



GRUPE EUROPÉEN DE DROIT INTERNATIONAL PRIVÉ – EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW

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**I.A. Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability]<sup>1</sup>**

**1. Introduction**

1. The *Groupe européen de droit international privé*/European Group for Private International Law (GEDIP/EGPIL) welcomes the Commission's initiative for a European Union Instrument on the responsibilities of businesses relating to the adverse impact of their value chains, often extending into States with weak legal systems, on [human rights, the environment and good governance]<sup>2</sup>.

2. While sector-specific EU instruments, such as the Timber and Conflict Mineral Regulations, may seek to achieve their aim through 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 future EU Instrument, will be far more effective if, in addition, it creates *civil* law duties for the relevant companies. Since such civil law duties may extend beyond Member States' territories, they give rise to issues of private international law, including questions such as: which EU court, if any, has jurisdiction to deal with civil claims based on the Instrument? What law should the court apply?

3. If the future Instrument is to be really effective, it must address these issues itself, and should not leave them to the various private international law systems of the Member States, as this would lead to uncertain, unpredictable and contradictory outcomes. Ultimately, the proposed rules on private international law may find their place in revised texts of EU regulations. But since the revisions of these regulations may not take place before the adoption of the Instrument, and these rules are indispensable for its proper operation, the proposal is to include them in the Instrument itself.

4. For this reason, the GEDIP recommends the inclusion in the future Instrument, whether it takes the form of a Regulation or a Directive, of the following rules. These rules are followed by a Commentary, a Background Note (English only), and an Annex (English only) dealing with some issues concerning the form and the substance of the future Instrument. Although the issues addressed in the Annex are not private international law issues properly speaking, they may have an impact on the private international law rules of the Instrument.

**2. The Proposal**

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

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<sup>1</sup> At this point, the precise scope of the Instrument is yet to be defined.

<sup>2</sup> *Idem*, see also *infra*, **III. Annex**, under **B**.

I. Scope of application

*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 selling goods or providing services*

II. Jurisdiction

*Without prejudice to the application of the provisions of the Brussels I Recast Regulation, a person not domiciled in a Member State may in matters falling within the scope of this Instrument also be sued for compensation or other remedies:*

1. *Connected claims*

*where (s)he is one of a number of defendants, 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*

*where no jurisdiction is available within the European Union, and if proceedings outside the European Union are impossible or cannot reasonably be required to be brought, in the courts of a Member State with which the case has a link.*

III. Overriding mandatory effect of the Instrument's provisions

*[Member States shall ensure that] provisions contained in this Instrument shall apply irrespective of the law otherwise applicable to companies, to contractual obligations and to non-contractual obligations.*

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

1. *Main rule*

*The law applicable to a non-contractual obligation arising out of damage as a result of non-compliance in respect of matters falling within the scope of this Instrument is the law determined by virtue of Article 4, paragraph 1 of the Rome II Regulation, unless the plaintiff chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.*

2. *Article 17 Rome II no excuse*

*Article 17 of the Rome 2 Regulation cannot be invoked by the defendant to exonerate or limit his liability.*

### **3. Commentary on the Proposal**

#### *I. Scope of application*

1. The rule proposed is a reminder that the future Instrument must define its scope of application regarding the [undertakings] it seeks to include. For a comparable, more detailed rule, see Article 2, Scope, of the **European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability**<sup>3</sup> (hereinafter “EP Resolution”).
2. The word “undertakings” appears in brackets, because private international law terminology more commonly uses the word “companies”. If the Instrument maintains the term “undertakings”, it should briefly note, and explain, this difference in terminology. This Commentary uses the two terms interchangeably.

#### *II. Jurisdiction*

3. The current Regulation 1215/2012 recast (Brussels I Recast) does not provide plaintiffs, (whether domiciled inside or outside the EU), with a forum to bring claims against [undertakings] domiciled in the EU (often the parent company in a chain of companies) together with other actors in those [undertaking]s’ value chain domiciled *outside* the EU, in the court of the EU domicile of the parent company. Article 8 (1) Brussels I Recast only offers such a forum against “a person domiciled in a Member State”. While the national laws of Member States may create such a forum, not all national laws do so, and to the extent they do, their rules differ from each other.
4. Regarding [undertakings] domiciled outside the EU but operating selling goods or providing services in the internal market, Brussels I Recast does not enable plaintiffs to sue those companies in the courts of the EU. Except for Articles 18 (1), 21 (2), 24 and 25, the Regulation leaves this to the national laws of Member States (Article 6 (1)).

