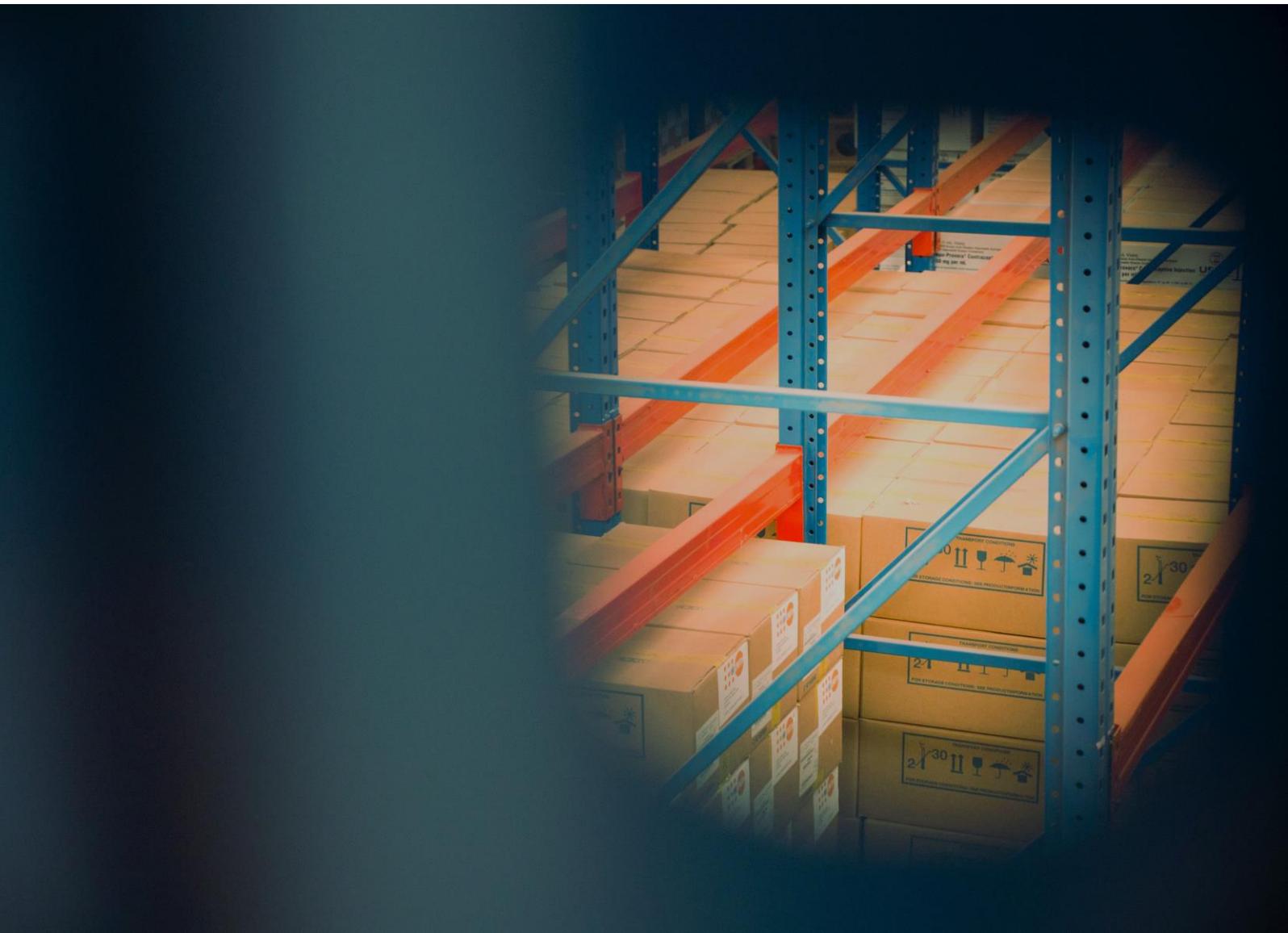


# THE PREVENTION OF CORRUPTION AS PART OF MANDATORY DUE DILIGENCE IN EU LEGISLATION

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## EXECUTIVE SUMMARY

**This study examines the existing legal framework on anti-corruption in the EU in the context of the proposal for new EU legislation on mandatory human rights and environmental due diligence for companies carrying on business in the EU. It argues in favour of introducing a requirement for companies to address their corruption risks and impacts as part of a broader human rights and environmental due diligence obligation and discusses how these and other complementary measures can advance the EU's fight against corruption.**

EU Member States have committed to imposing due diligence obligations on companies in order to ensure that they address corruption across multinational groups and within global supply chains, by monitoring their subsidiaries and their business partners. All the EU Member States are parties to the 2003 United Nations Convention against Corruption (UNCAC). They also operate under the OECD framework, defined by the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as by 2009 the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions and its annex on the Good Practice Guidance on Internal Controls, Ethics, and Compliance, as well as the OECD Guidelines on Multinational Enterprises originally. 22 EU Member States are also parties to the Council of Europe's Civil Law Convention on Corruption. The International Chamber of Commerce also adopted a model "anti-corruption clause" in 2011, encouraging businesses to insert such a clause in the contractual agreements between companies and their suppliers.

Taken together, these various instruments illustrate the strong alignment of EU Member States on certain standards in the fight against corruption. Yet, significant discrepancies remain between Member States, despite these

instruments and the adoption of the Framework Decision 2003/568/JHA on combating corruption in the private sector. Only three of the 27 EU Member States (France, Germany and Italy) currently impose legal obligations on larger enterprises relating to the prevention and detection of corruption. Distortions of competition thus remain within the internal market: depending on the jurisdiction under which companies operate, they are subject to different requirements with regard to due diligence to prevent and combat corruption. This also requires that companies seek information about the legal requirements in 27 different jurisdictions when they have EU-wide activities, and that they plan their activities on the basis of 27 variations in legislation. In contrast, a harmonised legal framework would allow companies to adopt group-wide policies that shall apply to all the entities operating in the EU, with no or only minor differences from Member State to Member State. This should facilitate the planning of transnational economic activities for businesses operating in the EU.

The strengthening of the EU anti-corruption framework should clearly distinguish the role of prevention (by obliging companies to conduct due diligence for these risks) from any liability that might result from prevention having failed: if the adoption of appropriate prevention measures were to result in legal immunity in the case of failure, this would be counterproductive, leading

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to compliance becoming a "box-ticking" exercise, rather than a tool through which the company is encouraged to proactively improve its standards and procedures to prevent corruption. The procedural tools through which the duty to prevent human rights, labour rights or environmental impacts, on the one hand, and corruption on the other hand, should also take into account the specific relationship of each to identified victims. Indeed, whereas the victims are generally easily identifiable where human, labour or environmental rights are adversely impacted, corruption often affects victims

indirectly, insofar as it may lead to certain laws or regulations being circumvented or under-enforced. Therefore, while some tools have been proven somewhat effective in corporate compliance programmes to prevent corruption (such tools include financial auditing, a protection for whistleblowers, or the possibility to provide information to a compliance officer anonymously or confidentially), other tools may be less effective when they rely primarily or exclusively on complaints filed by victims.

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## INTRODUCTION

This study argues that the European Union should seek to ensure that business enterprises operating in the EU internal market, address corruption risks and impacts as part of a broader human rights and environmental due diligence obligation. Such anti-corruption measures should therefore be required under the forthcoming legislation. The European Commission's legislative proposal on mandatory corporate due diligence in European Union law provides a unique opportunity for the EU to strengthen its anti-corruption framework, in order to ensure that companies doing business in the EU contribute to the fight against corruption in multinational groups and in global supply chains. This would help to ensure that corruption resulting from economic globalization the result of the deepening of the international division of labour and the segmentation of the production process across different jurisdictions is addressed. It would also allow the European Union to fully implement the UN Convention against Corruption, to which it acceded in 2008.

According to the UN Guiding Principles on Business and Human Rights (UNGPs), endorsed on 16 June 2011 by the Human Rights Council, human rights due diligence refers to the duty of companies to "avoid infringing on the rights of others and to address adverse impacts with which they are involved" by identifying, preventing, mitigating and accounting for how they address their impacts on human rights, whether such impacts are caused by the business enterprise itself or whether they are "directly linked to its operations, products or services by its business relationships".<sup>1</sup>

The study first recalls the close links between the fight against corruption and the protection of human rights that may be affected by business activities (Part 1). It then explains why the European Union should harmonise across the 27 EU Member States the due diligence obligations associated with the fight against corruption, by

imposing on companies doing business in the EU that they adopt robust anti-corruption measures as part of HREDD (Part 2). It further explains that if corruption is to be addressed effectively, it should be not only by the imposition of due diligence obligations that include corruption, but also by the imposition of administrative, civil and criminal sanctions (Part 3). Finally, it explains why such a harmonization should not be seen as a substitute for strengthening the liability of companies in cases where, despite efforts aimed at preventing corruption, corruption does occur. Imposing due diligence obligations to prevent corruption should be seen as part of a broader effort to strengthen the fight against corruption in the EU context (Part 4).

## 1. THE FIGHT AGAINST CORRUPTION AS A HUMAN RIGHTS ISSUE

The lack of enforcement or underenforcement of regulatory requirements is a major obstacle to the effective protection of human rights, including labour rights and environmental rights. Such deficiencies in enforcement may be the result of law enforcement agencies, including the police, the prosecuting authorities, courts, labour inspectorates or specialised agencies tasked with enforcing human rights and environmental legislation, being understaffed or lacking financial resources or political support to fulfil their duties effectively. It may also be due to corruption of public officials by the business undertakings concerned. Corruption therefore has a direct impact on the human rights and environmental impacts of business activities: if left unchecked, it can significantly weaken the protection of local communities against such impacts, and undermine the efforts to strengthen respect for human rights and environmental rights in global supply chains.

