciled in a Member State may in respect of due diligence obligations under [in matters falling within the scope of][36] ***this Instrument be sued, where (s)he is one of a number of defendants, in addition to the courts available under the Brussels I Recast Regulation in the courts***

[34] The bracketed language deals with the case where the Instrument takes the form of a Directive rather than a Regulation (to be further discussed)

[35] It should be noted that Article 9 Rome I refers "provisions the respect of which is regarded as crucial by a country for safeguarding its public interests ..". Art. 16 Rome II is to be interpreted in a similar way (CJEU 1 January 2019, Da Silva Martins, C-149/18, paras 27 et seq.). By contrast, the interests protected by the future Instrument are interests regarded as crucial by the Union to protect its public interests.

[36] The Sub-group considered two options, a narrow rule, limited to matters falling within the substantive and spatial scope of the Instrument, and a broad rule (between brackets), extending to all due diligence obligations as defined regarding their substance by the Instrument, whether or not falling within its spatial scope. The latter option would overlap, at least in part, with the corresponding provisions of Proposal II. below. Therefore, it might be preferable to include it in Proposal II. The two options are submitted to the Plenary for discussion and decision.

for the place where anyone of them is domiciled, provided the claims are connected such that it is expedient to hear and determine them together.

This provision applies without prejudice to the application of the remaining provisions of the Brussels I Recast Regulation.

2. *Forum necessitatis*

If, in respect of matters falling in respect of due diligence obligations under [in matters falling within the scope of][37] ***this Instrument, no jurisdiction is available under the Brussels I Recast Regulation within the European Union, and if proceedings outside the European Union are impossible or cannot reasonably be required to be brought, the courts of a Member State of the European Union shall have jurisdiction provided the case has a link with such Member State.***

This provision applies without prejudice to the application of the remaining provisions of the Brussels I Recast Regulation.

III. Law applicable to non-contractual obligations arising out of damage resulting from non-compliance with due diligence obligations

The law applicable to a non-contractual obligation arising out of damage as a result of non-compliance by [undertakings] of in respect of due diligence obligations under [in matters falling within the scope of][38] ***this Instrument is the law determined by virtue of Article 4, paragraph 1 of the Rome II Regulation, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.***
The due diligence obligations established by the Instrument are not to be considered as rules of safety and conduct under Article 17 of the Rome II Regulation

COMMENTS ON THE PROPOSED RULES

I. Overriding mandatory effect of the Instrument's provisions

See Introduction, paras **28-32.** The Sub-group considered the possibility of ensuring the overriding effect of the Instrument's provisions by adding references to these provisions to Articles 9 Rome I and 16 Rome II. The Sub-group concluded, however, that it would be preferable to include a rule on this overriding effect in the Instrument itself[39].

II. Jurisdiction

1. Connected claims

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[37] Idem

[38] Idem

[39] Cf. Thalia Kruger https://conflictoflaws.net/2021/european-parliament-resolution-on-corporate-due-diligence-and-corporate-accountability/

Recent cases such as *Vedanta, Okpabi,* and *Four Nigerian Farmers*[40] demonstrate the need for a mechanism enabling plaintiffs, in particular from outside the EU, to bring parent companies based in the EU together with other actors in their value chain based *outside* the EU, before the court of the EU domicile of the parent company. Presently this is possible only where *national* law provides for this, since the Brussels I Recast Regulation limits this mechanism to defendants domiciled in the EU. However, only certain Member States make this possible[41], others do not[42], or only partially[43]. This lack of uniformity also diminishes the level playing field for companies. Therefore, the Instrument should extend the jurisdictional ground provided in Article 8 (1) of the Brussels I Recast Regulation to such co-defendants based outside of the EU. Presently, according to CJEU case law, Article 8 (1), being an exception to Article 4, is to be interpreted strictly. Moreover, the use of Article 8 (1) by suing an "anchor defendant" for the sole purpose of enabling the plaintiff to sue a defendant otherwise than in the Member State of its domicile will be considered an abuse of the Article.