#### *1. Connected claims*

5. The proposed rule on connected claims seeks to deal with the first point (3.). It requires that the claims be connected, but states that it is sufficient that the court finds that it is expedient to hear and determine the claims together.

#### *2. Forum necessitatis*

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<sup>3</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)

6. The proposed rule on *forum necessitatis* deals, at least partially, with the second point (4.), but may also be useful in the case of claims that do not (fully) meet the requirements of the rule on connected claims.
7. The rule applies under three conditions: (1) there is no court available in the EU, either under Brussels I Recast, any other EU instrument or national law, (2) proceedings outside the European Union are impossible or cannot reasonably be required to be brought, and (3) the case has a link with the EU Member State where the claim is brought.
8. It may be recalled that the inclusion of a *forum necessitatis* has precedents in EU Regulations on private international law (see e.g., Article 7 Maintenance Regulation 4/2009, Article 11 Succession Regulation 650/2012, Article 11 Matrimonial Property Regulation 2016/1103, and Article 11 Property consequences of registered partnerships 2016/1104). However, whereas those Regulations require a “sufficient link”, the present Proposal in view of the fundamental nature of the matters it regulates, does not qualify the link with the EU Member State where the claim is brought.
9. Rule II specifies that the defendant may be sued “for compensation or other remedies”. The Instrument should put beyond doubt that its substantive provisions not only seek to regulate the conduct of companies, but also to enable victims to seek redress against non-compliance with its provisions<sup>4</sup>.

### **III. Overriding mandatory effect of the Instrument’s provisions**

10. This rule seeks to ensure that the provisions of the Instrument prevail over the otherwise applicable rules on contractual and non-contractual obligations and companies. The EP Resolution includes a rule to this effect in its Article 20, but limits it to “relevant provisions of this Directive” and, with its reference to Article 16 Regulation 864/2007 (Rome II), to non-contractual obligations.
11. Rather than leaving it open which are the “relevant” provisions, the Instrument should either define itself which of its provisions are intended to have overriding mandatory effect, or else stipulate that (all) its provisions establishing obligations for companies and rights of victims have such effect.
12. The overriding mandatory effect should extend to all rules that would be otherwise applicable under (1) Regulation 593/2008 (Rome I), Rome II, or any other EU Instrument, and (2) all rules on contractual and non-contractual obligations, and on companies not covered by those instruments, deriving from national laws.

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<sup>4</sup> See *infra*, III. Annex, C.

13. The words between brackets [Member States shall ensure that] may be needed if the future Instrument takes the form of a Directive (as opposed to a Regulation).

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

***1. Main rule***

14. The provisions of the future instrument creating obligations for companies or rights for victims must, in any case, be applied as mandatory provisions (*rule III.*). However, a special conflict rule should also be created for rules relating to civil liability, which do not appear in the future instrument but will be governed by national law and are therefore outside the provisions of the instrument. The proposed rule extends the range of applicable laws to civil liability (which otherwise, except for environmental damage, would be limited to the rules of Article 4 Rome II). 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, those arising out of due diligence obligations in respect of matters falling within the substantive scope of the Instrument regarding [human rights and good governance]<sup>5</sup>. The plaintiff is thus 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. The event giving rise to the damage includes decisions taken by a company at the place where it is established in violation of its due diligence obligations under the Instrument (see, in the context of defamation, CJEU C-68/93 (*Shevill*)).

***2. Article 17 Rome II no excuse***

15. This rule seeks to ensure that defendants will not be excused from liability for non-compliance with their due diligence obligations under the Instrument simply by invoking Article 17 Rome II. While account must be taken, as a matter of *fact*, and in so far as is appropriate, of the rules of safety and conduct in force at the place and time of the event giving rise to the liability, such rules cannot replace the legal duties established by the Regulation and cannot be used to evade the application of its Articles 4 and 7 to those duties.