The Sustainable Development Goals implementing the 2030 Agenda for Sustainable Development<sup>2</sup> acknowledge the links between sustainable development and corruption, by

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including a specific commitment (expressed in target 16.5) to reduce corruption and bribery in all their forms. Various resolutions of the UN Human Rights Council also underline the direct link between the fight against corruption and the protection of human rights,<sup>3</sup> noting in particular that corruption "renders those in vulnerable situations more prone to adversely suffering from the negative social and environmental impact of economic activities".<sup>4</sup> Such links were also highlighted in detail in a report by the UN Human Rights Council Advisory Committee<sup>5</sup> and by various reports of the United Nations High Commissioner for Human Rights, both acting at the request of the Human Rights Council.<sup>6</sup> The UN Committee on Economic, Social and Cultural Rights has expressed the view that States would violate their duty to protect the rights listed in the International Covenant on Economic, Social and Cultural Rights (a treaty ratified by all the EU Member States) by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused.<sup>7</sup>

In a recent report to the Human Rights Council, the UN Working Group on business and human rights noted that corruption

*"may undermine the availability, quality and accessibility of goods and services that States need to provide to meet their international human rights obligations. Moreover, corruption undermines the functioning and legitimacy of State institutions and weakens the rule of law. Groups and individuals who have been marginalized and discriminated against suffer disproportionately from corruption, and corruption involving business harms the human rights of workers and communities affected by it."*<sup>8</sup>

Referring to the announcement made by the European Commission in April 2020 that it would propose legislation on mandatory human rights and environmental due diligence for businesses operating in the EU, the Working Group on

Business and Human Rights noted that such legislation "would help to counter corruption and promote human rights"<sup>9</sup>. Indeed, the Working Group referred to a number of submissions they received emphasizing that the two objectives -- preventing corruption and preventing human rights abuses in the course of business activities - - are closely linked. These submissions noted that:

*Companies could not avoid assessing corruption's impact on human rights while conducting human rights impact assessments. In places where corruption is rife, companies need to consider human rights and anti-corruption measures as linked, for example, in situations where officials expected bribes to approve inspections, human rights abuses were also likely. In situations of grand corruption, where corruption may be endemic within a State or State institutions, businesses need to engage in enhanced due diligence to prevent corruption, and to identify the heightened risk of human rights abuses, given weak or corrupted political institutions and lack of rights protections.*<sup>10</sup>

The reports of the UN High Commissioner for Human Rights clarify the link between the international agenda on business and human rights and the fight against corruption. Recalling that, under the UN Guiding Principles on Business and Human Rights, corporations have a duty to carry out human rights due diligence, i.e. to assess actual and potential human rights impacts that business enterprises may cause or contribute to through their own activities or that may be directly linked to their operations, products or services by their business relationships (principle 17), and to integrate the findings from their impact assessments and take appropriate action (principle 19), the High Commissioner for Human Rights took the view that this human rights due diligence obligation should be considered to entail a duty to adopt corporate anti-corruption preventive measures:

*Given the negative impact of corruption on the enjoyment of human rights, adopting anti-corruption compliance procedures can be seen to be part of human rights due diligence. Linking anti-corruption compliance with human rights due diligence can improve the effectiveness of both methods.<sup>11</sup>*

This is also the conviction on which this study builds. The introduction of mandatory human rights and environmental due diligence in EU law -- which should cover human rights, labour rights and environmental harms -- provides a unique opportunity to also address corruption in corporate groups or in supply chains. Beyond the opportunity however, there is a logical link between the two: because corruption undermines the rule of law and the effective

enforcement of legislation implementing human rights, labour rights and environmental rights, a due diligence process not including the issue of corruption would be incomplete and thus weaker. Finally, there is a strong similarity between the tools and processes to be put in place for human rights due diligence and those generally included in corporate compliance programmes. In order to illustrate this similarity, Table 1 presents the expectations expressed, respectively, by the United States Sentencing Commission's description of an effective compliance and ethics program, and by the due diligence framework presented by the Organisation for Economic Cooperation and Development (OECD), building on the OECD's Guidelines for Multinational Enterprises:

**Table 1. Analogies between effective corporate compliance programs and due diligence**

	<b>Main components of an effective compliance and ethics program</b>  (excerpts from: United States Sentencing Commission, Chapter 8 (Sentencing of Organisations), part B: Remedying harm from criminal conduct, and effective compliance and ethics program (2015))	<b>Main components of due diligence</b>  (excerpts from: OECD, Due Diligence Guidance for Responsible Business Conduct (2018))
<b>Establishing procedures and oversight at highest level</b>	<p>The organization shall establish standards and procedures to prevent and detect criminal conduct.</p> <p>The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.</p> <p>High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as</p>	<p>Embed responsible business conduct (RBC) into policies and management systems. Assign oversight and responsibility for due diligence to relevant senior management and assign board level responsibilities for RBC more broadly.</p>

	described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.	
<b>Monitoring and auditing to identify risks</b>	The organization shall take reasonable steps ... to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct...	<p>Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services.</p> <p>Carry out a broad scoping exercise to identify all areas of the business, across its operations and relationships, including in its supply chains, where RBC risks are most likely to be present and most significant.</p> <p>Starting with the significant areas of risk identified above, carry out iterative and increasingly in-depth assessments of prioritised operations, suppliers and other business relationships in order to identify and assess specific actual and potential adverse RBC impacts.</p>
<b>Response to identified risks or criminal conduct / adverse human rights impacts</b>	After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.	<p>Cease, prevent and mitigate adverse impacts.</p> <p>Stop activities that are causing or contributing to adverse impacts on RBC issues, based on the enterprise's assessment of its involvement with adverse impacts ... Develop and implement plans that are fit-for-purpose to prevent and mitigate potential (future) adverse impacts.</p> <p>Develop and implement plans to seek to prevent or mitigate actual or potential adverse impacts on RBC issues which are directly</p>

		linked to the enterprise's operations, products or services by business relationships.
<b>Ongoing improvement of the procedures</b>	<p>The organization shall take reasonable steps— ...</p> <p>(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and</p> <p>(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.</p>	Monitor and track implementation and effectiveness of the enterprise's own internal commitments, activities and goals on due diligence, e.g. by carrying out periodic internal or third party reviews or audits of the outcomes achieved and communicating results at relevant levels within the enterprise.
<b>Communicating about standards and procedures</b>	<p>The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to [the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents] by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.</p>	Communicate externally relevant information on due diligence policies, processes, activities conducted to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities.
<b>Where prevention fails: providing an appropriate response</b>	<p>After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.</p>	When the enterprise identifies that it has caused or contributed to actual adverse impacts, address such impacts by providing for or cooperating in their remediation.

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The similarities between human rights and environmental due diligence and corporate compliance programs to address corruption should be seen as an opportunity. For companies, combining the two may appear the most efficient way to fulfil the objectives of both. It has been noted in this regard that "[a] company with bits and pieces of a program organizationally scattered, and operating in a complex environment, is greatly challenged from a cost-efficiency and effectiveness standpoint. Oftentimes regulatory processes are siloed leading to a host of inefficiencies. While enterprise software can go a long way towards addressing these inefficiencies, it often comes down to the organizational and cultural considerations to ensure an effective program across all significant risk areas".<sup>12</sup>

The following chapter explores the potential role of the European Union in strengthening the anti-corruption framework across the EU Member States, by imposing on companies doing business in the EU that they adopt anti-corruption measures as part of discharging their due diligence obligations.

## 2. THE ROLE OF THE EUROPEAN UNION

### 1. The role of the 2014 Non-Financial Reporting Directive

EU legislation already indirectly addresses the role of companies in preventing corruption in corporate groups and supply chains.

**Directive 2014/95/EU of 22 October 2014 on the disclosure of non-financial information by certain large undertakings and groups**,<sup>13</sup> indeed, imposes on large companies that they include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee

matters, respect for human rights, *anti-corruption and bribery matters*, including:

- > a brief description of the undertaking's business model;
- > a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
- > the outcome of those policies;
- > the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; and
- > non-financial key performance indicators relevant to the particular business.<sup>14</sup>

Directive 2014/95/EU imposes such non-financial reporting requirements on "public-interest entities [<sup>15</sup>] exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year": in practice, 6,000 large companies in the EU are concerned, that are publicly listed, or that are banks, insurance companies or other companies listed as public-interest entities in domestic legislation.

In June 2017, the European Commission adopted non-binding guidelines on how to discharge the new non-financial information reporting requirements.<sup>16</sup> As regards the disclosure on the policy concerning due diligence, these guidelines -- which, the Commission emphasises, are without prejudice to the interpretation that the Court of Justice of the European Union may give to the directive -- provide:

- > Due diligence processes relate to policies, to risk management and to outcomes. Due diligence processes are undertaken by a company to ensure that it delivers against a concrete objective (e.g. to ensure that carbon emissions are below a certain level or that supply chains are free from trafficking in

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human beings). They help identify, prevent and mitigate existing and potential adverse impacts.

> Companies should provide material disclosures on due diligence processes implemented, including, where relevant and proportionate, on its suppliers and subcontracting chains. They may also consider disclosing appropriate information on the decisions taken to set them up and how the processes are intended to work, in particular as regards preventing and mitigating adverse impacts. Companies may also consider providing relevant information on setting targets and measuring progress.