The Sub-group considered several options:

Option 1. *A person not domiciled in a Member State may also be sued, where (s)he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;*

Option 2. *A person not domiciled in a Member State may, in matters falling within the scope of the Instrument of the European Union on Corporate Due Diligence and Corporate Responsibility, also be sued, where (s)he is one of a number of defendants, (etc., Option1);*

Option 3. *As Option 2, but deleting "to avoid the risk of irreconcilable judgments resulting from separate proceedings";*

Option 4. *As Option 2, but deleting "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*".

Option 1. extends Article 8 (1) generally to defendants not domiciled in a Member State[44]. It presumes that the restrictive interpretation of Article 8 (1) offers sufficient guarantees to avoid abuse even in such a case. Some EU Member States have already a similar rule in their national procedural laws.

Option 2. follows ***Option 1***. but restricts it to situations covered by the new Instrument.

Option 3. seeks to introduce an element of flexibility by enabling the use of ***Option 2.*** even if this would lead to irreconcilable proceedings, e.g. an inconsistent judgment rendered by a court in a third country.

Option 4. goes a step further than ***Option 3***. by dropping the requirement of closely connected claims.

In the end, the Sub-group reached consensus on the rule of **II.1.** The last paragraph ensures that the remaining provisions of Brussels I are also applicable when the first paragraph is applied.

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[40] See Introduction, **2. Relevance and importance of private international law aspects: recent emblematic cases.**

[41] France, Art.42 par. 2, *Code de Procédure Civile*; Italy, Art. 3(2), first sentence of Law No 218/95 (PIL Act), Netherlands, Art.7 Code of Civil Procedure…..

[42]

[43]

[44] As such, the text of Option 1 could be included in the " Consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen, 21 September 2008, Padua 20 September 2009, Copenhagen, 19 September 2010), Documents du Gedip (gedip-egpil.eu)

2. *Forum necessitatis*

This Article is needed to provide a forum notably for claims concerning human rights violations or environmental damage or lack of good governance occurred outside the EU against a defendant who is not domiciled in the EU but operates in its internal market. The Article establishes a *forum necessitatis*: it seeks to avoid a denial of justice if under Brussels I Recast no access to a court in the EU is available regarding such claims. In that situation this Article gives the plaintiff access to a court of a Member State if the case has a link with that Member State. While this forum could be introduced as a general rule[45], here it is limited to situations [matters] covered by the new Instrument. It will be noted that this Article only in exceptional cases establishes a level playing field in respect of civil liability claims between EU based and non-EU based companies, in contrast to the public law monitoring and enforcement mechanisms, which apply equally to both categories of companies. Those based in the EU and those based outside the EU operating in the internal market.

The last paragraph ensures that the provisions of Brussels I are also applicable when the first paragraph is applied.

III. Law applicable to non-contractual obligations arising out of damage resulting from non-compliance with due diligence obligations

While the provisions of the future Instrument must, in any event, be applied as overriding mandatory provisions (*supra* **I**), the proposed rule extends the range of applicable civil liability regimes which otherwise would be limited to that of Article 4 Rome II (or, in the case of environmental damage only, also of Article 7). The rule enlarges the protection offered by Article 7 Rome II so that it will cover, in addition to non-contractual obligations arising out of environmental damage, also those arising out of due diligence obligations under the Instrument [or in matters falling within the substantive scope of the Instrument] regarding human rights and good governance. The plaintiff thus is given the option to choose the law of either the country in which the damage occurs, or the country in which the event giving rise to the damage occurred[46].

The rule could be further extended to offer the option, if the defendant business is established in the EU, of the country of its establishment or, if based outside the EU but operating in the internal market, of the country in which it operates. However, the Sub-group did not see much added value in adding those grounds of jurisdiction, and preferred the simpler approach of enlarging the scope of Article 7.

The last paragraph seeks to preclude recourse to the rules of safety and conduct of Article 17 of the Rome II Regulation to evade the application of its Articles 4 and 7.

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[45] Cf. Article 24 bis of the " Consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen, 21 September 2008, Padua 20 September 2009, Copenhagen, 19 September 2010)", Documents du Gedip (gedip-egpil.eu)

[46] See J. von Hein, https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/ proposing a modification of Article 7 Rome II to that effect ; contra, O. Boskovic….