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<sup>5</sup> See *infra*, **III. Annex, B.1.a.**

**I.B. Recommandation du Groupe européen de droit international privé  
(GEDIP/EGPIL) à la Commission européenne concernant les aspects de droit  
international privé du futur instrument de l'Union européenne sur [le devoir de  
diligence et la responsabilité des entreprises]<sup>6</sup>**

**1. Introduction**

1. Le Groupe européen de droit international privé/*European Group for Private International Law* (GEDIP/EGPIL) accueille favorablement l'initiative de la Commission relative à un instrument de l'Union européenne sur les responsabilités des entreprises en raison de l'impact négatif de leurs chaînes de valeur, souvent localisées dans des Etats dont le système juridique offre un faible niveau de protection, sur [les droits humains, l'environnement et la bonne gouvernance]<sup>7</sup>.

2. Alors que les instruments de l'UE spécifiques à un secteur, tels les règlements sur le bois et les minerais originaires de zones de conflit, peuvent chercher à atteindre leur objectif par le biais d'un mécanisme de contrôle et d'application de droit *public*, applicable au territoire de chaque État membre, une législation ayant un champ d'application large et intersectoriel tel que le futur instrument de l'UE, sera beaucoup plus efficace si, en outre, il crée des obligations de droit *civil* pour les entreprises concernées. Étant donné que ces obligations de droit civil peuvent s'étendre au-delà des territoires des États membres, elles soulèvent des questions de droit international privé, y compris des questions telles que : quelle juridiction de l'UE, le cas échéant, est compétente pour traiter des actions civiles fondées sur l'instrument ? Quelle loi le tribunal doit-il appliquer ?

3. Pour que le futur instrument soit réellement efficace, il doit traiter ces questions lui-même et ne pas les laisser aux différents systèmes de droit international privé des États membres, car cela conduirait à des résultats incertains, imprévisibles et contradictoires. À terme, les règles proposées sur le droit international privé pourraient trouver leur place dans les textes révisés des règlements de droit international privé de l'UE. Mais puisque les révisions de ces règlements ne pourront avoir lieu avant l'adoption de l'Instrument, et que ces règles sont indispensables à son bon fonctionnement, il est proposé de les inclure dans l'Instrument lui-même.

4. Pour cette raison, le GEDIP recommande l'inclusion dans le futur instrument, qu'il prenne la forme d'un règlement ou d'une directive, des règles suivantes. Ces règles sont suivies d'un commentaire, d'une note d'information (en anglais seulement) et d'une annexe (en anglais seulement) traitant de certaines questions concernant la forme et le fond du futur instrument. Bien que les questions abordées dans l'annexe ne soient pas des questions de droit international privé à proprement parler, elles peuvent avoir un impact sur les règles de droit international privé de l'Instrument.

**2. La Proposition**

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<sup>6</sup> À ce stade, le champ d'application précis de l'instrument n'a pas encore été défini.

<sup>7</sup> *Idem, infra, III. Annex.B.*

*Aspects de droit international privé pour un futur instrument de l'Union européenne sur [le devoir de vigilance et la responsabilité sociale des entreprises]*

**I. Champ d'application**

*Les dispositions du présent instrument s'appliquent aux [entreprises] établies dans l'Union européenne et à celles établies dans un État tiers lorsqu'elles opèrent sur le marché intérieur par la vente de biens ou la fourniture de services.*

**II. Compétence**

*Sans préjudice de l'application des dispositions du règlement Bruxelles I refondu, une personne non domiciliée dans un État membre peut aussi être atraite en réparation ou pour toute autre demande dans les matières relevant du champ d'application du présent instrument :*

**1. Connexité**

*s'il y a plusieurs défendeurs, devant la juridiction du domicile de l'un deux, à condition que les demandes soient liées entre elles de telle sorte qu'il y a intérêt à les instruire et à les juger en même temps ;*

**2. Forum necessitatis**

*lorsqu'aucune juridiction n'est compétente au sein de l'Union européenne, et si une procédure est impossible ou ne peut raisonnablement être introduite ou conduite en dehors de l'Union européenne, devant les juridictions d'un État membre avec lequel l'affaire a un lien.*

**III. Application impérative**

*[Les États membres veillent à ce que] les dispositions contenues dans le présent instrument s'appliquent quelle que soit la loi applicable aux sociétés, aux obligations contractuelles et aux obligations non contractuelles.*

**IV. Loi applicable aux obligations non contractuelles découlant d'un dommage causé par la violation des obligations de vigilance**