> For example, OECD Guidance documents for several sectors, UN Guiding Principles on Business and Human Rights, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, or ISO 26000 provide useful guidance on this.

As regards the provision of information on corruption issues, the guidelines presented by the Commission explain:

- > Companies are expected to disclose material information on how they manage anti-corruption and bribery matters and occurrences.
- > Companies may consider making disclosures on organisation, decisions, management instruments, and on the resources allocated to fighting corruption and bribery.
- > Companies may also consider explaining how they assess fighting corruption and bribery, take action to prevent or mitigate adverse impacts, monitor effectiveness, and communicate on the matter internally and externally.
- > Companies may find it useful to rely on broadly recognised, high quality frameworks, for instance in the OECD Guide lines for Multinational Enterprises, or ISO 26000.

According to the same communication, key performance indicators related to the

establishment of standards and procedures to address corruption include the setting of criteria used in corruption-related risk assessments; the establishment of internal control processes and the allocation of resources assigned to preventing corruption and bribery; the provision of training to employees; or the use of whistleblowing mechanisms.

Certain legitimate expectations may be derived from these clarifications, and such expectations may influence the interpretation of general civil liability provisions by courts (in particular, by leading courts to define 'fault' in tort litigation as a failure to comply with the commitments announced by the company). The information conveyed to the public under the reporting requirements, moreover, can be considered as a form of advertising, which -- if it is considered as misrepresenting the facts -- may give rise to a specific form of liability for misleading advertising.<sup>17</sup>

## 2. Moving beyond the 2014 Non-Financial Reporting Directive

Strictly speaking however, the 2014 Directive **on the disclosure of non-financial information** does not impose on these companies a duty to take certain actions, such as to adopt a due diligence plan on human rights or social or environmental impacts; nor does it require companies to take robust measures to address the risk of corruption. Instead, the Non-Financial Reporting Directive relies on a 'comply or explain' approach, according to which "Where the undertaking does not pursue policies in relation to one or more of those matters [i.e., environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters], the non-financial statement shall provide a clear and reasoned explanation for not doing so". Moreover, the directive does not link the requirement to disclose non-financial information to the establishment of a new duty of care. In particular, it does not state that, in the

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absence of the adoption of certain policies to prevent risks in environmental, social, human rights and anti-corruption / bribery matters, the company may be held liable for any impacts that might have been prevented by the adoption of such policies.

Therefore, although the Non-Financial Reporting Directive was an important initial step towards encouraging companies operating in the EU to prevent corruption in the corporate group and throughout the supply chain, this remains an unfinished task. This study argues that the European Union has an essential role to play in strengthening the due diligence obligations imposed on companies to ensure that they prevent corruption in multinational groups and in global supply chains. Unless harmonization proceeds at EU level, the EU Member States acting individually will be reluctant to impose robust obligations on the companies operating under their jurisdiction, as this may be seen as imposing a competitive disadvantage in the internal market, particularly since it may restrict the choice of suppliers and thus reduce cost competitiveness. The result of EU inaction in this area will be, at best, a fragmented space in which strong divergences are allowed to subsist across Member States, resulted in distortions to competition -- an uneven playing field for companies. At worst, it will delay progress in this area, and means that EU based companies are vulnerable to corruption in their global supply chains.

Key arguments are set out below in favor of EU intervention in this field. There is already significant alignment across the EU Member States in the adoption of measures to combat corruption. The implementation of their commitment, however, remains highly uneven across the EU. Further harmonization measures are warranted, therefore, to avoid distortions of competition within the internal market.

In order to describe the consensus that exists on core commitments in the field of anti-corruption,

the following sections first review the main standards that apply to the EU Member States (section 3). This study argues, however, that despite this set of commitments, strong differences remain between the EU Member States. This results in distortion of competition in the internal market (section 4). It also does not ensure legal certainty for businesses (section 5). EU Member States are falling behind the standard set by the United States Foreign Corrupt Practices Act of 1977 (FCPA) and companies operating in the EU will continue to be subject to prosecution under the FCPA (section 6). Finally, the differences do not allow companies to respond to the growing concerns of public opinion towards corruption (section 7).

### 3. A common set of commitments against corruption

All EU Member States are parties to the 2003 United Nations Convention against Corruption (UNCAC) (3.1.). They also are all parties to the other major international instrument that exists in this regard, the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD anti-bribery framework also includes the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 26 November 2009) and the Good Practice Guidance on Internal Controls, Ethics, and Compliance (adopted as annex II of the 2009 recommendation), as well as the OECD Guidelines on Multinational Enterprises originally adopted in 1976 (3.2.). 22 EU Member States are also party to the Council of Europe's Civil Law Convention on Corruption (3.3.). Finally, the International Chamber of Commerce adopted Rules on Combating Corruption in 2011 and encourages companies to insert a model clause (called the "anti-corruption clause") in the contractual agreements between companies and their suppliers (3.4.). Taken together, these various instruments illustrate the strong

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alignment of EU Member States on certain standards in the fight against corruption.

### i. The United Nations Convention against Corruption (UNCAC)

The European Union is a party to the United Nations Convention against Corruption (UNCAC) since 12 November 2008.<sup>18</sup> UNCAC provides that States Parties shall prohibit their officials from receiving bribes and prohibit private entities from bribing domestic public officials, as well as foreign public officials and officials of public international organisations: in principle, bribing or offering to bribe a public official "in order that the official act or refrain from acting in the exercise of his or her official duties", should be made a criminal offence (article 15). The liability of legal persons for corruption or for the other related offences referred to in the convention, however, may be criminal, civil or administrative (article 26(2)), provided legal persons "are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions" (article 26(4)).

The convention imposes on States parties that they establish their jurisdiction over the offences established in accordance with the convention, at a minimum, when the offence is committed in the territory of the State party concerned (article 42(1)(a)). States parties may go beyond that, however, and assert their jurisdiction also over their nationals, wherever they may be operating from: this is consistent with the principles of general international law concerning State jurisdiction (article 42(2)(b)).

The implication is that the State should address instances of corruption which have been decided under its territorial jurisdiction (for instance, when the decision is made within the headquarters of the company, where such headquarters are located on the State's territory), even where the corruption concerns a foreign public official and took place on foreign territory. This is of particular relevance as regards transnational corporations that have established

long-term contractual relationships with business partners abroad, or that own shares in a subsidiary established abroad. Moreover, States may extend the prohibition, and take action, vis-à-vis any act of corruption committed by a company domiciled under its jurisdiction, whether because the company is incorporated under its jurisdiction, or has its main place of business or its central place of administration on its territory, in accordance with the general understanding of the "nationality" of a legal person.

There is no explicit reference to due diligence obligations being imposed on companies in order to discharge that general duty of Parties to prevent corruption. Chapter II of the Convention does refer to preventive measures, however. That chapter includes a provision (article 12) on the private sector, according to which States parties should "prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures". Parties to the Convention are expected to ensure that "private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures".<sup>19</sup>

**It follows that, under the UN Convention against Corruption, the Parties should impose on all corporations (i) a prohibition to resort to corruption, as well as (ii) a duty to take measures to prevent corruption, to ensure that any act of corruption (or related to corruption) leads to effective sanctions.** While this is a duty for Parties insofar as the act is adopted within their territory, Parties may -- and are encouraged to -- extend the prohibition to all corporations over which

they can exercise jurisdiction, wherever the specific act of corruption takes place.

## ii. The OECD Anti-Bribery Framework

The 1997 OECD Anti-Bribery Convention entered into force on 15 February 1999. It is complemented by the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 26 November 2009) and the Good Practice Guidance on Internal Controls, Ethics, and Compliance (adopted as annex II of the 2009 recommendation). These instruments provide that companies should be obliged to "develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery". The OECD Guidelines on Multinational Enterprises moreover -- initially adopted in 1976 as part of the Declaration on International Investment and Multinational Enterprises<sup>20</sup> and most recently revised in 2011 -- clarify the due diligence obligations that result from the prohibition imposed on companies to resort to bribery (see box 1).

### Box 1. The OECD Anti-Bribery Framework

All EU Member States are parties to the **1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)**. As such, they have committed to define as a criminal offence "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business" (art. 1(1)). Complicity in such an offence (including incitement, aiding and abetting, or authorizing bribery), as well as attempt and conspiracy to bribe a foreign public official, shall equally be punishable offences (art. 1(2)). *Legal persons*

*should be liable for bribery thus defined, either by the imposition of criminal liability, or by the imposition of "effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions" (art. 2 and art. 3(2)).*

The "other improper advantage" referred to in the definition of prohibited bribery "refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements" (commentaries, para. 5). Thus, payments to a public official, or the provision of other advantages to that official, in order for instance to circumvent requirements related to labor legislation, to respect for the rights of local communities, or to compliance with environmental rules, falls under the definition of bribery under the convention. *Since bribery should be prohibited whether it is made directly or through intermediaries, liability should extend to a lead corporation in global supply chains directing or authorizing its suppliers to bribe public officials, or to a parent company directing or authorizing a subsidiary entity to do so.* This is stipulated in a 2009 recommendation which notes that "a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf".

This understanding is further confirmed by the **2009 Good Practice Guidance on Internal Controls, Ethics, and Compliance**, which states explicitly that the ethics and compliance programmes or measures designed within the company to prevent and detect foreign bribery should apply not only to all directors, officers, and employees, but also "to all entities over which a company has effective control, including subsidiaries", as well as "where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners", referred to as "business partners".