PROPOSAL II. Amendments to the Brussels I Recast, Rome I, and Rome II Regulations [and to the 2016 GEDIP draft Rules on the law applicable to companies and other bodies]

A. Amendments to the Brussels I Recast Regulation:

1. Jurisdiction regarding connected claims

1. Add Article 8 A:
A person not domiciled in a Member State may, in matters relating to due diligence obligations of companies in respect of human rights, the environment or good governance, be sued, where that person is one of a number of defendants, in addition to the courts available under the Brussels I Recast Regulation, in the courts for the place where anyone of them is domiciled, provided the claims are connected such that it is expedient to hear and determine them together.

2. Forum necessitatis

***2. Add*: Article 26 A**:

If, in matters relating to due diligence obligations of companies in respect of human rights, the environment or good governance, no jurisdiction is available under the Brussels I Recast Regulation within the European Union, and if proceedings outside the European Union are impossible or cannot reasonably be required to be brought, the courts of a Member State of the European Union shall have jurisdiction provided the case has a link with such Member State.

B. Amendment to the Rome I Regulation

Add: Article 9 A:

Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum concerning due diligence obligations of companies in respect of human rights, the environment or good governance.

Effect may be given to such mandatory overriding provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application

C. Amendments to the Rome II Regulation

<u>1. Add</u>: Article 6 bis:

The law applicable to a non-contractual obligation arising out of damage as a result of non-compliance with due diligence obligations in respect of human rights, the environment or good governance, is the law determined by virtue of Article 4, paragraph 1, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred [, on the law of the Member State in which the defendant is habitually resident or, if it is not habitually resident in a Member State, under the law of the country in which it operates.]

Due diligence obligations in respect of human rights, the environment or good governance are not to be considered as rules of safety and conduct under Article 17 of the Rome II Regulation

<u>2. Add</u>: Article 16 A*:*

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum concerning due diligence obligations of companies in respect of human rights, the environment or good governance in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation

D. Amendment to the GEDIP draft Rules of 18 September 2016 on the law applicable to companies and other bodies

<u>Add</u>: Article 10 A: *Nothing in this Regulation shall restrict the application of the provisions of the law of the forum concerning due diligence obligations of companies in respect of human rights, the environment or good governance in a situation where they are mandatory irrespective of the law otherwise applicable to the company.*

Effect may be given to the overriding mandatory provisions of the law of a third country in which the company [has its central administration] [has an establishment] [is carrying activities]. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Delete Article 1, paragraph 3

COMMENTS ON THE PROPOSED RULES

As stated in the Introduction (par. **19),** the GEDIP is of the view that the amendments of **Proposal II.** concerning the Brussels I Recast, Rome I and Rome II Regulations, as well as the GEDIP draft Rules of 18 September 2016 on the law applicable to companies and other bodies, are needed irrespective of any amendments which will be necessary as a result of the future EU Instrument.

A. Amendments to the Brussels I Recast Regulation:

The justification of the proposed rules for connected claims and *forum necessitatis* is similar to that given for the parallel provisions in **Proposal I.** If adopted, **Article 6** should be amended accordingly.

B. Amendment to the Rome I Regulation

Article 9 Rome I ensures the application of overriding mandatory provisions as defined in that Article. Arguably, the new laws and draft laws of both EU Member States and Non-Member States in the field of corporate responsibility regarding human rights, environment and good governance (see above under **3.**) could be considered as "mandatory rules the respect for which is regarded as crucial by a country for safeguarding its public interests…". However, this may be the subject of debate, and the GEDIP recommends this amendment to avoid uncertainty, and to ensure that such due diligence obligations are applied as overriding mandatory rules according to paragraphs 1-3 of Article 9.

