



*KPMG Professorship in International Corporate Governance & New Generation Management
Challenges for Corporate Board Members in 2022*

Workshop ESCP

Corporate Governance and Human Rights:

How should businesses integrate human rights and environmental due diligence into their corporate governance & management systems?

Workshop moderated by Valéria Silva (affiliate Professor of law, ESCP Business School),
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June 14th, 2022, from 3pm to 4.30pm

In-person (ESCP Paris campus, 79 Avenue de la République, 75011 Paris) and online event (login details will be sent to participants the day prior to the event).

The workshop seeks to address how businesses could reconcile human rights and environmental concerns into their due diligence processes, into their operations and throughout their value chains, so as to prevent silos and integrate their assessments and responses to prevent and minimize them.

The effective protection of human rights and the environment for the accomplishment of a sustainable global economy has been established as an imperative by States through foundational multilateral instruments - particularly the 2011 United Nations Guiding Principles on Businesses and Human Rights (UNGPs), the 2015 UN Sustainable Development Goals (SDGs) and the 2015 Paris Agreement on Climate Change. To reach an impact at scale – which includes the mitigation of the current climate change emergency, limiting global warming to 1.5°C limit set forth in the Paris Agreement - substantive concerted efforts by major actors, particularly States and businesses (including financial institutions), are needed at a global level.

States have to set in place the necessary **policy and legal framework**, as well as ensure its implementation (Pillar 1 of the UNGPs). Businesses are required to ensure the protection

of human rights in their activities through **due diligence**¹ (Pillar 2 of the UNGPs). Due diligence on human rights has been expanded by other international instruments - most notably the OECD Guidelines for Multinational Enterprises² - to include adverse environmental impacts, among other relevant issues to be subject to due diligence by companies in the assessment of their activities³.

The aforementioned instruments comprise the first-generation framework, that is, they establish a duty to protect human and environmental rights on States while assign to companies a responsibility on the matter that is dependent on voluntary engagement and self-regulation. This scenario significantly started to change in the past five years, with the increasing acknowledgment that the magnitude of these global challenges requires a concerted, active collective effort. As a result, countries have increasingly promulgated mandatory due diligence laws at the national level, mainly in Europe.⁴ Expanding from it, in February 2022 the European Commission published its proposal for a Directive on Corporate Sustainability Due Diligence, aimed to harmonize the legal framework on the matter within the EU, while seeking to scale private action to address adverse human rights and environmental impacts by regulating, monitoring and sanctioning of companies in case of failure to comply with the provisions⁵. The proposal is meant to be applied to high-impact sectors and to very large businesses (whether EU or foreign companies doing business in the EU), taking into account potential and actual human rights and environmental impacts of their activities⁶⁷. As the proposal will produce effects beyond EU borders⁸, it is expected that other jurisdictions will incorporate similar provisions in their regulatory frameworks, as it has occurred with other domains such as data privacy, following the EU General Data Protection Regulation (GDPR)⁹.

¹ So as to identify, prevent and mitigate adverse human rights and environmental impacts. Following the definition available on art. 17 of the UNGPs, “[t]he [due diligence] process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”.

² Available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

³ Health, safety, labor, taxation and financial incentives are also targeted by the OECD Guidelines for Multinational Enterprises.

⁴ European countries have mainly taken the leadership in this area, namely France (2017 *Loi relative au devoir de vigilance*) and Germany (2021 *Sorgfaltspflichtengesetz*). The Netherlands, Belgium, Luxembourg and Sweden are also considering enacting due diligence laws.

⁵ Failure will subject companies to administrative sanctions, including pecuniary sanctions, as well as civil liability for damages.

⁶ The definition of due diligence under the UNGPs is brought to the EU proposal for the Directive on Corporate Sustainability Due Diligence:

⁷ If the current version is approved, EU Member States will be required to enact national legislation establishing the obligation for those companies to carry out value chain due diligence on human rights and environmental adverse impacts at least once every 12 months and integrate it to their internal processes. Directors shall be assigned the responsibility for carrying out due diligence in companies.

⁸ As a result of including foreign companies above a certain turnover in the EU under the obligations of the proposal, as well as and the fact that due diligence encompasses companies’ operations and is to be performed throughout the value chain. It therefore includes upstream and downstream established business partners, in addition to suppliers, as well as the full lifecycle of products and services.

⁹ Several countries have already adopted national legislation influenced by the EU GDPR model, including the UK, Canada, India, Japan, New Zealand, South Korea, Argentina, Brazil, Uruguay, Israel, Qatar, Turkey, Bahrain, Kenya, Mauritius, Nigeria, South Africa and Uganda.

In the ongoing evolving legal scenario, it is expected that companies are increasingly requested to assess, address and communicate the extent of their contribution to suppress and mitigate adverse human rights and environmental impacts from both their operations and value chains. This requires companies to overcome existing silos in addressing human rights and environmental issues under the ESG acronym, so as to promote an integrated analysis that not only take into account the substance, but also internal processes across various different departments and hierarchies.

The workshop will investigate the conceptual and practical aspects of integrating human rights and environmental issues in companies' due diligence, in light of the current ongoing shift from the voluntary consideration of human rights and environmental risks from the standpoint of companies and investors, towards a mandatory, sanctionable duty to integrate ESG risks thereby considered from the standpoint of a broader array of stakeholders (including unions and civil society organizations).

Several issues arise in this exercise both from conceptual and operational standpoints. The workshop will seek to address a number of those that follow below:

Conceptual

- To what extent are HRs and environmental issues are intertwined?
- What are the conceptual challenges?
- What are the potential alternatives for thinking about how to overcome them?

Practical/operational

- How could companies better integrate adverse human rights and environmental impacts into their due diligence procedures, including to ensure that these issues will not be addressed in silos?
- What are the main practical obstacles for the implementation of human rights and environmental due diligence? How to address them?
- How to better communicate due diligence, should it be integrated into the company's annual report?
- How to determine what are the relevant stakeholders in each instance of the companies' operations and across the value chain? How to structure and streamline dialogue with the relevant stakeholders?
- How can governments and international institutions support the advancement of due diligence towards enhanced sustainability? What should be the priorities?
- How to best foster education and training towards sustainability awareness across stakeholders?

These are the issues that the workshop will seek to address with the participation of representatives of the business community, NGOs and international organisations. Although many of the questions will require clarification through the enactment of legislation, official guidelines and decisions (whether administrative or judicial), the workshop will contribute to shed light about the implications of alternative paths, so as to reduce companies' regulatory, reputational and liability risks when carrying out human rights and environmental due diligence.