States parties should establish their jurisdiction over the bribery of a public official "when the offence is committed in whole or in part in its territory" (art. 4(1)), although "extensive physical connection to the bribery act is not required" (commentaries, para. 25); or when the bribery is committed by one of its nationals (art. 4(2)). International law has not settled on any single criterion to determine "the circumstances under which a legal person can be deemed to possess the nationality of the state claiming jurisdiction". It thus leaves it to each municipal law to set its own criteria for determining which legal persons will be considered to have its "nationality". Current international practice appears however to impose on States a duty to control companies which either have been incorporated under their jurisdiction (and have thus established their statutory seat within that jurisdiction), or have the central place of administration or the main place of business within that jurisdiction: these are, for instance, the criteria for the definition of the "domicile" of the corporation under the "Brussels I" Regulation (which determines the conditions under which domestic courts of the EU Member States should recognise their jurisdiction in civil liability claims), and this was the position adopted by the UN Committee on Economic, Social and Cultural Rights in its general comment no. 24 on the duties of States in the context of business activities.

Certain due diligence obligations follow from the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Indeed, a 2009 recommendation provides that the States parties to the OECD Anti-Bribery Convention should encourage companies to "develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery", which should be further strengthened by a public commitment of the management (the management should include "statements in their annual reports or otherwise publicly disclose their internal

controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery") and by the establishment of "monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards".

**The Good Practice Guidance on Internal Controls, Ethics, and Compliance**, adopted as annex II of the 2009 recommendation, clarifies the implications of these due diligence obligations. As regards business partners in global supply chains, they require that the lead company (typically, the buyer of goods or services) (i) ensures risk-based due diligence pertaining to the hiring of business partners, as well as appropriate and regular oversight of business partners, and documents these practices; (ii) informs business partners of "the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery"; and finally (iii) seeks "a reciprocal commitment from business partners".

**The OECD Guidelines for Multinational Enterprises** also provide useful indications concerning the duties of companies to address bribery -- and duties here are not limited to the bribery of foreign public officials, but extend to any bribery "to obtain or retain business or other improper advantage", including exemption from having to comply with generally applicable regulations. The Guidelines specifically indicate that multinational enterprises domiciled in OECD countries (or in non-OECD countries having adhered to the Guidelines) should also ensure that their business partners do not resort to bribery:

"Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channeling undue pecuniary or other

advantages to public officials,..."

Section VII, para. 2 of the Guidelines provide a concise restatement of the due diligence obligations that result from the prohibition imposed on companies to resort to bribery. Companies should:

"Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion".

### iii. The Council of Europe's Civil Law Convention on Corruption

The Council of Europe's Civil Law Convention on Corruption<sup>21</sup> is also relevant. This instrument, which entered into force in 2003, was ratified by 22 EU Member States (the exceptions are Denmark, Germany, Ireland, Luxembourg and Portugal).<sup>22</sup> The main aim of this convention is to ensure that the Parties provide in their internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, "to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage" (art. 1). It is

noteworthy however that liability should be possible in situations where "the defendant has committed or authorised the act of corruption, *or failed to take reasonable steps to prevent the act of corruption*" (art. 4(1) (emphasis added)). **The Civil Law Convention on Corruption therefore assumes, at the very least, that private persons (including legal persons<sup>23</sup>) should take preventive measures to avoid the risk of corruption and provide for effective remedy.** This is confirmed by the Explanatory Report to the Convention, which states:

[T]hose who failed to take the appropriate steps, in the light of the responsibilities which lie on them, to prevent corruption would also be liable for damage. This means that employers are responsible for the corrupt behaviour of their employees if, for example, they neglect to organise their company adequately or fail to exert appropriate control over their employees.<sup>24</sup>

There is therefore a solid legal culture against corruption across the EU Member States, and one element of that culture is the affirmation of **liability of companies for failing to prevent corruption in their business activities.** However, harmonization across member States remains incomplete, particularly as regards the imposition on companies of due diligence obligations to prevent corruption, both because of the vagueness of the provisions of these international instruments concerning the precise scope of the due diligence obligations, and because implementation of the prescriptions of these instruments remains uneven.

### iv. The Anti-Corruption Clause of the International Chamber of Commerce

The International Chamber of Commerce (ICC) adopted Rules on Combating Corruption in 2011 and seeks to encourage companies to insert a model clause in the contractual agreements between companies and their suppliers (see Box 2). The influence of these Rules has been modest, however, and the model clause has not been widely adopted; moreover, soft law and self-

regulation cannot be seen as a substitute for legislative harmonization.

## **Box 2. The Anti-Corruption Clause of the International Chamber of Commerce**

The International Chamber of Commerce has also provided guidance to businesses in order to improve the monitoring of supply chains, and thus to ensure that instances of corruption would be identified and addressed. The ICC Rules on Combating Corruption adopted in 2011, after providing in Article 1 a description of the prohibited "corrupt practices" largely inspired by the 1997 OECD Anti-Bribery Convention and the 2003 Convention against Corruption,<sup>25</sup> state in Article 2 that companies shall endeavour to ensure that their business partners in the broadest sense of the expression also shall be made to comply with the prohibition:

*With respect to Third Parties subject to the control or determining influence of the Enterprise, including but not limited to agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or similar intermediaries, acting on the Enterprise's behalf in connection with marketing or sales, the negotiation of contracts, the obtaining of licenses, permits or other authorizations, or any actions that benefit the Enterprise or as subcontractors in the supply chain, Enterprises should: instruct them neither to engage nor to tolerate that they engage in any act of corruption; not use them as a conduit for any corrupt practice; hire them only to the extent appropriate for the regular conduct of the Enterprise's business; and not pay them more than an appropriate remuneration for their legitimate services.*

In order to encourage full compliance with this requirement, the ICC's Commission on Corporate Responsibility and Anti-corruption and Commission on Commercial Law and Practice

proposed a model clause, to be inserted in the contractual agreements between companies and their suppliers. The basic philosophy underlying the model clause is that, if a business partner failed to comply and did not take remedial action, or if remedial action is not possible, and if the partner in question failed to provide an adequate defence (for instance, by demonstrating that it has put into place adequate anti-corruption preventive measures, and thus has deployed its best efforts to prevent corruption), the contract may be suspended or terminated ("[a]n Enterprise should include in its contracts with Business Partners a provision allowing it to suspend or terminate the relationship, if it has a unilateral good faith concern that a Business Partner has acted in violation of applicable anti-corruption law [or of the Rules on Combating Corruption]"<sup>26</sup>). The precise scope of the due diligence obligation to prevent corruption that should be imposed on business partners is described as follows:

*A Party is not required to prevent by all means any of its subcontractors, agents or other third parties, subject to its control or determining influence, to commit any form of corrupt practice. Each Party shall, however, based on a periodical assessment of the risks it faces, put into place an effective corporate compliance programme, adapted to its particular circumstances; exercise, on the basis of a structured risk management approach, appropriate due diligence in the selection of subcontractors, agents or other third parties, subject to its control or determining influence; and train its directors, officers and employees accordingly.<sup>27</sup>*

The content of the "corporate compliance programme" is thus decisive, since it shall determine whether a Party is indeed practicing appropriate due diligence in order to effectively comply. Article 10 of the ICC Rules on Combating Corruption 2011 lists certain measures which may be included in such a corporate compliance

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programme. Such measures include the expression of a "strong, explicit and visible support and commitment to the Corporate Compliance Programme" at the highest level of the company; "establishing a clearly articulated and visible policy reflecting [the ICC Rules on Combating Corruption 2011] and binding for all directors, officers, employees and Third Parties and applying to all controlled subsidiaries, foreign and domestic"; providing for "periodical risk assessments and independent reviews of compliance with these Rules and recommending corrective measures or policies, as necessary"; appointing senior officers reporting directly to the Board of Directors on the implementation of the Corporate Compliance Programme, and establishing independent auditing; etc. The list of such measures is not meant to be exhaustive, and it is intended to be used flexibly: each company is expected to select from the list the measures deemed necessary or adequate for organizing its own anti-corruption prevention system.<sup>4</sup> Uneven implementation across EU Member States.

As follows from the various instruments reviewed in the preceding section, there exists a strong consensus across the EU Member States on the need to impose due diligence obligations on companies in order to ensure that they address corruption across multinational groups and within global supply chains (by monitoring their subsidiaries and their business partners). Yet, significant discrepancies remain between Member States. It is striking, first, that the perception of corruption varies between them, as illustrated in figure 1 below, based on the ranking by Transparency International in its Corruption Perceptions Index.