**1. Règle principale**

*La loi applicable à une obligation non contractuelle découlant d'un dommage causé par la violation d'obligations relevant du champ d'application du présent instrument est celle qui résulte de l'application de l'article 4, paragraphe 1, du règlement Rome II, à moins que le demandeur n'ait choisi de fonder ses prétentions sur la loi du pays dans lequel le fait générateur du dommage s'est produit.*

**2. Article 17 Rome II**

*L'article 17 du règlement Rome 2 ne peut être invoqué par le défendeur pour s'exonérer de sa responsabilité ou la limiter.*

### 3. Commentaire de la Proposition

#### *I. Champ d'application*

1. La règle proposée rappelle que le futur instrument doit définir son champ d'application en ce qui concerne les [entreprises] qu'il vise à inclure. Pour une règle comparable et plus détaillée, voir l'article 2, Champ d'application, de la **Résolution du Parlement européen du 10 mars 2021 contenant des recommandations à la Commission sur le devoir de vigilance et la responsabilité des entreprises**<sup>8</sup> (ci-après la « résolution du PE »).

2. Le mot « entreprises » apparaît entre crochets, car la terminologie du droit international privé utilise plus couramment le mot « sociétés ». Si l'instrument conserve le terme « entreprises », il devrait brièvement noter et expliquer cette différence de terminologie. Ce Commentaire utilise les deux termes de manière interchangeable.

#### *II. Compétence*

3. Le texte actuel du règlement 1215/2012 (Bruxelles I refondu) n'offre pas aux demandeurs, (qu'ils soient domiciliés à l'intérieur ou en dehors de l'UE) un for pour intenter des actions contre [les entreprises] domiciliées dans l'UE (souvent la société mère d'une chaîne de sociétés), ni contre d'autres acteurs de la chaîne de valeur de ces [entreprises] domiciliés en dehors de l'UE, devant le tribunal du domicile de l'État membre de la société mère. L'article 8, paragraphe 1, Bruxelles I refondu n'offre de for que contre « une personne domiciliée dans un État membre ». Si les législations nationales des États membres peuvent créer un tel for, toutes ne le font pas et, lorsqu'elles le font, leurs règles diffèrent les unes des autres.

4. Concernant les [entreprises] domiciliées en dehors de l'UE mais opérant sur le marché intérieur par la vente de biens ou la fourniture de services, Bruxelles I refondu ne permet pas aux demandeurs de poursuivre ces sociétés devant les tribunaux de l'UE. A l'exception des articles 18 (1), 21 (2), 24 et 25, le règlement laisse cela aux législations nationales des États membres (article 6 (1)).

#### *I. Connexité*

5. La règle proposée sur les demandes connexes vise à traiter le premier point (3.). Il exige que les demandes soient liées, mais précise qu'il suffit que le tribunal juge opportun de les instruire et juger en même temps.

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<sup>8</sup> Textes adoptés - Devoir de diligence et responsabilité des entreprises - Mercredi 10 mars 2021 (europa.eu)

## ***2. Forum necessitatis***

6. La règle proposée sur le *forum necessitatis* traite, au moins partiellement, du deuxième point (4.), mais peut également être utile dans le cas de demandes qui ne satisfont pas (totalement) aux exigences de la règle sur les demandes connexes.

7. La règle s'applique sous trois conditions : (1) il n'y a pas de tribunal disponible dans l'UE, que ce soit en vertu de Bruxelles I refondu, de tout autre instrument de l'UE ou du droit national, (2) une procédure en dehors de l'Union européenne est impossible ou ne peut raisonnablement être introduite ou conduite, et (3) l'affaire a un lien avec l'État membre de l'UE où la demande est introduite.

8. Il est rappelé que l'inclusion d'un *forum necessitatis* a des précédents dans les règlements de l'UE sur le droit international privé (voir par exemple l'article 7 du règlement en matière d'obligations alimentaires 4/2009, l'article 11 du règlement en matière de successions 650/2012, l'article 11 du règlement en matière de régimes matrimoniaux 2016/1103 et l'article 11 du règlement en matière d'effets patrimoniaux des partenariats enregistrés 2016/1104). Cependant, alors que ces règlements exigent un « lien suffisant », la présente proposition, compte tenu de la nature fondamentale des matières qu'elle règle, ne qualifie pas le lien avec l'État membre de l'UE où la demande est introduite.