C. Amendments to the Rome II Regulation

1. Regarding the addition of **Article 6 bis**:

In the light of the legislative activity of both EU Member States and Non-Member States in the field of corporate responsibility regarding human rights, environment and good governance, the current Article 4, in the view of the GEDIP, is too limited where these new laws establish civil liability for non-compliance with human rights and good governance. The proposed rule extends the range of applicable civil liability regimes which otherwise would be limited to that of Article 4 (or, in the case of environmental damage only, also of Article 7). The rule enlarges the protection offered by Article 7 so that it will cover, in addition to non-contractual obligations arising out of environmental damage, also those arising out of due diligence obligations regarding human rights and good governance. The plaintiff thus is given the option to choose the law of either the country in which the damage occurs, or the country in which the event giving rise to the damage occurred[47].

The rule could be further extended to offer the option, if the defendant business is established in the EU, of the country of its establishment or, if the applicable law also were to apply to companies based outside the EU but operating in the internal market, of the country in which it operates. However, the Sub-group did not see much added value in adding those grounds of jurisdiction, and preferred the more simple approach of enlarging Article 7.

[47] See J. von Hein, https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/ who proposes a modification of Article 7 to that effect ; contra, O. Boskovic….

The last paragraph seeks to preclude recourse to the rules of safety and conduct of Article 17 of the Rome II Regulation to evade the application of its Articles 4 and 7.

2. Regarding the addition of **Article 16 A**:

See comment **B.** on the Amendment of the Rome I Regulation. While the GEDIP takes the view that Article 9 Rome I and 16 Rome II should be similar, and Article 16 should be extended to overriding mandatory provisions of the laws of other countries than that of the forum, at this stage no proposals have been made to that effect.

ANNEX

Suggestions regarding substantive law aspects of Instrument of the European Union on Corporate Due Diligence and Corporate Accountability

A. Form of the instrument: Regulation or Directive?

The European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability urges the Commission to establish "mandatory due diligence requirements at Union level", noting, inter alia that -

"(11).There are significant differences between Member States' legal and administrative provisions on due diligence, including as regards civil liability, that apply to Union undertakings. It is essential to prevent future barriers to trade stemming from the divergent development of such national laws";

"(13).The establishment of mandatory due diligence requirements at Union level would be beneficial to businesses in terms of harmonization, legal certainty and the securing of a level playing field and would give undertakings subject to them a competitive advantage, inasmuch as societies are increasingly demanding from undertakings that they become more ethical and sustainable. This Directive, by setting a Union due diligence standard, could help foster the emergence of a global standard for responsible business conduct."

Whilst the Resolution refers to existing EU Regulations, namely (EU) No 995/2010 (Timber) and (EU) 2017/821(Conflict Minerals), which the new Instrument should in principle respect, the Resolution does not explain why it opts for the form of a Directive rather than a Regulation. Given the "significant differences" between Member States' laws on due diligence, the resulting lack of "harmonization, legal certainly and the securing of a level playing field", and the urgent need for taking measures at the EU level, the choice of a Directive is not self-evident. A Directive leaves Member States room for divergent implementing measures – including regarding the precise scope and mandatory nature of its provisions which are often open-ended – which, moreover, will take time to establish. Moreover, from the point of

view of private international law, a Directive would, as argued above, require rules on the overriding mandatory character and spatial application of its provisions (see **Proposal I.**), which complicate their application (as illustrated by the Directives in the field of the Consumer Rights). A Regulation would avoid those disadvantages[48].

It is hoped, therefore, that the Commission will carefully weigh the advantages and disadvantages of the choice for a Regulation or Directive, and in any event provide explanations for its choice.

B. Substantive cope of the instrument:

1. Extent of the due diligence obligation

a. Adverse impacts on (i) human rights, (ii) the environment and (iii) good governance in their operations and business relationships?

The EP draft requires Member States to "lay down rules to ensure that undertakings carry out effective due diligence with respect to potential or actual adverse impacts on human rights, the environment and good governance in their operations and business relationships". There is much to be said for this holistic approach since these three aspects of due diligence are often interrelated[49]. However, as long as neither "due diligence", nor "human rights", nor "environment", nor "good governance" are defined with precision, there is a serious risk that the Instrument will overshoot its mark, in particular if the form of a Directive is chosen. In any event, the Instrument should where possible be aligned with globally accepted definitions, notably the UNGP's definition of "human rights". The proposed extension beyond UNGP's "international recognized human rights" – the international bill of rights (the UN Universal Declaration and Covenants on Human Rights) and the ILO Core Labour Standards – would lead to unacceptable unpredictability[50].

b. First tier/all tiers responsibility?