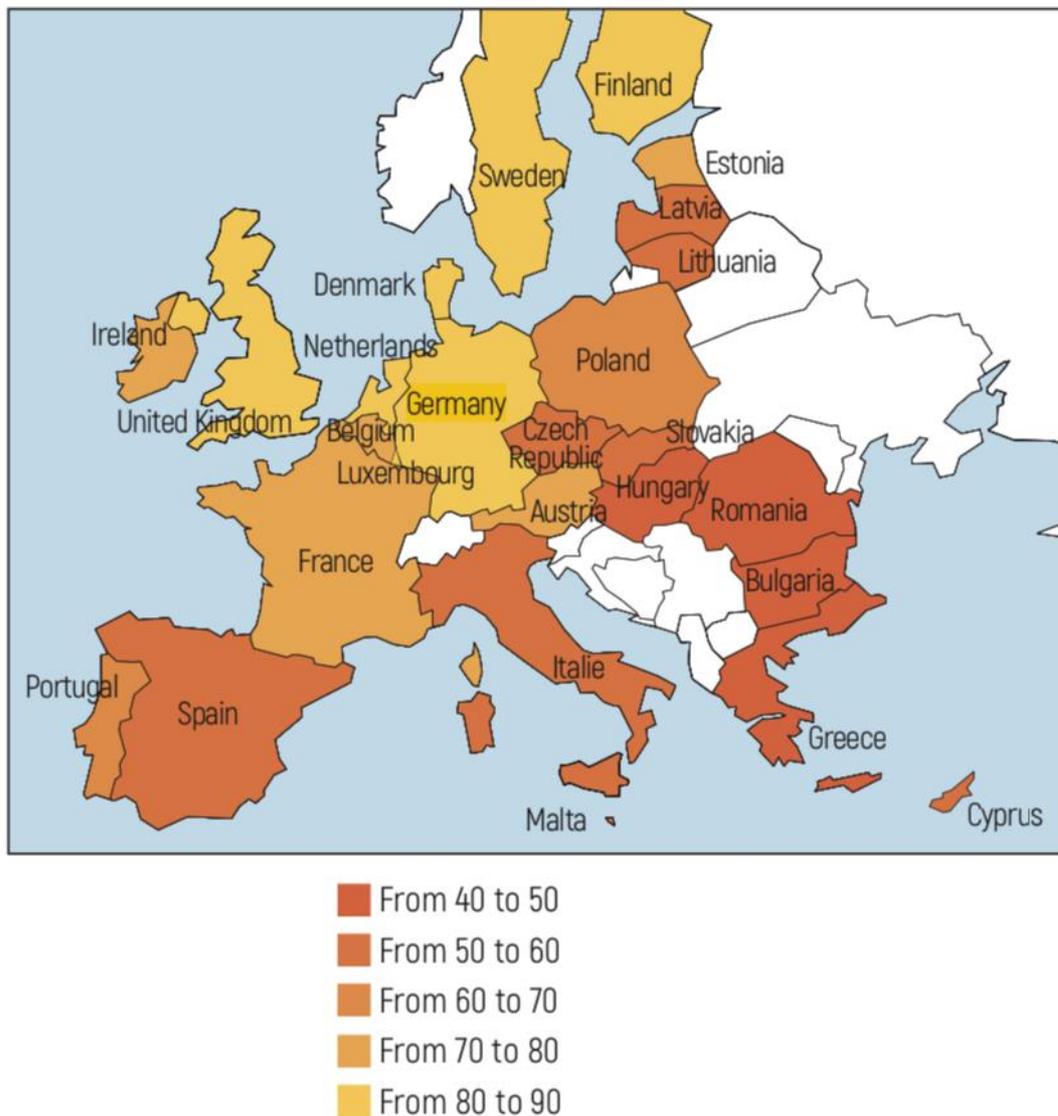
The disparity between Member States is further confirmed in the 2014 EU Anti-Corruption Report, which noted "a considerable divide among Member States concerning prevention of corruption".<sup>28</sup> The report was in fact almost entirely silent about the question of the role of

business enterprises in addressing corruption in multinational groups and in global supply chains. It simply noted in this regard that significant progress had been achieved by the United Kingdom in this area by the adoption of the Bribery Act 2010, which "not only criminalises the payment and receipt of bribes and the bribing of a foreign official but also extends criminal liability to commercial organisations that fail to prevent bribery committed on their behalf" (see Box 3). The OECD has otherwise criticised other Member States for "insufficient or non-existent prosecution of foreign bribery, considering the corruption risks their companies face abroad".<sup>29</sup>

Indeed, it is striking that, according to a recent report, despite the various international instruments referred to in this study, **only three of the 27 EU Member States (France, Germany and Italy) currently impose legal obligations on larger enterprises relating to the prevention and detection of corruption.**<sup>30</sup>

In Germany, administrative sanctions, in the form of fines, may be imposed on businesses on the basis of Article 30 of the Federal Law on Administrative Offences (OwiG)<sup>31</sup> where managers or employees have committed acts of corruption, where it is found that the business enterprise has failed to put in place effective anti-corruption compliance programmes. In Italy, Decree 231/2001 of 8 June 2001<sup>32</sup> imposes on large undertakings that they adopt a corporate compliance programme, including at a minimum an identification of the activities that may lead to corruption; the setting up of mechanisms in the management of financial resources that could prevent the risk from materializing; and the establishment of a disciplinary system that is dissuasive enough to prevent corruption. The adoption of such a corporate compliance programme may allow the company concerned to be exempt from criminal liability, in the event where an act of corruption would be committed on its behalf. The case of France, finally, is detailed in Box 4.

**Figure 1. Corruption perceptions index in EU Member States.** The figures reflect the perceived levels of public sector corruption according to experts and businesspeople, using a scale of zero to 100, where zero is highly corrupt and 100 is very clean.



**Source:** *For a European Law of Compliance*. Report by the Working group chaired by B. Cazeneuve, rapp. A. Gaudemet, Le Club des Juristes (Paris, Nov. 2020), based on Transparency International data.

**Box 3. The example of the United Kingdom Bribery Act 2010**

Before the United Kingdom left the EU, it could boast the most advanced anti-corruption legislation within the EU. The 2010 Bribery Act defines both active and passive bribery as criminal offences (s. 1 and 2), and it includes a specific offence on the bribery of foreign public officials (s. 6). Legal persons, referred to in the

British legislation as "commercial organisations", can be guilty of the offence if a person acting on their behalf or providing services to it commits bribery (s. 7(1)), however it shall be a defence for the business entity concerned to prove that it has put in place "adequate procedures designed to prevent persons associated with [it] from undertaking such conduct" (s. 7(2)). The duties to prevent bribery under section 7 of the Act are of particular relevance to extraterritorial situations,

i.e., to situations where the act of bribery has taken place outside the United Kingdom, and where the direct author of the offence is not a UK national or a UK resident, or (if a legal person) is not incorporated in the UK. Indeed, although in principle British courts shall have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership (s. 12), this "close connection" requirement does not apply to the offence of section 7: a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK, provided only the organisation that benefited from the bribery (or on behalf of which bribery was committed) is incorporated or formed in the UK, or carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed).

In accordance with section 9(1) of the Bribery Act,<sup>33</sup> the Secretary of State for Justice K. Clarke issued guidance in March 2011 on how commercial organisations could manage bribery risks, by putting forward six principles<sup>34</sup>:

*Principle 1: Proportionate procedures. A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.*

*Principle 2: Top-level commitment. The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.*

*Principle 3: Risk assessment. The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.*

*Principle 4: Due diligence. The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.*

*Principle 5: Communication (including training). The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.*

*Principle 6: Monitoring and review. The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.*

#### **Box 4. The duty to adopt anti-corruption preventive measures under the French Law of 9 December 2016 (Sapin 2)**

In France, the Law of 9 December 2016 on transparency, anti-corruption and economic modernisation<sup>35</sup> (colloquially known as "Sapin 2", from the name of the minister who piloted the legislation) provides that directors of companies employing at least 500 employees, or belonging to a group of companies whose parent company is incorporated in France and has at least 500 employees and an annual revenue of at least 100 million euros,<sup>36</sup> should put in place the following measures and procedures:

1) A code of conduct defining and illustrating the different types of behaviour prohibited as being

likely to characterise acts of corruption or influence peddling. Such code of conduct shall be incorporated into the internal regulations of the undertaking and shall therefore be subject to the procedure for the consultation of staff representatives provided for by Article L. 1321-4 of the Employment Code;

2) An internal alerts system designed to enable reports to be received from employees regarding the existence of conduct or situations contrary to the company's code of conduct;

3) Risk mapping in the form of regularly updated documentation to identify, analyse, and prioritise the risks of exposure of the company to external calls for bribery, in accordance with, inter alia, the sectors of activity and geographical areas in which the company operates;

4) Procedures for assessing the situation of clients, top suppliers and intermediaries with regard to risk mapping;

5) Accounting controls procedures, internal or external, to ensure that books, records and accounts are not used to mask acts of corruption or influence peddling. These checks may be carried out either by the company's own accounting and financial control services or by instructing an external auditor on completion of the certification audits of the accounts provided for by Article L. 823-9 of the Commercial Code;

6) A training system for managers and staff most at risk of corruption and influence peddling;

7) A disciplinary regime enabling employees of the company to be sanctioned in the event of a breach of the company's code of conduct;

8) A system for internal monitoring and assessment of the measures implemented.<sup>37</sup>

These duties are imposed both on the directors of the companies subject to the legislation, and on the companies themselves, as legal persons. Compliance is ensured by the submission of reports to an independent agency, the French

Anti-corruption Agency (Agence française anticorruption), which can address recommendations to the company concerned if it considers that the preventive measures in place are insufficient, and has the power to impose fines in cases of persistent non-compliance.<sup>38</sup>

Of course, the EU did adopt Framework Decision 2003/568/JHA on combating corruption in the private sector.<sup>39</sup> This instrument provides that it shall be a criminal offence to bribe, directly or indirectly, a person working for a private entity in order that that person breaches its duties (active corruption), or for that person to seek any undue advantage in order to perform or refrain from performing any act, in breach of one's duties (passive corruption).<sup>40</sup> It also leaves it to each Member State to decide whether or not to provide for extraterritorial jurisdiction. In other terms, whether or not to extend the criminalization of corruption in the private sector to the nationals of the Member State concerned or to companies with their head office the national territory of that Member State, where the offence is committed outside the national territory.<sup>41</sup> As such, this instrument does not address corruption by business enterprises seeking to obtain undue advantages by bribing public officials, so as to avoid enforcement of legislation protecting human rights or environmental rights, which is the topic of this study.