9. La règle **II** précise que le défendeur peut être poursuivi « en réparation ou pour toute autre demande ». L'instrument devrait clairement établir que ses dispositions de fond visent non seulement à réglementer la conduite des entreprises, mais aussi à permettre aux victimes de demander réparation en cas de violation de ses dispositions<sup>9</sup>.

## **III. Application impérative des dispositions de l'Instrument**

10. Cette règle vise à garantir que les dispositions de l'instrument prévalent sur les règles par ailleurs applicables aux obligations contractuelles et non contractuelles et aux sociétés. La résolution du PE inclut une règle à cet effet dans son article 20, mais la limite aux « dispositions pertinentes de la présente directive » et, avec sa référence à l'article 16 du règlement 864/2007 (Rome II), aux obligations non contractuelles.

11. Plutôt que de laisser ouverte la question des dispositions « pertinentes », l'instrument devrait soit définir lui-même lesquelles de ses dispositions sont censées avoir un effet impératif,

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<sup>9</sup> Voir *infra*, **III. Annex C**.

soit préciser que (toutes) ses dispositions créant des obligations pour les entreprises ou des droits pour les victimes, ont un tel effet.

12. L'effet impératif devrait s'étendre à toutes les règles qui seraient autrement applicables en vertu (1) du Règlement 593/2008 (Rome I), de Rome II ou de tout autre instrument de l'UE, et (2) toutes les règles relatives aux obligations contractuelles et non contractuelles et sur les sociétés, non couvertes par ces instruments, découlant des législations nationales.

13. Les mots entre crochets [les États membres veillent à ce que] seraient nécessaires si le futur instrument prend la forme d'une directive (par opposition à un règlement).

#### **IV. Loi applicable aux obligations non contractuelles découlant d'un dommage causé par la violation des obligations de vigilance**

##### ***1. Règle principale***

14. Les dispositions du futur instrument créant des obligations pour les entreprises ou des droits pour les victimes, doivent, en tout état de cause, être appliquées en tant que dispositions impératives (règle **III.**). Toutefois, il convient également de créer une règle de conflit spéciale pour des règles ayant trait à la responsabilité civile, lesquelles ne figurent pas dans le futur instrument mais relèveront des règles de droit commun et sont donc en dehors des dispositions de l'instrument. La règle proposée étend l'éventail des lois applicables aux régimes de responsabilité civile applicables qui, autrement, à l'exception des dommages environnementaux, serait limité aux règles de l'article 4 Rome II. La règle étend la protection offerte par l'article 7 Rome II de sorte qu'elle couvre, outre les obligations non contractuelles découlant des dommages environnementaux, celles découlant des obligations de diligence raisonnable en ce qui concerne les questions relevant du champ d'application matériel de l'instrument concernant [droits humains et bonne gouvernance]<sup>10</sup>. Le demandeur a ainsi la possibilité de choisir la loi soit du pays dans lequel le dommage survient, soit du pays dans lequel s'est produit l'événement à l'origine du dommage. L'événement à l'origine du dommage comprend les décisions prises par une entreprise au lieu où elle est établie en violation de ses obligations de diligence en vertu de l'instrument (voir, dans le cadre de la diffamation, CJUE C-68/93 (*Shevill*)).

##### ***2. Article 17 Rome II***

15. Cette règle vise à garantir que les défendeurs ne seront pas exonérés de leur responsabilité pour violation de leurs obligations de diligence en vertu de l'Instrument en invoquant simplement l'article 17 Rome II. S'il doit être tenu compte, en tant qu'élément de fait, et pour

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<sup>10</sup> Voir *infra*, **III. Annex, B.1.a.**

autant que de besoin, des règles de sécurité et de comportement en vigueur au lieu et au jour de la survenance du fait qui a entraîné la responsabilité, ces règles ne peuvent se substituer aux obligations établies par le règlement et ne peuvent être utilisées pour échapper à l'application de ses articles 4 et 7 à ces obligations.

## II. Background to the Proposal

### 1. Introduction

1. 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. The GEDIP welcomes, therefore, 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].

2. While a wide arrange of instruments in this field have been adopted at the international level<sup>11</sup>, 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**.