The EP resolution of 10 March 2021 notes:

"*(44) Undertakings should be required to make all proportionate and commensurate efforts within their means to identify their suppliers and subcontractors and make relevant information accessible to the public, with due regard to commercial confidentiality. In order to be fully effective, due diligence should not be limited to the first tier downstream and upstream in the supply chain but should encompass those that, during the due diligence process, might have been identified by the undertaking as posing major risks. This Directive, however, should take account of the fact that not all undertakings have the same resources or capabilities to identify all their suppliers and subcontractors and therefore this obligation should be made subject to the principles of reasonableness and proportionality, which in no case should be interpreted by undertakings as a pretext not to comply with their obligation to make all necessary efforts in that regard*"

[48] Critical of the Directive approach, Bastian Brunk, above fn.28, approving Jan von Hein, above fn. 46.

[49] As illustrated, for example, by the cases referred to above, fn. 5

[50] For more precise definitions see the draft Directive for an amendment of the Non-financial Reporting Directive, published by the Commission on 21 April 2021, Articles 19 a – c, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189. For an interesting detailed proposal for a definition of "Adverse Human Rights Impact", see the draft recently published by the Canadian NGO The Canadian Network on Corporate Accountability, "The Corporate Respect for Human Rights and the Environment Abroad Act", Part IV: General Provisions, Art. 8 (cf. also Art.10 on the overriding effect of the draft Act's provisions) at https://cnca-rcrce.ca/site/wp-content/uploads/2021/05/The-Corporate-Respect-for-Human-Rights-and-the-Environment-Abroad-Act-May-31-2021.pdf

While these principles are to be welcomed, it will be very important to define the due care obligations of businesses as precisely as possible in the Instrument. A gradual refinement over time of the criteria, based on factual outcomes of their application, determined in cooperation with the companies concerned, may be a recommendable methodology.

2. Which companies should be covered?

a. EU based/non-EU-based companies?

In order to avoid unfair competitive advantages for non-EU-based companies operating in the internal market at the expense of EU companies, the Instrument is likely to apply to both. Also, the Instrument should apply to both private and state-owned companies. This will also offer additional protection to victims, because all these types of companies will then be subject to the same public law monitoring and enforcement mechanism established by the Instrument. **This will require, however, adequate private international law rules**, see above, **Proposal I.**

b. Large/medium sized/ small companies?

Ideally, all companies, large, medium sized or small should be made aware of, and combat, the adverse effects of their activities and those in their supply chains on human rights, the environment, and good governance, in- and outside of the EU. In order to give tangible but also fair results, however, the Instrument should take into account the evolving nature of the current awareness process. A step by step gradual expansion of the range of companies covered by the Instrument.[51].

C. Provision on civil liability for non-compliance with due diligence (see In Introduction, paras 27-30 above):

Instead of the proposed Article 19 (2) of the Resolution, a rule might be included to put beyond doubt that the substantive provisions of the Directive not only seek to regulate the conduct of companies, but also to enable victims to seek redress against non-compliance with its provisions:

Member States shall ensure that] the due diligence provisions of the Instrument may be invoked by persons seeking compensation for damage suffered as a result of non-compliance with these provisions, or:

Member States shall ensure that] those affected by the company's failure to exercise due diligence have access to judicial and/or non-judicial remedies (such as financial compensation for the harm suffered, restoration to the position before the harm took place, preventative remedies including injunctions to force the company to cease with ongoing or potentially harmful conduct, or, in climate change actions, compensation calculated as a percentage of the company's contribution to the damage[52].

[51] The draft Directive for an amendment of the Non-financial Reporting Directive, cited in the previous fn. offers an example of such a step by step expansion of the coverage of an EU instrument .

[52] Cf. the draft for "The Corporate Respect for Human Rights and the Environment Abroad Act", cited above, fn. 49, Part IX: Private Right of Action, Arts. 41-47.