It is nevertheless noteworthy that according to article 5 of the Framework Decision, the Member States should establish **the liability of legal persons in relation to both active and passive corruption** (Member States are left to decide between criminal and administrative liability); under article 5(2), Member States have to ensure that a legal person can also be liable in cases where the commission of the offence was made possible because of lack of supervision or control. The 2019 review of the implementation of the Framework Decision found that, while 16 Member States (BE, DK, DE, ES, EL, FR, CY, LV, LT, LU, HU,

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AT, PL, FI, SK and SI) had adopted legislation that transposes this provision, in eight Member States, there was not enough information to assess whether the lack of supervision or control is covered under national law (BG, CZ, EE, IT, MT, NL and PT), or whether case law covers these aspects (in IE, it is through case law that the liability of legal persons is covered). Implementation therefore is far from uniform.<sup>42</sup>

As a result of such discrepancies, distortions of competition remain within the EU internal market: depending on the jurisdiction under which companies operate, they are subject to different requirements with regard to due diligence to prevent and combat corruption. These requirements can be more or less demanding, with implications for companies, particularly with regard to their sourcing policies (the choice of their suppliers). Adopting a harmonised framework would result in a more level playing field for all companies operating in the EU. It would also prevent any risk that Member States will delay action on the strengthening of the anti-corruption legal framework in order to avoid imposing regulatory burdens on companies operating within their jurisdiction, at the risk of a race to the bottom, or at least a lack of progress, in this area.

#### **v. Providing greater legal certainty to business enterprises**

Such a harmonised legal framework would also be in the interest of business. Currently, the measures companies should take in order to prevent corruption in multinational groups or in global supply chains are different from Member State to Member State, requiring companies to seek information about the legal requirements in 27 different jurisdictions when they have EU-wide activities, and to plan their activities on the basis of different legislation in each Member State. In contrast, an EU-wide harmonised legal framework would allow companies to adopt group-wide policies that shall apply to all the entities operating in the EU, with no or only minor

differences from Member State to Member State. This should facilitate the planning of transnational economic activities for businesses operating in the EU.

EU-wide harmonization should also facilitate compliance for suppliers operating outside the EU, but entering into business relationships with a number of clients in the EU, providing access to the EU market. Rather than having to adapt to a variety of requirements, related for instance to risk assessment, to independent auditing, or to reporting, depending on the location of the client, such requirements shall be similar, or at least comparable, wherever the client is located in the EU. The transparency and cost-effectiveness of anti-corruption measures should be significantly improved as a result. Moreover, this may allow some form of mutual recognition of different compliance programmes, including the associated auditing mechanisms, thus reducing the costs of compliance for suppliers.

#### **vi. Strengthening the role of the EU in the regulation of international business**

The absence of a robust and unified legislative framework and corresponding law enforcement against corruption in the European Union results in a situation where the EU is trailing behind over jurisdictions in the fight against corruption. In particular, under the United States Foreign Corrupt Practices Act of 1977,<sup>43</sup> one of the early and most influential legislations against corruption, European companies have been held liable for corruption, in part because of a lack of an adequate European legislation in this area.

The FCPA, has an extraterritorial reach: it can target illegal activities (bribery of foreign officials) outside the United States, provided there is a link to the United States, even where the said activities would be considered legal in the jurisdiction where they take place. The link to the United States may result from the fact that corporate entity is registered with the US Securities and Exchange Commission (SEC)<sup>44</sup>, is incorporated in the United States,<sup>45</sup> or "either

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directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States".<sup>46</sup> In recent years, the interpretation of these provisions has been significantly extended by the US Department of Justice: the link to the United States is considered sufficient when communications devices are used that present such a link (including, for instance, email exchanges going through a US internet service provider).

Being prosecuted under the FCPA can have very serious consequences for the corporations concerned. First, the fines imposed by the US Department of Justice are high, not even counting the legal fees and the costs of setting up a compliance system and a monitoring scheme, if the existing system has been found deficient. Secondly, the reputational costs are considerable, and companies prosecuted under the FCPA (even when not found guilty) are generally treated with suspicion by potential clients, whether these clients are US firms or not. Thirdly, the legislation on public procurement excludes from public contracts companies that have been found to violate anti-corruption legislation.<sup>47</sup> For all these reasons, it would seem important to ensure that the EU significantly improves its EU wide anti-corruption legislation to ensure it is not lagging behind the US in the fight against corruption

#### vii. Responding to the concerns expressed by European public opinion

Corruption is cited as a major concern in opinion polls. A Special Eurobarometer survey conducted in 2013 showed at the time that three quarters (76%) of Europeans think that corruption is widespread, with the highest figures found in Greece (99%), Italy (97%), Lithuania, Spain and the Czech Republic (95% in each). The same poll showed that more than half (56%) thought that the level of corruption in their country had been increasing over the previous three years. Although these data, collected in February and

March 2013 from approximately 28,000 people surveyed, are based on questions related to the perception of corruption within the countries concerned (there were no questions related to the role of companies in addressing corruption within multinational groups or in global supply chains), they do express, at the very least, a growing concern with the distortions resulting from corruption.

Concerns that corruption undermines the rule of law and leads to unfair competition remain vivid today. A 2017 Special Eurobarometer report on corruption found that the perception that corruption is part of the business culture is widespread, with 63% of those surveyed across the EU considering that corruption was part of the business culture in their country. Although in a number of EU Member States the figures have decreased significantly in recent years (on average across the EU, the proportion of those surveyed taking that view decreased by 5 percentage points<sup>48</sup>), this concern remains high in many countries:

Over nine in ten (93%) of those polled in Cyprus say that corruption is part of their country's business culture, as do over eight in ten of those polled in Italy and Greece (both 84%). In a further nine EU Member States, at least three quarters of respondents hold this view. At the other end of the scale, just over a third (35%) of respondents in Luxembourg and the Netherlands hold this view, as do three in ten (30%) of those polled in Sweden, just over a quarter (28%) in Finland, and less than a quarter of respondents in Denmark (23%).<sup>49</sup>

It is also noteworthy that corruption is seen as a major obstacle to doing business by the companies surveyed for the EU Anti-Corruption Report 2014.

At European level, **more than 4 out of 10 companies consider corruption to be a problem for doing business**, and this is true for patronage and nepotism too. When asked specifically

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whether corruption is a problem for doing business, 50% of the construction sector and 33% of the telecoms/IT companies felt it was a problem to a serious extent. The smaller the company, the more often corruption and nepotism appears as a problem for doing business. Corruption is most likely to be considered a problem when doing business by companies in the Czech Republic (71%), Portugal (68%), Greece and Slovakia (both 66%).<sup>50</sup>

Again, these figures only relate to corruption within the EU (particularly in the public procurement area). They do show however that economic actors see corruption as a significant distortion, creating an unfair marketplace for companies. Strengthening anti-corruption requirements by imposing harmonised due diligence obligations on companies would partly address this concern.

### 3. DUE DILIGENCE TO PREVENT CORRUPTION

The forthcoming legislative proposal from the European Commission should impose on companies operating within the EU a requirement to practice human rights and environmental due diligence by ensuring that the other entities to which they are connected by an investment nexus (whatever the degree of ownership) or by a contractual nexus (whatever the actual leverage they may exercise) comply with human rights and environmental standards. The only restriction to the scope of the liability of the company should be based not on a formal criterion based on the "degree of proximity", as this could lead to abuse -- organising the corporate structure or segmenting the supply chain into a larger number of sub-contractors in order to limit liability --, but on considerations of practicability: liability might stop where it would be unreasonable to expect the company against which a liability claim is filed to adopt a broader range of measures to prevent the violation from occurring.

While not an end in itself, and while it should be complemented by other obligations (including obligations of a remedial nature), **a duty to adopt preventive measures against corruption, should be part of the due diligence obligations imposed on companies operating in the EU.** This would ensure that strong anti-corruption measures are included as a component of the systems that companies put in place in order to prevent the occurrence of human rights, labour rights or environmental rights violations in the corporate group and in supply chains. The result will be a significant strengthening of the anti-corruption culture across businesses operating in the EU, and the removal of any distortions of competition stemming from the current lack of harmonization of EU anti-corruption measures.

In order to ensure that corruption risks are properly taken into account as part of a company's due diligence process it is essential to distinguish the role of *prevention* (by imposing on companies that they address corruption risks) from any liability that might result from prevention having *failed*. If the adoption of appropriate prevention measures were to result in legal immunity in the case of failure, this would be counterproductive, leading to compliance becoming a "box-ticking" exercise, rather than a tool through which the company is encouraged to proactively improve its standards and procedures to prevent corruption. This should guide, in particular, the strengthening of the EU framework against corruption, including the adoption of a specific directive on corruption. Finally, the procedural tools through which the duty to prevent (i) corruption and (ii) human rights, labour rights or environmental rights impacts, respectively, should take into account the specific relationship of each to identified victims. Each of these issues are discussed in turn.

#### 1. Prevention and legal liability

The duty to address corruption risks and impacts as part of a broader due diligence obligation is

*preventive* in nature. As such, it should be distinguished from the *remedial* function of the imposition of liability (whether civil, administrative or criminal), in situations where a company is found to have practiced corruption or to have been complicit in, or knowingly benefited from corruption practiced by others, even where appropriate anti-corruption measures were in place. (Table 3 provides a summary of the forms of liability that are anticipated in the various legal instruments against corruption reviewed above.)

The robustness of such a due diligence process which takes into account corruption risks and impacts, of course, may be taken into account, for instance in the sentencing in the context of administrative or criminal liability, or in type and duration of the resolution.<sup>51</sup> However, even a company which has practiced due diligence, by putting in place a robust anti-corruption measures, should not be immune from legal liability if it appears that the preventive efforts have failed to prevent harms.