4. The Union itself has already adopted mandatory due diligence frameworks, but only in two specific areas, the Timber Regulation<sup>12</sup>, and the Conflict Minerals Regulation<sup>13</sup>. 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<sup>14</sup>, 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.

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<sup>11</sup> 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.

<sup>12</sup> *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

<sup>13</sup> *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.

<sup>14</sup> *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. 45.

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 through 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 far 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, if any, have jurisdiction to deal with claims based on the Instrument? And: what law applies to those civil duties? These issues should not be left to the various private international law systems of the Member States, which are diverse. The future EU Instrument would be incomplete if it did not address these issues.

7. Therefore, the Proposal Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability] provides suggestions for the private international law aspects of the future EU Instrument.

The Annex 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 the Proposal.

Independent of the Commission's initiative certain Member States have already adopted rules on (aspects of) corporate responsibility for responsible business or are preparing such rules. The same goes for certain non-Member States. These developments, briefly described under 3. below, may well make it necessary to propose amendments to the Brussels I Recast, Rome I, and Rome II Regulations as well as to the 2016 GEDIP draft Rules on the law applicable to companies and other bodies. The GEDIP has already been working on ideas for such amendments and may come back with concrete proposals at a later stage. At this stage, however, revisions of these regulations are unlikely to take place before the adoption of the EU Instrument. And since this Instrument would be incomplete and less effective without rules on private international law, the **Proposal** is to include these rules in the Instrument itself.

## **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<sup>15</sup>.

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

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<sup>15</sup> 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](#)

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 uniform rule see **the Proposal, rule II**.

10. The issue of applicable law was resolved in both the UK and the Dutch cases in an atypical 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<sup>16</sup>.

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 event 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*” – “*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.<sup>17</sup>

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, rule IV**.

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<sup>16</sup> “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.

<sup>17</sup> 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.

### 3. Recent legislative developments in EU Member States and neighbouring States<sup>18</sup>

12. In several EU States laws on corporate social and environmental responsibility have been adopted or are being proposed or prepared<sup>19</sup>. Such a statute also applies in the UK, and legislative initiatives are under way in Norway and Switzerland<sup>20</sup>. 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<sup>21</sup>.

13. The Dutch 2019 *Child Labour Due Diligence Act*<sup>22</sup> 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<sup>23</sup>. 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<sup>24</sup>. Again, this Act applies as a mandatorily applicable rule that is applicable to UK territory only, and does not establish a civil liability regime.

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<sup>25</sup>. The *Loi sur le devoir de vigilance* was the principal inspiration for the

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<sup>18</sup> 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).

<sup>19</sup> 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/\(Finland\)](https://www.business-humanrights.org/en/latest-news/finland-govt-publishes-study-on-possible-regulatory-options-for-proposed-due-diligence-legislation/(Finland)).

<sup>20</sup> 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.

<sup>21</sup> (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*.

<sup>22</sup> *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>

<sup>23</sup> 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.

<sup>24</sup> 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*

<sup>25</sup> 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 it 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/communiqu%C3%A9-presse/affaire-total-ouganda-la-cour-dappel-de-versailles-renvoie-au-tribunal-de-commerce/> [www.totalautribunal.org](http://www.totalautribunal.org).

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<sup>26</sup>.

16. The recent (2021) German legislative proposal *Sorgfaltspflichtengesetz*, 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 offering less protection in Germany than in the UK<sup>27</sup>.

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, and therefore, the rule of Article 7 should be extended to violations of human rights and obligations relating to good governance.

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. In respect of the future Instrument, the GEDIP proposes the inclusion in the future Instrument of a rule that makes it possible for such co-defendants to be sued in the courts of the Member States.

19. These developments at the level of national law, may make it necessary, in addition to the Proposal submitted by the GEDIP regarding the future EU Instrument, to propose amendments to the Brussels I Recast, Rome I, and Rome II Regulations as well as to the 2016 GEDIP draft Rules on the law applicable to companies and other bodies. Whether such amendments will effectively be necessary and how precisely they should be drafted may depend on the scope of the future EU Instrument and the rules on private international law it will include.

#### **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<sup>28</sup>. The BIICL Study presented 4 options for action to be taken by the EU: no change

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<sup>26</sup> Valérie Pironon, « Le devoir de vigilance et le droit international privé – influences croisées », *Travaux du Comité français de droit International privé* 2018-2020....

