

Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care

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This summary presents preliminary conclusions of the [Human Rights in Business Project](#), a research consortium of leading European academic institutions. The project, funded by the Civil Justice Programme of the European Union, aims at researching and resolving problems associated with access to justice for human rights violations in a business and human rights context, including jurisdiction, substantive and procedural applicable law, non-judicial remedy mechanisms, and standards of care in tort/civil law. This document summarises preliminary research findings on standards of care, the last issue.

The corporate responsibility to respect human rights and the human rights due diligence (HRDD) process described in the UN Guiding Principles on Business and Human Rights (Guiding Principles) are similar to the standard of care concept in tort law and its analogues in civil law. In law, the attribution of responsibility to a particular corporation is obscured to an outside observer by the complex organisation of corporate structures and relationships. Building on the survey responses provided by distinguished legal academics and practitioners from France, Germany, the Netherlands, Sweden, and the United Kingdom, and reflecting on recent legislative developments at the EU level and in France, Switzerland, and the United Kingdom, the Project has identified three legally feasible and practical recommendations to realise the corporate responsibility to respect human rights in tort/civil law across Europe.

Recommendation I: Evidence of control

Business and human rights disputes are typically characterised by an imbalance of power between the parties, both in terms of financial resources and access to information. Asymmetry of information is particularly problematic with respect to evidence that the company controlled or influenced the actions which caused or contributed to the harm, but which were carried out by a third party such as a company's subsidiary or business partner. The claimant is often required to prove control in order to establish that the company owed a duty of care to the victims. In this respect, common law and civil law systems differ considerably. Generally speaking, common law systems have general disclosure rules whereas civil law systems do not.

Recommendation

Civil law jurisdictions could introduce a specific evidentiary disclosure obligation with respect to the control a parent company exercises over its subsidiaries. This legislation would allow claimants to petition the court to order a company-defendant to disclose all details of the control it exercises over its subsidiaries and its general involvement in the management of its subsidiaries as well as its control and involvement in the specific case connected to the claim, inasmuch as this information is relevant for assessing the parent company's duty of care. The aim of this recommendation is to limit the courts' current discretion and to extend the basis for claimants to access information.

Recommendation II: Rebuttable presumption of control

As with recommendation I, this recommendation seeks to address claimants' lack of information with respect to the control a parent company exercises over its subsidiaries. It concerns both common and civil law

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jurisdictions. The recommendation represents a gradual rather than a principled departure from existing law. Courts may already be able to partially alleviate the burden of proof placed on claimants where the facts speak for themselves (known as '*res ipsa loquitur*'). They should also be encouraged to do so for questions of a parent company's control of its subsidiaries, although the full implementation of this scenario requires a statutory reform. It does not radically change the legal situation of defendant companies, as it would not result in automatic liability for the conduct of their subsidiaries, or cause any obviously onerous issues with respect to competitiveness or confidentiality.

Recommendation

Courts could be required to accept *prima facie* evidence that a company is in control of its subsidiaries and their actions relevant to the case and then shifts the burden of proof to the company to prove that it did not exercise such control. The shift only concerns control, not the duty of care. The court could use control definitions from, for example, accounting law by assuming control if the company controls the majority of shareholders' voting rights, appointed or has the right to appoint the majority of the subsidiary's management, or has the power to exercise or exercises dominant influence. If the company fails to meet the threshold, the court would not shift the burden of proof, but this would be without prejudice to the company's liability.

Recommendation III: Statutory duty to conduct human rights due diligence

In most legal systems, it is difficult for victims of human rights violations to establish that a company owed them a *duty of care* to supervise its subsidiaries, suppliers or other business partners. Apart from the rarely accepted 'piercing the corporate veil' in company law, such a duty is only accepted under strict and narrow conditions, if at all.

Recommendation

HRDD could be made compulsory by creating statutory duties to identify, prevent, mitigate and cease human rights violations for which a company is directly or indirectly responsible and by providing remedies (damages, injunctions) in case one or more of such duties would be breached. Corporate liability would depend on the question whether it effectively carried out the HRDD. Meeting the HRDD requirement would be considered according to the general tort standard of acting like a 'reasonable person'. Generally accepted industry standards would further inform the assessment of the reasonableness of an action taken to discharge the duty.

Additionally, a sufficient causal connection between the victims' harm and the lack of HRDD by the company is required. If these requirements are met, the company is obliged to pay compensation for the damage suffered by the claimants. In common law, the new statute should explicitly recognise that the duty was imposed for the protection of victims and that the breach of the duty gives rise to the private right of action.

The company's liability might initially be limited to third parties over which the company exercises legal control. Where appropriate, the scope could be extended to third parties over whom it exercises considerable factual control (such as companies in the supply chain that are not at the same time the company's subsidiaries). For these latter cases, it needs to be established how much factual control is needed to create a legal duty and, in conjunction with this, what such a duty would entail.

The company's liability might initially also be limited to certain specific human rights risks. This may link to certain human rights or to a certain level of breach such as 'serious human rights violations'. It may also link to internationally recognised standards, for example with respect to environmental harm.