**Table 2. Forms of liability (criminal, civil and administrative) for individuals and legal persons respectively, under the main anti-corruption instruments**

	Individuals	Legal persons
<b>United Nations Convention against Corruption (UNCAC) (2003)</b>	UNCAC provides that States parties should define as criminal offences, when committed intentionally, the bribery of national public officials, consisting both of offering an undue advantage to a public official "in order that the official act or refrain from acting in the exercise of his or her official duties", and accepting such an advantage (art. 15). Similarly, the bribery of foreign public officials or of officials of public international organisations should be made a criminal offence (art. 16), and so should embezzlement, misappropriation or other diversion by a public official of any property or funds (art. 17), trading in influence (art. 18), abuse of functions (art. 19), illicit enrichment (art. 20), bribery or embezzlement in the private sector (arts. 21-22), the laundering of proceeds of crime (art. 23), concealment (art. 24), or obstruction of justice (art. 25).	Article 26 UNCAC provides that States parties "shall adopt such measures as may be necessary ... to establish the liability of legal persons for participation in the offences established in accordance with this Convention" (par. 1); such liability of legal persons "may be criminal, civil or administrative" (par. 2), and "without prejudice to the criminal liability of the natural persons who have committed the offences" (par. 3). "Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions" (par. 4).
<b>OECD Anti-Bribery Convention (1997)</b>	"Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law	"Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish

	for any person intentionally to offer, promise or give any undue pecuniary or other advantage, ... to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business" (art. 1(1)). Such bribery of a foreign public official "shall be punishable by effective, proportionate and dissuasive criminal penalties" (art. 3(1)), however "the imposition of additional civil or administrative sanctions" shall also be considered (art. 3(4)).	the liability of legal persons for the bribery of a foreign public official" (art. 2). In States where criminal responsibility is not applicable to legal persons, "legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials" (art. 3(2)).
<b>Council of Europe Civil Law Convention on Corruption (1999)</b>	Persons who have suffered damage as a result of corruption should be guaranteed the right to initiate an action in order to obtain full compensation for such damage (art. 3(1)).	Both natural persons and legal persons can be defendants in civil liability proceedings addressing corruption.

**Liability for failure to practice human rights and environmental due diligence should be distinguished from liability (criminal, civil or administrative) for the practice of, or complicity in, corruption, including where such liability stems for the violation of a duty of care.** This is also the approach recommended under the UN Guiding Principles on Business and Human Rights. The UNGPs clearly suggest that the duty of care a company owes to those who may be affected by its activities, including indirectly (through the acts of its subsidiaries or business partners), is not absolved by a company discharging its due diligence obligations. In other words, **due diligence and duty of care should be treated as two separate and complementary duties of the company.** The Commentary to Principle 17 of the UNGPs states that:

*Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.*

Thus, while they may be seen as complementary, the two duties should be kept separate: the *preventative* duty to take all necessary measures to avoid corruption does not absolve the duty to *compensate* or to be held *liable* if corruption does take place. It should be role of courts, when faced with prosecution or with legal claims from victims, to assess on a case by case basis whether

the company should have done more to prevent corruption from occurring. The risk, otherwise, is that due diligence will become a sophisticated "box-ticking" exercise: the incentive, in other terms, would be for the company to do the minimum required to comply with the requirements of due diligence, but not to be proactive in preventing harms beyond that minimum.

**2. Harms from corruption and harms from human, labour or environmental rights violations**

The link between corruption on the one hand, and human, labour or environmental rights on the other hand, demonstrate why they need to be considered as complementary components of due diligence broadly conceived (see Table 1). There is, however, a difference between the two: whereas the victims are generally easily identifiable where human, labour or environmental rights are adversely impacted, corruption often affects victims indirectly, insofar as it may lead to certain laws or regulations being circumvented or under-enforced. Corruption of course has impacts on victims: individuals and communities are adversely impacted when the legal protections they should benefit from are left unenforced or deliberately circumvented. These victims however are often not able to prove or are attacked for exposing that the reason why labor inspectorates do not intervene, why land is given away to "investors"<sup>52</sup> or why mining companies are allowed to pollute rivers, is because the public officials in charge have been bribed.

This is important to take into account in the design of the systems put in place in order to prevent such risks. Indeed, while some tools have been proven somewhat effective in corporate

compliance programmes to prevent corruption (such tools include financial auditing, a protection for whistleblowers, or the possibility to provide information to a compliance officer anonymously or confidentially), other tools may be less effective when they rely primarily or exclusively on complaints filed by victims given the inherent risks to victims of exposing corruption. As such, if a due diligence system is put in place to address the full range of corporate risks, including corruption - thus "linking anti-corruption compliance with human rights due diligence", as recommended by the UN High Commissioner for Human Rights<sup>53</sup> -, it would be inappropriate to place too much reliance on the initiative of victims to ensure the effectiveness of anti-corruption measures.

By providing that persons who have suffered damage as a result of corruption should be guaranteed the right to initiate an action in order to obtain full compensation for such damage (art. 3(1), the Council of Europe Civil Law Convention on Corruption suggests that corruption causes prejudice to victims, and that the chain between the act and the prejudice is direct enough to trigger civil liability. A similar assumption is implicit where the UN Convention against Corruption refers to civil liability of legal persons as complementing the definition of corruption as a criminal offence, in legal systems that do not recognise the criminality liability of legal persons; or where the OECD Anti-Bribery Convention refers to "the imposition of additional civil or administrative sanctions" as having to be considered alongside criminal liability (art. 3(4)).

Table 3 below summarises the two points made above:

**Table 3. The complementarity of preventive and remedial dimensions of the due diligence obligations -- recognising the specificity of corruption**

	Preventive dimension	Remedial dimension
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Human rights, labour rights and environmental rights	Due diligence obligations	Allows victims to file civil liability claims, allows a shift of the burden of proof
Corruption		As above <i>and</i> administrative sanctions (such as exclusion from public contracts) and criminal sanctions, adopted at the initiative of public authorities, including independent prosecuting authorities

#### 4. IMPROVING THE EU FRAMEWORK AGAINST CORRUPTION

The inclusion of provisions related to the duty to prevent corruption in the mandatory human rights and environmental due diligence legislation proposed by the European Commission should not delay progress on other initiatives to build an effective EU-wide anti-corruption framework.

In accordance with article 83 of the Treaty on the Functioning of the European Union, the EU may adopt directives (adopted following the ordinary legislative procedure, i.e., by co-decision between the European Parliament and the Council deciding by a qualified majority) in order to establish minimum rules on the offence of corruption. The classification of corruption among this category of so-called "euro-crimes" is justified by its often transnational dimension and by its links to organised crime. However, with the exception of the situation covered by Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law<sup>54</sup> (article 4(4) of which refers to national officials of third countries, among others), EU law has not yet adopted harmonization measures in this area. This creates a gap, since Directive (EU) 2017/1371 only applies to corruption which causes damage, or is likely to cause damage, to the EU's financial interests.<sup>55</sup> A

proposal for a directive specifically on combating corruption would help to fill this gap.

While the definition of corruption as a "euro-crime" calls for a separate advocacy effort, the establishment of minimum rules on the offence of corruption should not be considered to be absorbed by the duty to adopt anti-corruption measures as part of a broader due diligence requirement. For the reasons that have just been outlined, the two duties, while complementary, should be kept separate, although of course they may be related to one another - in particular, the existence of a robust anti-corruption programmes may lead courts to reduce the levels of civil, administrative or criminal sanctions that might be imposed where corruption has occurred.

#### 5. CONCLUSION

The forthcoming proposal from the European Commission for a mandatory due diligence law in the European Union provides a reminder that the anti-corruption framework in the EU remains patchy and uneven across the Member States. There is a striking mismatch between the range of instruments that apply across the EU-27, on the one hand, and the strong variations across the EU, on the other hand: whereas all EU Member States are parties to the UN Convention against Corruption and to the OECD Anti-Bribery Convention, and whereas the Framework

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Decision 2003/568/JHA on combating corruption in the private sector applies across the EU, only three countries (France, Germany and Italy) currently impose legal obligations on larger enterprises relating to the prevention and detection of corruption.

This study has identified the concerns raised by this mismatch. The uneven implementation of anti-corruption norms results in distortions of competition in the internal market, and it is an obstacle to the operation of business activities across the EU: the corporate anti-corruption measures put in place by transnational corporations operating in the EU currently still have to take into account the legal requirements of 27 different jurisdictions, which present significant variations between them.

The introduction of mandatory human rights and environmental due diligence legislation provides an opportunity to strengthen the EU's anti-corruption framework. Article 83 of the Treaty on the Functioning of the European Union also allows the EU to adopt directives establishing minimum rules on the offence of corruption. This study proposes key parameters that should be taken into account in the design of such a framework, including by emphasizing that the adoption of robust corporate anti-corruption measures should not shield corporations from legal liability in the event that such measures should fail to prevent acts of corruption. By noting that –there often exist many barriers to victims raising issues related to corruption- which means that whichever anti-corruption framework the EU decides to put in place should not rely exclusively, nor even predominantly, on the initiatives of victims.