<sup>27</sup> 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.

<sup>28</sup> See <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

(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*”<sup>29</sup>. 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<sup>30</sup>. 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<sup>31</sup>.

21. Meanwhile the European Parliament had commissioned studies both on environmental liability of companies<sup>32</sup> and on corporate due diligence and corporate accountability<sup>33</sup>. 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”<sup>34</sup>. 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 several amendments<sup>35</sup>.

22. The initiative was welcomed in circles of private international law scholars<sup>36</sup>, 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<sup>37</sup>) 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.

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<sup>29</sup> *Ibid.* p. 20.

<sup>30</sup> 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

<sup>31</sup> See <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021>

<sup>32</sup> See [https://www.europarl.europa.eu/cmsdata/214267/IPOL\\_STU\(2020\)651698\\_EN.pdf](https://www.europarl.europa.eu/cmsdata/214267/IPOL_STU(2020)651698_EN.pdf)

<sup>33</sup> See [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS\\_STU\(2020\)654191\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf)

<sup>34</sup> See [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/JURI/PR/2021/01-27/1212406EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/PR/2021/01-27/1212406EN.pdf)

<sup>35</sup> See [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/JURI/DV/2021/01-27/Votinglist\\_Corporateduediligence\\_amendments\\_EN.pdf](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.

<sup>36</sup> 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.

<sup>37</sup> ‘*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.

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<sup>38</sup>.

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<sup>39</sup> but rather to any “relevant provisions”, without defining those. Nor does the proposal define any connecting factor

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<sup>38</sup> 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/>

<sup>39</sup> This would have required a different formulation: Member States shall ensure that the liability rules established under Art. 20 (2) will be overriding mandatory provisions in line with Article 16 of Rome II.

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*<sup>40</sup>. 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. The **Proposal** submitted by the GEDIP concerns the latter, private international law, aspect only. The **Annex** below 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<sup>41</sup> 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.*

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<sup>42</sup>. 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

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<sup>40</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)

<sup>41</sup> *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) 2018/957 of the European Parliament and of the Council of 28 June 2018*

<sup>42</sup> 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](http://www.erasmuslawreview.nl/tijdschrift/ELR/2014/3/ELR_2210-2671_2014_007_003_006)

“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..

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 applicable 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, III. Overriding mandatory effect of the Instrument’s provisions**

33. However, in order for the future instrument to fully reach its objective, as pointed out before, additional consequential, measures are needed. First, the **Proposal** includes a provision to extend the rule of Article 8 (1) Brussels I Recast on connected claims to defendants domiciled outside of the EUm and second it proposes to establish a *forum necessitatis*, see, **II. Jurisdiction**. Second, the Proposal includes a provision, inspired by Article 7 of the Rome II Regulation, extending the plaintiff’s option to choose the applicable law in the case of damage resulting from non-compliance with obligations in respect of the environment, to damage resulting from non-compliance with the Instrument’s due diligence provisions regarding human rights and good governance, see **Proposal, Rule IV Law applicable to non-contractual obligations arising out of damage resulting from non-compliance with due diligence obligations**

### III. 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.”*

While 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 certainty 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, Rule III.**), which complicate their application (as illustrated by the Directives in the field of the Consumer Rights). A Regulation would avoid those disadvantages<sup>43</sup>.

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<sup>44</sup>. However, as long as neither

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<sup>43</sup> Critical of the Directive approach, Bastian Brunk, above fn.38, approving Jan von Hein, above fn. 36.

<sup>44</sup> As illustrated, for example, by the cases referred to above, Background to the Proposal 2.

“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<sup>45</sup>.

## **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”*

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 way forward.

## **2. Which companies should be covered?**

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

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**, as suggested by the GEDIP Proposal

### **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

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<sup>45</sup> 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>

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 gradual expansion of the range of companies covered by the Instrument may recommend itself.<sup>46</sup>

**C. Provision on civil liability for non-compliance with due diligence (see point 4. 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 because 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<sup>47</sup>.*

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<sup>46</sup> 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.

<sup>47</sup> Cf. the draft for “The Corporate Respect for Human Rights and the Environment Abroad Act”, cited above, fn. 45, Part IX: Private Right of Action, Arts. 41-47.