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## ENDNOTES

- 1 Guiding Principles on Business and Human Rights approved by the Human Rights Council on 16 June 2011 (HRC Res. 17/4), principles 6, 15 b) and 17 b).
- 2 UN General Assembly resolution 70/1 (25 September 2015).
- 3 See in particular A/HRC/RES/35/25 (23 June 2017); A/HRC/RES/41/9 (11 July 2019).
- 4 A/HRC/RES/35/25 (23 June 2017), Preamble.
- 5 A/HRC/28/73.
- 6 See in particular Best practices to counter the negative impact of corruption on the enjoyment of all human rights. Report of the United Nations High Commissioner for Human Rights (UN doc. A/HRC/32/22); Challenges faced and best practices applied by States in integrating human rights into their national strategies and policies to fight against corruption, including those addressing non-State actors, such as the private sector. Report of the United Nations High Commissioner for Human Rights submitted pursuant to Human Rights Council resolution 41/9 (UN doc. A/HRC/44/27) (21 April 2020).
- 7 General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 18.
- 8 A/HRC/44/43 (17 June 2020), para. 8.
- 9 A/HRC/44/43, para. 44.
- 10 *Id.*, para. 48.
- 11 A/HRC/44/27, para. 41.
- 12 Ron Kral, "Effective Corporate Compliance Programs", Corporate Compliance Insights (December 3, 2010), available at: <https://www.corporatecomplianceinsights.com/effective-corporate-compliance-programs-ron-kral-candela/> (last consulted on Jan. 15, 2021).
- 13 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.
- 14 New article 29a inserted by Directive 2014/95/EU into Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182 of 26.6.2013, p. 19).
- 15 'Public-interest entities' are defined in article 2 of Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, cited above.
- 16 Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information) (C/2017/4234) (OJ C 215, 5.7.2017, p. 1).
- 17 In the EU, the Unfair Commercial Practices Directive was adopted in 2005 (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22) in order to harmonise the rules on misleading advertising beyond certain minimum requirements initially set forth in 1984 (Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, OJ 1997 L 290/18, corrigendum OJ 1998 L 194/54). The Unfair Commercial Practices Directive provides that a misleading commercial practice may consist in practice which 'contains false information and is therefore untruthful or in any way, (...) deceives or is likely to deceive the average consumer', in relation, inter alia, to 'the main characteristics of the product, such as its (...) method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use (...)' (art. 6(1)(b)). Article 6(2)(b) of the Directive explicitly defines as constituting a misleading commercial practice "non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code".
- 18 The United Nations Convention against Corruption (UNCAC) (U.N.T.S. vol. 2349, p. 41) was adopted by the General Assembly of the United Nations on 31 October 2003. It entered into force on 14 December 2005. All the EU Member States have acceded to the Convention. The accession of the EU was the result of Decision (2008/801/EC) of the Council of the European Union of 25 September 2008. In accordance with article 67, para. 3 of the Convention, the accession of the European Union was accompanied with a Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention against Corruption. While the Declaration seeks to specify the areas of the Convention for which the EU Member States have transferred competences to the European

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Community (to which the European Union has succeeded since 1 December 2009), it includes a "continuous development" clause concerning the scope and exercise of the European Union's competence.

19 Article 12, para. 2, (f).

20 OECD doc. C(76)99/FINAL.

21 E.T.S., n° 174, opened for signature and ratification on 4 November 1999.

22 Although article 15(1) of the convention provides that the European Community (now European Union) may accede to it, the EU is not yet a party. Since July 2019 however, on the basis of article 15(5) and following lengthy negotiations, the EU has joined with the status of observer the Group of States against Corruption (GRECO), which supervises compliance with the convention.

23 See the Explanatory Report to the Convention, para. 27.

24 Explanatory Report, para. 42.

25 The prohibited practices include: (i) 'active' as well as 'passive' corruption (also referred to at times as 'Extortion' or 'Solicitation'); (ii) bribery as well as trading in influence; (iii) corruption of public officials, as well as private-to-private corruption; (iv) corruption in the national and local as well as in the international sphere; (v) corruption with or without the use of intermediaries; (vi) bribery with money or through any other form of undue advantage; and (vii) bribery with or without laundered money.

26 Article 3, E., of the ICC Rules on Combating Corruption.

27 ICC Anti-Corruption Clause, prepared by the ICC Commission on Corporate Responsibility and Anti-corruption, and the Commission on Commercial Law and Practice (2012), p. 8.

28 EU Anti-Corruption Report 2014 (COM(2014) 38 final, of 3.2.2014), p. 10. When, in 2014, the EU Anti-Corruption Report was published for the first time, the intention was to have it published every two years. However, the European Commission decided not to proceed with further publications of anti-corruption reports, and instead to include the fight against corruption in the European Semester process, with a particular focus on inefficient practices in public procurement, conflict of interest rules, the statute of limitations for corruption offences, and informal payments in healthcare (see [https://ec.europa.eu/info/sites/info/files/european-semester\\_thematic-factsheet\\_anti-corruption\\_en.pdf](https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_anti-corruption_en.pdf)); until now at least, monitoring companies' role in addressing corruption in multinational groups and in global supply chains has not been part of this exercise. The inclusion of the fight against corruption is ostensibly justified by the consideration that "Law enforcement is just one aspect of efforts to prevent and combat corruption, which require collaboration across policy domains. In view of corruption's serious economic impact, addressing it in the context of the main economic policy dialogue between the Member States and EU institutions is in line with the approach of this Commission to streamline processes and focus on key issues in the relevant fora" (see the Answer given by Mr. Avramopoulos on behalf of the Commission on 22 September 2017 to written questions E-001323/2017, E-000920/2017 and E-001015/2017 from the European Parliament, doc. E-004868/2017).

29 EU Anti-Corruption Report 2014 (COM(2014) 38 final, of 3.2.2014), pp. 17-18.

30 For a European Law of Compliance. Report by the Working group chaired by B. Cazeneuve, rapp. A. Gaudemet, Le Club des Juristes (Paris, Nov. 2020), p. 149. This conclusion is based, among other sources, on the comparative overview provided by the Directorate-General of the Treasury, International comparative study, Prevention of corruption (January 2018).

31 Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten) in the version published on 19 February 1987 (Federal Law Gazette [Bundesgesetzblatt] I p. 602), last amended by Article 5 para. 15 of the Act of 21 June 2019 (Federal Law Gazette I, p. 846).

32 Decreto legislativo 8 giugno 2001, n. 231: Disciplina della responsabilita' amministrativa delle persone giuridiche, delle societa' e delle associazioni anche prive di personalita' giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300 (Gazzetta Ufficiale Serie Generale n. 140 del 19.6.2001).

33 This provides that "The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)".

34 Ministry of Justice (United Kingdom), Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010) (2011).

35 Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Journal officiel de la Rép. fr., n° 0287, du 10 déc. 2016

36 Article 17.I.

37 Article 17.II.

38 Article 17.III to VII.

39 *OJ L 192, 31.7.2003, p. 54.*

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40 More precisely, article 2(1) of the Framework Decision provides that "Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities: (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties". The implementation of this Framework Decision remains highly uneven across Member States, although improvements have been noted in recent years (for the situation in 2011, see Second Implementation Report of Framework Decision 2003/568/JHA, COM(2011) 309 final, of 6.6.2011; for the situation in 2019, see Report of the Commission to the European Parliament and Council assessing the extent to which the Member States have taken the necessary measures in order to comply with Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM(2019) 355 final of 26.7.2019). In 2011, the transposition of the provisions on criminalisation of all elements of active and passive bribery, as well as liability of legal persons, had been found to be particularly deficient; even for Member States that had transposed the Framework Decision, information on enforcement is scarce. The 2019 review of the implementation by the EU Member States highlighted significant progress.

41 See Article 7(2) of the Framework Decision.

42 Report of the Commission to the European Parliament and Council assessing the extent to which the Member States have taken the necessary measures in order to comply with Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM(2019) 355 final of 26.7.2019), p. 9.

43 15 U.S.C. §§ 78dd-1, et seq. The FCPA makes it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.

44 See Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. § 78dd-1.

45 15 U.S.C. § 78dd-2.

46 15 U.S.C. § 78dd-3. The quote is from A Resource Guide to the U.S. Foreign Corrupt Practices Act. Second Edition, prepared by Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (July 2020), p. 10.

47 See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 094 28.3.2014, p. 65: article 57(1)(b) of this directive exclude from the award of public contracts economic operators which have been convicted for corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195, 25.6.1997, p. 1) and Article 2(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54), "as well as corruption as defined in the national law of the contracting authority or the economic operator".

48 Portugal is the main exception: in comparison to 2013, 16% more of the people surveyed in Portugal considered that corruption was part of the business culture in their country.

49 Special Eurobarometer 470, survey requested by the European Commission, Directorate-General for Migration and Home Affairs and co-ordinated by the Directorate-General for Communication (TNS opinion & social, December 2017), p. 47.

50 EU Anti-Corruption Report 2014 (COM(2014) 38 final, of 3.2.2014), p. 7.

51 It is noteworthy in this regard that "the existence of an effective compliance and ethics program" is one of the two factors that, under the Sentencing Guidelines followed by the U.S. Sentencing Commission, can mitigate the ultimate punishment of an organization (the other factor is "self-reporting, cooperation, or acceptance of responsibility"). See chapter 8 of the Sentencing Guidelines, which relate to the sentencing of organisations: <https://www.uscc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8#NaN> (last consulted on 15 January 2021).

52 On the role of corruption in land grabbing, see the report Tainted Lands: Corruption in Large-Scale Land Deals (Global Witness and International Corporate Accountability Roundtable, 2016), available at: <https://www.globalwitness.org/en/campaigns/land-deals/tainted-lands-corruption-large-scale-land-deals/> (last consulted on 25 Jan. 2021).

53 A/HRC/44/27, para. 41.

54 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ L 198, 28.7.2017, p. 29*.

55 See article 4(2) of the directive.